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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1963

OPINIONS AND DECISIONS PER CURIAM
APRIL 20 THROUGH (IN PART) JUNE 15, 1964
ORDERS APRIL 20 THROUGH JUNE 22, 1964

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.

RETIRED

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

ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
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SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

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

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ARTHUR J. GOLDBERG, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

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

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

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

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

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

October 15, 1962.

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

TRIBUTE TO MR. JUSTICE DOUGLAS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, APRIL 20, 1964.

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

Mr. Attorney General Kennedy addressed the Court as follows:

Mr. Chief Justice: May it please the Court. On behalf of the members of this Bar and of lawyers throughout the United States, I come here to join in paying tribute to Justice Douglas, who is celebrating the completion of 25 years of distinguished service on the Court. It is an unusual circumstance that just 2 years ago we were paying similar tribute to Mr. Justice Black.

Justice Douglas came to the Court in the year 1939. He was able to draw upon a unique background, bringing with him knowledge and experience that were greatly needed in the United States at that time. His expertness in the fields of economic regulation and administrative law were of particular value and enabled him to make a vital contribution to the progress we were seeking to achieve during those very difficult days.

I would also like to add a brief personal note. I think it was my father who was responsible for bringing Justice Douglas to Washington a number of years ago, when I was about 6 years old. He came on the Court when I was 13, and I remember that bright day even now. He has been a great friend of our family for many years.

I also remember vividly my trips with him around the world—not merely because of what I gained personally, but primarily because I witnessed the way in which he presented a picture of the United States to the people of other countries. He was a man who was able to tell them, in ways they understood, of our views and beliefs. He could speak with wisdom of our laws and explain our system of government. He could talk to them also, in every-day terms, of many other matters in which they were deeply interested—how much cotton was produced per acre in South Carolina or how much wheat in Nebraska. The many who have seen him in his travels, read his books, and heard his friendly words have been moved and inspired.

He has been a great credit not only to this Court, but as a citizen of the United States and of the world.

Thank you, Mr. Chief Justice.

THE CHIEF JUSTICE said:

Mr. Attorney General: It is thoughtful of you to publicly remind us of this important milestone in the life of the Court, and it is generous of you to speak of our Brother Douglas in such felicitous terms. We heartily join you both in the timing and in the fervor of your remarks. Twenty-five years of devoted service to the highest Court of the Nation should not be passed over without comment. Only 18 of the 94 men appointed to the Court have achieved that distinction, and only 5 of them—Holmes, McReynolds, Van Devanter, Black and Douglas—were appointed in this century.

When Mr. Justice Douglas, succeeding Justice Brandeis, took his seat on the Court, Mr. Justice McReynolds was the Senior Justice. Appointed in 1914, he had sat for 7 years with Chief Justice Edward D. White, who was appointed an Associate in 1894. Thus, as evidence of the continuing nature of the Court, it should be appro-

priate to point out that Mr. Justice Douglas served with one who had in turn sat for 7 years with Justice White, who was appointed 70 years ago. This continuity of service is one of the strong factors which brings stability and tradition to our Court.

It has been said that in a cyclic way every basic problem of the American people eventually reaches the Supreme Court. If this is true—and there is evidence to sustain it—Mr. Justice Douglas has served through more than one of these cycles. The last quarter of a century has taken him through depression, hot wars, cold wars, and social and economic revolutions. He has written for the Court or in dissent in many hundreds of cases. His work is a vital part of the jurisprudence of the Court. It is recorded in more than 70 volumes of the United States Reports. His opinions will be read and studied so long as the Constitution is the guiding light of our Nation.

This is neither the time nor the place to appraise his work. That will be done by lawyers, scholars, courts and the people in the fullness of time. One does not try to determine the record of a swimmer when he is in midstream, particularly when he is swimming against unknown currents. Mr. Justice Douglas is in midstream. We know that by nature he recoils against merely swimming downstream. He will continue to swim strongly and purposefully.

We join with you, Mr. Attorney General, and with the Bar in wishing him continued success and happiness on the Court for many years to come.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1963.

BROTHERHOOD OF RAILROAD TRAINMEN *v.* VIRGINIA EX REL. VIRGINIA STATE BAR.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 34. Argued January 13, 1964.—Decided April 20, 1964.

An injunction issued by a state court, prohibiting, as the unlawful solicitation of litigation and the unauthorized practice of law, a labor union from advising injured members or their dependents to obtain legal assistance before settling claims and recommending specific lawyers to handle such claims, infringes rights guaranteed by the First and Fourteenth Amendments. *NAACP* v. *Button*, 371 U. S. 415, followed.

Judgment and decree vacated, and case remanded

Beecher E. Stallard and *John J. Naughton* argued the cause for petitioner. With them on the briefs were *Edward B. Henslee* and *Arnold Elkind.*

Aubrey R. Bowles, Jr. argued the cause for respondent. With him on the brief was *Aubrey R. Bowles III.*

Wayland B. Cedarquist, Holcombe H. Perry, Warren H. Resh and *Earl Sneed* filed a brief for the American Bar Association, as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Virginia State Bar brought this suit in the Chancery Court of the City of Richmond, Virginia,

against the Brotherhood of Railroad Trainmen, an investigator employed by the Brotherhood, and an attorney designated its "Regional Counsel," to enjoin them from carrying on activities which, the Bar charged, constituted the solicitation of legal business and the unauthorized practice of law in Virginia.[1] It was conceded that in order to assist the prosecution of claims by injured railroad workers or by the families of workers killed on the job the Brotherhood maintains in Virginia and throughout the country a Department of Legal Counsel which recommends to Brotherhood members and their families the names of lawyers whom the Brotherhood believes to be honest and competent. Finding that the Brotherhood's plan resulted in "channeling all, or substantially all," the workers' claims to lawyers chosen by the Department of Legal Counsel, the court issued an injunction against the Brotherhood's carrying out its plan in Virginia. The Supreme Court of Appeals of Virginia affirmed summarily over objections that the injunction abridges the Brotherhood's rights under the First and Fourteenth Amendments, which guarantee freedom of speech, petition and assembly. We granted certiorari to consider this constitutional question in the light of our recent decision in *NAACP* v. *Button,* 371 U. S. 415.[2] 372 U. S. 905.

The Brotherhood's plan is not a new one. Its roots go back to 1883, when the Brotherhood was founded as a fraternal and mutual benefit society to promote the welfare of the trainmen and "to protect their families by the exercise of benevolence, very needful in a calling so

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[1] The investigator and the Regional Counsel were not served with process and are not parties.

[2] We do not find it necessary to consider the Brotherhood's additional argument that the decree violates the Brotherhood's right to represent workers which is guaranteed by the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. §§ 151–188.

hazardous as ours . . . ." [3] Railroad work at that time was indeed dangerous. In 1888 the odds against a railroad brakeman's dying a natural death were almost four to one; [4] the average life expectancy of a switchman in 1893 was seven years.[5] It was quite natural, therefore, that railroad workers combined their strength and efforts in the Brotherhood in order to provide insurance and financial assistance to sick and injured members and to seek safer working conditions. The Trainmen and other railroad Brotherhoods were the moving forces that brought about the passage of the Safety Appliance Act [6] in 1893 to make railroad work less dangerous; they also supported passage of the Federal Employers' Liability Act [7] of 1908 to provide for recovery of damages for injured railroad workers and their families by doing away with harsh and technical common-law rules which sometimes made recovery difficult or even impossible. It soon became apparent to the railroad workers, however, that simply having these federal statutes on the books was not enough to assure that the workers would receive the full benefit of the compensatory damages Congress intended they should have. Injured workers or their families often fell prey on the one hand to persuasive claims adjusters eager to gain a quick and cheap settle-

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[3] Constitution of the Brotherhood of Railroad Trainmen and Brotherhood of Railroad Trainmen Insurance Department, Preamble.

[4] Interstate Commerce Commission, Third Annual Report (1889), 85.

[5] Griffith, "The Vindication of a National Public Policy Under the Federal Employers' Liability Act," 18 Law and Contemp. Prob. 160, 163.

[6] 27 Stat. 531, as amended, 45 U. S. C. §§ 1–43.

[7] 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60. An earlier version of the law passed two years earlier, 34 Stat. 232, had been held unconstitutional. *Employers' Liability Cases,* 207 U. S. 463. The constitutionality of the 1908 statute was sustained in the *Second Employers' Liability Cases,* 223 U. S. 1.

ment for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar.

It was to protect against these obvious hazards to the injured man or his widow that the workers through their Brotherhood set up their Legal Aid Department, since renamed Department of Legal Counsel, the basic activities of which the court below has enjoined. Under their plan the United States was divided into sixteen regions and the Brotherhood selected, on the advice of local lawyers and federal and state judges, a lawyer or firm in each region with a reputation for honesty and skill in representing plaintiffs in railroad personal injury litigation. When a worker was injured or killed, the secretary of his local lodge would go to him or to his widow or children and recommend that the claim not be settled without first seeing a lawyer, and that in the Brotherhood's judgment the best lawyer to consult was the counsel selected by it for that area.[8]

There is a dispute between the parties as to the exact meaning of the decree rendered below, but the Brotherhood in this Court objects specifically to the provisions which enjoin it

> ". . . from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; . . . or in any other manner soliciting or encouraging such legal employment of the selected lawyers; . . . and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the

[8] The Brotherhood also provides a staff, now at its own expense, to investigate accidents to help gather evidence for use by the injured worker or his family should a trial be necessary to vindicate their rights.

> result of which is to channel legal employment to any particular lawyer or group of lawyers . . . ." [9]

The Brotherhood admits that it advises injured members and their dependents to obtain legal advice before making settlement of their claims and that it recommends particular attorneys to handle such claims. The result of the plan, the Brotherhood admits, is to channel legal employment to the particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families. It is the injunction against this particular practice which the Brotherhood, on behalf of its members, contends denies them rights guaranteed by the First and Fourteenth Amendments. We agree with this contention.

It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best

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[9] Certain other provisions of the decree enjoin the Brotherhood from sharing counsel fees with lawyers whom it recommended and from countenancing the sharing of fees by its regional investigators. The Brotherhood denies that it has engaged in such practices since 1959, in compliance with a decree of the Supreme Court of Illinois. See *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163. Since the Brotherhood is not objecting to the other provisions of the decree except insofar as they might later be construed as barring the Brotherhood from helping injured workers or their families by recommending that they not settle without a lawyer and by recommending certain lawyers selected by the Brotherhood, it is only to that extent that we pass upon the validity of the other provisions. Because of our disposition of the case, we do not consider the Brotherhood's claim that the findings of the court were not supported by substantial evidence.

course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other.

Virginia undoubtedly has broad powers to regulate the practice of law within its borders; [10] but we have had occasion in the past to recognize that in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution.[11] For as we said in *NAACP* v. *Button, supra,* 371 U. S., at 429, "a State cannot foreclose the exercise of constitutional rights by mere labels." Here what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It is not "ambulance chasing." The railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are they or the lawyers whom

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[10] The Bar relies on the common law, the Canons of Ethics of the American Bar Association, adopted into the rules of the Supreme Court of Appeals of Virginia, 171 Va. xviii, and several Virginia statutes prohibiting the unauthorized practice of law. The Canons of Ethics to which the Bar refers prohibit respectively stirring up of litigation, control or exploitation by a lay agency of professional services of a lawyer, and aiding the unauthorized practice of law. Canons 28, 35, 47. The statutes respectively set the qualifications for the practice of law in the State and provide for injunctions against "running, capping, soliciting and maintenance." Virginia Code, 1950, §§ 54–42, 54–83.1.

[11] *NAACP* v. *Button,* 371 U. S. 415; *Konigsberg* v. *State Bar,* 353 U. S. 252; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232.

they select parties to any soliciting of business. It is interesting to note that in Great Britain unions do not simply recommend lawyers to members in need of advice; they retain counsel, paid by the union, to represent members in personal lawsuits,[12] a practice similar to that which we upheld in *NAACP* v. *Button, supra.*

A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. *Gideon* v. *Wainwright,* 372 U. S. 335, and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics.[13] The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.

Only last Term we had occasion to consider an earlier attempt by Virginia to enjoin the National Association for the Advancement of Colored People from advising prospective litigants to seek the assistance of particular attorneys. In fact, in that case, unlike this one, the attorneys were actually employed by the association which recommended them, and recommendations were made even to nonmembers. *NAACP* v. *Button, supra.* We held that "although the petitioner has amply shown that its activities fall within the First Amendment's

[12] See Feather, The Essence of Trade Unionism (London, 1963), 42–43.

[13] Cf. Drinker, Legal Ethics (1953), 167; *Hildebrand* v. *State Bar,* 36 Cal. 2d 504, 515, 225 P. 2d 508, 514 (Carter, J., dissenting), 36 Cal. 2d, at 521, 225 P. 2d, at 518 (Traynor, J., dissenting).

protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed." 371 U. S., at 444.[14] In the present case the State again has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan to recommend the lawyers it selects to represent injured workers. The Brotherhood's activities fall just as clearly within the protection of the First Amendment. And the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP.

We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge.

The judgment and decree are vacated and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART took no part in the disposition of this case.

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[14] See also *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U. S. 539; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293; *Shelton* v. *Tucker*, 364 U. S. 479; *Bates* v. *City of Little Rock*, 361 U. S. 516; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449; *Schneider* v. *State*, 308 U. S. 147.

1 CLARK, J., dissenting.

MR. JUSTICE CLARK, whom MR. JUSTICE HARLAN joins, dissenting.

By its decision today the Court overthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise. The Court permits a labor union—contrary to state law—to engage in the unauthorized practice of soliciting personal injury cases from among its membership on behalf of 16 regional attorneys whom its president has placed on the union's approved list. Local officials of the union call on each member suffering an injury and seek to secure employment of these approved attorneys in the prosecution of claims for damages arising therefrom. Moreover the union, through its president, not only controls the appointment and dismissal of the approved attorney but also has considerable influence over his fees and often controls the disposition of cases. Furthermore, from 1930 to at least 1959, the union had required these approved attorneys to pay to it a portion of their fees, usually 25%. Such an arrangement may even now be in effect through the ruse of reimbursement for investigatory services rendered by the union. This state of affairs degrades the profession, proselytes the approved attorneys to certain required attitudes and contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct.

The Court excuses the practice on the policy ground that the union membership needs a corps of attorneys experienced in personal injury litigation because ordinary "lawyers [are] either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar." To me this is a serious indictment of the profession. In the cases that I have passed on here—numbering about 177 during the past 15 years—I dare say that counsel for the railroad employee has exhibited advocacy not inferior to that of

his opponent (although I do not remember that any one of the 16 approved attorneys appeared in these cases). Indeed, the railroad employee has prevailed in practically all of the cases and the recoveries have ranged as high as $625,000. See *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U. S. 108 (1963); Transcript of Record, p. 7. Under these facts the Court's rationale will not stand up, even as a policy ground for approving this patent violation of the cardinal ethics of our profession and flagrant disobedience to the law of most of our States.

The Court depends upon *NAACP* v. *Button*, 371 U. S. 415 (1963), to support its position. But there the vital fact was that the claimed privilege was a "form of political expression" to secure, through court action, constitutionally protected civil rights.[1] Personal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims. No guaranteed civil right is involved. Here, the question involves solely the regulation of the profession, a power long recognized as belonging peculiarly to the State. *Button*, as well as its ancestry cited by the majority in the footnotes, is not apposite.

Finally, no substantive evil would result from the activity permitted in *Button*. But here the past history of the union indicates the contrary. Its Legal Aid Department (now the Department of Legal Counsel) was set up in 1930 for the admitted purposes of advising members "relative to their rights respecting claims for damages" and assisting them "in negotiating settlements . . . ." The Department had a complete reporting service on all major

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[1] "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression." *NAACP* v. *Button, supra*, at 429.

injuries or deaths suffered by its members, regional investigators to whom such reports were referred, and the 16 approved regional counsel (many of whom remain the same today) to whom the cases were channeled for prosecution and who split their fees with the union. And, what is of even more significance, the trial court in this case found "that the defendant Brotherhood still adheres to the pattern and design of the plan formulated and implemented in 1930."

The union admits that it did operate in this manner until 1959 but says that it has now reformed its operation. But the record shows that this identical union plan has been before several other courts [2] and, while the union has repeatedly promised to reform, as here, it has consistently renewed the same practices. But even if the union has sincerely reformed, which I doubt, the plan it now proposes to follow is subject to the same deficiencies. It includes: the approval of 16 regional attorneys by the president of the union, who also has power to discharge them at his pleasure; the solicitation of all injured members by the local officials of the Brotherhood who urge the employment of an approved counsel; the furnishing of the name of the approved counsel to the injured brother as the only attorney approved by the Brotherhood; the furnishing of the names and addresses of injured members to the approved attorneys; the furnishing of investigative services to the approved attorney, the cost of which, it is indicated, comes from the fees received by the latter; and, finally, the "tooting" of the approved attorneys in union literature and meetings.

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[2] *E. g., In re Petition of Committee on Rule 28 of the Cleveland Bar Assn.*, 15 Ohio L. Abs. 106 (1933); *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163 (1958); *In re O'Neill*, 5 F. Supp. 465 (E. D. N. Y. 1933); *Young* v. *Gulf M. & O. R. Co.*, No. 3957 (E. D. Mo. 1946); *Reynolds* v. *Gulf M. O. & Texas Pac. R. Co.*, No. 772 (E. D. Tenn. 1946); *North Carolina ex rel. McLean* v. *Hice*, Superior Ct. of N. C., County of Buncombe (1948).

I do not read the decree approved by the State as prohibiting union members from recommending an attorney to their brothers in the union. Virginia has sought only to halt the gross abuses of channeling and soliciting litigation which have been going on here for 30 years. The potential for evil in the union's system is enormous and, in my view, will bring disrepute to the legal profession. The system must also work to the disadvantage of the Brotherhood members by directing their claims into the hands of the 16 approved attorneys who are subject to the control of one man, the president of the union. Finally, it will encourage further departures from the high standards set by canons of ethics as well as by state regulatory procedures and will be a green light to other groups who for years have attempted to engage in similar practices. *E. g., Chicago Bar Assn.* v. *Chicago Motor Club,* 362 Ill. 50, 199 N. E. 1; *Rhode Island Bar Assn.* v. *Automobile Service Assn.,* 55 R. I. 122, 179 A. 139; cf. *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608 (1935); *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U. S. 483 (1955).

SIMPSON *v.* UNION OIL CO. OF CALIFORNIA.

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

No. 87. Argued January 15–16, 1964.—Decided April 20, 1964.

Respondent oil company supplies gasoline in eight western States to numerous retailers, including petitioner, who lease outlets from respondent and enter into a "consignment" agreement under which respondent retains "title" to the gasoline until sold, pays property taxes thereon, and fixes the selling price therefor. Petitioner is compensated by a minimum commission, assumes operating costs and most types of losses on the gasoline, and carries personal liability and property insurance. The lease, like the "consignment" agreement, runs for a year and is allegedly not renewable unless prescribed conditions are met, including the retailer's adherence to prices set by respondent. When petitioner, allegedly to meet a competitive price, sold gasoline below the fixed price, respondent solely for that reason refused to renew the lease and terminated the "consignment" agreement, whereupon petitioner brought this action for damages under § 4 of the Clayton Act for violation of §§ 1 and 2 of the Sherman Act. The Federal District Court after hearings granted respondent's motion for summary judgment, which the Court of Appeals affirmed, concluding that, although there were assumedly triable issues of law, petitioner had suffered no actionable wrong or damage. *Held:* Resale price maintenance through a coercive type of "consignment" agreement like that involved here violates the antitrust laws, causing petitioner to suffer actionable wrong or damage. Pp. 14–25.

(a) The "consignment" agreement and lease injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all or remain consignees, and to sell at competitive prices. That the retailer can refuse to deal cannot under these circumstances immunize the supplier from the antitrust laws. P. 16.

(b) An actionable wrong results whenever the restraint of trade or monopolistic practice has an impact on the market; and it is irrelevant that the complainant is only one merchant or that on respondent's failure to renew his lease another dealer may take his place. Pp. 16–17.

(c) A supplier may not use a coercive device, whether in the form of an agreement used coercively, or in any other form, to achieve resale price maintenance. *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, followed. P. 17.

(d) A consignment, however lawful as a matter of private contract law, must yield to federal antitrust policy. P. 18.

(e) The antitrust laws prevent the fixing of prices through many retail outlets by the "consignment" device. *United States* v. *General Electric Co.*, 272 U. S. 476, distinguished. Pp. 21–24.

(f) Although the issue of resale price maintenance under the Sherman Act is resolved here, the case must be remanded for a hearing on the other issues, including those raised under the McGuire Act and the damages, if any, suffered. P. 24.

(g) The question is reserved whether there may be equities that would warrant only prospective application in damage suits of the rule governing price fixing by the "consignment" device which this Court now announces. P. 25.

311 F. 2d 764, reversed and remanded.

Maxwell Keith argued the cause and filed briefs for petitioner.

Moses Lasky argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit for damages under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2. The complaint grows out of a so-called retail dealer "consignment" agreement which, it is alleged, Union Oil requires lessees of its retail outlets to sign, of which Simpson was one. The "consignment" agreement is for one year and thereafter until canceled, is terminable by either party at the end of any year and, by its terms, ceases upon any termination of the lease. The lease is also for one year; and it is alleged that it is used to police the retail prices charged by the consignees, renewals not being made

if the conditions prescribed by the company are not met. The company, pursuant to the "consignment" agreement, sets the prices at which the retailer sells the gasoline. While "title" to the consigned gasoline "shall remain in Consignor until sold by Consignee," and while the company pays all property taxes on all gasoline in possession of Simpson, he must carry personal liability and property damage insurance by reason of the "consigned" gasoline and is responsible for all losses of the "consigned" gasoline in his possession, save for specified acts of God. Simpson is compensated by a minimum commission and pays all the costs of operation in the familiar manner.

The retail price fixed by the company for the gasoline during the period in question was 29.9 cents per gallon; and Simpson, despite the company's demand that he adhere to the authorized price, sold it at 27.9 cents, allegedly to meet a competitive price. Solely because Simpson sold gasoline below the fixed price, Union Oil refused to renew the lease; termination of the "consignment" agreement ensued; and this suit was filed. The terms of the lease and "consignment" agreement are not in dispute nor the method of their application in this case. The interstate character of Union Oil's business is conceded, as is the extensive use by it of the lease-consignment agreement in eight western States.[1]

After two pretrial hearings, the company moved for a summary judgment. Simpson moved for a partial summary judgment—that the consignment lease program is

[1] As of December 31, 1957, Union Oil supplied gasoline to 4,133 retail stations in the eight western States of California, Washington, Oregon, Nevada, Arizona, Montana, Utah and Idaho. Of that figure, 2,003 stations were owned or leased by Union Oil and, in turn, leased or subleased to an independent retailer; 14 were company-operated training stations; and the remaining 2,116 stations were owned by the retailer or leased by him from third persons. Union Oil had "consignment" agreements as of that date with 1,978 (99%) of the lessee-retailers and with 1,327 (63%) of the nonlessee-retailers.

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in violation of §§ 1 and 2 of the Sherman Act. The District Court, concluding that "all the factual disputes" had been eliminated from the case, entertained the motions. The District Court granted the company's motion and denied Simpson's, holding as to the latter that he had not established a violation of the Sherman Act and, even assuming such a violation, that he had not suffered any actionable damage. The Court of Appeals affirmed. While it assumed that there were triable issues of law, it concluded that Simpson suffered no actionable wrong or damage, 311 F. 2d 764. The case is here on a writ of certiorari. 373 U. S. 901.

We disagree with the Court of Appeals that there is no actionable wrong or damage if a Sherman Act violation is assumed. If the "consignment" agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices. The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.

There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant. See *Klor's* v. *Broadway-Hale Stores,* 359 U. S. 207, 213; *Radiant Burners* v. *Peoples Gas Co.,* 364 U. S. 656, 660. As we stated in *Radovich* v. *National Football League,* 352 U. S. 445, 453–454:

> "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public."

The fact that, on failure to renew a lease, another dealer takes Simpson's place and renders the same service to the public is no more an answer here than it was in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473. For Congress, not the oil distributor, is the arbiter of the public interest; and Congress has closely patrolled price fixing whether effected through resale price maintenance agreements or otherwise.[2] The exclusive requirements contracts struck down in *Standard Oil Co.* v. *United States,* 337 U. S. 293, were not saved because dealers need not have agreed to them, but could have gone elsewhere. If that were a defense, a supplier could regiment thousands of otherwise competitive dealers in resale price maintenance programs merely by fear of nonrenewal of short-term leases.

We made clear in *United States* v. *Parke, Davis & Co.,* 362 U. S. 29, that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is. *United States* v. *Colgate,* 250 U. S. 300, as explained in *Parke, Davis,* 362 U. S., at 37, was a case where there was assumed to be no agreement to maintain retail prices. Here we have such an agreement; it is used coercively, and, it promises to be equally if not more effective in maintaining gasoline prices than were the *Parke, Davis* techniques in fixing monopoly prices on drugs.

Consignments perform an important function in trade and commerce, and their integrity has been recognized by many courts, including this one. See *Ludvigh* v. *American Woolen Co.,* 231 U. S. 522. Yet consignments, though useful in allocating risks between the parties and determining their rights *inter se,* do not necessarily con-

[2] See the McGuire Act, 66 Stat. 631, 15 U. S. C. § 45; the Miller-Tydings Act, 50 Stat. 693, 15 U. S. C. § 1; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150.

trol the rights of others, whether they be creditors or sovereigns. Thus the device has been extensively regulated by the States. 22 Am. Jur., Factors, § 8; *Hartford Indemnity Co.* v. *Illinois,* 298 U. S. 155. Congress, too, has entered parts of the field, establishing by the Act of June 10, 1930, 46 Stat. 531, as amended, 7 U. S. C. § 499a *et seq.*, a pervasive system of control over commission merchants dealing in perishable agricultural commodities.

One who sends a rug or a painting or other work of art to a merchant or a gallery for sale at a minimum price can, of course, hold the consignee to the bargain. A retail merchant may, indeed, have inventory on consignment, the terms of which bind the parties *inter se.* Yet the consignor does not always prevail over creditors in case of bankruptcy, where a recording statute or a "traders act" or a "sign statute" is in effect. 4 Collier, Bankruptcy (14th ed.), pp. 1090–1097, 1484–1486. The interests of the Government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy. Thus a consignment is not allowed to be used as a cloak to avoid § 3 of the Clayton Act. See *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 353–356; cf. *Straus* v. *Victor Talking Mach. Co.,* 243 U. S. 490, 500–501. Nor does § 1 of the Sherman Act tolerate agreements for retail price maintenance. See *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 221–222; *United States* v. *Parke, Davis & Co., supra.*

We are enlightened on present-day marketing methods by recent congressional investigations. In the automobile field the price is "the manufacturer's suggested retail price," [3] not a price coercively exacted; nor do automo-

[3] H. R. Rep. No. 1958, 85th Cong., 2d Sess., S. Rep. No. 1555, 85th Cong., 2d Sess.

biles go on consignment; they are sold.[4] Resale price maintenance of gasoline through the "consignment" device is increasing.[5] The "consignment" device in the gasoline field is used for resale price maintenance. The theory and practice of gasoline price fixing in vogue under the "consignment" agreement has been well exposed by Congress. A Union Oil official in recent testimony before a House Committee on Small Business explained the price mechanism:

> "Mr. ROOSEVELT. Who sets the price in your consignment station, dealer consignment station?
>
> "Mr. RATH. We do.
>
> "Mr. ROOSEVELT. You do?
>
> "Mr. RATH. Yes. We do it on this basis: You see, he is paid a commission to sell these products for us. Now, we go out into the market area and find out what the competitive major price is, what that level is, and we set our house-brand price at that." [6]

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[4] H. R. Rep. No. 1958, *supra,* note 3, at 1.

[5] See H. R. Rep. No. 1157, 85th Cong., 1st Sess., pp. 6–7. The Assistant Attorney General in charge of the Antitrust Division, Department of Justice, testified:

"Another issue relating to price fixing concerns certain of the practices which the major oil companies have used to preserve their tank wagon price structure; for example, the placing of the dealer on a commission or consignment agency basis, which narrows his normal margin of profit and effectively fixes the retail price." *Id.,* at 7. The Committee report said:

"One of the effects of this expansion of commission and consignment outlets is that more and more service station operators lose their status as independent businessmen. The selling price and gross margin of profit per gallon in the commission-type stations are wholly within the control of the supplier." *Ibid.*

[6] See Hearings, House Select Committee on Small Business, 85th Cong., 1st Sess., H. R. Res. 56, Pt. III, pp. 79–80. The same official

Dealers, like Simpson, are independent businessmen; and they have all or most of the indicia of entrepreneurs, except for price fixing. The risk of loss of the gasoline is on them, apart from acts of God. Their return is affected by the rise and fall in the market price, their commissions declining as retail prices drop.[7] Prac-

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gave this justification for the consignment program—a justification similar to that traditionally advanced for resale price maintenance:

"Consignment is our method of protecting our dealers' profit margins during disturbed retail price conditions, at the same time maintaining our dealers' positions as people handling a premium quality product. We have not used consignment as a means of unfair competition, nor has it been used to price any dealer out of any station. It has instead been used by us to maintain a competitive relationship between our dealers' prices and those of our competitors.

"We are proud of our retail consignment program which has accomplished the ends outlined above. We have been able to make these accomplishments without taking away any of the independence of our dealers. Through our consignment program we have established and maintained under all conditions the minimum guaranteed margins for our dealers that are the best in the industry. It has brought our dealers one other substantial benefit also—and I would like to point this out strongly—they have available for other uses the investment which otherwise would be in gasoline inventories. This amounts to an average of $2,500 per dealer.

"If there is any suspicion or resentment by any dealers or dealer groups, it certainly appears that Union Oil Co.'s retail consignment program is a greatly misunderstood one. It does not remove any aspect of a dealer's independence other than giving us the right to name the dealer's selling prices. It has not been used to create or disturb any retail price situations and instead has, as a matter of fact, contributed materially to the economic welfare of our dealers.

"If we were today to withdraw the consignment program as it is now set up, we know that such action would be bitterly opposed by our dealers. Any problems that are laid at its doorstep—and there were some problems as there are in any new program—have been corrected to the point that a survey of our dealers today would reveal that the great majority of them are heartily in favor of consignment. We are able to offer the names of hundreds of our dealers who are in favor of the program." *Id.*, at 86–87.

[7] The basic agreement in force during most of the period when Simpson was a consignee provided that his commission was 1½¢ per

tically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil. By reason of the lease and "consignment" agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive. The evil of this resale price maintenance program, like that of the requirements contracts held illegal by *Standard Oil Co.* v. *United States, supra,* is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by these nominal "consignees" who are in reality small struggling competitors seeking retail gas customers.

As we have said, an owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner. There is nothing illegal about that arrangement. When, however, a "consignment" device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the "consignment" an agency,[8] for then the end result of *United States* v. *Socony-*

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gallon more than the amount by which the price at which the company "authorized" him to sell exceeded a posted "tank wagon" price applicable to those gallons. However, if the "authorized" price fell below a posted "minimum retail" price, the commission was reduced by 50% of the difference between "minimum retail" and "authorized" retail. In no event could the commission be less than 5.95¢ for regular and 5.75¢ for ethyl.

Shortly before Simpson ceased to be a consignee the program was changed. The guaranteed minimum was eliminated and the consignee absorbed 20% of the difference if "authorized" prices fell below "minimum retail." If the "authorized" price exceeded "minimum retail," the commission increased by 80% of the excess, as compared with 100% thereof under the former plan.

[8] See Klaus, Sale, Agency and Price Maintenance, 28 Col. L. Rev. 312, 441, 443–454 (1928).

Vacuum Oil Co., supra, would be avoided merely by clever manipulation of words, not by differences in substance. The present, coercive "consignment" device, if successful against challenge under the antitrust laws, furnishes a wooden formula for administering prices on a vast scale.[9]

Reliance is placed on *United States* v. *General Electric Co.*, 272 U. S. 476, where a consignment arrangement was utilized to market patented articles. Union Oil correctly argues that the consignment in that case somewhat

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[9] A. A. Berle recently described the critical importance of price control to money making by the large oligarchies of business, or the "behemoths" as he calls them:

"Are these behemoths good at making goods—or merely good at making money? Do they come out better because they manufacture more efficiently—or because they 'control the market' and collect unduly high prices from the long-suffering American consumer?

"Again, no one quite knows. It is pretty clear that most prices are established only partly by competition, and partly by administration. Economists are just beginning to wrestle with the problem of 'administered' prices. The three or four 'bigs' in any particular line are happy to stay with a good price level for their product. If the price gets too high, some smart vice president in charge of sales may see a chance to take a fat slice of business away from his competitors.

"But while any one of the two or three bigs knows he can reduce prices and start taking all the business there is, he knows, too, that one or all of his associates will soon drop the price below that. In the ensuing price war, nobody will make money for quite a while.

"So, an uneasy balance is struck, and everyone's price remains about the same. Shop around for an automobile and you will see how this works. Economists call it 'imperfect competition'—a tacitly accepted price that is not necessarily the price a stiff competitive free market would create. Only big concerns can swing this sort of competition effectively.

"We do not really know whether bigs make more money because they are efficient or because, through their size, they can 'administer' prices." Bigness: Curse or Opportunity? New York Times Magazine, Feb. 18, 1962, pp. 18, 55, 58.

parallels the one in the instant case.[10] The Court in the *General Electric* case did not restrict its ruling to patented articles; it, indeed, said that the use of the consignment device was available to the owners of articles "patented or otherwise." *Id.*, at 488. But whatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special facts here.

The Court in that case particularly relied on the fact that patent rights have long included licenses "to make, use and vend" the patented article "for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure." *Id.*, at 489. Congress in establishing the patent system included 35 U. S. C. § 154, which provides in part: "Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right *to exclude others from making, using, or selling* the invention throughout the United

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[10] In *General Electric* the consignee was responsible for lost, damaged or missing items from the stock in his possession and the consignor assumed all risks of fire, flood and obsolescence, while in the instant case the consignee is "responsible to Consignor for all gasolines consigned to him, or for loss thereof or damage thereto from any cause whatsoever other than earthquake, lightning, flood, fire or explosion not caused by his negligence and will pay Consignor for all gasolines sold, lost or damaged."

In *General Electric* the consignees were, in their regular business, wholesale or retail merchants of other merchandise and some of them had previously so handled the consignor's lamps, while in the instant case the consignees, although some of them had previously been regular retail merchants, deal exclusively in the consignor's gasoline.

General Electric Co. paid "all" taxes assessed on the stock of lamps, whereas Union Oil pays only property taxes.

General Electric Co. carried "whatever insurance is carried" on the stock held by consignees, while Union Oil apparently is not obligated to carry any insurance.

States, referring to the specification for the particulars thereof." (Italics added.)

"The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee." *Adams* v. *Burke,* 17 Wall. 453, 456. Long prior to the *General Electric* case, price fixing in the marketing of patented articles had been condoned (*Bement* v. *National Harrow Co.,* 186 U. S. 70), provided it did not extend to sales by purchasers of the patented articles. *Adams* v. *Burke, supra; Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436.

The patent laws which give a 17-year monopoly on "making, using, or selling the invention" are *in pari materia* with the antitrust laws and modify them *pro tanto.* That was the *ratio decidendi* of the *General Electric* case. See 272 U. S., at 485. We decline the invitation to extend it.

To allow Union Oil to achieve price fixing in this vast distribution system through this "consignment" device would be to make legality for antitrust purposes turn on clever draftsmanship. We refuse to let a matter so vital to a competitive system rest on such easy manipulation. Cf. *United States* v. *Masonite Corp.,* 316 U. S. 265, 280.

Hence on the issue of resale price maintenance under the Sherman Act there is nothing left to try, for there was an agreement for resale price maintenance, coercively employed.

The case must be remanded for a hearing on all the other issues in the case, including those raised under the McGuire Act, 66 Stat. 631, 15 U. S. C. § 45, and the damages, if any, suffered. We intimate no views on any other issue; we hold only that resale price maintenance through the present, coercive type of "consignment" agreement is illegal under the antitrust laws, and that petitioner suffered actionable wrong or damage. We reserve the ques-

tion whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the "consignment" device which we announce today.

Reversed and remanded.

MR. JUSTICE HARLAN took no part in the disposition of this case.

MR. JUSTICE STEWART, dissenting.

In this case the District Court granted a summary judgment in favor of the respondent, finding that the respondent had not violated the Sherman Act, and that even if there had been a violation, the petitioner had not suffered any damages. The Court of Appeals affirmed upon the theory that, even assuming a Sherman Act violation, "any damage occurring to Simpson was the result of his own free and deliberate choice and he could not deliberately and knowingly enter into contractual obligations and then and thereafter contend he was injured by the results of his own acts." 311 F. 2d 764, at 769.

I think the reasoning upon which the Court of Appeals proceeded is untenable. The gravamen of the petitioner's complaint was that he had been coerced into a lease conditioned upon acceptance of the respondent's allegedly unlawful system of selling. If, as the Court of Appeals assumed, there had been such a violation of the Sherman Act, it was inconsistent to assume that the petitioner could not have been subject to the coercion he alleged and could not have suffered damages. But the root error in this case, it seems to me, was the District Court's decision to terminate the controversy by way of a summary judgment. I therefore agree with the Court that the judgment of the Court of Appeals should be set aside and the case remanded to the District Court for a

trial on the merits. *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464. But I think that upon remand there should be a full trial of all the issues in this litigation, because I completely disagree with the Court that whenever a bona fide consignor, employing numerous agents, sets the price at which *his* property is to be sold, "the antitrust laws prevent calling the 'consignment' an agency," and transform the consignment into a sale. In the present posture of this case, such a determination, overruling as it does a doctrine which has stood unquestioned for almost 40 years, is unwarranted, unnecessary and premature.

In *United States* v. *General Electric,* 272 U. S. 476, this Court held that a bona fide consignment agreement of this kind does not violate the Sherman Act. The Court today concedes that "the consignment in that case somewhat parallels the one in the instant case." The fact of the matter is, so far as the record now before us discloses, the two agreements are virtually indistinguishable.[1] Instead of expressly overruling *General Electric,*

[1] Without commenting on their significance, the Court does purport to discover in the operative provisions of the two agreements factual differences regarding the tax and insurance burdens assumed by the consignors. On closer examination, however, even these purported differences disappear. From the records in the cases, it is clear that both companies assumed the same tax burden—payment of property taxes on the consigned goods. And since both companies bore virtually the same insurable risks of loss or damage to the goods consigned, the fact that General Electric apparently "carried 'whatever insurance is carried' on the stock held by consignees, while Union Oil apparently is not obligated to carry any insurance" is no distinction at all.

The Court implies that the terms of this agreement providing that the consignee must carry personal liability and property damage insurance; that the consignee is responsible for losses of consigned gasoline incurred in the ordinary course of events; and that the consignee must pay his own costs of operation, are inconsistent with a valid consignment agreement. But such provisions are common to

however, the Court seeks to distinguish that case upon the specious ground that its underpinnings rest on patent law.

It is, of course, true that what was sold in *General Electric* was not gasoline, but lamp bulbs which had been manufactured under a patent. But until today no one has ever considered this fact relevant to the holding in

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consignment agreements. They merely illustrate the well-recognized fact that these retail gasoline dealers are both independent businessmen and agents. A consignee is commonly defined as one who "in the pursuit of an independent calling," is engaged by another as his agent to sell property. See, *e. g.*, Calif. Civil Code § 2026. Consequently, it is not at all surprising for a consignment agreement to provide both that a consignee bear the expenses of conducting *his own* business, and that he be responsible for loss or damage to the goods occurring in the ordinary course of business. The Court in *General Electric* explicitly found such provisions unobjectionable, 272 U. S., at 484–485, and further observed that a provision placing the burden of risk of loss or damage to goods on the consignee "is only a reasonable provision to secure [the consignee's] careful handling of the goods entrusted to him." *Id.*, at 484. Nor is the requirement that Simpson carry property damage and personal liability insurance of significance. Such a provision serves the reasonable purpose of protecting the consignor from responsibility (which might be imputed by virtue of the agency relationship) for liabilities incurred by *Simpson* arising out of or in connection with *Simpson's* business.

The only remaining point which the Court makes is that the consignee's commission declines as retail prices drop. But it is in the very nature of commissions that they be geared to prices, and it is thus typical of consignment agreements that the consignee bears some of the risk of price declines. In fact, the consignment agreement challenged in the *General Electric* case provided that "[t]he agent is allowed a compensation of 10% of the list prices of the lamps . . . ." Since the General Electric Company set the list price, it would have been as correct to say in that case, as it is in this one, that the consignee's commission declined as retail prices dropped. Moreover, under Union's agreement, Simpson received a minimum guaranteed commission regardless of the extent of price declines, thereby substantially restricting his exposure to the risks of a decline in the market price.

that case that bona fide consignment agreements do not violate the antitrust laws "however comprehensive as a mass or whole in their effect . . . ." *Id.*, at 488. In addition to the unambiguous statement in Chief Justice Taft's opinion for a unanimous Court that "[t]he owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer," 272 U. S., at 488, the Court, throughout that portion of its opinion dealing with the validity of General Electric's consignment agreements, gave no intimation whatsoever that its conclusion would have differed in any respect if the consigned article had been unpatented. Quite the contrary, the *General Electric* Court, assessing the validity of these agreements, addressed itself to but one question: "The question is whether, in view of the arrangements, made by the company with those who ordinarily and usually would be merchants buying from the manufacturer and selling to the public,—such persons are to be treated as agents, or as owners of the lamps consigned to them under such contracts." 272 U. S., at 483–484.

To answer that question, the Court examined the operative provisions of the consignment agreement to determine whether the agreement created a valid agency or whether, in fact, title effectively passed to the so-called consignee. *Id.*, at 483–488. If the latter were the case, the price-fixing requirement would have made the agreement nothing more than a resale-price-maintenance scheme, unlawful under the antitrust laws, cf. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, regardless of whether or not the article sold was patented. Similarly, if the agreement created a bona fide agency, the consignment would be valid under the antitrust laws, again regardless of whether or not the article consigned were patented.

Possession of patent rights on the article allegedly consigned has no legal significance to an inquiry directed to ascertaining whether the burdens, risks, and rights of ownership actually remain with the principal or have passed to his agent. Nor is the power of a consignor to fix the prices at which his consignee sells augmented in any respect by the possession of a patent on the goods so consigned. It is not by virtue of a patent monopoly that a bona fide consignor may control the price at which his consignee sells; his control over price flows from the simple fact that the owner of goods, so long as he remains the owner, has the unquestioned right to determine the price at which he will sell them.[2]

It is clear, therefore, that the Court today overrules *General Electric*. It does so, even though the validity of that decision was not challenged in the briefs or in oral argument in this case. I should have thought that a decision of such impact and magnitude could properly be reached only after careful consideration of all relevant considerations and preferably by a full Court.[3] Today's upsetting decision carries with it the most severe consequences to a large sector of the private economy. We cannot be blind to the fact that commercial arrangements throughout our economy are shaped in reliance upon this Court's decisions elaborating the reach of the antitrust

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[2] The quotations in the majority opinion from the *General Electric* case relate to a wholly separate second issue involved in that case—the validity of a license granted by General Electric to Westinghouse, under the patents owned by the former, to manufacture and sell lamps at prices fixed by the patentee-licensor—and have no relevance whatsoever to the issue here. Since the source of power over price by the patentee-consignor in *General Electric* was not his patent, and since the question of patent monopoly is not involved in this case, the patent cases cited by the Court are also singularly irrelevant to the issue here.

[3] There is no reason to suppose that MR. JUSTICE HARLAN will be disqualified in any future case which may involve the question of the continuing validity of the *General Electric* rule.

laws. Everyone knows that consignment selling is a widely used method of distribution all over the country. By our decision today outlawing consignment selling if it includes a price limitation, we inject severe uncertainty into commercial relationships established in reliance upon a decision of this Court explicitly validating this method of distribution. We create, as well, the distinct possibility that an untold number of sellers of goods will be subjected to liability in treble damage suits because they thought they could rely on the validity of this Court's decisions.

If the record now before us actually required re-examination of the *General Electric* case, I think that in view of the serious considerations which I have mentioned we should set this case for reargument and invite the Justice Department to express its views.[4] But the fact is that in the present posture of this case, this broad issue need not be decided. The record upon which the District Court entered its summary judgment is wholly inadequate to support a realistic assessment of the actual nature and effect of the so-called lease-and-consignment agreement here involved. As the Court of Appeals pointed out, "[t]he record is not an easy one to read. No written pretrial stipulation of facts was entered into nor was any formal pretrial order made. . . . The result of all this was to create a most unsatisfactory record . . . . As the record now stands, it is almost impossible to determine what agreements, if any, were reached at pretrial." 311 F. 2d, at 767.

[4] The Department's views are not known, because they have not been sought. Indeed, had they been sought, there is a substantial possibility in light of the Department's recognition and tacit validation of consignment selling under the 1959 consent decree entered against the large West Coast oil companies, *United States* v. *Standard Oil Co. of California*, 1959 Trade Cases ¶ 69,399, p. 75,522 *et seq.*, that the Government would have taken the position that the rule of *General Electric* should be left undisturbed.

After a trial on the merits it may be determined that the scheme here involved, although on its face a bona fide lease-and-consignment agreement, was in actual operation and effect a system of resale price maintenance.[5] Or the District Court after a trial might find that despite the formal provisions of the lease-and-consignment agreement, there actually existed here some coercive arrangement otherwise violative of the antitrust laws. In either event, the question of the petitioner's damages would then become an issue to be determined. Only if all these issues, and perhaps others, were resolved in favor of the respondent, would there be presented the question of the continuing validity of the *General Electric* doctrine. Consequently, re-examination of that case should certainly await another day.

I would vacate the judgment of the Court of Appeals and remand this case to the District Court for a plenary trial of all the issues.

Memorandum of MR. JUSTICE BRENNAN and MR. JUSTICE GOLDBERG.

We do not necessarily disagree with the Court that "resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws, and that petitioner suffered actionable wrong or damage." We think, however, that the Court should not decide that question either as to fact or law on the record upon which this summary judgment was entered. Since the decision may be expected to affect consignment agreements in many businesses, including outstanding agreements that may have been entered into in reliance upon *United States* v. *General Electric,* 272 U. S. 476, the Court ought not pronounce that judgment without

[5] In that event, the effect of California's Fair Trade Act, Cal. Bus. & Prof. Code § 16900, would have to be considered. See 66 Stat. 631, 15 U. S. C. § 45 (McGuire Act).

the benefit of a trial of the question whether this is a "coercive type of 'consignment' agreement," and without affording interested parties, including the Antitrust Division of the Department of Justice, an opportunity to express their views. We therefore agree with MR. JUSTICE STEWART and would vacate the judgment of the Court of Appeals and remand this case to the District Court for a plenary trial of all the issues.

Syllabus.

FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL.

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

No. 386. Argued March 25, 1964.—Decided April 20, 1964.

1. A Court of Appeals granted review of a Federal Power Commission (FPC) order concerning a contract performed in its circuit involving natural gas produced there by two respondent natural gas companies incorporated outside the circuit, the principal place of business of one (A) being within the circuit; that of the other (B) being without. Respondents proceeded under § 19 (b) of the Natural Gas Act, which provides for review in the court of appeals wherein the aggrieved natural gas company "is located or has its principal place of business." *Held:* The Court of Appeals erred in failing to dismiss the petition of respondent B for lack of venue, since the term "is located" in § 19 (b) means more than having physical presence in a place and refers in the case of a corporation to the State of its incorporation. Pp. 37–39.
2. Pursuant to § 16 of the Natural Gas Act and § 4 of the Administrative Procedure Act, the FPC after a hearing given to interested parties, including respondents, at which they were allowed to submit their views in writing, issued regulations providing for the summary rejection of contracts with pricing provisions other than those specified in the regulations as being "permissible." Under § 7 of the Natural Gas Act, which includes a provision for an FPC hearing, respondents each submitted an application for a certificate of public convenience and necessity to supply natural gas to a pipeline. Since the applications disclosed price clauses impermissible under its regulations, the FPC rejected the applications without a hearing. Its order on review was set aside by the Court of Appeals. *Held:*

   (a) The "hearing" satisfied the requirements of § 4 of the Administrative Procedure Act. P. 39.

   (b) The requirement for a hearing under § 7 does not preclude the FPC from specifying statutory standards through the rule-making process and barring at the outset those like respondent A whose applications neither meet those standards nor show why in the public interest the rule should be waived. *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, followed. Pp. 39–41.

(c) The present regulations pass on the merits neither of any rate structure nor of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants. P. 42.

(d) The FPC need not proceed on a case-by-case basis where its policy outlaws all indefinite price-changing provisions. P. 44.

(e) A plenary adversary-type hearing under § 7 of the Natural Gas Act and § 5 of the Administrative Procedure Act would have been necessary had there been an adjudication on the merits as to whether respondent A could qualify for a certificate of public convenience and necessity. But the only determination made—after the adequate rule-making hearing under § 4 (b) of the Administrative Procedure Act—was not one on the merits but only that respondent A's application was not in proper form because of the impermissible price-changing provisions in the contract upon which the application depended. Pp. 44–45.

317 F. 2d 796, reversed.

Howard E. Wahrenbrock argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Ralph S. Spritzer, Richard A. Solomon, Josephine H. Klein* and *Peter H. Schiff.*

Alfred C. DeCrane, Jr. argued the cause for respondent Texaco Inc. With him on the brief was *Paul F. Schlicher.* *Carroll L. Gilliam* argued the cause for respondent Pan American Petroleum Corp. With him on the brief were *W. W. Heard, Wm. H. Emerson* and *William J. Grove.*

J. Calvin Simpson and *John T. Murphy* filed a brief for the State of California and the Public Utilities Commission of California, as *amici curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Federal Power Commission in its regulation of independent producers [1] of natural gas has required them

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[1] See Natural Gas Act, 52 Stat. 821–833, as amended, 15 U. S. C. §§ 717–717w; *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672.

to file their contracts as rate schedules. This was done by regulations which evolved as a result of a series of rule-making proceedings.[2] The pertinent regulations presently provide that only certain pricing provisions in the contracts of independent producers are "permissible," [3] any other being "inoperative and of no effect at law." [4] The regulations go on to say that any contract executed on or after April 2, 1962, containing price-changing provisions other than the "permissible" ones, "shall be rejected" so far as producer rates are concerned,[5] that a producer's application for a certificate of public convenience and necessity under § 7 of the Natural Gas Act "shall be rejected" if any contract submitted in support of it contains any of the forbidden provisions,[6] and that, so far as pipeline certificates are concerned, any producer contract executed after that date which has that

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[2] See Order No. 174–B, 13 F. P. C. 1576, 18 CFR § 157.25; Order No. 232, 25 F. P. C. 379, 26 Fed. Reg. 1983, as amended by Order No. 232A, 25 F. P. C. 609, 26 Fed. Reg. 2850; Order No. 242, 27 F. P. C. 339, 27 Fed. Reg. 1356; Reg. § 154.91 *et seq.*, as amended, 18 CFR (Cum. Supp. 1963) § 154.91 *et seq.*

[3] Section 154.93 defines the "permissible" provisions:

"(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

"(b) Provisions that change a price to a specific amount at a definite date; and

"(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question . . . ."

[4] *Ibid.* For a discussion of escalation clauses see *Pure Oil Co.*, 25 F. P. C. 383, aff'd 299 F. 2d 370.

[5] *Ibid.*

[6] § 157.25.

infirmity "will be given no consideration in determining adequacy" of a pipeline company's gas supply.[7]

These regulations were adopted pursuant to the provisions of § 4 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. § 1003. General notice of the proposed rule making was published in the Federal Register as required by § 4 (a) of that Act. The Commission also gave interested parties a "hearing" under § 4 (b).[8] No oral argument was had but an opportunity was afforded for all interested parties to submit their views in writing; and the two respondents in this case—Texaco and Pan American—along with others, did so.

Later, each respondent submitted an application for a certificate of public convenience and necessity under § 7 of the Natural Gas Act, to supply natural gas to a pipeline company. Section 7 provides, with exceptions not presently material, that the Commission "shall set" such an application "for hearing." Since, however, the applications disclosed price clauses that are not "permissible" under the regulations,[9] the Commission without a hearing

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[7] § 157.14 (a) (10) (v).

[8] Section 4 (b) provides:

"After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."

[9] Pan American's contracts provide (1) for a one-cent escalation in 1968, 1973, and 1978, and (2) for a redetermination of a "fair market price" in each five-year period commencing October 1, 1983, but in no event for less than 20.5 cents per thousand cubic feet.

Texaco's contract contained price clauses to become effective at definite times or upon the happening of definite circumstances in the

rejected the applications. 28 F. P. C. 551; 29 F. P. C. 378. Petitions for review were filed with the Court of Appeals, which set aside the orders of the Commission. 317 F. 2d 796. It held that while the regulations are valid as a statement of Commission policy, they cannot be used to deprive an applicant of the statutory hearing granted those who seek certificates of public convenience and necessity. The two cases are here in one petition for certiorari which we granted because of an apparent conflict between that decision and *Superior Oil Co.* v. *Federal Power Comm'n*, 322 F. 2d 601, decided by the Court of Appeals for the Ninth Circuit. 375 U. S. 902.

I.

A preliminary question, which concerns Texaco Inc., alone, is whether venue to review these orders of the Commission was properly in the Tenth Circuit. The governing provision is § 19 (b) of the Natural Gas Act which provides:

> "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . ."

The term "is located" would have an ambivalent meaning if venue lay only in "any circuit" where the natural gas company "is located." But in the context of § 19 (b) "any circuit" covers either the place where the company

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future, *e. g.*, the passage of 5, 10, or 15 years, increased taxation on the production, severance, gathering, transportation, sale, or delivery of gas or as a result of renegotiations undertaken six months prior to the beginning of the third (1974) and fourth (1979) of the four five-year periods into which the contract term was divided.

"is located" or where it "has its principal place of business." Hence the main argument of Texaco derives from the fact that "is located" was substituted for "resides" in an early draft of the bill [10] which later emerged as the Federal Power Act, from which § 19 (b) of the Natural Gas Act is derived. The Court of Appeals found that change decisive; but we can only conjecture as to why it was made, as no explanation appears. The bill in which "resides" was used gave review to "any person aggrieved" and the bill substituting "is located" for "resides" substituted "licensee or public utility" for "person aggrieved." Since the latter language was changed from the personal to the impersonal it may be, as the Commission says, that the Congress was trying to use common legal parlance that a corporation "can have its legal home only at the place where it is located by or under the authority of its charter," as stated in *Ex parte Schollenberger,* 96 U. S. 369, 377. And see *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 169. However that may be, we think that "is located" means more than having physical presence or existence in a place, since the alternate venue referred to in § 19 (b) is "principal place of business." The Court of Appeals recognized the overlap between the two clauses inherent in its construction but resolved its doubts in favor of Tenth Circuit venue because the gas sold by Texaco under the contested contracts was produced in that circuit and the performance of the contract took place there.

The Act with which we deal was enacted August 26, 1935. At that time and down to the 1948 amendment of § 1391 of the Judicial Code, 28 U. S. C. § 1391 (c), the only residence of a corporation for purposes of federal venue was the State and district in which it had been in-

[10] See § 313 (b) of the Federal Power Act, 49 Stat. 860, 16 U. S. C. § 825*l* (b); cf. S. 1725, 74th Cong., 1st Sess., with S. 2796 of the same session.

corporated. See 9 Fletcher, Cyclopedia Corporations (1931), § 4385. That theme runs through the cases. See, *e. g., Shaw* v. *Quincy Mining Co.,* 145 U. S. 444, 449–450. We conclude that, although "located" sometimes is used as indicating a place of business (*Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555), in the setting of this Act "is located" and "resides" are equated and that "is located" refers in the case of Texaco to its State of incorporation. There is symmetry in that construction as the choice, so far as circuits are concerned, is then left between that State, the "principal place of business" (with no penumbra of other places of business, as here), or the District of Columbia where the Commission sits.

Texaco is a Delaware corporation and there is no claim that its principal place of business is within the Tenth Circuit. The Court of Appeals therefore erred in failing to dismiss its petition for lack of venue. There is, however, another respondent, Pan American, whose principal place of business is within the Tenth Circuit. We therefore proceed to the merits of its application.

II.

The main issue in the case is whether the "hearing" granted under § 4 (b) of the Administrative Procedure Act is adequate, so far as the price clauses are concerned, for purposes of § 7 of the Natural Gas Act. We think the Court of Appeals erred, that the present case is governed by the principle of *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192, and that the statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.

In *Storer* the Federal Communications Commission, pursuant to its general rule-making authority, limited

permissible multiple ownership for radio and television stations. Storer, which had seven radio stations and five television stations, was under that rule automatically disqualified for further licensing. To surmount that barrier it argued that the Act required a license to issue where the public interest would be served and that before an application could be denied, a hearing must be held. We said:

> "We read the Act and Regulations as providing a 'full hearing' for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361 (c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309 (b) . . . would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open." 351 U. S., at 205.

In the present case, as in *Storer,* there is a procedure provided in the regulations whereby an applicant can ask for a waiver of the rule complained of.[11] Facts might con-

[11] Regulation § 1.7 (b), 18 CFR (Cum. Supp. 1963) § 1.7 (b), provides in relevant part:

"A petition for the issuance, amendment, waiver, or repeal of a rule by the Commission shall set forth clearly and concisely petitioner's interest in the subject matter, the specific rule, amendment, waiver, or repeal requested, and cite by appropriate reference the

ceivably be alleged sufficient on their face to provide a basis for waiver of the price-clause rules and for a hearing on the matter. Cf. *Atlantic Refining Co.*, 28 F. P. C. 469; 29 F. P. C. 384. But no such attempt was made here by Pan American, the only respondent to which the present point has any immediate applicability.

The rule-making authority here, as in *Storer*, is ample to provide the conditions for applications under § 4 or § 7. Section 16 of the Natural Gas Act gives the Commission power to prescribe such regulations "as it may find necessary or appropriate to carry out the provisions of this Act." We deal here with a procedural aspect of a rate question and with a certificate question that is important in effectuating the aim of the Act to protect the consumer interest. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610. In a rate case under § 5 (a) of the Act the Commission can pass on existing contracts affecting rates, can find that particular contracts are "unjust, unreasonable, unduly discriminatory, or preferential" and thereupon has power to determine the "just and reasonable" rate or contract and "fix the same." And see *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 341. And where, as here, applications for certificates are made under § 7 of the Act, the Commission under § 7 (e) is required to control the terms and conditions under which natural gas companies, such as respondent, may initiate sales at wholesale of natural gas in

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statutory provision or other authority therefor. If a rate filing is accompanied by a request for waiver pursuant to this section the thirty-day notice period provided in section 4 (d) of the Natural Gas Act and section 205 (d) of the Federal Power Act shall begin to run if and when the Commission grants the request. Such petition shall set forth the purpose of, and the facts claimed to constitute the grounds requiring, such rule, amendment, waiver, or repeal, and shall conform to the requirements of §§ 1.15 and 1.16. Petitions for the issuance or amendment of a rule shall incorporate the proposed rule or amendment."

commerce. *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U. S. 378, 389.

Pan American does not disagree on that score; it insists that those changes and adjustments can be made only after an adversary hearing. To that there are two answers. The present regulations do not pass on the merits of any rate structure nor on the merits of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants. Those qualifications are in the category of conditions that relate to the ability of applicants to serve the consumer interest in this regulated field. They are kin to the kind of capital structure that an applicant has and to his ability by reason of the rate structure to serve the public interest. It must be remembered that under this Act rate increases are initiated by the natural gas company, the Commission having the burden by reason of § 4 (e) of the Act to initiate a hearing on their legality with only a limited power to suspend new rates. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra.* Natural gas companies that seek to enter the field with prearranged escalator clauses and the like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may be best achieved if it is given at the very threshold of the enterprise. At least the Commission may so conclude; [12] and

[12] The Commission in making the last amendment to the regulation now challenged said:

"Protection of the public interest is the touchstone of our regulatory powers under the Natural Gas Act. The Commission's obligation under the Act to the natural gas companies, as one segment of the public whose interest is to be protected, does not compel it to acquiesce in the use of contracts which carry provisions incompatible with a scheme of effective rate regulation. To be sure, the proposed rule will have impact upon contractual practices which have been fairly widespread. But the real issue is not one of 'freedom of contract'; the question is whether the rule is rationally related to a

the legislative history makes clear that its authority reaches that far. H. R. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2–3, states:

> ". . . The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension *at a time when such vital matters can*

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condition which requires correction if regulatory objectives embraced by the statute are to be achieved. See *American Trucking Associations* v. *United States*, 344 U. S. 298. In our view, the rule we adopt fully meets this test.

"We held in the *Pure Oil* case [see note 4, *supra*] that indefinite escalation clauses are contrary to the public interest and restated this conclusion in Order No. 232A. Increases in producer prices, triggered by indefinite escalation clauses, have resulted in a flood of almost simultaneous filings. These filings bear no apparent relationship to the economic requirements of the producers who file them. The Natural Gas Act contemplates that prices, to be just and reasonable, be related to economic needs. The elimination of indefinite escalation provisions does not, of course, cut off other avenues by which a producer may make provision for filing for increased rates.

"Filings under indefinite escalation clauses have created a significant portion of the administrative burdens under which this Commission is laboring today. The Natural Gas Act contemplates that rate increases shall be sought when there is economic justification, but not that there shall be a chain reaction in a wide area whenever one producer in the area negotiates a contract at a new price level. The Act requires the Commission to give precedence to the hearing and decision of rate increases, but the complexity of indefinite price clauses requires it to spend an undue amount of time in their interpretation and application at the expense of making a prompt determination of the rate issues involved. Accordingly, in protecting the public against waves of increases which have no defensible basis, we also serve the need—which we believe we should take into account—of making the tasks of regulation more manageable." 27 F. P. C. 339, 340, 27 Fed. Reg. 1356, 1357.

readily be modified as the public interest may demand. . . ." (Italics added.)

And see S. Rep. No. 948, 77th Cong., 2d Sess., pp. 1–2.

To require the Commission to proceed only on a case-by-case basis would require it, so long as its policy outlawed indefinite price-changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. There would be a vast proliferation of hearings, for as a result of *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, there are thousands of individual producers seeking applications. See *Wisconsin* v. *Federal Power Comm'n*, 373 U. S. 294, 300. We see no reason why under this statutory scheme the processes of regulation need be so prolonged [13] and so crippled.

Pan American finally argues that the "hearing" accorded it under § 4 (b) of the Administrative Procedure Act [14] did not comply with that Act nor with the Natural Gas Act. It points out that § 7 of the Natural Gas Act requires a hearing and that § 5 of the Administrative Procedure Act provides, with exceptions not relevant here, that a full-fledged adversary-type of hearing be held in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." "Adjudication" is defined in § 2 (d) of the Administrative Procedure Act as "agency process for the formulation of an order"; "order" is defined as "the whole or any part of the final disposition . . . of any agency in any matter other than rule making but

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[13] In one recent case seven years elapsed between the date of the new rate filing and the close of the review proceedings. *Shell Oil Co.*, 18 F. P. C. 617, 19 F. P. C. 74, set aside *sub nom. Shell Oil Co.* v. *Federal Power Comm'n*, 263 F. 2d 223, rev'd *sub nom. Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U. S. 263; on remand, aff'd *sub nom. Shell Oil Co.* v. *Federal Power Comm'n*, 292 F. 2d 149, cert. denied, 368 U. S. 915.

[14] See note 8, *supra*.

including licensing." And "licensing" is defined as "agency process respecting the . . . denial . . . of a license." § 2 (e). What the Commission did in these cases, however, is not an "adjudication," not "an order," not "licensing" within the meaning of § 2. Whether Pan American can qualify for a certificate of public convenience and necessity has never been reached. It has only been held that its application is not in proper form because of the pricing provisions in the contracts it tenders. No decisions on the merits have been reached. The only hearing to which Pan American so far has been entitled was given when the regulations in question were adopted pursuant to § 4 (b) of the Administrative Procedure Act.

Reversed.

MR. JUSTICE STEWART, dissenting in part.

I agree with Part I of the Court's opinion, holding that the petition of Texaco Inc. should have been dismissed for lack of venue. I cannot agree, however, that a gas producer's application for a certificate of public convenience and necessity can be rejected without the full adjudicative hearing to which § 7 of the Act entitles him. My reasons are substantially those expressed in Judge Breitenstein's opinion for the Court of Appeals. 317 F. 2d 796, 804–807.

NATIONAL LABOR RELATIONS BOARD *v.* SERVETTE, INC.

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

No. 111. Argued February 19, 1964.—
Decided April 20, 1964.

In support of a strike against respondent, which is a wholesale distributor of food products, the union asked supermarket chain store managers to refrain from selling any goods supplied by respondent. It warned that handbills asking the public not to purchase those goods would be distributed at noncooperating stores, and handbills were in fact distributed at some stores. A complaint charging that the union's conduct violated §§ 8 (b) (4) (i) and (ii) of the National Labor Relations Act was dismissed by the National Labor Relations Board. The Board held that the appeal to supermarket managers did not fall within subsection (i), which makes it an unfair labor practice for a union to induce "any individual employed by any person" to refuse to perform services with an object of forcing his employer to cease doing business with another. It also held that the handbilling was protected by the proviso to § 8 (b) (4) which exempts truthful publicity, other than picketing, to advise the public that an employer is distributing products "produced" by an employer with whom the union has a primary dispute. The Court of Appeals set aside the Board order, holding that "individual" in § 8 (b) (4) (i) includes the market managers, and that the "publicity" proviso was inapplicable since respondent is a distributor, not a producer. *Held:*

1. It is not an unfair labor practice for the union to request supermarket managers not to handle products of the distributor against whom the union is striking. Though store managers come within the term "individual" in § 8 (b) (4) (i), that provision is inapplicable here since they were requested to make decisions within their managerial authority rather than to cease performing duties to force their employers to stop dealing with respondent. Pp. 49–54.

2. The union's distribution of handbills was protected by the "publicity" proviso in § 8 (b) (4). Products "produced" by an

employer include products distributed by a wholesaler with whom the primary dispute exists. Pp. 54–56.

3. Warnings that handbills would be distributed at noncooperating stores are not "threats" prohibited by § 8 (b) (4) (ii). P. 57.

310 F. 2d 659, reversed.

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

Stanley E. Tobin argued the cause for respondent. With him on the briefs was *Carl M. Gould.*

Duane B. Beeson filed a brief for the American Federation of Television and Radio Artists et al., as *amici curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent Servette, Inc., is a wholesale distributor of specialty merchandise stocked by retail food chains in Los Angeles, California.[1] In 1960, during a strike which Local 848 of the Wholesale Delivery Drivers and Salesmen's Union was conducting against Servette, the Local's representatives sought to support the strike by asking managers of supermarkets of the food chains to discontinue handling merchandise supplied by Servette. In most instances the representatives warned that handbills asking the public not to buy named items distributed by Servette would be passed out in front of stores which refused to cooperate, and in a few cases handbills were

[1] The supermarket chains principally involved were Kory's Markets, Inc., and McDaniels Markets. The testimony mentioned only one other chain, Daylight Markets, one of whose store managers made an unsworn statement that he was interviewed on one occasion, and that although he refused to cooperate, the Local did not handbill at his store. Servette's products are primarily candy, liquor, holiday supplies and specialty articles.

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in fact passed out.[2] A complaint was issued on charges by Servette that this conduct violated subsections (i) and (ii) of § 8 (b)(4) of the National Labor Relations Act, as amended,[3] which, in relevant part, provide that it is an unfair labor practice for a union

> "(i) . . . to induce or encourage any individual employed by any person . . . to engage in . . . a refusal in the course of his employment to . . . handle . . . commodities or to perform any services; or"
>
> "(ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is—
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> . . . . . .
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> "(B) forcing or requiring any person to cease . . . dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .
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> . . . . . .

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[2] The handbill was as follows:

"To the Patrons of This Store

"Wholesale Delivery Drivers & Salesmen's Local No. 848 urgently requests that you do not buy the following products distributed by Servette, Inc.:

"Brach's Candy

"Servette Candy

"Good Season Salad Dressing

"Old London Products

"The Servette Company which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual 'Yellow Dog' contracts.

"These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

"The drivers of Servette appreciate your cooperation in this fight."

[3] As amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704 (a), 73 Stat. 542–543, 29 U. S. C. (Supp. IV, 1963) § 158 (b)(4).

> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . ."

The National Labor Relations Board dismissed the complaint. The Board adopted the finding of the Trial Examiner that "the managers of McDaniels Markets were authorized to decide as they best could whether to continue doing business with Servette in the face of threatened or actual handbilling. This, a policy decision, was one for them to make. The evidence is persuasive that the same authority was vested in the managers of Kory." 133 N. L. R. B. 1506. The Board held that on these facts the Local's efforts to enlist the cooperation of the supermarket managers did not constitute inducement of an "individual" within the meaning of that term in subsection (i); the Board held further that the handbilling, even if constituting conduct which "threaten[s], coerce[s], or restrain[s] any person" under subsection (ii), was protected by the quoted proviso to amended § 8 (b) (4). 133 N. L. R. B. 1501. The Court of Appeals set aside the Board's order, holding that the term "individual" in subsection (i) was to be read literally, thus including the supermarket managers, and that the distributed products were not "produced" by Servette within the meaning of the proviso, thus rendering its protection unavailable. 310 F. 2d 659. We granted certiorari, 374 U. S. 805. We reverse the judgment of the Court of Appeals.

The Court of Appeals correctly read the term "individual" in subsection (i) as including the supermarket

managers,[4] but it erred in holding that the Local's attempts to enlist the aid of the managers constituted inducement of the managers in violation of the subsection. The 1959 statute amended § 8 (b)(4)(A) of the National Labor Relations Act,[5] which made it unlawful to induce or encourage "the employees of any employer" to strike or engage in a "concerted" refusal to work. We defined the central thrust of that statute to be to forbid "a union to induce employees to strike against or to refuse to handle goods for their employer when an object is to force him or another person to cease doing business with some third party." *Local 1976, Carpenters' Union* v. *Labor Board,* 357 U. S. 93, 98. In the instant case, however, the Local, in asking the managers not to handle

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[4] The Board reached a contrary conclusion on the authority of its decision in *Carolina Lumber Co.,* 130 N. L. R. B. 1438, 1443, which viewed the statute as distinguishing "low level" supervisors from "high level" supervisors, holding that inducement of "low level" supervisors is impermissible but inducement of "high level" supervisors is permitted. We hold today that this is not the distinction drawn by the statute; rather, the question of the applicability of subsection (i) turns upon whether the union's appeal is to cease performing employment services, or is an appeal for the exercise of managerial discretion.

[5] Section 8 (b)(4) of the National Labor Relations Act, 61 Stat. 140, 141, 29 U. S. C. § 158 (b)(4), read as follows:

"SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

Servette items, was not attempting to induce or encourage them to cease performing their managerial duties in order to force their employers to cease doing business with Servette. Rather, the managers were asked to make a managerial decision which the Board found was within their authority to make. Such an appeal would not have been a violation of § 8 (b)(4)(A) before 1959, and we think that the legislative history of the 1959 amendments makes it clear that the amendments were not meant to render such an appeal an unfair labor practice.

The 1959 amendments were designed to close certain loopholes in the application of § 8 (b)(4)(A) which had been exposed in Board and court decisions. Thus, it had been held that the term "the employees of any employer" limited the application of the statute to those within the statutory definitions of "employees" and "employer." Section 2 (2) of the National Labor Relations Act defines "employer" to exclude the federal and state governments and their agencies or subdivisions, nonprofit hospitals, and employers subject to the Railway Labor Act. 29 U. S. C. § 152 (2). The definition of "employee" in § 2 (3) excludes agricultural laborers, supervisors, and employees of an employer subject to the Railway Labor Act.[6] 29 U. S. C. § 152 (3). Further-

[6] In view of these definitions, it was permissible for a union to induce work stoppages by minor supervisors, and farm, railway or public employees. See *Ferro-Co Corp.*, 102 N. L. R. B. 1660 (supervisors); *Arkansas Express, Inc.*, 92 N. L. R. B. 255 (supervisors); *Conway's Express*, 87 N. L. R. B. 972, 980, aff'd, 195 F. 2d 906, 911 (C. A. 2d Cir.) (supervisors); *Great Northern R. Co.*, 122 N. L. R. B. 1403, enforcement denied, 272 F. 2d 741 (C. A. 9th Cir.), and supplemental Board decision, 126 N. L. R. B. 57 (railroad employees); *Smith Lumber Co.*, 116 N. L. R. B. 1756, enforcement denied, 246 F. 2d 129, 132 (C. A. 5th Cir.) (railroad employees); *Paper Makers Importing Co., Inc.*, 116 N. L. R. B. 267 (municipal employees). Compare *Di Giorgio Fruit Corp.*, 87 N. L. R. B. 720, 721, enforced, 89 U. S. App. D. C. 155, 191 F. 2d 642, cert. denied, 342 U. S. 869 (agricultural labor organization).

more, since the section proscribed only inducement to engage in a strike or "concerted" refusal to perform services, it had been held that it was violated only if the inducement was directed at two or more employees.[7] To close these loopholes, subsection (i) substituted the phrase "any individual employed by any person" for "the employees of any employer," and deleted the word "concerted." The first change was designed to make the provision applicable to refusals by employees who were not technically "employees" within the statutory definitions, and the second change was intended to make clear that inducement directed to only one individual was proscribed.[8] But these changes did not expand the type of conduct which § 8 (b)(4)(A) condemned, that is, union pressures calculated to induce the

[7] See *Joliet Contractors Assn.* v. *Labor Board,* 202 F. 2d 606, 612 (C. A. 7th Cir.), cert. denied, 346 U. S. 824; cf. *Labor Board* v. *International Rice Milling Co.,* 341 U. S. 665, 671.

[8] The changes made in § 8 (b)(4)(A) by subsection (i) first appeared in the Administration bill, which was introduced by Senator Goldwater. See § 503 (a) of S. 748, I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 142. The Secretary of Labor testified that the change would cure the situation whereby unions could "avoid the existing provisions by inducing individual employees, or workers not defined as employees by the act such as railroad and agricultural workers—to refuse to handle the products of the person with whom they want the employer to cease doing business." Hearings before the Senate Subcommittee on Labor and Public Welfare on S. 505, etc., 86th Cong., 1st Sess., p. 265. The Landrum-Griffin bill introduced in the House contained a subsection (i) similar to that of the Administration bill. Section 705 (a) of H. R. 8400, I Leg. Hist. 680. An analysis submitted by its sponsors explained the purpose of the amendment as had the Secretary of Labor, and added that the omission of the word "concerted" was to prevent the unions from inducing employees one at a time to engage in secondary boycotts. 105 Cong. Rec. 14347, II Leg. Hist. 1522–1523. See also 105 Cong. Rec. 15531–15532 (Congressman Griffin), II Leg. Hist. 1568.

employees of a secondary employer to withhold their services in order to force their employer to cease dealing with the primary employer.[9]

Moreover, the division of § 8 (b)(4) into subsections (i) and (ii) by the 1959 amendments has direct relevance to the issue presented by this case. It had been held that § 8 (b)(4)(A) did not reach threats of labor trouble made to the secondary employer himself.[10] Con-

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[9] Thus, the following colloquy occurred between Secretary of Labor Mitchell and Senator Kennedy with respect to the provision of the Administration bill analogous to § 8 (b) (4) (ii):

"Senator KENNEDY. Mr. Secretary . . .

"I would like to ask you a question regarding section 503 (a) of your bill: There is a manufacturer of clothing 'A.' He begins to purchase the products of a plant which is under the domination of racketeers . . . . Would it be a violation of section 503 of your bill if the business agent of the Clothing Workers Union at company A spoke to the plant manager and requested him not to order materials—nonunion materials—from the racketeer plant in Pennsylvania?

"Secretary MITCHELL. We don't think it would be, Senator.

"Senator KENNEDY. Now, supposing the plant in Pennsylvania was a nonunion plant, would it be a violation under your bill for union leaders in another company to go to his plant manager and ask him not to buy goods from the nonunion plant?

"Secretary MITCHELL. Request him not to buy? No.

"Senator KENNEDY. Now, if the representative of the union at plant A told the manufacturer that the members of the union would not continue to work on goods which were secured from the racketeer's shop?

"Secretary MITCHELL. In that case, it is my interpretation of our proposal that that would be coercion. And our proposal prohibits coercion for the purpose of bringing pressure on an employer not to buy merchandise from a neutral third party." Hearings before the Senate Subcommittee on Labor and Public Welfare on S. 505, etc., 86th Cong., 1st Sess., pp. 304–305.

[10] See *Sealright Pacific, Ltd.*, 82 N. L. R. B. 271, 272, n. 4; *Rabouin* v. *Labor Board*, 195 F. 2d 906, 911–912 (C. A. 2d Cir.); *Labor Board* v. *International Union of Brewery Workers*, 272 F. 2d 817, 819 (C. A. 10th Cir.).

gress decided that such conduct should be made unlawful, but only when it amounted to conduct which "threaten[s], coerce[s] or restrain[s] any person"; hence the addition of subsection (ii). The careful creation of separate standards differentiating the treatment of appeals to the employees of the secondary employer not to perform their employment services, from appeals for other ends which are attended by threats, coercion or restraint, argues conclusively against the interpretation of subsection (i) as reaching the Local's appeals to the supermarket managers in this case.[11] If subsection (i), in addition to prohibiting inducement of employees to withhold employment services, also reaches an appeal that the managers exercise their delegated authority by making a business judgment to cease dealing with the primary employer, subsection (ii) would be almost superfluous. Harmony between (i) and (ii) is best achieved by construing subsection (i) to prohibit inducement of the managers to withhold their services from their employer, and subsection (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would "threaten, coerce, or restrain" that exercise.[12]

We turn finally to the question whether the proviso to amended § 8 (b)(4) protected the Local's handbilling.

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[11] Accord, *Labor Board* v. *Local 294, Teamsters,* 298 F. 2d 105 (C. A. 2d Cir.); and see *Alpert* v. *Local 379, Teamsters,* 184 F. Supp. 558 (D. C. D. Mass.).

[12] The Conference Committee in adopting subsection (ii) understood that the subsection would reach only threats, restraints or coercion of the secondary employer and not a mere request to him for voluntary cooperation. Senator Dirksen, one of the conferees, stated that the new amendment "makes it an unfair labor practice for a union to try to coerce or threaten an employer directly (*but not to persuade or ask him*) in order— . . . To get him to stop doing business with another firm or handling its goods." 105 Cong. Rec. 19849, II Leg. Hist. 1823. (Italics supplied.)

The Court of Appeals, following its decision in *Great Western Broadcasting Corp.* v. *Labor Board,* 310 F. 2d 591 (C. A. 9th Cir.), held that the proviso did not protect the Local's conduct because, as a distributor, Servette was not directly involved in the physical process of creating the products, and thus "does not produce any products." The Board on the other hand followed its ruling in *Lohman Sales Co.,* 132 N. L. R. B. 901, that products "produced by an employer" included products distributed, as here, by a wholesaler with whom the primary dispute exists. We agree with the Board. The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded. We elaborated the history of the proviso in *Labor Board* v. *Fruit & Vegetable Packers, Local 760, post,* p. 58, decided today. It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. Moreover, a primary target of the 1959 amendments was the secondary boycotts conducted by the Teamsters Union, which ordinarily represents employees not of manufacturers, but of motor carriers.[13] There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.

The term "produced" in other labor laws was not unfamiliar to Congress. Under the Fair Labor Standards Act, the term is defined as "produced, manufactured, mined, handled, or in any other manner worked on . . . ,"

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[13] See, *e. g.,* 105 Cong. Rec. 1730, II Leg. Hist. 993–994; 105 Cong. Rec. 6105, II Leg. Hist. 1028; 105 Cong. Rec. 6669, II Leg. Hist. 1196; 105 Cong. Rec. 3926–3927, II Leg. Hist. 1469–1470; 105 Cong. Rec. 15544, II Leg. Hist. 1580.

29 U. S. C. § 203 (j), and has always been held to apply to the wholesale distribution of goods.[14] The term "production" in the War Labor Disputes Act has been similarly applied to a general retail department and mail-order business.[15] The Court of Appeals' restrictive reading of "producer" was prompted in part by the language of § 8 (b)(4)(B), which names as a proscribed object of the conduct defined in subsections (i) and (ii) "forcing or requiring any person to cease . . . dealing in the products of any other *producer, processor,* or *manufacturer.*" (Italics supplied.) In its decision in *Great Western Broadcasting Corp.* v. *Labor Board, supra,* the Court of Appeals reasoned that since a "processor" and a "manufacturer" are engaged in the physical creation of goods, the word "producer" must be read as limited to one who performs similar functions. On the contrary, we think that "producer" must be given a broader reach, else it is rendered virtually superfluous.

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[14] See, *e. g., Mitchell* v. *Pidcock,* 299 F. 2d 281 (C. A. 5th Cir.); *McComb* v. *Wyandotte Furniture Co.,* 169 F. 2d 766 (C. A. 8th Cir.); *McComb* v. *Blue Star Auto Stores,* 164 F. 2d 329 (C. A. 7th Cir.); *Walling* v. *Friend,* 156 F. 2d 429 (C. A. 8th Cir.); *Walling* v. *Mutual Wholesale Food Co.,* 141 F. 2d 331, 340 (C. A. 8th Cir.).

[15] *United States* v. *Montgomery Ward & Co.,* 150 F. 2d 369 (C. A. 7th Cir.).

We attach no significance to the fact that another version of the proviso read:

"*Provided,* That nothing contained in this subsection (b) shall be construed . . . to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor dispute . . . ." 105 Cong. Rec. 17333, II Leg. Hist. 1383.

This version was in a request by the Senate conferees for instructions but was not made the subject of debate or vote because Senate and House conferees reached agreement on the proviso.

Finally, the warnings that handbills would be distributed in front of noncooperating stores are not prohibited as "threats" within subsection (ii). The statutory protection for the distribution of handbills would be undermined if a threat to engage in protected conduct were not itself protected.

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL.

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

No. 88. Argued February 18–19, 1964.—Decided April 20, 1964.

Respondent union, while on strike, conducted a consumer boycott of the employers' products, pursuant to which it engaged in peaceful picketing and distributed handbills at markets selling such products. The signs and handbills asked the public not to purchase primary employers' products. The National Labor Relations Board held that § 8 (b) (4) of the National Labor Relations Act was intended by Congress to prohibit all consumer picketing at secondary establishments. The Court of Appeals rejected that conclusion, holding that the crucial issue is whether the secondary employer is in fact coerced or threatened by the picketing, and remanded for a finding on that issue. *Held:* Peaceful secondary picketing of retail stores directed solely at appealing to consumers to refrain from buying the primary employer's product is not prohibited by § 8 (b) (4). Pp. 63–73.

113 U. S. App. D. C. 356, 308 F. 2d 311, judgment vacated and case remanded.

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

David Previant argued the cause for respondents. With him on the brief were *Hugh Hafer* and *Richard P. Donaldson.*

Alfred J. Schweppe and *Mary Ellen Krug* filed a brief for the Tree Fruits Labor Relations Committee, Inc., as *amicus curiae,* urging reversal.

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

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under § 8 (b)(4)(ii)(B) of the National Labor Relations Act, as amended,[1] it is an unfair labor practice for a union "to threaten, coerce, or restrain any person," with the object of "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . . ." A proviso excepts, however, "publicity, *other than picketing,* for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." (Italics supplied.) The question in this case is whether the respondent unions violated this section when they limited their secondary picketing of retail stores to an appeal to the customers of the stores not to buy the products of certain firms against which one of the respondents was on strike.

Respondent Local 760 called a strike against fruit packers and warehousemen doing business in Yakima, Washington.[2] The struck firms sold Washington State

[1] As amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704 (a), 73 Stat. 542–543, 29 U. S. C. (Supp. IV, 1963) § 158 (b)(4).

[2] The firms, 24 in number, are members of the Tree Fruits Labor Relations Committee, Inc., which acts as the members' agent in labor disputes and in collective bargaining with unions which represent employees of the members. The strike was called in a dispute over the terms of the renewal of a collective bargaining agreement.

apples to the Safeway chain of retail stores in and about Seattle, Washington. Local 760, aided by respondent Joint Council, instituted a consumer boycott against the apples in support of the strike. They placed pickets who walked back and forth before the customers' entrances of 46 Safeway stores in Seattle. The pickets—two at each of 45 stores and three at the 46th store—wore placards and distributed handbills which appealed to Safeway customers, and to the public generally, to refrain from buying Washington State apples, which were only one of numerous food products sold in the stores.[3]

[3] The placard worn by each picket stated: "To the Consumer: Non-Union Washington State apples are being sold at this store. Please do not purchase such apples. Thank you. Teamsters Local 760, Yakima, Washington."

A typical handbill read:

"DON'T BUY
WASHINGTON STATE
APPLES

THE 1960 CROP OF WASHINGTON STATE APPLES IS BEING PACKED BY NON-UNION FIRMS

Included in this non-union operation are twenty-six firms in the Yakima Valley with which there is a labor dispute. These firms are charged with being

UNFAIR

by their employees who, with their union, are on strike and have been replaced by non-union strikebreaking workers employed under substandard wage scales and working conditions.

In justice to these striking union workers who are attempting to protect their living standards and their right to engage in good-faith collective bargaining, we request that you

DON'T BUY
WASHINGTON STATE
APPLES

TEAMSTERS UNION LOCAL 760
YAKIMA, WASHINGTON

This is not a strike against any store or market.

(P.S.—PACIFIC FRUIT & PRODUCE CO. is the only firm packing Washington State Apples under a union contract.)"

Before the pickets appeared at any store, a letter was delivered to the store manager informing him that the picketing was only an appeal to his customers not to buy Washington State apples, and that the pickets were being expressly instructed "to patrol peacefully in front of the consumer entrances of the store, to stay away from the delivery entrances and not to interfere with the work of your employees, or with deliveries to or pickups from your store." A copy of written instructions to the pickets—which included the explicit statement that "you are also forbidden to request that the customers not patronize the store"—was enclosed with the letter.[4] Since it was desired to assure Safeway employees that they were not to cease work, and to avoid any interference with pickups or deliveries, the pickets appeared after the stores opened for business and departed before the stores closed. At all times during the picketing, the store employees continued to work, and no deliveries or pickups were obstructed. Washington State apples were handled in normal course by both Safeway employees and the employees of other employers involved. Ingress and egress by customers and others was not interfered with in any manner.

A complaint issued on charges that this conduct violated § 8 (b)(4) as amended.[5] The case was submitted directly to the National Labor Relations Board on a stipulation of facts and the waiver of a hearing and proceedings before a Trial Examiner. The Board held, following

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[4] Copies of the letter delivered to each store manager and of the instructions to pickets are printed in the Appendix.

[5] The complaint charged violations of both subsections (i) and (ii) of § 8 (b)(4). The Board held, however, that as the evidence indicated "that Respondents' picketing was directed at consumers only, and was not intended to 'induce or encourage' employees of Safeway or of its suppliers to engage in any kind of action, we find that by such picketing Respondents did not violate Section 8 (b)(4)(i)(B) of the Act." 132 N. L. R. B., at 1177. See also *Labor Board* v. *Servette, Inc.*, *ante*, p. 46, decided today.

its construction of the statute in *Upholsterers Frame & Bedding Workers Twin City Local No. 61*, 132 N. L. R. B. 40, that "by literal wording of the proviso [to Section 8 (b)(4)] as well as through the interpretive gloss placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited." 132 N. L. R. B. 1172, 1177.[6] Upon respondents' petition for review and the Board's cross-petition for enforcement, the Court of Appeals for the District of Columbia Circuit set aside the Board's order and remanded. The court rejected the Board's construction and held that the statutory requirement of a showing that respondents' conduct would "threaten, coerce, or restrain" Safeway could only be satisfied by affirmative proof that a substantial economic impact on Safeway had occurred, or was likely to occur as a result of the conduct. Under the remand the Board was left "free to reopen the record to receive evidence upon the issue whether Safeway was in fact threatened, coerced, or restrained." 113 U. S. App. D. C. 356, 363, 308 F. 2d 311, 318. We granted certiorari, 374 U. S. 804.

The Board's reading of the statute—that the legislative history and the phrase "other than picketing" in the proviso reveal a congressional purpose to outlaw all picketing directed at customers at a secondary site—necessarily rested on the finding that Congress determined that such picketing always threatens, coerces or restrains the secondary employer. We therefore have a special responsibility to examine the legislative history for confirmation that Congress made that determination. Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. "In the sensitive area of peaceful picketing Congress has

[6] Accord: *Burr & Perfection Mattress Co.* v. *Labor Board*, 321 F. 2d 612 (C. A. 5th Cir.).

dealt explicitly with isolated evils which experience has established flow from such picketing." *Labor Board* v. *Drivers Local Union,* 362 U. S. 274, 284. We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history," *ibid.,* that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.

We have examined the legislative history of the amendments to § 8 (b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in

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forcing the secondary employer to cooperate with the union in its primary dispute.[7] This is not to say that this distinction was expressly alluded to in the debates. It is to say, however, that the consumer picketing carried on in this case is not attended by the abuses at which the statute was directed.

The story of the 1959 amendments, which we have detailed at greater length in our opinion filed today in *Labor Board* v. *Servette, Inc., ante,* p. 46, begins with the original § 8 (b)(4) of the National Labor Relations Act. Its prohibition, in pertinent part, was confined to the inducing or encouraging of "the employees of any employer to engage in, a strike or a concerted refusal . . . to . . . handle . . . any goods . . ." of a primary employer. This proved to be inept language. Three major loopholes were revealed. Since only inducement of "employees" was proscribed, direct inducement of a supervisor or the secondary employer by threats of labor trouble was not prohibited. Since only a "strike or a concerted refusal" was prohibited, pressure upon a single employee was not forbidden. Finally, railroads, airlines

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[7] The distinction between picketing a secondary employer merely to "follow the struck goods," and picketing designed to result in a generalized loss of patronage, was well established in the state cases by 1940. The distinction was sometimes justified on the ground that the secondary employer, who was presumed to receive a competitive benefit from the primary employer's nonunion, and hence lower, wage scales, was in "unity of interest" with the primary employer, *Goldfinger* v. *Feintuch,* 276 N. Y. 281, 286, 11 N. E. 2d 910, 913; *Newark Ladder & Bracket Sales Co.* v. *Furniture Workers Local 66,* 125 N. J. Eq. 99, 4 A. 2d 49; *Johnson* v. *Milk Drivers & Dairy Employees Union, Local 854,* 195 So. 791 (Ct. App. La.), and sometimes on the ground that picketing restricted to the primary employer's product is "a primary boycott against the merchandise." *Chiate* v. *United Cannery Agricultural Packing & Allied Workers of America,* 2 CCH Lab. Cas. 125, 126 (Cal. Super. Ct.). See I Teller, Labor Disputes and Collective Bargaining § 123 (1940).

and municipalities were not "employers" under the Act and therefore inducement or encouragement of their employees was not unlawful.

When major labor relations legislation was being considered in 1958, the closing of these loopholes was important to the House and to some members of the Senate. But the prevailing Senate sentiment favored new legislation primarily concerned with the redress of other abuses, and neither the Kennedy-Ives bill, which failed of passage in the House in the Eighty-fifth Congress, nor the Kennedy-Ervin bill, adopted by the Senate in the Eighty-sixth Congress, included any revision of § 8(b)(4). Proposed amendments of § 8 (b)(4) offered by several Senators to fill the three loopholes were rejected. The Administration introduced such a bill, and it was supported by Senators Dirksen and Goldwater.[8] Senator Goldwater, an insistent proponent of stiff boycott curbs, also proposed his own amendments.[9] We think it is especially significant that neither Senator, nor the Secretary of Labor in testifying in support of the Administration's bill, referred to consumer picketing as making the amendments necessary.[10] Senator McClellan, who also

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[8] S. 748, 105 Cong. Rec. 1259–1293, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 975, 987.

[9] 105 Cong. Rec. 6190, II Leg. Hist. 1034.

[10] 105 Cong. Rec. 1283, 6428, II Leg. Hist. 979, 1079 (Senator Goldwater); 105 Cong. Rec. 1729–1730, II Leg. Hist. 993–994 (remarks of the Secretary of Labor, inserted in the record by Senator Dirksen).

It is true that Senator Goldwater referred to consumer picketing when the Conference bill was before the Senate. His full statement reads as follows: "the House bill . . . closed up every loophole in the boycott section of the law including the use of a secondary consumer picket line, an example of which the President gave on his nationwide TV program on August 6. . . ." 105 Cong. Rec. 17904, II Leg. Hist. 1437. The example given by the President was this: "The employees [of a furniture manufacturer] vote against joining a particular union. Instead of picketing the furniture plant itself, un-

offered a bill to curb boycotts, mentioned consumer picketing but only such as was "pressure in the form of dissuading customers *from dealing with* secondary employers." [11] (Emphasis supplied.) It was the opponents of the amendments who, in expressing fear of their sweep, suggested that they might proscribe consumer picketing. Senator Humphrey first sounded the warning early in April.[12] Many months later, when the Conference bill was before the Senate, Senator Morse, a conferee, would not support the Conference bill on the express ground that it prohibited consumer picketing.[13] But we have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395; see also *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 288; *United States* v. *Calamaro*, 354 U. S. 351, n. 9, at 358. The silence of the sponsors of amendments is pregnant with significance

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scrupulous organizing officials . . . picket the stores which sell the furniture . . . . How can anyone justify this kind of pressure against stores which are not involved in any dispute? . . . This kind of action is designed to make the stores bring pressure on the furniture plant and its employees . . . ." 105 Cong. Rec. 19954, II Leg. Hist. 1842. Senator Goldwater's own definition of what he meant by a secondary consumer boycott is even more clearly narrow in scope: "A secondary consumer, or customer, boycott involves the refusal of consumers or customers to buy the products or services of one employer in order to force him to stop doing business with another employer." 105 Cong. Rec. 17674, II Leg. Hist. 1386.

[11] 105 Cong. Rec. 6667, II Leg. Hist. 1194.

[12] 105 Cong. Rec. 6232, II Leg. Hist. 1037.

[13] 105 Cong. Rec. 17882–17883, II Leg. Hist. 1426.

since they must have been aware that consumer picketing as such had been held to be outside the reach of § 8 (b)(4).[14] We are faithful to our practice of respecting the congressional policy of legislating only against clearly identified abuses of peaceful picketing when we conclude that the Senate neither specified the kind of picketing here involved as an abuse, nor indicated any intention of banning all consumer picketing.

The House history is similarly beclouded, but what appears confirms our conclusion. From the outset the House legislation included provisions concerning secondary boycotts. The Landrum-Griffin bill,[15] which was ultimately passed by the House, embodied the Eisenhower Administration's proposals as to secondary boycotts. The initial statement of Congressman Griffin in introducing the bill which bears his name, contains no reference to consumer picketing in the list of abuses which he thought required the secondary boycott amendments.[16] Later in the House debates he did discuss consumer picketing, but only in the context of its abuse when directed against shutting off the patronage of a secondary employer.

In the debates before passage of the House bill he stated that the amendments applied to consumer picketing of customer entrances to retail stores selling goods manufactured by a concern under strike, if the picketing

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[14] *United Wholesale & Warehouse Employees, Local 261,* v. *Labor Board,* 108 U. S. App. D. C. 341, 282 F. 2d 824; *Labor Board* v. *International Union of Brewery Workers,* 272 F. 2d 817, 819 (C. A. 10th Cir.); *Labor Board* v. *Business Machine & Office Appliance Mechanics Conference Board,* 228 F. 2d 553, 559–561 (C. A. 2d Cir.), cert. denied, 351 U. S. 962.

[15] The Landrum-Griffin bill, H. R. 8400, was substituted on the floor of the House for the bill reported by the House Committee on Education and Labor, H. R. 8342; the language of the two bills with respect to secondary boycotts is compared at II Leg. Hist. 1912.

[16] 105 Cong. Rec. 15531–15532, II Leg. Hist. 1568.

were designed to "coerce or to restrain the employer of [the] second establishment, to get him not to do business with the manufacturer . . . ," and further that, "of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to *coerce the retailer not to do business* with the manufacturer"—then such a boycott could be stopped.[17] (Italics supplied.)

The relevant changes in former § 8 (b)(4) made by the House bill substituted "any individual employed by any person" for the Taft-Hartley wording, "the employees of any employer," deleted the requirement of a "concerted" refusal, and made it an unfair labor practice "to threaten, coerce, or restrain any person" where an object thereof was an end forbidden by the statute, *e. g.*, forcing or requiring a secondary employer to cease handling the products of, or doing business with, a primary employer. There is thus nothing in the legislative history prior to the convening of the Conference Committee which shows any congressional concern with consumer picketing beyond that with the "isolated evil" of its use to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer. When Congress meant to bar picketing *per se*, it made its meaning clear; for example, § 8 (b)(7) makes it an unfair labor practice, "to picket or cause to be picketed . . . any employer . . . ." In contrast, the prohibition of § 8 (b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise.

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[17] 105 Cong. Rec. 15673, II Leg. Hist. 1615. The same concern with direct coercion of secondary employers appears in President Eisenhower's message accompanying the Administration bill. S. Doc. No. 10, 86th Cong., 1st Sess., I Leg. Hist. 81–82. See also minority report of the Senate Committee on the Kennedy-Ervin bill. S. Rep. No. 187, 86th Cong., 1st Sess., I Leg. Hist. 474–475.

Senator Kennedy presided over the Conference Committee. He and Congressman Thompson prepared a joint analysis of the Senate and House bills. This analysis pointed up the First Amendment implications of the broad language in the House revisions of § 8 (b)(4) stating,

> "The prohibition [of the House bill] reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
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> . . . . . .
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> ". . . one of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression." [18]

This analysis was the first step in the development of the publicity proviso, but nothing in the legislative history of the proviso alters our conclusion that Congress did not clearly express an intention that amended § 8 (b)(4) should prohibit all consumer picketing. Because of the sweeping language of the House bill, and its implications for freedom of speech, the Senate conferees refused to accede to the House proposal without safeguards for the right of unions to appeal to the public, even by some conduct which might be "coercive." The result was the addition of the proviso. But it does not follow from the fact that some coercive conduct was protected by the proviso, that the exception "other than picketing" indicates that Congress had determined that all consumer picketing was coercive.

No Conference Report was before the Senate when it passed the compromise bill, and it had the benefit

[18] 105 Cong. Rec. 16591, II Leg. Hist. 1708.

only of Senator Kennedy's statement of the purpose of the proviso. He said that the proviso preserved "the right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor *and* to refrain from trading with a retailer who sells such goods. . . . We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop . . . and can carry on all publicity short of having ambulatory picketing . . . ." [19] (Italics supplied.) This explanation does not compel the conclusion that the Conference Agreement contemplated prohibiting any consumer picketing at a secondary site beyond that which urges the public, in Senator Kennedy's words, to "refrain from trading with a retailer who sells such goods." To read into the Conference Agreement, on the basis of a single statement, an intention to prohibit all consumer picketing at a secondary site would depart from our practice of respecting the congressional policy not to prohibit peaceful picketing except to curb "isolated evils" spelled out by the Congress itself.

Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product. The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him, but not such publicity which has

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[19] 105 Cong. Rec. 17898–17899, II Leg. Hist. 1432.

the effect of cutting off his deliveries or inducing his employees to cease work. On the other hand, picketing which persuades the customers of a secondary employer to stop all trading with him was also to be barred.

In sum, the legislative history does not support the Board's finding that Congress meant to prohibit all consumer picketing at a secondary site, having determined that such picketing necessarily threatened, coerced or restrained the secondary employer. Rather, the history shows that Congress was following its usual practice of legislating against peaceful picketing only to curb "isolated evils."

This distinction is opposed as "unrealistic" because, it is urged, all picketing automatically provokes the public to stay away from the picketed establishment. The public will, it is said, neither read the signs and handbills, nor note the explicit injunction that "This is not a strike against any store or market." Be that as it may, our holding today simply takes note of the fact that Congress has never adopted a broad condemnation of peaceful picketing, such as that urged upon us by petitioners, and an intention to do so is not revealed with that "clearest indication in the legislative history," which we require. *Labor Board* v. *Drivers Local Union, supra.*

We come then to the question whether the picketing in this case, confined as it was to persuading customers to cease buying the product of the primary employer, falls within the area of secondary consumer picketing which Congress did clearly indicate its intention to prohibit under § 8 (b)(4)(ii). We hold that it did not fall within that area, and therefore did not "threaten, coerce, or restrain" Safeway. While any diminution in Safeway's purchases of apples due to a drop in consumer demand might be said to be a result which causes respondents' picketing to fall literally within the statutory prohibition,

"it is 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. See *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543–544. When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.[20]

We disagree therefore with the Court of Appeals that the test of "to threaten, coerce, or restrain" for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss. A violation of § 8 (b)(4)(ii)(B) would not be established, merely because respondents' picketing was effective to reduce Safeway's

[20] For example: If a public appeal directed only at a product results in a decline of 25% in the secondary employer's sales of that product, the corresponding reduction of his purchases of the product is due to his inability to sell any more. But if the appeal is broadened to ask that the public cease all patronage, and if there is a 25% response, the secondary employer faces this decision: whether to discontinue handling the primary product entirely, even though he might otherwise have continued to sell it at the 75% level, in order to prevent the loss of sales of other products.

sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller.

The judgment of the Court of Appeals is vacated and the case is remanded with direction to enter judgment setting aside the Board's order.

It is so ordered.

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

APPENDIX TO OPINION OF THE COURT.

"Notice to Storage [*sic*] Manager and Store Employees.

"We are advised that you are presently engaged in selling Washington State Apples.

"The 1960 crop of Washington State Apples is being packed by non-union firms, including 26 firms in the Yakima Valley. Prior to this year, the 26 Yakima Valley firms had been parties to a collective bargaining contract with Teamsters Union Local 760 of Yakima, Washington, but this year, when a new contract was being negotiated, the employers took the position that many of the basic provisions of the prior contract, such as seniority, overtime, protection against unjust discharge, grievance procedure and union security, should be weakened or eliminated entirely. These extreme demands plus a refusal to bargain in good faith led to a strike against the employer. The union made all possible efforts to avoid this strike as did outside agencies who were assisting in the negotiations. Even the Governor of the State of Washington, the Honorable Albert D. Rosellini, intervened and suggested that the parties agree to a fact finding committee or arbitration. The union agreed to these proposals but the employers declined.

"The employer's refusal to bargain in good faith has caused the Seattle office of the National Labor Relations

Board to prepare a complaint against the employers, charging them with unfair labor practices in violation of federal law.

"The strike at Yakima is still continuing and in order to win this strike, we must ask the consuming public not to purchase Washington State Apples.

"Therefore, we are going to place peaceful pickets at the entrances to your store for the purpose of trying to persuade the public not to buy Washington Apples. These pickets are being instructed to patrol peacefully in front of the consumer entrances of the store, to stay away from the delivery entrances and not to interfere with the work of your employees, or with deliveries to or pickups from your store. A copy of the instructions which have been furnished to the pickets is attached herewith.

"We do not intend that any of your employees cease work as a result of the picketing. We ask that you advise your employees of our intentions in this respect, perhaps by posting this notice on your store bulletin board.

"If any of your employees should stop work as a result of our program, or if you should have any difficulties as far as pickups and deliveries are concerned, or if you observe any of the pickets disobeying the instructions which they have been given, please notify the undersigned union representative at once and we will take steps to see that the situation is promptly corrected.

"As noted above, our information indicates that you are presently selling Washington State Apples. If, however, this information is not correct and you are selling apples exclusively from another state, please notify the undersigned and we will see that the pickets are transferred to another store where Washington State Apples are actually being sold.

"Thank you for your cooperation."

The instructions to pickets read as follows:

"Instructions to Pickets.

"Dear Picket:

"You are being asked to help publicize a nationwide consumer boycott aimed at non-union Washington State Apples. To make this program a success your cooperation is essential. Please read these instructions and follow them carefully.

"1. At all times you are to engage in peaceful picketing. You are forbidden to engage in any altercation, argument, or misconduct of any kind.

"2. You are to walk back and forth on the sidewalk in front of the consumer entrances to the grocery stores. If a particular store is located toward the rear of a parking lot, you are to ask the store manager for permission to walk back and forth on the apron or sidewalk immediately in front of the store; but if he denies you this permission, you are to picket only on the public sidewalk at the entrances to the parking lot. As far as large shipping centers are concerned, you will be given special instruction for picketing in such locations.

"3. You are not to picket in front of or in the area of any entrance to the store which is apparently set aside for the use of store employees and delivery men. As noted above, you are to limit your picketing to the consumer entrances to the store.

"4. This union has no dispute with the grocery stores, and you are forbidden to make any statement to the effect that the store is unfair or on strike. You are also forbidden to request that the customers not patronize the store. We are only asking that the customers not buy Washington State apples, when they are shopping at the store.

"5. Similarly, you are not to interfere with the work of any employees in the store. If you are asked by these employees what the picketing is about, you are to tell them it is an advertising or consumer picket and that

they should keep working. Likewise if you are asked by any truck drivers who are making pickups or deliveries what the picket is about, you are to advise that it is an advertising or consumer picket and that it is not intended to interfere with pickups or deliveries (i. e. that they are free to go through).

"6. If you are given handbills to distribute, please distribute these handbills in a courteous manner and if the customers throw them on the ground, please see that they are picked up at once and that the area is kept clean.

"7. You are forbidden to use intoxicating beverages while on duty or to have such beverages on your person.

"8. If a state official or any other private party should complain to you about the picketing, advise them you have your instructions and that their complaints should be registered with the undersigned union representative.

"9. These instructions should answer most of your questions concerning this program. However, if you have any additional questions or if specific problems arise which require additional instructions, please call the undersigned."

MR. JUSTICE BLACK, concurring.

Because of the language of § 8 (b)(4)(ii)(B) of the National Labor Relations Act and the legislative history set out in the opinions of the Court and of my Brother HARLAN, I feel impelled to hold that Congress, in passing this section of the Act, intended to forbid the striking employees of one business to picket the premises of a neutral business where the purpose of the picketing is to persuade customers of the neutral business not to buy goods supplied by the struck employer. Construed in this way, as I agree with Brother HARLAN that it must be, I believe, contrary to his view, that the section abridges freedom of speech and press in violation of the First Amendment.

"Picketing," in common parlance and in § 8 (b)(4)(ii)(B), includes at least two concepts: (1) patrolling, that is, standing or marching back and forth or round and round on the streets, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; (2) speech, that is, arguments, usually on a placard, made to persuade other people to take the picketers' side of a controversy. See MR. JUSTICE DOUGLAS concurring in *Bakery & Pastry Drivers* v. *Wohl,* 315 U. S. 769, 775. See also *Hughes* v. *Superior Court,* 339 U. S. 460, 464–465, and concurring opinions at 469. While "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution," *Thornhill* v. *Alabama,* 310 U. S. 88, 102, patrolling is, of course, conduct, not speech, and therefore is not directly protected by the First Amendment. It is because picketing includes patrolling that neither *Thornhill* nor cases that followed it lend "support to the contention that peaceful picketing is beyond legislative control." *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 499–500. Cf. *Schneider* v. *State,* 308 U. S. 147, 160–161.[1] However, when conduct not constitutionally protected, like patrolling, is intertwined, as in picketing, with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press. In such cases it is established

[1] *Thornhill* v. *Alabama* and *Carlson* v. *California,* 310 U. S. 106, came down the same day. Neither held that picketing was constitutionally immune from legislative regulation or complete proscription. *Thornhill* held that a statute against picketing was too broad, inexact, and imprecise to be enforceable, and *Carlson* held, 310 U. S., at 112, "The sweeping and inexact terms of the ordinance disclose the threat to freedom of speech inherent in its existence." This principle of *Thornhill* and *Carlson* has been uniformly followed. See, *e. g., Edwards* v. *South Carolina,* 372 U. S. 229; *Henry* v. *City of Rock Hill,* 376 U. S. 776.

that it is the duty of courts, before upholding regulations of patrolling, "to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" of speech and press. *Schneider* v. *State,* 308 U. S., *supra,* at 161. See also, *e. g., N. A. A. C. P.* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460–462; *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 438–439.

Even assuming that the Federal Government has power to bar or otherwise regulate patrolling by persons on local streets or adjacent to local business premises in the State of Washington,[2] it is difficult to see that the section in question intends to do anything but prevent dissemination of information about the facts of a labor dispute—a right protected by the First Amendment. It would be different (again assuming federal power) if Congress had simply barred or regulated all patrolling of every kind for every purpose in order to keep the streets around interstate businesses open for movement of people and property, *Schneider* v. *State, supra,* at 160–161; or to promote the public safety, peace, comfort, or convenience, *Cantwell* v. *Connecticut,* 310 U. S. 296, 304; or to protect people from violence and breaches of the peace by those who are patrolling, *Thornhill* v. *Alabama, supra,* at 105. Here the section against picketing was not passed for any of these reasons. The statute in no way manifests any government interest against patrolling as such, since the only patrolling it seeks to make unlawful is that which is carried on to advise the public, including consumers, that certain products have been produced by an employer with

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[2] "*Municipal authorities,* as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated." *Schneider* v. *State,* 308 U. S. 147, 160. (Emphasis supplied.) Cf. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 749.

whom the picketers have a dispute. All who do not patrol to publicize this kind of dispute are, so far as this section of the statute is concerned, left wholly free to patrol. Thus the section is aimed at outlawing free discussion of one side of a certain kind of labor dispute and cannot be sustained as a permissible regulation of patrolling. Cf. *Carlson* v. *California,* 310 U. S. 106, 112.

Nor can the section be sustained on the ground that it merely forbids picketers to help carry out an unlawful or criminal undertaking. Compare *Giboney* v. *Empire Storage & Ice Co., supra.* For the section itself contains a proviso which says that it shall not be construed "to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers . . . that a product or products are produced by an employer with whom . . . [the picketers have] a primary dispute . . . ." Thus, it is clear that the object of the picketing was to ask Safeway customers to do something which the section itself recognizes as perfectly lawful. Yet, while others are left free to picket for other reasons, those who wish to picket to inform Safeway customers of their labor dispute with the primary employer, are barred from picketing—solely on the ground of the lawful information they want to impart to the customers.

In short, we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgment of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment.

I cannot accept my Brother HARLAN'S view that the abridgment of speech and press here does not violate the

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First Amendment because other methods of communication are left open. This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop.

For these reasons I concur in the judgment of the Court vacating the judgment of the Court of Appeals and remanding the case with directions to enter judgment setting aside the Board's order.

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

The question in this case is whether a union involved in a labor dispute with an employer may lawfully engage in peaceful picketing at the premises of another employer in order to dissuade its customers from purchasing products of the first employer dealt in by the picketed establishment. Such activity, in the parlance of labor law, is known as secondary consumer picketing, the picketed employer being called the "secondary employer" and the other the "primary employer."

The question is controlled by § 8 (b) of the National Labor Relations Act [1] which makes it an unfair labor practice for a union

> "(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object . . . is . . . (B) forcing or requiring any person to cease using, selling . . . or otherwise dealing in the products of any other producer, processor,

[1] As amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704 (a), 73 Stat. 542–543, 29 U. S. C. (Supp. IV, 1963) § 158 (b) (4).

> or manufacturer, or to cease doing business with any other person . . . ."

with a proviso that

> "nothing contained in . . . [the above provisions] shall be construed to prohibit publicity, *other than picketing,* for the purpose of truthfully advising the public, including consumers . . . that a product or products are produced by an employer with whom . . . [the union] has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . ." (Emphasis added.)

The Labor Board found the Union's picketing at Safeway stores, though peaceful, unlawful *per se* under § 8 (b)(4)(ii)(B), and issued an appropriate order. The Court of Appeals reversed, holding the picketing lawful in the absence of any showing that Safeway had *in fact* been "threatened, coerced, or restrained" (113 U. S. App. D. C. 356, 360–363, 308 F. 2d 311, at pp. 315–318), and remanded the case to the Board for further proceedings. This Court now rejects (correctly, I believe) the Court of Appeals' holding, but nevertheless refuses to enforce the Board's order. It holds that although § 8 (b)(4)(ii)(B) does automatically outlaw peaceful secondary consumer picketing aimed at *all* products handled by a secondary employer, Congress has not, with "the requisite clarity" (*ante,* p. 63), evinced a purpose to prohibit such picketing when directed *only* at the products of the primary employer. Here the Union's picketing related only to Washington apples, not to all products carried by Safeway.

Being unable to discern in § 8 (b)(4)(ii)(B) or in its legislative history any basis for the Court's subtle narrowing of these statutory provisions, I must respectfully dissent.

I.

The Union's activities are plainly within the letter of subdivision (4)(ii)(B) of § 8 (b), and indeed the Court's opinion virtually concedes that much (*ante*, pp. 71–72). Certainly Safeway is a "person" as defined in those subdivisions; indubitably "an object" of the Union's conduct was the "forcing or requiring" of Safeway, through the picketing of its customers, "to cease . . . selling, handling . . . or otherwise dealing in" Washington apples, "the products of" another "producer"; and consumer picketing is expressly excluded from the ameliorative provisions of the proviso. See *supra*, pp. 80–81.

Nothing in the statute lends support to the fine distinction which the Court draws between general and limited product picketing. The enactment speaks pervasively of threatening, coercing, or restraining any person; the proviso differentiates only between modes of expression, not between types of secondary consumer picketing. For me, the Court's argument to the contrary is very unconvincing.

The difference to which the Court points between a secondary employer merely lowering his purchases of the struck product to the degree of decreased consumer demand and such an employer ceasing to purchase one product because of consumer refusal to buy any products, is surely too refined in the context of reality. It can hardly be supposed that in all, or even most, instances the result of the type of picketing involved here will be simply that suggested by the Court. Because of the very nature of picketing there may be numbers of persons who will refuse to buy at all from a picketed store, either out of economic or social conviction or because they prefer

to shop where they need not brave a picket line. Moreover, the public can hardly be expected always to know or ascertain the precise scope of a particular picketing operation. Thus in cases like this, the effect on the secondary employer may not always be limited to a decrease in his sales of the struck product. And even when that is the effect, the employer may, rather than simply reducing purchases from the primary employer, deem it more expedient to turn to another producer whose product is approved by the union.

The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced, or restrained by picket signs which said "Do not buy *X* gasoline" than by signs which said "Do not patronize this gas station." To be sure Safeway is a multiple article seller, but it cannot well be gainsaid that the rule laid down by the Court would be unworkable if its applicability turned on a calculation of the relation between total income of the secondary employer and income from the struck product.

The Court informs us that "Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product," *ante*, p. 70. The difference was, it is stated, "well established in the state cases by 1940," *ante*, p. 64, note 7, that is, before the present federal enactment. In light of these assertions, it is indeed remarkable that the Court not only substantially acknowledges that the statutory language does not itself support this distinction (*ante*, pp. 71–72)[2]

[2] The Court seeks to find support for its limited interpretation of the language of § 8 (b) (4) in Congress' explicit mention of picketing

but cites no report of Congress, no statement of a legislator, not even the view of any of the many commentators in the area, in any way casting doubt on the applicability of § 8 (b)(4)(ii)(B) to picketing of the kind involved here.

II.

The Court's distinction fares no better when the legislative history of § 8 (b)(4)(ii)(B) is examined. Even though there is no Senate, House, or Conference Report which sheds light on the matter, that hardly excuses the Court's blinding itself to what the legislative and other background materials do show. Fairly assessed they, in my opinion, belie Congress' having made the distinction upon which the Court's thesis rests. Nor can the Court find comfort in the generalization that " 'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing' " (*ante*, pp. 62–63); in enacting the provisions in question Congress *was* addressing itself to a particular facet of secondary boycotting not dealt with in prior legislation, namely, peaceful secondary consumer picketing. I now turn to the materials which illuminate what Congress had in mind.

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in § 8 (b)(7). *Ante*, p. 68. The answer to this is twofold: First, § 8 (b)(7) regulates *only picketing* (in the context of organizational and recognitional disputes), while § 8 (b)(4) covers a wide range of activities, of which picketing is only one. Second, even if the argument had substance, it would not aid the Court's resolution of this case. The Court recognizes that § 8 (b)(4) does make illegal *per se* consumer picketing designed to accomplish a complete boycott of the secondary employer. It in effect admits, *ante*, pp. 71–72, that the language "threaten, coerce, or restrain" does not suggest any distinction between such picketing and that directed only at the struck product. It follows, even on the Court's own analysis, that the breadth of the language of § 8 (b)(4) provides no support for a view that Congress did not mean to render illegal *per se* the kind of picketing involved here.

It is clear that consumer picketing in connection with secondary boycotting was at the forefront of the problems which led to the amending of the Taft-Hartley Act by the Labor-Management Reporting and Disclosure Act of 1959. See, *e. g.,* remarks of Senator McClellan, 105 Cong. Rec. 3951, II Leg. Hist. 1007; remarks of Congressman Lafore, 105 Cong. Rec. 3928, II Leg. Hist. 1471; remarks of Congressman Griffin, *infra,* note 4. During Senate debate before passage of the Kennedy-Ervin bill, Senator Humphrey criticized an amendment proposed by Senator Goldwater to § 8 (b)(4) of the Taft-Hartley Act, which reflected the position of the Administration and was incorporated in substance in the Landrum-Griffin bill passed by the House. He said:

> "To distribute leaflets at the premises of a neutral employer to persuade customers not to buy a struck product is one form of consumer appeal. To peacefully picket the customer entrances, with a placard asking that the struck product not be bought, is another form. I fear that consumer picketing may also be the target of the words 'coerce, or restrain.' I fear that, in addition to the existing foreclosure of the union on strike from making any effective appeal to the employees of the so-called neutral employer, the union by this amendment is now to be effectively sealed off from even an appeal to the consumers." 105 Cong. Rec. 6232, II Leg. Hist. 1037.

Reporting on the compromise reached by the Conference Committee on the Kennedy-Ervin and Landrum-Griffin bills, Senator Kennedy, who chaired the Conference Committee, stated:

> "[T]he House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not

> say that there was a strike in a primary plant. . . . Under the language of the conference, [ultimately resulting in present § 8 (b)(4)(ii)(B)] we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth." 105 Cong. Rec. 17720, II Leg. Hist. 1389.

Senator Morse, one day later, explained quite explicitly his objection to the relevant portion of the bill reported out of the Conference Committee, of which he was a member:

> "This bill does not stop with threats and with illegalizing the hot cargo agreement. It also makes it illegal for a union to 'coerce, or restrain.' This prohibits consumer picketing. What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying, 'Do not buy *X* shoes.' This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer." 105 Cong. Rec. 17882, II Leg. Hist. 1426.[3]

Later the same day, Senator Kennedy spoke further on the Conference bill and particularized the union rights protected by the Senate conferees:

> "(c) The right to appeal to consumers by methods other than picketing asking them to refrain from

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[3] Senator Morse continued by quoting *Goldfinger* v. *Feintuch*, 276 N. Y. 281, 11 N. E. 2d 910, which he believed established the *legitimacy* of such picketing. The Court now cites the same case, *ante*, p. 64, as a state decision recognizing the distinction on which the opinion is based, apparently without reflecting on the anomaly that the case is used in debate as an example of the kind of activity § 8 (b) (4) (ii) (B) prohibits.

> buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.
>
> "Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site." 105 Cong. Rec. 17898–17899, II Leg. Hist. 1432.

The Court does not consider itself compelled by these remarks to conclude that the Conference Committee meant to prohibit *all* secondary consumer picketing. A fair reading of these comments, however, can hardly leave one seriously in doubt that Senator Kennedy believed this to be precisely what the Committee had done; the Court's added emphasis on the word "and" (*ante,* p. 70) is, I submit, simply grasping at straws, if indeed the phrase relied on does not equally well lend itself to a disjunctive reading. Cf. *DeSylva* v. *Ballentine,* 351 U. S. 570, 573. The complicated role the Court assigns to the publicity proviso (*ante,* pp. 70–71) makes even less understandable its failure to accord to the remarks of Senator Kennedy their proper due. The proviso, according to the Court's interpretation, is unnecessary in regard to picketing designed to effect a boycott of the primary product and comes into play only if a complete boycott of the secondary employer is sought. Had this ingenious interpreta-

tion been intended, would not Senator Kennedy, who was at pains to emphasize the scope of activities still left to unions, have used it to refute the criticisms of Senator Morse made only shortly before?

Further, Senator Goldwater spoke in favor of the Conference bill and pointed out that in contrast to the Senate bill, which he had opposed, "[t]he House bill . . . closed up every loophole in the boycott section of the law including the use of a secondary consumer picket line . . . ." 105 Cong. Rec. 17904, II Leg. Hist. 1437.

The Court points out that the Senate had no Conference Report when it passed the compromise bill and that it had only Senator Kennedy's statement of the purpose of the proviso. (*Ante*, pp. 69–70.) But I am wholly at a loss to understand how on that premise (particularly when Senator Kennedy's remarks are supplemented by the comments of one Senator (Morse) who thought the final bill too harsh and those of another (Goldwater) who believed the Senate bill too weak) one can conclude that the members of the Senate did not mean by their vote to outlaw all kinds of secondary consumer picketing.

A reading of proceedings in the House of Representatives leads to a similar conclusion regarding the intent of that body. In criticism of the Landrum-Griffin bill, Congressman Madden stated, "It would prohibit any union from advising the public that an employer is unfair to labor, pays substandard wages, or operates a sweatshop . . . ." 105 Cong. Rec. 15515, II Leg. Hist. 1552. Since the theory of the majority regarding the publicity proviso adopted by the Conference is that it is redundant in situations where the union seeks only a boycott of the struck product, the sweep of Congressman Madden's comment is plainly at odds with the Court's view of § 8 (b)(4)(ii)(B).

Indicative of the contemporaneous understanding is an analysis of the bill prepared by Congressmen Thompson

and Udall and inserted in the Congressional Record, in which a hypothetical case, as directly in point as the department store example used by Senator Morse, is suggested:

> "Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sold Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.
>
> "The Landrum bill forbids this elementary freedom to appeal to the general public for assistance in winning fair labor standards." 105 Cong. Rec. 15540, II Leg. Hist. 1576.

The majority (*ante*, pp. 67–68) relies on remarks made by Congressman Griffin, the bill's co-sponsor. When read in context what seems significant about them is that the Congressman nowhere suggests that there can be some kind of consumer picketing which does not coerce or restrain the secondary employer. Nor does he intimate any constitutional problem in prohibiting picketing that follows the struck product.[4]

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[4] The colloquy between Congressmen Griffin and Brown on the Landrum-Griffin bill, from which the excerpt of the Court is taken, reflects a plain intent to outlaw consumer picketing; the caveat regarding the right of free speech appears to be only an acknowledgment of the general principle that any legislation is subject to constitutional limitations:

"Mr. BROWN of Ohio. . . .

"My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

"Mr. GRIFFIN. Let us take for example the case that the President talked about in his recent radio address. A few news-

After passage of the Landrum-Griffin bill, Congressman Thompson presented to the House an analysis of the differences between the House and Senate bills prepared

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papers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering . . . the right to picket at the manufacturing plant where the dispute exists.

"Mr. BROWN. That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

"Mr. GRIFFIN. Then, we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

"However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.

"Mr. BROWN. In other words, the Taft-Hartley Act does not cover such a situation now?

"Mr. GRIFFIN. The way it has been interpreted.

"Mr. BROWN. But the Griffin-Landrum bill would?

"Mr. GRIFFIN. Our bill would; that is right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.

"Mr. BROWN. . . . Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

"Mr. GRIFFIN. Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing—

"Mr. BROWN. Advertising.

"Mr. GRIFFIN. Advertising, or anything else, it would be covered by our bill. It is not covered now." 105 Cong. Rec. 15672–15673, II Leg. Hist. 1615.

by Senator Kennedy and himself. This described the nature of secondary boycotts:

> "In all cases of secondary boycotts two employers are involved. The union brings pressure upon the employer with whom it has a dispute (called the 'primary' employer) by inducing the employees of another employer (called the 'secondary' employer) to go on strike—or the customers not to patronize—until the secondary employer stops dealing with the primary employer. Or the union may simply induce the employees of the secondary employer to refuse to handle or work on goods—*or the customers not to buy*—coming from the primary employer as a way of putting pressure upon him." 105 Cong. Rec. 16589, II Leg. Hist. 1706. (Emphasis added.)

The prepared analysis then discusses the effect of the House bill on consumer picketing, 105 Cong. Rec. 16591, II Leg. Hist. 1708. To describe activities outlawed by the House bill, it uses the same "Coors beer" hypothetical which the earlier analysis had employed. This analysis shows beyond peradventure that Senator Kennedy did believe the language of the bill to proscribe *all* consumer picketing and indicates that this view was squarely placed before the House. The Court adverts to this analysis (*ante*, p. 69), as the genesis of the publicity proviso, but fails to acknowledge the difficulty of squaring the great concern of the Senate conferees to protect freedom of communication with the Court's supposition that the House bill closed off no lines of communication so long as the union appeal was limited to boycott of the struck products.

Congressman Griffin placed in the Congressional Record, 105 Cong. Rec. 18022, II Leg. Hist. 1712, a preliminary report on the Conference agreement. A summary analysis of Taft-Hartley amendments states that the

House bill "Prohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute." The Conference agreement, according to this summary, "Adopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott."

When Congressman Thompson spoke to the Conference agreement, he reiterated his view of the House bill and of its modification, 105 Cong. Rec. 18133, II Leg. Hist. 1720, 1721. Specifically he stated, "All appeals for a consumer boycott would have been barred by House bill."

In the light of the foregoing, I see no escape from the conclusion that § 8 (b)(4)(ii)(B) does prohibit *all* consumer picketing. There are, of course, numerous times in the debates of both houses in which consumer picketing is referred to generally or the reference is made with an example of an appeal to consumers not to purchase at all from the secondary employer. But it is remarkable that every time the possibility of picketing of the sort involved in this case was considered, it was assumed to be prohibited by the House bill. Admittedly, in the House, appeals to refrain from purchase of the struck product were discussed only by opponents of the House bill; however, only one of two inferences can be drawn from the silence of the bill's supporters. Either the distinction drawn by this Court was not considered of sufficient significance to require comment, or the proponents recognized a difference between the two types of consumer picketing but assumed that the bill encompassed both. Under either supposition, the conclusion reached by the Court in regard to the picketing involved here is untenable.

III.

Under my view of the statute the constitutional issue is therefore reached. Since the Court does not discuss it, I am content simply to state in summary form my reasons for believing that the prohibitions of § 8 (b)(4)(ii)(B), as applied here, do not run afoul of constitutional limitations. This Court has long recognized that picketing is "inseparably something more [than] and different" from simple communication. *Hughes* v. *Superior Court*, 339 U. S. 460, 464; see, *e. g., Building Service Employees* v. *Gazzam*, 339 U. S. 532, 537; *Bakery Drivers* v. *Wohl*, 315 U. S. 769, 776 (concurring opinion of DOUGLAS, J.). Congress has given careful and continued consideration to the problems of labor-management relations, and its attempts to effect an accommodation between the right of unions to publicize their position and the social desirability of limiting a form of communication likely to have effects caused by something apart from the message communicated, are entitled to great deference. The decision of Congress to prohibit secondary consumer picketing during labor disputes is, I believe, not inconsistent with the protections of the First Amendment, particularly when, as here, other methods of communication are left open.[5]

Contrary to my Brother BLACK, I think the fact that Congress in prohibiting secondary consumer picketing has acted with a discriminating eye is the very thing that renders this provision invulnerable to constitutional attack. That Congress has permitted other picketing which is likely to have effects beyond those resulting from the "communicative" aspect of picketing does not, of course, in any way lend itself to the conclusion that

[5] I mean to intimate no view on the constitutionality of the regulation or prohibition of picketing which publicizes something other than a grievance in a labor-management dispute.

Congress here has aimed to "prevent dissemination of information about the facts of a labor dispute" (*ante*, p. 78). Even on the highly dubious assumption that the "non-speech" aspect of picketing is always the same whatever the particular context, the social consequences of the "non-communicative" aspect of picketing may certainly be thought desirable in the case of "primary" picketing and undesirable in the case of "secondary" picketing, a judgment Congress has indeed made in prohibiting secondary but not primary picketing.

I would enforce the Board's order.

UNITED STATES *v.* WELDEN.

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

No. 235. Argued February 27, 1964.—
Decided April 20, 1964.

An indictment against appellee under the Sherman Act and Conspiracy Act concerned matters about which he had previously testified before a congressional subcommittee. The District Court dismissed the indictment, upholding appellee's contention that prosecution was barred under the immunity provision of the Act of February 25, 1903, providing that no person shall be prosecuted on account of any matter concerning which he testifies "in any proceeding, suit, or prosecution" under the Sherman Act and other specified statutes. *Held:* Appellee's testimony before the congressional subcommittee did not immunize him from prosecution, the Act of February 25, 1903, as amended in 1906, confining immunity to persons who testify in judicial proceedings under oath and in response to a subpoena.

215 F. Supp. 656, reversed and remanded.

Irwin A. Seibel argued the cause for the United States. With him on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Orrick* and *Robert B. Hummel.*

George H. Lewald argued the cause for appellee. With him on the brief were *Edward B. Hanify* and *Alan D. Hakes.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This appeal presents the question of whether a person who has testified under subpoena before a congressional committee investigating the operation of the Antitrust Acts has testified in a "proceeding, suit, or prosecution under said Acts" thereby acquiring immunity from prose-

cution under the Act of February 25, 1903, 32 Stat. 854, 904.[1]

The facts are undisputed. On September 6, 1962, appellee, along with other individuals and corporations, was indicted on charges of conspiring to fix milk prices and to defraud the United States, in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and the Conspiracy Act, 62 Stat. 701, 18 U. S. C. § 371. Appellee moved to dismiss the indictment on the ground, *inter alia,* that the prosecution was barred under the immunity provision of the Act of February 25, 1903, because he had previously testified before a subcommittee of the House Select Committee on Small Business concerning matters covered by the indictment. The Government opposed the motion to dismiss contending that the immunity provision of the Act of February 25, 1903, extends only to judicial proceedings and not to hearings before congressional committees.[2] The District Court for the District of Massachusetts, rejecting the Government's contention, dismissed the indictment against appellee. The Government appealed the dismissal directly to this Court pursuant to the Criminal Appeals Act, 62 Stat. 844, as amended, 18 U. S. C. § 3731. Probable jurisdiction was noted. 375 U. S. 809.

We hold, for the reasons stated below, that the immunity provision of the Act of February 25, 1903, applies only to persons testifying in judicial proceedings, not to persons testifying before committees or subcommittees of Congress.

The immunity provision in question was enacted as part of an appropriations act which declared:

> "That for the enforcement of the provisions of the Act entitled 'An Act to regulate commerce,'

[1] The relevant portion of this Act is set forth on pp. 96–97.

[2] The Government concedes that the testimony given before the subcommittee related to matters charged in the indictment.

approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice *to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: Provided,* That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, *in any proceeding, suit, or prosecution under said Acts. . . .*" 32 Stat. 903–904. (Emphasis added.)

By any common-sense reading of this statute, the words "any proceeding, suit, or prosecution under said Acts" in the proviso plainly refer to the phrase "proceedings, suits, and prosecutions under said Acts *in the courts* of the United States," in the previous clause. The words "under said Acts" confirm that the immunity provision is limited to judicial proceedings, which are brought "under" specific existing acts, such as the Sherman Act or the Commerce Act. Congressional investigations, although they may relate to specific existing acts, are not

generally so restricted in purpose or scope as to be spoken of as being brought "under" these Acts.[3]

In *Hale* v. *Henkel,* 201 U. S. 43, decided only three years after the passage of the Act of February 25, 1903, this Court construed that Act in accordance with the plain meaning of its words as follows:

> "While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a 'proceeding' within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a *judicial inquiry,* whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them." *Id.,* at 66. (Emphasis added.)

We conclude, therefore, that as enacted the Act of February 25, 1903, applies only to judicial proceedings.[4]

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[3] Congressional hearings are generally conducted under the Legislative Reorganization Act of 1946, 60 Stat. 812, under the rules or regulations of either House, or, as in the present case, under a special resolution. H. Res. 51, 86th Cong., 1st Sess., 105 Cong. Rec. 1785.

[4] This Act, as codified, appears at 15 U. S. C. § 32. The codification, which has not been enacted into positive law, eliminates the appropriation provision of the Act which by its terms was of no effect after June 30, 1904. The codification makes no other change. 61 Stat. 638, 1 U. S. C. § 204 (a), declares that the United States Code establishes "prima facie the laws of the United States, general and permanent in their nature . . . *Provided, however,* That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts . . . ." This Court, in construing that statute has said that "the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent." *Stephan* v. *United States,* 319 U. S. 423, 426. Even where Congress

Appellee does not really dispute this. His basic contention, which is not accepted by any member of the Court,[5] is that the 1906 immunity statute [6] amended the Act of February 25, 1903, to extend immunity to persons who testified in nonjudicial as well as judicial proceedings. He does not contend that the 1906 statute, by its terms, so amended the 1903 Act. He offers the following interpretation of the events leading up to the enactment of the 1906 statute in support of the contention that the 1903 Act was amended by implication to extend to nonjudicial proceedings. In the case of *United States* v. *Armour & Co.*, 142 F. 808, decided three years after the enactment of the 1903 Act, the United States District Court for the Northern District of Illinois held that certain defendants had been immunized from prosecution under the Antitrust Laws by giving *unsubpoenaed* and *unsworn* testimony in a *nonjudicial investigation* con-

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has enacted a codification into positive law, this Court has said that the

"change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222, 227, quoting *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 198–199.

Certainly where, as here, the "change of arrangement" was made by a codifier without the approval of Congress, it should be given no weight. "If construction [of a section of the United States Code which has not been enacted into positive law] is necessary, recourse must be had to the original statutes themselves." *Murrell* v. *Western Union Tel. Co.*, 160 F. 2d 787, 788. Accordingly, in order to construe the immunity provision of the Appropriations Act of February 25, 1903, we must read it in the context of the entire Act, rather than in the context of the "arrangement" selected by the codifier.

[5] See dissenting opinion of MR. JUSTICE BLACK, *post*, at 113, note 11.

[6] The text of the 1906 statute is set forth *infra*, note 9.

ducted by the Commissioner of Corporations,[7] an official of the Department of Commerce and Labor.[8] Congressional reaction to this decision was immediate and adverse, and within four months Congress enacted the 1906 immunity statute.[9] This statute specifically limited immunity under existing immunity statutes to persons testifying *under oath* and *in obedience to subpoena.*[10] Appellee contends that the purpose of Congress in enacting the 1906 statute was to remedy the objectionable features of the *Armour* decision, and that since the statute did not "remedy" the court's holding that immunity could be obtained by testifying in a nonjudicial proceeding, it follows that Congress did not regard that holding as objectionable. He asks us to conclude, therefore, that

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[7] This conclusion was reached after the taking of testimony. Accordingly, the Government could not appeal the trial court's directed verdict of acquittal.

[8] The *Armour* case arose before the creation of independent Departments of Labor and of Commerce.

[9] The full text of the 1906 Act is as follows.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That under the immunity provisions in the Act entitled 'An Act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled 'An Act to establish the Department of Commerce and Labor,' approved February fourteenth, nineteen hundred and three, and in the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and in the Act entitled 'An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes,' approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." 34 Stat. 798, 15 U. S. C. § 33.

[10] See discussion of these events in *United States* v. *Monia,* 317 U. S. 424, 428–429.

"proceeding" as used in the immunity provision of the Act of February 25, 1903, must now be read to include nonjudicial as well as judicial proceedings.

This argument erroneously assumes that the *Armour* decision rested on a construction of "proceeding, suit, or prosecution" in the immunity provision of the Act of February 25, 1903. A reading of that decision reveals, however, that it rested primarily on the Commerce and Labor Act, which contained a specific grant of immunity to persons who testified in investigations, admittedly nonjudicial, conducted by the Commissioner of Corporations.[11] In deciding the *Armour* case, the court felt it

[11] "An Act To establish the Department of Commerce and Labor" provided in relevant part:

"In order to accomplish the purposes declared in the foregoing part of this section, the said Commissioner shall have and exercise the same power and authority in respect to corporations, joint stock companies and combinations subject to the provisions hereof, as is conferred on the Interstate Commerce Commission in said 'Act to regulate commerce' and the amendments thereto in respect to common carriers so far as the same may be applicable, including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce' and by 'An Act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said 'Act to regulate commerce,' shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." 32 Stat. 825, 828.

The Act of February 11, 1893, provides in relevant part:

"That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-

"necessary to look into the purposes of Congress in passing the commerce and labor act in order that the court may determine what construction will best carry out the legislative intent." 142 F., at 819. After a detailed analysis of that statute and its history, the court concluded that the Commerce and Labor Act was dispositive of the case and that defendants were entitled to immunity thereunder. Following this conclusion, the judge added a brief paragraph in which he said, without analyzing (or even quoting) the language or history of the Act of February 25, 1903, that he was "of opinion" that the defendants would also be entitled to immunity under that Act as well. *Id.*, at 826.[12] In the very next para-

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seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." 27 Stat. 443–444.

[12] Although Congressman Littlefield referred to this *dictum* in the debate on the House version of the bill, 40 Cong. Rec. 8738, he did not intimate that the 1903 Act was applicable to congressional investigations or that the purpose of the 1906 Act was to make it so applicable. On the contrary, Congressman Littlefield stated that the sole purpose of the Act was to limit immunity to subpoenaed and sworn testimony. He specifically said, moreover, that the 1906 Act and the Acts which it amended were intended to apply only to a "criminal prosecution . . . [and to investigations conducted by] the Interstate Commerce Commission . . . or by the Commissioner of Corporations . . . ," and that the 1906 Act was intended to assure that no "person shall have the power to offer immunity to a witness except the Government of the United States or some officer acting in behalf thereof." *Id.*, at 8739. This lan-

graph, however, the judge again described the opinion as resting on "the construction here given to the commerce and labor law . . . ." *Ibid.*

The controversial feature of the *Armour* decision, and the only one which Congress was interested in remedying, was the holding that unsubpoenaed and unsworn testimony came within "the purposes of Congress in passing the commerce and labor act . . . ." 142 F., at 819. Congress wanted to be certain that persons anticipating indictment could not immunize themselves from prosecution by volunteering to give unsworn testimony.[13] There was nothing controversial about the court's holding that immunity could result from testimony given in an investigation conducted by the Commissioner of Corporations, since the Commerce and Labor Act specifically granted immunity for testimony given in such an investigation.

It is not at all significant, therefore, that Congress, while "remedying" the *Armour* holding that immunity could be obtained from testimony which was unsworn and voluntary, did not "remedy" the holding that immunity could result from testimony given in nonjudicial investigations conducted by the Commissioner of Corporations.

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guage, in its context, would not seem to include members or Committees of Congress. See also H. R. Rep. No. 3797, 59th Cong., 1st Sess. Furthermore, even if we were to assume *arguendo* that the *Armour* decision was based on a construction of the Act of February 25, 1903, we would be hesitant to accept appellee's argument that the failure of Congress to overrule that construction resulted in an amendment by implication. Amendments by implication, like repeals by implication, are not favored. See 1 Sutherland, Statutory Construction (3d ed.) 365–366 (citing cases). As this Court said in *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, 534: "We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action."

[13] See *United States* v. *Monia, supra,* at 429.

Congress, in enacting the 1906 statute, did not manifest any intent to enlarge the reach of the immunity provision of the Act of February 25, 1903, to include nonjudicial proceedings. The purpose of the 1906 statute was not to define the type of *proceeding* in which immunity, under existing statutes, could be obtained. Its sole purpose was to define the type of *testimony* for which immunity, under existing statutes, could be obtained. This is all Congress was asked to do by President Theodore Roosevelt in his message recommending the legislation which became the 1906 statute. In his message the President said:

> "It has hitherto been supposed that the immunity conferred by existing laws was only upon persons who, being subpoenaed, had given testimony or produced evidence . . . .
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> . . . . . .
>
> "But Judge Humphrey [the district judge who decided the *Armour* case] holds that if the Commissioner of Corporations (and therefore if the Interstate Commerce Commission), in the course of any investigations prescribed by Congress, asks any questions of a person, not called as a witness, or asks any questions of an officer of a corporation, not called as a witness, with regard to the action of the corporation on a subject out of which prosecutions may subsequently arise, then the fact of such questions having been asked operates as a bar to the prosecution of that person or of that officer of the corporation for his own misdeeds. Such interpretation of the law comes measurably near making the law a farce, and I therefore recommend that the Congress pass a declaratory act stating its real intention." H. R. Doc. No. 706, 59th Cong., 1st Sess.

The limited purpose of the 1906 Act is also apparent from the response made by Senator Knox, the manager of the

bill which became the 1906 Act,[14] to a statement made by Senator Daniel, a critic of immunity legislation. Senator Daniel said:

> "I suppose that the bill under consideration as it reads now applies only to persons who testify in a judicial proceeding or to those who are responding to some body such as a Congressional committee that has the right to enforce an answer from a witness.[15]
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> . . . . . .
>
> "I should like very much to hear from the patron of this bill some statement as to the present state of the law and as to the benefits to be derived from the bill."

Senator Knox responded as follows:

> "Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself. . . .
>
> . . . . . .
>
> "Mr. President, the whole purpose of this bill is to define the right of the witness as we thought it was defined in the statute which I have read, and to say, as the statute said, but to say it even more clearly and emphatically, that the immunity shall

[14] The Senate version of the bill prevailed in conference and was adopted. See H. R. Rep. No. 5049, 59th Cong., 1st Sess.

[15] Senator Daniel's supposition that the 1906 Act "applies" to congressional committees was probably based on the erroneous assumption that the 1906 Act, in addition to amending the Acts to which it made specific reference, see note 9, *supra,* also amended 12 Stat. 333 which provided that: "the testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness in any court of justice . . . ." This statute was superseded in 1954 by 68 Stat. 745, 18 U. S. C. § 3486.

> only extend to witnesses who have been subpoenaed to produce books and papers or subpoenaed to give testimony. The essence of the whole act is found in lines 18, 19, and 20, on page 2, which read that these immunity provisions—only the immunity provisions under the interstate commerce act and under the Commerce and Labor act, not the general immunity that the citizen enjoys in judicial proceedings, but merely in relation to the proceedings of these two great bureaus of the Government—'shall extend only to a natural person.' That is, that a corporation is not to have the benefit of the immunity provisions, but they—'shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.' " 40 Cong. Rec. 7657–7658.[16]

This Court in *United States* v. *Monia,* 317 U. S. 424, 429–430, recognized that "the sole purpose" of the 1906 statute was to limit immunity to persons "who, in obedience to a subpoena, testified or produced evidence under oath," so that the decision whether or not to grant immunity would be that of the appropriate "Government officials," rather than of private citizens anticipating indictment.[17]

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[16] Although the 1906 amendment referred to the Act of February 25, 1903, along with other immunity statutes, in limiting immunity to persons testifying under oath and in response to subpoena, Senator Knox was correct in suggesting that the Amendment would have little, if any, application to judicial testimony which is commonly sworn and subpoenaed.

[17] In *Monia,* which involved a grand jury investigation, the appropriate "Government officials" were the Attorney General and his subordinates. In *Armour* the appropriate government official was the Commissioner of Corporations. Congress may of course designate its own members as appropriate officials, as it has in fact done in certain limited situations not here involved, see note 18, *infra.*

It is true that the *Monia* opinion, with regard to the issue raised in that case, considered the 1903 Act as having the same effect as

We conclude, therefore, that the 1906 statute did not, either expressly or implicitly, extend the immunity provision of the Act of February 25, 1903, to include nonjudicial proceedings. The 1906 Act simply limited immunity to persons testifying under oath and in response to subpoena.

Our decision today is based solely on the language and legislative history of the relevant congressional enactments. Congress has extended immunity, with careful safeguards, to persons testifying before congressional committees in certain limited situations not here involved.[18] Where Congress, however, has limited immunity to persons testifying in judicial proceedings, as it has plainly done here, it is not for the courts to extend the scope of the immunity.

The District Court erred, therefore, in holding that appellee's testimony before a congressional subcommittee had immunized him from prosecution. The judgment dismissing the indictment is reversed and the case remanded for proceedings in conformity with this opinion.

It is so ordered.

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

The appellee was indicted for conspiracy [1] and violation of § 1 of the Sherman Act [2] shortly after he had

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the Interstate Commerce Act. The issue in that case was whether a witness was required to claim his privilege against self-incrimination as a condition of obtaining immunity. It is undisputed that the 1906 Act standardized the rules relating to the *types of testimony* which would be privileged under the Interstate Commerce Act, the Commerce and Labor Act, and the Act of February 25, 1903. The 1906 Act did not, however, standardize (or alter) the *types of proceedings* in which immunity could be obtained.

[18] See Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. § 3486.

[1] 62 Stat. 701, 18 U. S. C. § 371.

[2] 26 Stat. 209, as amended, 15 U. S. C. § 1.

appeared and testified about the alleged violation before a Committee of Congress in obedience to its subpoena. The District Court dismissed the indictment on the ground that the prosecution was barred by the Antitrust Immunity Act of February 25, 1903,[3] as amended in 1906.[4] The Immunity Act provides:

> ". . . no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said [Interstate Commerce or Antitrust[5]] Acts . . . ."

The 1903 Act was amended in 1906 so as to limit its application "only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." The Court holds that the word "proceeding" in the 1903 Act "applies only to persons testifying in judicial proceedings." This narrow and grudging interpretation of the Act is, in my judgment, not justified by either the language or the history of the legislation.

The Court appears to find much comfort for its holding in the Act's language appropriating funds to the Attorney General for the employment of special counsel and agents of the Department of Justice "to conduct proceedings, suits, and prosecutions under said [Interstate Commerce or Antitrust] Acts in the courts of the United

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[3] 32 Stat. 854, 904, 15 U. S. C. § 32.

[4] 34 Stat. 798, 15 U. S. C. § 33.

[5] The Acts with respect to which immunity from prosecution was given are the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. §§ 1–27, 41–43, 301–327, the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1–7, and the antitrust provisions of the Wilson Tariff Act of 1894, §§ 73–76, 28 Stat. 509, 570, as amended, 15 U. S. C. §§ 8–11.

States." The Immunity Act itself was appended to the appropriation language following the word "*Provided.*" But the appropriation provision was merely utilized as a legislative vehicle for passage of the substantive Immunity Act in the form of a proviso. The language after the word "*Provided*" is a separate and distinct immunity enactment, itself part of an immunity program enacted by Congress in 1903 in order to aid in the enforcement of the Antitrust Acts by compelling witnesses to testify upon this broad statutory promise of immunity by the Government.[6] This immunity provision of the 1903 enactment is complete in itself, independent of the appropriation provision. In fact, so independent is the immunity provision, that in the codification of the statute, 15 U. S. C. § 32, the appropriation provision has been dropped altogether, making the majority's effort to limit the immunity provision's language by that of the appropriation provision even more strained. Therefore the 1903 Act, as amended in 1906, clearly—unless the meaning of its language is to be amended by judicial decree—stands as a lasting obligation upon the Government to give complete immunity to a witness who testifies "in obedience to a subpoena . . . under oath," not merely in a "suit, or prosecution under said Acts" but "in any proceeding . . . under said [Interstate Commerce or Antitrust] Acts." The word "proceeding," broad enough to include testimony before a grand jury, *Hale* v. *Henkel*, 201 U. S. 43, is also broad enough to include testimony given under oath in obedience to a subpoena before any federal agency or legislative committee investigating antitrust violations.

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[6] See also the identical immunity provisions in the Commerce and Labor Act of February 14, 1903, § 6, 32 Stat. 825, 828, incorporating by reference Compulsory Testimony Amendment of 1893 to the Interstate Commerce Act, 27 Stat. 443, 49 U. S. C. § 46, and in the Elkins Amendment to the Interstate Commerce Act, Act of February 19, 1903, § 3, 32 Stat. 847, 848, 49 U. S. C. §§ 41–43.

The historical setting of the 1903 Immunity Act shows, I think, beyond any shadow of a doubt, that the word "proceeding" was deliberately chosen in order to provide a grant of immunity for testimony concerning antitrust violations given before investigatory agencies that were wholly nonjudicial. During the month of February 1903, Congress also passed an Act, including provisions for immunity, which established the Department of Commerce and Labor and conferred upon the Commissioner of Corporations (an official of the Department of Commerce and Labor) the investigatory powers possessed by the Interstate Commerce Commission. 32 Stat. 825, 828. See also 32 Stat. 847, 848. Soon after the 1903 legislation was passed, officers of Armour & Company testified voluntarily before the Commissioner of Corporations concerning antitrust violations. The company and the officers were later indicted by a federal grand jury for violation of the Sherman Act. United States District Judge Humphrey in 1905, in *United States* v. *Armour & Co.*, 142 F. 808 (D. C. N. D. Ill.), directed a verdict for the individual defendants on the ground that the Antitrust Immunity Act of February 25, 1903, gave individuals who testified before the Commissioner of Corporations complete immunity from prosecution. The district judge held that this immunity was granted both by that Act (the Act here in question) and by the Commerce and Labor Act of 1903, *supra*. As to the applicability of the Act before us, he said:

> "If it shall be said that the act of February 14, 1903, establishing the Department of Commerce and Labor, allows immunity to the witness only upon the conditions urged by the government, viz., that he shall have resisted until regularly subpoenaed and sworn, no such contention can fairly be made as to the immunity clause of the act of February 25,

> 1903. . . . It is contended that . . . the defendants are entitled to immunity under the independent and unconditional act of February 25, 1903, and I am of opinion that they are so entitled." [7]

Judge Humphrey held that both the Commerce and Labor Act and the Antitrust Immunity Act now before us granted complete immunity. His holding as to the latter Act cannot be dismissed, as the Court attempts to do, by calling it "dictum."

The subsequent legislative treatment of the Antitrust Immunity Act of 1903 supports Judge Humphrey's holding that the complete immunity which that Act granted was not limited to testimony given in judicial proceedings only. The part of Judge Humphrey's opinion that caused great concern to the Government was his holding that witnesses obtained complete immunity from prosecution based on their testimony even though they had not been subpoenaed or put under oath. This concern prompted President Theodore Roosevelt to send a message to Congress requesting that the law be amended in this respect. The President's message specifically showed that he did not want to take away the immunity of witnesses who testified or produced documentary evidence, but simply wanted the law to grant immunity only to witnesses who appeared under subpoena and testified under oath—that is, those who were compelled to testify. Showing that this was his only objection to Judge Humphrey's holding, the President in his message told the Congress:

> "It is of course necessary, under the Constitution and the laws, that persons who give testimony or produce evidence as witnesses should receive immunity from prosecution." [8]

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[7] 142 F., at 826.

[8] Message of the President, H. R. Doc. No. 706, 59th Cong., 1st Sess., p. 2.

Without at all attempting to limit the kinds of "proceeding" in which the witness can earn the promised immunity, Congress followed the President's suggestion and provided in the 1906 amendment to the 1903 Immunity Act now before us that the immunity would apply only to individuals testifying in obedience to subpoena and under oath. After thorough scrutiny of the *Armour* decision, Congress, agreeing with President Roosevelt, made no move to change the part of the holding which stated flatly that the antitrust immunity provision of the Act of February 25, 1903, applied to witnesses testifying before the Commissioner of Corporations, and so was not limited to "judicial proceedings." And this part of the *Armour* holding did not pass unnoticed, for Congressman Littlefield, who presented to the House of Representatives the Attorney General's request for an amendment to the Antitrust Immunity Act, told the House:

> "Perhaps I ought to say that, in my judgment, the legislation upon which Judge Humphrey largely based his ruling was not the act relating to interstate commerce, under which the Interstate Commerce Commission acts, nor the act creating the Bureau of Corporations, under which the Commissioner of Corporations acts, but probably the resolution appropriating $500,000, which contained a very broad and loosely drawn provision in relation to immunity. I am not authorized to say upon what the judge based his decision; but having read what he did say, it is rather my judgment that he was controlled in his conclusion very largely by the language contained in that appropriation, which was, in my judgment, very much broader than is found in the interstate-commerce act or in the act creating the Department of Commerce and Labor." [9]

[9] 40 Cong. Rec. 8738.

And in the Senate debate on the 1906 amendment, Senator Daniel expressed an understanding which no one questioned:

> "I suppose that the bill under consideration as it reads now applies only to persons who testify in a judicial proceeding or to those who are responding to some body *such as a Congressional committee* that has the right to enforce an answer from a witness." [10]

Senator Knox, the manager of the amendment in the Senate, thereupon explained the bill to Senator Daniel in detail, never contradicting what Senator Daniel had said on this point. Neither Congressman Littlefield, Senator Daniel, Senator Knox, nor any other member of Congress suggested altering the *Armour* holding that the Antitrust Immunity Act of 1903 was not limited to judicial proceedings—none, in fact, ever questioned it—because that holding, it may fairly be inferred, correctly read the intent of an almost identical Congress in passing the Act three years earlier.[11]

From that day until this no one seems ever to have doubted that this reading of the 1903 Antitrust Immunity Act was correct. In fact, in 1942 this Court obviously read the statute the same way in *United States* v. *Monia,* 317 U. S. 424. Monia and another claimed complete immunity under that Act as amended in 1906 because they had testified before a federal grand jury inquiring into alleged violations of the federal antitrust laws. The Act

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[10] 40 Cong. Rec. 7657 (emphasis supplied).

[11] I agree with the Court that Congress in the 1906 statute did not "manifest any intent to enlarge the reach of the immunity provision of the Act of February 25, 1903, to include nonjudicial proceedings." *Ante,* p. 104. But the Act of 1903, as pointed out above, clearly applied to nonjudicial proceedings without any enlargement; it was never limited to judicial "proceedings," but granted complete immunity to witnesses who testified before governmental agencies other than those that could be called judicial.

was fully considered in the majority opinion by Mr. Justice Roberts and in the dissenting opinion of Mr. Justice Frankfurter. Not only was there in that case no intimation that the immunity provided in the Act was for testimony given before judicial agencies only, but both opinions went on a precisely opposite assumption. In holding that the Act gave immunity even to a witness who had not asserted his Fifth Amendment privilege against being compelled to testify against himself, Mr. Justice Roberts speaking for the Court treated the 1903 Act before us as covering the same kinds of "proceedings" as the immunity provisions of the Interstate Commerce Act, as amended in 1893,[12] which gave a complete immunity for testimony given before the Commission. Moreover, in his detailed dissent Mr. Justice Frankfurter referred at length to the immunity provisions contained in various statutes establishing governmental agencies both before and after the passage of the 1903 Act, such as the Securities Act,[13] the Public Utility Holding Company Act,[14] the Motor Carrier Act,[15] the Fair Labor Standards Act,[16] and various others. 317 U. S. 424, 431. Surely all these were not cited in the belief that the 1903 Act related to testimony given before judicial bodies only. It is plain beyond doubt that they were referred to on the assumption that the 1903 Act granted whatever immunity it did, not merely for testimony given before judicial bodies, but for testimony given before all the various governmental agencies that subpoena witnesses to give evidence before them on antitrust matters.

The Antitrust Immunity Act of 1903 was passed at a time when the fear of prosecution was making testi-

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[12] 27 Stat. 443, 49 U. S. C. § 46.

[13] 48 Stat. 74, 87, 15 U. S. C. § 77v (c).

[14] 49 Stat. 803, 832, 15 U. S. C. § 79r.

[15] 49 Stat. 543, 550, 49 U. S. C. § 305 (d).

[16] 52 Stat. 1060, 1065, 29 U. S. C. § 209.

mony from witnesses often impossible to obtain and thereby impeding enforcement of the antitrust laws. It was passed by a Congress friendly to those laws, not to frustrate but to help enforce them.[17] Whether it was a wise or, in the case of an unwilling witness, constitutionally legitimate [18] means for Congress to use in seeking that goal is not the issue in this case. Wise or unwise, it was a solemn promise made by Congress which I think the Government should keep, just as I thought that the Government should have been compelled to keep a solemn promise of immunity made by the Secretary of the Treasury in *Shotwell Mfg. Co.* v. *United States,* 371 U. S. 341, 367 (dissenting opinion). The very fact that the Court must labor so long and hard to reach its result is in my judgment strong evidence that that result should not have been reached, for I think that when the Government makes an obligation in broad terms on which individuals have a reasonable right to rely, it should not seek to have all doubts resolved in its own favor against the private citizens who have taken it at its word. Important as I believe the antitrust laws to be, I believe it is more important still that there should be no room for anyone to doubt that when the Government makes a promise, it keeps it. Cf. *Federal Power Comm'n* v. *Tuscarora Indian Nation,* 362 U. S. 99, 124 (dissenting opinion).

I would affirm the judgment.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I am inclined to construe this Immunity Act more in harmony with its literal language than is the Court;

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[17] See 36 Cong. Rec. 411–419. The provision was not debated in the Senate. See *id.,* 989–990.

[18] Compare *Ullmann* v. *United States,* 350 U. S. 422, 440 (dissenting opinion).

and the reasons I do so are in part those stated by MR. JUSTICE BLACK and in part the nature of the modern congressional committee. The trial-nature of the modern investigating committee argues strongly for a construction of this Act that gives immunity to one subjected to scrutiny and probing under the full glare of today's hearing methods.

Congressional investigations as they have evolved, are in practice "proceedings" of a grave nature so far as individual liberties are concerned. Not all committee hearings are "trials" of the witness; not all committee hearings are televised or broadcast; and so far as appears this witness was not subjected to any such ordeal.[1] But the problem with which we deal concerns not a particular committee nor a particular hearing but the generalized meaning of "proceeding" as used in the Act of February 25, 1903.

Courts cannot enjoin a committee from questioning a witness anymore than they can enjoin passage of a palpably unconstitutional bill. See *Nelson* v. *United States,* 93 U. S. App. D. C. 14, 208 F. 2d 505. But courts, knowing the manner in which committees often operate, are properly alert either in denying legal effect to what has been done or in taking other steps protective of the rights of the accused.[2] See *Nelson* v. *United States,* 93 U. S. App. D. C., at 22, 208 F. 2d, at 513. That is one reason why I would not import any ambiguities into this Immunity Act to the disadvantage of the accused.

The present investigation was in my view a "proceeding, suit, or prosecution" under the antitrust laws within

[1] Respondent's testimony before the Committee appears in Hearings, Special Subcommittee of the House Select Committee on Small Business, 86th Cong., 2d Sess., pursuant to H. Res. 51, Pt. IV, pp. 665–700.

[2] For analogous instances of the alertness of the Court to protect an accused against the effect of pretrial publicity, see *Irvin* v. *Dowd,* 366 U. S. 717; *Rideau* v. *Louisiana,* 373 U. S. 723.

the meaning of the Act of February 25, 1903. The House Committee before which Welden testified was trenching on the same ground as the present antitrust prosecution. Its power to proceed derived of course from the Legislative Reorganization Act of 1946, 60 Stat. 812, the Rules and Regulations of the House, or a Special Resolution. The power to investigate extends to the manner in which laws are being administered and to the need for new laws. *Watkins* v. *United States,* 354 U. S. 178, 187. The questions put by the House Committee were allowable, as they clearly were, only because they pertained to the manner in which the antitrust laws were operating or to the need for more effective laws. They were therefore "under" the antitrust laws.

We have repeatedly said that a congressional investigation which exposes for exposure's sake or which is "conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated is indefensible." *Watkins* v. *United States,* 354 U. S., at 187. Congress is not a law enforcement agency; that power is entrusted to the Executive. Congress is not a trial agency; that power is entrusted to the Judiciary. Some elements of a "fair" hearing are provided by Committee Rules (*Yellin* v. *United States,* 374 U. S. 109); some by constitutional requirements. By reason of the First Amendment Congress, being unable to abridge freedom of speech or freedom of the press, may not probe into what a witness reads (cf. *United States* v. *Rumely,* 345 U. S. 41), or why a publisher chose one editorial policy rather than another. Since by reason of the First Amendment Congress may make no law "prohibiting the free exercise" of religion, it may not enter the field through investigation and probe the minds of witnesses as to whether they go to church or to the confessional regularly, why they chose this church rather than that one, etc. By reason of the Self-Incrimination Clause of the Fifth Amendment, wit-

nesses may refuse to answer certain questions. See *Quinn* v. *United States,* 349 U. S. 155; *Emspak* v. *United States,* 349 U. S. 190; *Bart* v. *United States,* 349 U. S. 219.

There are other limitations. "The Senate, for instance, could not compel a witness to testify in a Senate investigation whose sole and avowed purpose was to determine whether a particular federal official should be impeached, since only the House can impeach. The House could not force a witness to testify in a House investigation whose sole and avowed purpose was to decide the guilt of a person already impeached, or to determine whether or not a treaty should be ratified, since the Constitution entrusts these functions to the Senate. Neither House could conduct an investigation for the sole and avowed purpose of determining whether an official of the State of New York should be impeached, since that determination is reserved to the Legislature of that State." Snee, Televising Congressional Hearings, 42 Geo. L. J. 1, 9 (1953).

In these and other related ways, congressional committees are fenced in. Yet in the view of some of us the tendency has been to trench on First Amendment rights. See *Braden* v. *United States,* 365 U. S. 431; *Wilkinson* v. *United States,* 365 U. S. 399; *Barenblatt* v. *United States,* 360 U. S. 109; *Gibson* v. *Florida Legislative Comm.,* 372 U. S. 539. There was a time when a committee, knowing that a witness would not answer a question by reason of the Fifth Amendment, would not put the question to him. Today, witnesses who invoke the Fifth Amendment at the threshold have been minutely examined, apparently to see how many times they can be forced to invoke it.[3] Hearings have indeed often become a spec-

[3] See Hearings before Senate Committee on Rules and Administration on Financial or Business Interests of Officers or Employees of the Senate, 88th Cong., 1st and 2d Sess., pp. 1337–1363 (Robert G. Baker); Hearings before Senate Select Committee on Improper

tacle,[4] some of the reasons being succinctly stated by the experienced Chairman of the Senate Committee on Government Operations, and head of the Permanent Committee on Investigations, Senator McClellan of Arkansas:

> "First let me say that the primary purpose and actually the only legitimate purpose for such hearings must be a legislative purpose, but out of that also flows the opportunity to disseminate information of great value and advantage to the public. Because the public of course is interested in legislation and upon what you premise it—upon what is the need for it. It all fits in. Now my position has been, and there are those, who, I'm sure, disagree with me, when we hold a public hearing it is public. Those who have the opportunity, who can conveniently at some times attend in person and witness everything that occurs—the press is present to make a reporting on what occurs—radio is there to disseminate the information as it is produced—I can see no good reason for barring television. That too is a media of communication, and in my judgment sometimes is the most effective, next to actually being present in person and witnessing what has occurred. So I have always felt that if the press is to be present, radio coverage is to be given, the television is entitled to the same privileges. I do think that the lights being on is a distraction—I think the lights should be turned off and we have always observed that except where a man is simply taking the

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Activities in the Labor or Management Field, 85th Cong., 1st Sess., pp. 1511–1578, 1654–1684, 2038–2047, 2374–2405 (Dave Beck); *Beck* v. *Washington*, 369 U. S. 541, 583–587 (dissenting opinion).

[4] Barth, Government by Investigation (1955), p. 81; Rogge, The First and the Fifth (1960), p. 204; American Bar Association, Report on Congressional Investigations (1954).

fifth amendment. If he's taking the fifth amendment and reading from a card, the light helps him to see to read the script on the card and I don't see any reason to turn them off." [5]

A strong case has been made for holding these "spectacles" to be out of bounds:

"1. The use of these publicity media bears no real and substantial relation to any legitimate purpose of a congressional investigating committee. Yet, it constitutes a substantial restraint upon the liberty of an unwilling witness. Hence to force him to testify before these media exceeds the constitutional bounds of the investigating power; the attempt to do so, and *a fortiori* punishment under R. S. 102 (1875), 2 U. S. C. § 192 (1946 ed.) is therefore a denial of substantive due process under the Fifth Amendment.

"2. The use of these media creates an atmosphere in which it is normally unfair to compel the testimony of an unwilling witness, and in which rights guaranteed by the Constitution are placed in jeopardy. Hence to use these media, without reasonable necessity, constitutes a denial of procedural due process under the same Amendment." [6]

President Truman condemned "spectacles" of that kind. His specific objection was directed to the televised hearings by the Kefauver Committee in 1951:

"The President is most seriously concerned. The trouble with television, he said, is that a man is held before cameras and 40,000,000 people more or less

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[5] Metropolitan Broadcasting, "Opinion in the Capital," Interview with Senator John McClellan, March 1, 1964. For a like defense of televised hearings see Senator Kefauver, 97 Cong. Rec. 9777 *et seq.*

[6] Snee, Televising Congressional Hearings, 42 Geo. L. J. 1, 2–3 (1953).

hear him charged with so and so, and the public, untrained generally with evaluating the presentation of evidence, is inclined to think him guilty just because he is charged.

"It is the very negation of judicial process, with the committee acting as prosecutor and defense and the public acting as the jury." [7]

Alan Barth reviewed the nature of the "legislative trial":

"The legislative trial carries with it sanctions of a severe order. It is, to begin with, unimpeded by any

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[7] White House Press Release, as quoted by Chicago Daily News, June 27, 1951, p. 49, col. 5, and quoted in Snee, *supra*, note 6, at 2.

Congressman Magee said in 97 Cong. Rec. A1145: ". . . there is no more reason for televising crime investigations than there is in televising criminal trials. Of necessity, many of our criminal cases develop lurid and obscene testimony. Some of it is unfit to put in public print. Certainly it is unfit to go out over the air waves. Many witnesses would despair at the thought of testifying when they were being viewed by television. It is bad enough for a timid witness to face a small courtroom of spectators; but it would be far worse if that person knew that he or she was being spied upon by television addicts all over the Nation. Certainly it would not be conducive to clear thought or expression. I cannot feel that the courts will ever force witnesses to subject themselves to this needless procedure. To me the whole idea is inane and repulsive. It would bring the Congress to a new low level in public esteem. The dignity of the courtroom would become only a memory while its sacred portals became a testing ground for the future Faye Emersons and Jimmie Durantes." And see Gossett, Justice and TV, 38 A. B. A. J. 15 (1952); Yesawich, Televising & Broadcasting Trials, 37 Cornell L. Q. 701 (1952); Arnold, Mob Justice and Television, 12 Fed. Com. B. J. 4 (1951); Klots, Trial by Television, Harper's, October 1951, 90; Report of the Special Committee on Televising and Broadcasting, 77 Rep. A. B. A., p. 607 *et seq.* (1952).

Telecasting and broadcasting of committee hearings are banned by the House. See 98 Cong. Rec. 1334–1335, 1443, 1567–1571, 1689–1691, 1949–1952, 5394–5395, A1152–A1153, A1176, A1180, A1196, A1227; 108 Cong. Rec. 267–269.

statute of limitations; an error committed in the 1930s may be judged in the 1950s—and without any allowance whatever for altered conditions or a changed political climate. Defendants may be subjected to double or triple jeopardy, that is, they may be tried by different committees for the same deed. The punishments meted out are uninhibited by any sort of criminal code. Persons convicted in the courts of Congress may not suffer imprisonment, but they are likely to be subjected, in addition to loss of reputation, to a black-listing which may effectively deny them any means of gaining a livelihood." [8]

Barth goes on to say:

"The legislative trial serves three distinct though related purposes: (1) it can be used to punish conduct which is not criminal; (2) it can be used to punish supposedly criminal conduct in the absence of evidence requisite to conviction in a court of law; and (3) it can be used to drive or trap persons suspected of 'disloyalty' into committing some collateral crime such as perjury or contempt of Congress, which can then be subjected to punishment through a judicial proceeding." [9]

Benjamin V. Cohen has shown why the legislative trial has no place in our system:

"There is no excuse for congressional committees acting as 'people's courts' following totalitarian patterns.

"Legislative trials, since the trial of Socrates, have had an odious history. Legislative trials combine the functions of prosecutor and judge and deny to the accused the right to impartial and independent judgment. Legislative trials are sub-

[8] *Op. cit., supra,* note 4, at 82.

[9] *Id.,* at 83.

> ject to the influence of partisanship, passion and prejudice. Legislative trials are political trials. Let us remember that in the past legislative justice has tended to degenerate into mob injustice." [10]

The legislative "trial" is a phenomenon that Senator Cain once described as a committee "running wild," becoming "victims of a wave of emotion which they created, but over which they had no control." [11]

Some may see wisdom in this modern kind of "trial by committee," so to speak, with committees and prosecutors competing for victims. But the more I see of the awesome power of government to ruin people, to drive them from public life, to brand them forever as undesirable, the deeper I feel that protective measures are needed. I speak now not of constitutional power, but of the manner in which a statute should be read. I therefore incline to construe the Immunity Act freely to hold that he who runs the gantlet of a committee cannot be "tried" again.

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[10] When Men Fear to Speak, Freedom Withers on the Vine, Address, Indiana B'nai B'rith Convention, Sept. 27, 1953. See *Delaney* v. *United States*, 199 F. 2d 107, 113, where the Court of Appeals in setting aside a conviction said:

"This is not a case of pre-trial publicity of damaging material, tending to indicate the guilt of a defendant, dug up by the initiative and private enterprise of newspapers. Here the United States, through its legislative department, by means of an open committee hearing held shortly before the trial of a pending indictment, caused and stimulated this massive pre-trial publicity, on a nationwide scale. Some of this evidence was indicative of Delaney's guilt of the offenses charged in the indictment. Some of the damaging evidence would not be admissible at the forthcoming trial, because it related to alleged criminal derelictions and official misconduct outside the scope of the charges in the indictment. None of the testimony of witnesses heard at the committee hearing ran the gantlet of defense cross-examination. Nor was the published evidence tempered, challenged, or minimized by evidence offered by the accused." See *Nelson* v. *United States*, 93 U. S. App. D. C. 14, 208 F. 2d 505.

[11] 97 Cong. Rec. 9768.

378 REALTY CORP. ET AL. *v.* NEW YORK CITY RENT AND REHABILITATION ADMINISTRATION ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 845. Decided April 20, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 13 N. Y. 2d 902, 193 N. E. 2d 510.

Harris L. Present and *Irving S. Freedman* for appellants.

Beatrice Shainswit for appellees.

PER CURIAM.

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

VOKES ET AL. *v.* CITY OF CHICAGO.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 855. Decided April 20, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 28 Ill. 2d 475, 193 N. E. 2d 40.

Charles A. Bellows for appellants.

John C. Melaniphy, Sydney R. Drebin and *Robert J. Collins* for appellee.

PER CURIAM.

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

SANDERS *v.* ALABAMA.

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

No. 856, Misc. Decided April 20, 1964.

Certiorari granted and judgment reversed.

Petitioner *pro se.*

Richmond M. Flowers, Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed. *Gideon* v. *Wainwright,* 372 U. S. 335; *Draper* v. *Washington,* 372 U. S. 487; *Douglas* v. *California,* 372 U. S. 353.

HATTIESBURG BUILDING & TRADES COUNCIL ET AL. *v.* BROOME, DOING BUSINESS AS BROOME CONSTRUCTION & MAINTENANCE CO., ET AL.

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

No. 669. Decided April 27, 1964.

State court had no jurisdiction to enjoin the arguably unfair labor practice of union picketing at a secondary employer's premises since the National Labor Relations Board had jurisdiction, its standards being satisfied by reference to the operations of either the primary, or as here, the secondary employer.

Certiorari granted; 247 Miss. 458, 153 So. 2d 695, reversed.

Ralph N. Jackson for petitioners.

Richard C. Keenan for respondents.

Solicitor General Cox, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* for the United States, as *amicus curiae,* in support of the petition.

PER CURIAM.

After finding that the primary employer was not in commerce and ruling that the pre-emption rule of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, was therefore not applicable, the state court enjoined picketing at the premises of the secondary employer. The judgment must be reversed. The jurisdictional standards established by the National Labor Relations Board (see 23 N. L. R. B. Ann. Rep. 8 (1958)) may be satisfied by reference to the business operations of either the primary or the secondary employer. *Truck Drivers Local No. 649,* 93 N. L. R. B. 386; *Teamsters Local No. 554,* 110 N. L. R. B. 1769; *Madison Bldg. & Const. Trades Council,* 134 N. L. R. B. 517. Here, as the record clearly

shows, the secondary employer's operations met the jurisdictional requirements. Since the union's activities in this case were arguably an unfair labor practice, *Sailors' Union of the Pacific,* 92 N. L. R. B. 547, the state court had no jurisdiction to issue the injunction. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236; *Construction Laborers* v. *Curry,* 371 U. S. 542. Accordingly, the petition for certiorari is granted and the judgment is reversed.

729-256 O-65-13

CICKELLI *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 791. Decided April 27, 1964.

Appeal dismissed and certiorari denied.

James F. Bell for appellant.

Lynn B. Griffith, Jr. for appellee.

PER CURIAM.

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

MICHELL *v.* LOUISIANA BOARD OF OPTOMETRY EXAMINERS.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 890. Decided April 27, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 245 La. 1, 156 So. 2d 457.

Thomas J. Meunier for appellant.

PER CURIAM.

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

COLEMAN *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 583. Argued March 25, 1964.—Decided May 4, 1964.

Petitioner, a Negro convicted of murder, filed a motion for a new trial asserting for the first time deprivation of his constitutional rights through systematic exclusion of Negroes from the grand and petit juries. The trial judge permitted petitioner to proceed on his motion but, relying upon a state requirement that objections to the composition of a jury be made before trial, sustained objections to all questions concerning the alleged jury discrimination and denied the motion. The state Supreme Court affirmed, finding no sufficient proof of jury discrimination. *Held:* The practice of systematic exclusion, if proved, would entitle petitioner to a new trial and since the state Supreme Court decided his constitutional claim of jury discrimination on the merits, although petitioner had not been allowed to offer evidence to support that claim, petitioner must now be given that opportunity.

276 Ala. 513, 164 So. 2d 704, reversed and remanded.

Michael C. Meltsner, pro hac vice, by special leave of Court, argued the cause for petitioner. With him on the brief were *Jack Greenberg* and *Orzell Billingsley, Jr.*

Leslie Hall, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Richmond M. Flowers,* Attorney General of Alabama.

MR. JUSTICE CLARK delivered the opinion of the Court.

The petitioner, a Negro convicted and sentenced to death for murdering a white man, attacks his conviction as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. He claims that, as a result of a long-established practice in the county of his conviction, Negroes were arbitrarily and systematically excluded from sitting on the grand jury which indicted him and the petit jury which convicted him.

The State answers that the claim comes too late, having been asserted for the first time by a motion for a new trial. Code of Ala. (1958 Recomp.), Tit. 15, §§ 278, 279; *Ball* v. *State*, 252 Ala. 686, 689, 42 So. 2d 626, 629. Admittedly, the point was not raised until the filing of the motion for a new trial, but the trial judge permitted the petitioner to proceed on his motion. However, the judge sustained objections to all questions concerning the alleged jury discrimination and denied the motion. The Supreme Court of Alabama affirmed the conviction, finding that petitioner's claim of jury discrimination was not supported by any evidence. We granted certiorari, 375 U. S. 893.

Petitioner was convicted of the first degree murder of a white mechanic, the apparent motive being robbery. There were no witnesses to the killing and the evidence of guilt was circumstantial, based largely upon expert testimony given by the State's toxicologist. Petitioner was represented by court-appointed counsel at trial but he obtained new counsel after conviction. In his motion for a new trial petitioner alleged that "Negroes qualified for jury service in Greene County, Alabama are arbitrarily, systematically and intentionally excluded from jury duty in violation of rights and privileges guaranteed defendant by the Fourteenth Amendment to the United States Constitution."

The petitioner does not attack the reasonableness of Alabama's procedural requirement that objections to the composition of juries must be made before trial. Nor does he question the validity of such procedures as a state ground upon which refusal to consider the question might be based. However, in this case the judge granted petitioner a hearing on his motion for a new trial and permitted him to call two Circuit Solicitors as witnesses to prove his allegations of discrimination. Nonetheless, the judge sustained objections to all questions concerning systematic discrimination on the ground that

the point was not raised prior to trial.[1] On automatic appeal the Supreme Court of Alabama found that the trial judge had afforded petitioner "an opportunity on the hearing of the motion for a new trial to adduce evidence of any systematic exclusion . . . ." However, it found further that "none was introduced other than an affidavit

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[1] "ATTORNEY FOR DEFENDANT: I can ask whether or not the law was complied with?

"COURT: Yes. The fact that the law was complied with, that is a general question, but the Court will sustain an objection to that because the courts have held repeatedly, the Supreme Court of Alabama and the Supreme Court of the United States, that you can not go into those matters unless they have been raised properly during the trial or in some proceedings prior thereto. That is the reason I asked you the question before. The case was tried by Mr. Boggs and the Court is familiar with it.

"ATTORNEY FOR DEFENDANT: But I would like to get one or two of these questions in the record for the purpose of taking an exception to it.

"COURT: You may ask the questions, but the Court will have to sustain an objection to them.

"Q. Mr. Boggs, you were present when the Grand Jury, which indicted Johnny Coleman, was convened, were you not?

"A. I was.

"Q. How many persons were on that grand jury?

"A. Eighteen.

"Q. Were any negroes on that grand jury?

"SOLICITOR: I object to that, may it please the Court. It is an illegal mode of raising that which should have been raised by motion to quash the indictment.

"COURT: Sustain the objection.

"ATTORNEY FOR DEFENDANT: I want to ask one more question, and then I won't have any further question to ask—two more, your Honor.

"Q. Were there any negroes on the petit jury that tried this defendant?

"SOLICITOR: I object to that, may it please the Court, on the ground that it should have been properly raised by motion to quash the venire if the Fourteenth Amendment was to be taken advantage of in this matter.

"COURT: Sustain the objection."

of appellant's mother that her son was indicted by a grand jury composed of white men, and tried and convicted by a petit jury composed of twelve white men."

It appears clear that the motion for a new trial alleged a practice of systematic exclusion which, if proved, would entitle petitioner to a new trial. *Arnold* v. *North Carolina,* 376 U. S. 773 (1964); *Eubanks* v. *Louisiana,* 356 U. S. 584 (1958); *Reece* v. *Georgia,* 350 U. S. 85 (1955); *Hernandez* v. *Texas,* 347 U. S. 475 (1954); *Strauder* v. *West Virginia,* 100 U. S. 303 (1879). Here petitioner's counsel failed to raise the issue before trial; but the Alabama Supreme Court, apparently acting under the enlightened procedure of its automatic appeals statute,[2] did not base its affirmance on this ground but considered the claim on the merits and held that the petitioner had not met his burden of establishing racial discrimination. The court concluded:

> "No sufficient proof having been produced at the hearing on the motion for a new trial, or at any other state of the proceedings, it is clear appellant may not now complain. Therefore, we are left under no doubt that appellant's point on systematic exclusion of Negroes from the jury rolls in Greene County is not well taken."

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[2] Code of Alabama (1958 Recomp.), Tit. 15, § 382 (10):

"Hearing and determination in appellate court.—In all cases of automatic appeals the appellate court may consider, at its discretion, any testimony that was seriously prejudicial to the rights of the appellant, and may reverse thereon even though no lawful objection or exception was made thereto. The appellate court shall consider all of the testimony and if upon such consideration is of opinion the verdict is so decidedly contrary to the great weight of the evidence as to be wrong and unjust and that upon that ground a new trial should be had, the court shall enter an order of reversal of the judgment and grant a new trial, though no motion to that effect was presented in the court below."

Exercising its discretion to permit petitioner to attack the exclusion by motion for a new trial, the Supreme Court of Alabama decided petitioner's constitutional claim on the merits. The judgment, therefore, "rested upon the State Supreme Court's considered conclusion that the conviction resulting in the death sentence was not obtained in disregard of the protections secured to the petitioner by the Constitution of the United States." *Irvin* v. *Dowd,* 359 U. S. 394, 404 (1959). Since the case comes here in that posture and the record shows that petitioner was not permitted to offer evidence to support his claim, the judgment of affirmance must fall. As in *Carter* v. *Texas,* 177 U. S. 442 (1900), where the state court found that "the motion was but a mere tender of the issue, unaccompanied by any supporting testimony . . . ," this Court must reverse on the ground that the defendant "offered to introduce witnesses to prove the allegations . . . and the court . . . declined to hear any evidence upon the subject . . . ." At 448–449.

In light of these considerations, the petitioner is now entitled to have his day in court on his allegations of systematic exclusion of Negroes from the grand and petit juries sitting in his case. The judgment is therefore reversed and the case remanded to the Supreme Court of Alabama for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MISSOURI PACIFIC RAILROAD CO. *v.* ELMORE & STAHL.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 292. Argued March 3, 1964.—Decided May 4, 1964.

Seeking recovery for damage to an interstate shipment of melons, respondent shipper brought this action in a state court against the carrier. The jury made special findings that the melons were in good condition when turned over to the carrier, but in damaged condition when they reached their destination; and that the carrier performed all transportation services without negligence. But the jury refused to find that the carrier had sustained the burden of proving that the damage was due solely to the "inherent vice" of the melons. On these findings the trial court awarded damages to respondent. The state Supreme Court affirmed on the ground that, under federal law, a carrier is not relieved of liability by showing that transportation services were not negligently performed, but must also establish that damage was caused by one of the excepted common-law perils, here the natural deterioration of the melons. *Held:* Under § 20 (11) of the Interstate Commerce Act, which codifies the common-law rule that a carrier, while not an absolute insurer, is liable for damages unless caused by an act of God, a public enemy, the shipper, public authority, or the inherent vice or nature of the goods, the shipper makes out a prima facie case when he shows delivery in good condition, arrival damaged, and the quantum of damages. The carrier then has the burden of proving lack of negligence and that damage was due to one of the exceptions relieving it of liability.

(a) The rule of liability is the same for nonperishable and perishable commodities (other than livestock). Pp. 139–140.

(b) Rules 130 and 135 of the Perishable Protective Tariff merely restate the common-law rules of liability. Pp. 140–143.

(c) The rule of liability of the carrier is based upon its knowledge concerning the condition of the shipment while in its possession. Pp. 143–144.

368 S. W. 2d 99, affirmed.

Thurman Arnold argued the cause for petitioner. With him on the briefs were *Abe Fortas, Abe Krash* and *Dennis G. Lyons.*

John C. North, Jr. argued the cause and filed a brief for respondent.

Gregory S. Prince, William M. Moloney and *J. Edgar McDonald* filed a brief for the Association of American Railroads, as *amicus curiae,* urging reversal.

Michael C. Bernstein and *William Augello, Jr.* filed a brief for the United Fresh Fruit & Vegetable Association et al., as *amici curiae,* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether a common carrier which has exercised reasonable care and has complied with the instructions of the shipper, is nonetheless liable to the shipper for spoilage in transit of an interstate shipment of perishable commodities, when the carrier fails to prove that the cause of the spoilage was the natural tendency of the commodities to deteriorate. The petitioner is a common carrier and the respondent is a fruit shipper. The respondent sued the petitioner in a Texas court to recover for damage to a carload of honeydew melons shipped from Rio Grande City, Texas, to Chicago, Illinois.[1]

In accordance with Texas practice, special issues were submitted to the jury at the close of the evidence. The jury affirmatively found that the melons were in good condition at the time they were turned over to the carrier in Rio Grande City, but that they arrived in damaged condition at their destination in Chicago. The jury also affirmatively found that the petitioner and its connect-

[1] The complaint contained four independent counts, each stating a separate claim for damage to a different shipment of perishables. The shipment involved here is solely that covered by Count 1, which related to the shipment of 640 crates of honeydew melons in Car ART 35042 from Rio Grande City to Chicago.

ing carriers performed all required transportation services without negligence. The jury were instructed that "inherent vice" means "any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." They answered "No" to a special issue asking whether they found from a preponderance of the evidence that the condition of the melons on arrival in Chicago was due solely to an inherent vice, as so defined, "at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation." [2]

On the basis of these special findings, the trial judge entered judgment for damages against the carrier. The judgment was affirmed by the Texas Court of Civil Appeals, 360 S. W. 2d 839, and by the Texas Supreme Court, upon the ground that, as a matter of federal law, "the carrier may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss or damage was caused by one of the four excepted perils recognized at common law." 368 S. W. 2d 99, 100. The court concluded, in view of the jury's findings, that, although "[a] common carrier is not responsible for spoilage or decay which is shown to be due entirely to the inherent nature of the goods, . . . petitioner has not established that the

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[2] The jury also refused to find that the damage was caused by acts or omissions of the shipper in the shipping instructions:

"Do you find from a preponderance of the evidence that the worsened condition . . . was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

"Answer 'yes' or 'no.'

"We, the jury, answer: No."

damage in this case was caused solely by natural deterioration." *Id.*, at 103. We granted certiorari, 375 U. S. 811, because of a conflict with an almost contemporaneous decision of the United States Court of Appeals for the Ninth Circuit holding that "in the case of perishable goods the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions." [3] For the reasons which follow, we affirm the judgment before us.

The parties agree that the liability of a carrier for damage to an interstate shipment is a matter of federal law controlled by federal statutes and decisions. The Carmack Amendment of 1906,[4] § 20 (11) of the Interstate Commerce Act, makes carriers liable "for the full actual loss, damage, or injury . . . caused by" them to property they transport, and declares unlawful and void any contract, regulation, tariff, or other attempted means of limiting this liability.[5] It is settled that this statute has two undisputed effects crucial to the issue in this case: First, the statute codifies the common-law rule that a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by "(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods." *Bills of Lading,* 52 I. C. C. 671, 679; *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.,* 270 U. S. 416, 421–423; *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 509; *Hall & Long* v. *Railroad Companies,* 13 Wall. 367, 372.

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[3] *Larry's Sandwiches, Inc.,* v. *Pacific Electric R. Co.,* 318 F. 2d 690, 692–693. Cf. *Trautmann Bros. Co.* v. *Missouri Pac. R. Co.,* 312 F. 2d 102; *United States* v. *Reading Co.,* 289 F. 2d 7; *Atlantic Coast Line R. Co.* v. *Georgia Packing Co.,* 164 F. 2d 1.

[4] 34 Stat. 595.

[5] See 24 Stat. 386, as amended; 49 U. S. C. § 20 (11).

Second, the statute declares unlawful and void any "rule, regulation, or other limitation of any character whatsoever" purporting to limit this liability.[6] See *Cincinnati & Texas Pac. R. Co.* v. *Rankin,* 241 U. S. 319, 326; *Boston & M. R. Co.* v. *Piper,* 246 U. S. 439, 445. Accordingly, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. *Galveston, H. & S. A. R. Co.* v. *Wallace,* 223 U. S. 481, 492; *Chicago & E. I. R. Co.* v. *Collins Co.,* 249 U. S. 186, 191; *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.,* 270 U. S. 416, 420–423; *Thompson* v. *James McCarrick Co.,* 205 F. 2d 897, 900.

The disposition of this case in the Texas courts was in accordance with these established principles. It is apparent that the jury were unable to determine the cause of the damage to the melons. "[T]he decay of a perishable cargo is not a cause; it is an effect. It may be the result of a number of causes, for some of which, such as the inherent defects of the cargo . . . the carrier is not liable."[7] But the jury refused to find that the carrier

[6] The meaning of § 20 (11) was reaffirmed by the Cummins Amendment of 1915. 38 Stat. 1196. Clearly recognizing that the phrase "caused by" did not limit the carrier's liability to cases of negligence, but covered liability without fault except where the specific common-law exceptions could be established, the Cummins Amendment permitted the carrier to require the shipper to file a timely notice of his claim prior to filing a lawsuit in cases where the carrier was without fault but forbade such a condition where the loss resulted from the carrier's negligence. See *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.,* 270 U. S. 416, 422. The proviso forbidding the notice requirement in cases of negligence was repealed in 1930 (46 Stat. 251).

[7] *Schnell* v. *The Vallescura,* 293 U. S. 296, 305–306.

had borne its burden of establishing that the damaged condition of the melons was due solely to "inherent vice," as defined in the instruction of the trial judge—including "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." The petitioner does not challenge the accuracy of the trial judge's instruction or the jury's finding.[8] Its position is simply that if goods are perishable, and the nature of the damage is spoilage, and the jury affirmatively find that the carrier was free from negligence and performed the transportation services as required by the shipper, then the law presumes that the cause of the spoilage was the natural tendency of perishables to deteriorate even though the damage might, in fact, have resulted from other causes, such as the acts of third parties,[9] for which no exception from carrier liability is provided. Consequently, it is argued, the question of "inherent vice" should not have been submitted to the jury, since the carrier in such a case does not bear the affirmative burden of establishing that the damage was caused by the inherent vice exception of the common law.

The petitioner appears to recognize that, except in the case of loss arising from injury to livestock in transit—a well-established exception to the general common-law rule based on the peculiar propensity of animals to injure

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[8] The petitioner does appear to argue, however, that the rule applied by the Texas courts required it to show some specific peculiar defect in this particular shipment of perishables. We find no intimation of such a requirement either in the trial court's instructions or in the Texas Supreme Court's opinion. The Texas courts merely placed upon the petitioner the affirmative burden of satisfying the jury that the cause of the spoilage was the natural tendency of perishables to deteriorate over time.

[9] "[T]he carrier is responsible without regard to the exercise of due care, even though the damage or loss be occasioned by the independent act of third persons." *Commodity Credit Corp.* v. *Norton,* 167 F. 2d 161, 164–165.

themselves and each other [10]—no distinction was made in the earlier federal cases between perishables and non-perishables. It is said, however, that the "large-scale development, in relatively recent years, of long distance transportation of fresh fruit and vegetables in interstate commerce has led to the evolution" of a new federal rule governing the carrier's liability for spoilage and decay of perishables, similar to the "livestock rule," which absolves the carrier from liability upon proof that the carrier has exercised reasonable care, and has complied with the shipper's instructions.[11]

We are aware of no such new rule of federal law. As recently as 1956, in *Secretary of Agriculture* v. *United States,* 350 U. S. 162, this Court gave no intimation that the general rule placing on the carrier the affirmative burden of bringing the cause of the damage within one of the specified exceptions no longer applied to cases involving perishable commodities.[12]

Nor do Rules 130 and 135 of the Perishable Protective Tariff, relied upon by petitioner, reflect any such change in the federal law, when read in the light of the history underlying their adoption in 1920 by the Interstate Commerce Commission. Rule 130, declaring that a carrier does not "undertake to overcome the inherent tendency

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[10] See, *e. g., North Pennsylvania R. Co.* v. *Commercial Bank,* 123 U. S. 727, 734.

[11] With respect to wholly intrastate shipments, this is the rule in a number of States. See, *e. g., Southern Pacific Co.* v. *Itule,* 51 Ariz. 25, 74 P. 2d 38.

[12] The Court noted that it was "conceded" that § 20 (11) of the Interstate Commerce Act codified "the common-law rule making a carrier liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the commodity." 350 U. S., at 165–166 n. 9.

of perishable goods to deteriorate or decay," [13] merely restates the common-law rule that a carrier shall not be held liable in the absence of negligence for damage resulting solely from an inherent vice or defect in the goods. And Rule 135, declaring that the carrier shall not be "liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived," [14] merely reiterates the common-law and bill-of-lading rule that the carrier shall not be liable, in the absence of negligence, for the "act or default of the shipper or owner." Neither of these rules refers to the presumptions or burdens of proof imposed by the common law, and it is clear that it was not the intention of the Commission in approving these rules to modify or reduce the common-law liability of a carrier. Indeed, the Commission stated at the time these rules were adopted in 1920 that "such

[13] "RULE 130—CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—

"Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence." General Rules and Regulations of the Interstate Commerce Commission, Perishable Protective Tariff No. 17, I. C. C. No. 34, W. T. Jamison, Agent.

[14] "RULE 135—LIABILITY OF CARRIERS.—

"Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived." *Ibid.*

declarations can have no controlling effect, for the carrier's liability for loss or damage is determined by the law. Nothing can be added to or subtracted from the law by limitations or definitions stated in tariffs . . . . There is the constant risk, therefore, if such declarations are included, of misstating the law and misleading the parties to no good purpose." *Perishable Freight Investigation*, 56 I. C. C. 449, 482. Although the Commission concluded for this reason that this type of rule was generally objectionable, *id.*, at 483, it recognized the desirability of giving "some warning to shippers" that a carrier was not liable for the inherent tendency of perishable goods to deteriorate or decay, or for the shipper's failure to give proper transportation instructions. *Ibid.* The rules themselves reflect nothing more than this objective.[15]

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[15] The suggestion is made that because the shipper elected to ship under the terms and conditions of the Uniform Domestic Straight Bill of Lading, the carrier's liability is limited to negligence. But insofar as damage to merchandise in transit is concerned, the bill provides for full "common-law liability." Section 1 (a) of the bill provides that "[t]he carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided." Section 1 (b) provides, in pertinent part, that a carrier shall not be liable for damage "resulting from a defect or vice in the property." Nothing in the language of this contract even remotely suggests that the carrier does not bear the affirmative burden of proving that the damage was caused by a defect or vice in the property. Indeed, we think it significant that the identical bill of lading is used for the shipment of both perishable and nonperishable commodities, while a quite different contract, the Uniform Live Stock Contract, is employed in the shipment of livestock. See Uniform Freight Classification No. 4, p. 204.

Limitations on liability contained in other sections of the bill of lading apply to circumstances not covered by the Carmack Amendment. It could not lawfully be otherwise, for the Amendment codified the common-law liability for damage to goods in transit, and its legal effect was "to bar the Interstate Commerce Commission from legalizing tariffs limiting the common-law liability of a carrier for such damage. The common law, in imposing liability, dispensed

That this was the limited purpose of Rules 130 and 135 is confirmed by the Commission's action in rejecting an additional proposal made by the carriers at the time these Rules were approved in 1920. The carriers sought to include a provision to be known as Item 20 (d), reading:

> "Nothing in this tariff shall be construed as relieving carriers from such liability as may rest upon them for loss or damage when same is the result of carriers' negligence." See 56 I. C. C., at 481.

The Commission emphatically rejected the provision on the express ground that

> "*a carrier may be liable under the common law for loss or damage which is not the result of its negligence,* and this item implies that there may be something in the tariff which seeks to limit such liability." *Id.*, at 483. (Emphasis supplied.)

Finally, all else failing, it is argued that as a matter of public policy, the burden ought not to be placed upon the carrier to explain the cause of spoilage, because where perishables are involved, the shipper is peculiarly knowledgeable about the commodity's condition at and prior to the time of shipment, and is therefore in the best position to explain the cause of the damage. Since this argument amounts to a suggestion that we now carve out an exception to an unquestioned rule of long standing upon which both shippers and carriers rely, and which is reflected in the freight rates set by the carrier, the petitioner must sustain a heavy burden of persuasion. The general rule of carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge "[a]ll the facts and circumstances upon which [it] may rely to relieve [it] of [its] duty . . . . In consequence, the law

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with proof by a shipper of a carrier's negligence in causing the damage." *Secretary of Agriculture* v. *United States,* 350 U. S. 162, 173 (Frankfurter, J., concurring).

casts upon [it] the burden of the loss which [it] cannot explain or, explaining, bring within the exceptional case in which [it] is relieved from liability." *Schnell* v. *The Vallescura,* 293 U. S. 296, 304. We are not persuaded that the carrier lacks adequate means to inform itself of the condition of goods at the time it receives them from the shipper, and it cannot be doubted that while the carrier has possession, it is the only one in a position to acquire the knowledge of what actually damaged a shipment entrusted to its care.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The shipping contract in this case limited the liability of the carrier for damages in the nature of spoilage or decay to liability for negligence only. The shipping contract consists of the bill of lading and the applicable tariffs lawfully published and filed (*Southern R. Co.* v. *Prescott,* 240 U. S. 632, 637), from which there may be no departure. *Id.,* at 638. The bill of lading provides that the goods are received, "subject to the classifications and tariffs in effect" and that every service to be performed thereunder "shall be subject to all the conditions not prohibited by law . . . including the conditions on back hereof . . . ." Its form and terms are part of Uniform Freight Classification No. 4, one of the tariffs lawfully filed and published pursuant to § 1 (6) of the Act. Classification No. 4 provides for various rates for various types of service and limits liability according to the rate paid, such limitations being held lawful by the Interstate Commerce Commission. *Bills of Lading,* 52 I. C. C. 671, 684 *et seq.; Domestic Bill of Lading,* 64 I. C. C. 357, 360–361.

Under Classification No. 4 the shipper has the option of shipping his goods either under the uniform bill of

lading, with a "limited liability," or under "a common carrier's liability." If he chooses the latter he pays a rate 10% higher. Here the shipper chose "limited liability." One type of limitation is a tariff that limits the amount of damages for the loss of a shipment. See, *e. g., Pierce Co.* v. *Wells, Fargo Co.,* 236 U. S. 278. There the amount of recovery for negligence is allowed to be limited where the filed tariffs so provide, the shipper having the privilege of paying an increased rate and obtaining liability for the full value. *Id.,* at 283. Here there is no question of a carrier's being exempt from any liability caused by negligence. Rather it turns on Rule 130 and Rule 135 of the Perishable Protective Tariff No. 17, the tariff brought into play by the bill of lading.

Rule 130 states: "Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to *retard such deterioration or decay* insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence." (Italics added.)

Rule 135 states: "Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence *reasonable protective service of the kind and extent so* directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived." (Italics added.)

These provisions were approved by the Commission (see *Perishable Freight Investigation,* 56 I. C. C. 449, 483),

the declarations being "predicated upon the special hazard resulting from the perishable nature of the freight, or from the exercise by the shipper of some measure of control over the form or degree of protective service accorded." *Id.*, at 481.

Rules 130 and 135 are not in derogation of common-law liability which, as we said in *Secretary of Agriculture* v. *United States,* 350 U. S. 162, 165, note 9, was codified in § 20 (11) of the Act. That liability exempts the carrier only for damage caused by the shipper, acts of God, the public enemy, public authority, or "the inherent vice or nature of the commodity." Rules 130 and 135 merely operate within the ambit of the last category, supplying appropriate standards for its application.

Such a tariff has the force and effect of a federal statute. See *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.,* 360 U. S. 411. "Until changed, tariffs bind both carriers and shippers with the force of law." *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U. S. 516, 520; *Crancer* v. *Lowden,* 315 U. S. 631, 635.

It is under Uniform Freight Classification No. 4, the bill of lading, and the Rules of the Perishable Protective Tariff that we must decide this case.

The jury found that petitioner "performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions." The jury, however, refused to find that the damage was caused by "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." Judgment was entered for the shipper and this Court now affirms the judgment of the Texas Supreme Court.

I would reverse. In my opinion the Court should hold that a carrier of perishables overcomes the shipper's prima facie case when he demonstrates, as here,[1] that the nature of the damage is spoilage and decay and that he performed the *protective services ordered and paid for by the shipper* and all other duties in a reasonably prudent manner. Any other rule nullifies the provisions of the tariff which permit the shipper to select from numerous protective services and pay the corresponding charge, and which provide that "[t]he duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . . ."

The protective service ordered by respondent when the melons were delivered to petitioner for shipment was "standard refrigeration to destination." An expert witness explained that " 'standard refrigeration to destination' . . . means that the car will be reiced to capacity at all regular icing stations." [2] Generally, the services avail-

[1] Respondent has not seriously contended that such things as "Bacterial Soft Rot, generally in advanced stages" and "discoloration" are other than conditions of deterioration, spoilage and decay. The principal dispute at the trial centered around whether or not the shipper had in fact performed the requested services in a reasonably prudent manner, with respondent, more specifically, attempting to indicate that perhaps the refrigeration equipment was not functioning properly.

[2] The same expert witness discussed the various kinds of protective service available:

"Q. . . . [W]ho dictates or orders or determines what type of service shall be furnished on a refrigerator car on a particular shipment?

"A. The shipper.

"Q. And are there various kinds of services that he can select that he can direct the railroad to furnish?

"A. Yes. The Perishable Tariff has—I wouldn't know just how many, but perhaps a hundred different classes of service, starting with ventilation, which is no ice at all. He may ship with one icing

able for fresh fruits, vegetables, berries or melons include refrigeration with salt; standard refrigeration; initial icing only; initial icing with limited number of re-icings; half-stage refrigeration; top or body icing; cooling in car; fumigation; ventilation; and protection against cold (heater service). The "[c]harges published herein for protective service," says the tariff, "will be in addition to and independent of all freight rates . . . ." A shipper, in other words, by paying one charge gets one service and by paying a lesser charge gets a lesser service.

In the instant case, the melons were inspected at destination by the United States Department of Agriculture. The report said:

> "Condition: Generally hard to firm; white to cream color. In most samples 1 to 4 melons per crate, some none, average approximately 15% damaged by light to dark brown discoloration, some of which is sunken, occurring over ⅛ to ½ of surface. In most samples none, some 1 or 2 melons per crate, average approximately 3% decay, Bacterial Soft Rot, generally in advanced stages.
>
> "Grade: Now fails to grade U. S. No. 1 only account discoloration and decay."

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only, initial icing, Rule 240. He may start with two icings, three and four. With standard icing—which is icing at all regular icing stations—he, in addition to that, can specify salt, if he wants to, certain percentage of salt, which is supposed to step up the meltage and refrigeration. There are a hundred classes of service from which the shipper dictates what he thinks, in his opinion, will best protect his shipment."

Details on the numerous protective services available are contained in Perishable Protective Tariff 18, Local, Joint and Proportional Charges and Rules and Regulations Governing the Handling of Perishable Freight, National Perishable Freight Committee, I. C. C. 37 (1960).

The defects in the melons were described by an inspector for the Railroad Perishable Inspection Agency, an organization formed by an association of carriers: [3]

> "Well, light brown discoloration is actually a surface blemish of the melon. It's quite common to find that condition at destination markets, and we believe it's associated with immaturity. That is, if a melon is harvested a little bit immature during the grading and packing operation, it will get very slight abrasions, and then the surface will darken.
>
> . . . . .
>
> "Bacterial Soft Rot is a decay of—it's common decay found in many fruits and vegetables. It's caused by an organism, bacterial organism, and it's of field origin. The bacteria are commonly found on plant debris and that sort of thing, and it develops when the conditions of temperature and moisture are ripe for the development, bacteria-wise. You find it very commonly at destination on a great many fruits and vegetables.
>
> . . . . .
>
> "Well, the temperatures we have here would be favorable to retard that decay, because the lower the temperature you have, the more you are going to retard the development of Soft Rot.
>
> . . . . .

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[3] The only contradictory testimony came from respondent's office manager who, after stating on cross-examination that he would not attempt any opinions about "decay and sunken areas and discoloration or things like that," said on redirect examination:

"Q. Have you developed in your experience in this business over seventeen years a general knowledge of what causes the decay in some instances?

"A. Yes. Improper refrigeration, I would say."

> "It's my opinion that the decay originated at shipping point, either during the harvesting or the packing operation, and that the decay developed so that it was noticeable at destination."

The inherent weakness of perishable products and the owner's superior familiarity with them are reflected in Rules 130 and 135 of the Perishable Protective Tariff, which, as I have said, relate the charge to the protective service desired by the shipper. The necessary protective service varies greatly for conditions such as those enumerated in *Perishable Freight Investigation, supra,* at 468:

> Character of the commodity; variety of the same commodity; local climate; season when shipped; weather variations from year to year and from day to day; length of haul; condition of the commodity; use to which it is to be put; package in which it is shipped; schedule of freight-train operation; precooling of shipments; method of loading; weight loaded; character of car furnished.

And see *Providence Fruit & Produce Exchange* v. *New York Central & Hudson R. Co.,* 33 I. C. C. 294, 295, 296.

Respondent could have selected any one of a wide variety of protective services, paying a higher or lower charge as the case may be. It was testified that respondent, for example, could have ordered a specified percentage of salt to be added to the icings so as to speed up the refrigeration process. Instead, for whatever reason, respondent ordered the cheaper service.

Notwithstanding this, the Court ignores the obvious difference between perishables and nonperishables and formulates a rule contrary to a valid tariff and the weight of authority.[4]

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[4] See *Mirski* v. *Chesapeake & Ohio R. Co.,* 44 Ill. App. 2d 48, 194 N. E. 2d 361; *Trautmann Bros. Co.* v. *Missouri Pac. R. Co.,* 312 F. 2d 102 (C. A. 5th Cir.); and *Larry's Sandwiches, Inc.,* v. *Pacific Elec. R. Co.,* 318 F. 2d 690 (C. A. 9th Cir.).

As the Court of Appeals for the Ninth Circuit said, speaking through Judge Merrill: ". . . in the case of perishable goods the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions." *Larry's Sandwiches, Inc.*, v. *Pacific Electric R. Co.*, 318 F. 2d 690, 692–693.

In my opinion, the Court should recognize Uniform Freight Classification No. 4 and the Rules of the Perishable Protective Tariff as having the force of a statute, limiting liability to the service asked, paid for, and rendered. What we do today allows a shipper, under the guise of buying transportation service, to sell a car of produce to the railroad.

MERCER *v.* THERIOT.

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

No. 336. Argued April 22, 1964.—Decided May 4, 1964.

The Court of Appeals, for insufficiency of evidence and prejudicial errors, reversed a judgment for petitioner in a wrongful death action brought in a federal District Court, where jurisdiction was based on diversity of citizenship and amount in controversy, and remanded the case to the District Court with instructions for entry of judgment for respondent, or for a new trial if petitioner could show that on another trial there would be sufficiently probative evidence to warrant submission of the case to the jury. The District Court on remand denied petitioner's motion for a new trial, holding that the additional evidence would be inadmissible under the hearsay rule; and the Court of Appeals affirmed. *Held:*

1. This Court upon review of the second judgment may consider all the substantial federal questions determined in the earlier stages of the litigation. P. 153.

2. The evidence was sufficient under any appropriate standard, state or federal, to support the jury's verdict and no errors affecting substantial justice occurred at the trial. Pp. 154–156.

316 F. 2d 635, reversed and remanded.

H. Alva Brumfield argued the cause for petitioner. With him on the brief was *Sylvia Roberts.*

Stanley E. Loeb argued the cause and filed a brief for respondent.

PER CURIAM.

Petitioner brought a wrongful death action against respondent in the United States District Court for the Eastern District of Louisiana. Jurisdiction was based on diversity of citizenship and amount in controversy. The jury returned a verdict for petitioner in the amount of

$25,000, and the trial court denied respondent's motions for a new trial and for judgment notwithstanding the verdict.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit reversed the judgment. The court held that the evidence was insufficient to sustain the verdict of the jury and remanded the case to the District Court "with directions to enter a judgment for the defendant unless plaintiff . . . makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." 262 F. 2d 754, 761. The court also held that there were prejudicial errors in the conduct of the trial which would have required a new trial even if there had been sufficient evidence. 262 F. 2d, at 758–759. At that stage in the litigation, this Court denied a petition for a writ of certiorari. 359 U. S. 983.

Petitioner then submitted to the District Court additional evidence in support of a motion for a new trial. The district judge, regarding himself bound by the ruling of the Court of Appeals that the evidence adduced at trial was insufficient, denied the motion on the ground that the additional "evidence, while persuasive, would be inadmissible in a new trial under the hearsay rule." The Court of Appeals sitting *en banc,* over the dissent of four judges, affirmed the denial of a new trial. 316 F. 2d 635. Petitioner then sought, and we granted, a writ of certiorari. 375 U. S. 920.

We now "consider all of the substantial federal questions determined in the earlier stages of the litigation . . . ," *Reece* v. *Georgia,* 350 U. S. 85, 87, for it is settled that we may consider questions raised on the first appeal, as well as "those that were before the Court of Appeals upon the second appeal." *Hamilton-Brown*

Shoe Co. v. *Wolf Bros. & Co.*, 240 U. S. 251, 257. Cf. *Urie* v. *Thompson*, 337 U. S. 163, 171–173; *Messenger* v. *Anderson*, 225 U. S. 436, 444.

We consider first the alleged errors in the conduct of the trial. The Court of Appeals deemed the trial court's instruction regarding circumstantial evidence to be "highly prejudicial error" because it included a statement that "[t]he testimony of all of the witnesses for the plaintiff has made out what we call in law a circumstantial case . . . ." 262 F. 2d, at 758. But as soon as this was called to the court's attention, the following instruction was given:

> "What I meant to say was that the witnesses for the Plaintiff . . . have sought to make out . . . through their evidence a circumstantial case. The question as to whether or not the case of the Plaintiff has been proved is for the Jury to determine."

There was no objection to this re-instruction. We conclude that it properly stated the law and that it would have remedied any erroneous impression the jury may have received from the first instruction. The Court of Appeals also held that the trial judge committed a "grievous" error by permitting the introduction of certain hearsay evidence. *Id.*, at 757. Counsel for the respondent did not object to this evidence but in fact elicited the same evidence in his examination of the witness. On this record, the admission of the evidence cannot be deemed a deprivation of "substantial justice." Rule 61, Fed. Rules Civ. Proc. Finally, the Court of Appeals held that the inflammatory nature of the opening statement of petitioner's counsel required a new trial. Counsel told the jury that he would establish that respondent "was a hit-and-run driver," with "a complete disregard for . . . life." *Id.*, at 758. In the context of this case, however,

those remarks do not seem significantly outside the bounds of permissible advocacy. If respondent knowingly struck the deceased, then he was a hit-and-run driver with little regard for human life, for it was undisputed that the driver of the automobile that hit the decedent did not stop to render aid or to report the accident.

Our examination of the trial record reveals not only that there were no errors affecting substantial justice, but also that the trial judge conducted the trial with scrupulous regard for the litigants' rights.

We must consider next the sufficiency of the evidence adduced at trial. Our examination of the record indicates that the jury could reasonably have found the following facts: Decedent's body was discovered on an island on the right side of a black top road; the body was two or three feet off the edge of the road; near the body tire marks ran off the road for some distance; death resulted from a violent blow; the time of death was fixed at about 7:30 p. m.; the road was the only highway leading from the island to the respondent's home; the respondent had spent that afternoon at a bar on the island and had consumed between 8 and 10 drinks of whiskey; he left the bar at about 7:30 p. m. and drove toward his home on the road on which decedent was killed; at the time of decedent's death, few people were traveling that highway; on the day following the accident respondent's automobile was without a right headlight rim and bore marks of a recent blow to the right headlight and to the right front of the hood; some blue coloring which "had an appearance that it could have been done by clothing . . ." was on the hood; the decedent was wearing blue coveralls when he was struck; a towel with red stains which appeared to be blood was found concealed between the driver's seat and seat cover; particles which looked like hair were found underneath

the right side of the car; and the automobile was covered with a white substance which appeared to be a film of soap left after a washing.

We believe that the Court of Appeals erred in concluding that this evidence was insufficient to support the jury verdict. The evidence was sufficient under any standard which might be appropriate—state or federal. See *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 444–445. The jury's verdict, therefore, should not have been disturbed. Accordingly, the case is reversed and remanded to the District Court with instructions to enter judgment in accordance with the jury's verdict.*

It is so ordered.

MR. JUSTICE HARLAN, dissenting.

Certiorari was granted in this case because it appeared that the question was presented whether a state or federal standard determines the sufficiency of the evidence to support a jury verdict in cases in the district courts where jurisdiction is based on diversity of citizenship. That question was left undecided in *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 444–445. The Court having now concluded that the question is not before it, I believe that the writ of certiorari should be dismissed as improvidently granted. Nothing remains in the case, as the Court decides it, except the question whether the evidence was sufficient to support the verdict and questions concerning rulings of the trial judge. As to none of these questions can the Court do more than second-guess, one step further removed from the actual events, the District Court and the Court of Appeals. Accordingly, the case, as it revealed itself at argument, was not appropriate for review by this Court. See my opinion in *Ferguson* v.

*Our disposition of the case makes it unnecessary for us to consider the correctness of the trial court's disposition of the motion for a new trial.

Moore-McCormack Lines, Inc., 352 U. S. 521, 559, and the dissenting opinion of Mr. Justice Frankfurter in the same case, *id.*, at 524. The views there expressed apply with particular force in a diversity case, where the cause of action is founded on state rather than federal law. See the opinion of Mr. Justice Frankfurter, dissenting in *Gibson* v. *Phillips Petroleum Co.*, 352 U. S. 874.

On the merits, I think it is not appropriately part of the business of this Court to substitute its judgment for that of the Court of Appeals, either on the issue of sufficiency of the evidence or on the gravity of the trial errors which led the Court of Appeals to conclude that the respondent had been "deprived . . . of his day in court" and had been convicted "on rumor and hearsay, not of negligent fault but of bribery and corruption." 262 F. 2d 754, 759.

CLINTON *v.* VIRGINIA.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 294. Argued April 27, 1964.—Decided May 4, 1964.

204 Va. 275, 130 S. E. 2d 437, reversed.

Calvin H. Childress argued the cause and filed a brief for petitioner.

D. Gardiner Tyler, Assistant Attorney General of Virginia, argued the cause for respondent. With him on the briefs was *Robert Y. Button,* Attorney General of Virginia.

PER CURIAM.

The motion to strike the supplemental brief on behalf of the respondent is denied. The judgment is reversed. *Silverman* v. *United States,* 365 U. S. 505; *Ker* v. *California,* 374 U. S. 23.

MR. JUSTICE CLARK, concurring: Since the Court finds that the "spiked" mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass thereof, I join in the judgment.

MR. JUSTICE WHITE dissents.

Per Curiam.

WILLIS SHAW FROZEN EXPRESS, INC., *v.* UNITED STATES ET AL.

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

No. 201. Argued April 23, 27, 1964.—Decided May 4, 1964.

The District Court affirmed an order of the Interstate Commerce Commission (ICC) granting appellant's common carrier application under the grandfather clause of the Transportation Act of 1958 to transport certain frozen seasonal agricultural products but substantially curtailing its prior operations. *Held:* The ICC should reconsider in light of the carrier's status and ability to perform, and the transportation characteristics and marketing pattern of the products. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 482–489.

Reversed and remanded.

A. Alvis Layne argued the cause for appellant. With him on the brief was *John H. Joyce.*

Stephen J. Pollak argued the cause for the United States et al. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Robert W. Ginnane* and *Fritz R. Kahn.*

PER CURIAM.

Appellant applied to the Interstate Commerce Commission under the grandfather clause of the Transportation Act of 1958, § 7 (c), 72 Stat. 573, 49 U. S. C. § 303 (b)(6), to transport as a common carrier over irregular routes frozen fruits, berries, and vegetables, and frozen seafoods and poultry when transported with such frozen fruits, berries, and vegetables. The Commission granted a certificate which substantially curtailed appellant's prior operations. 89 M. C. C. 377. The District Court affirmed without opinion.

We think *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, requires reversal of the judgment and

a remand to the Commission for reconsideration in light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of appellant to perform the services. *Id.*, at 482–489.

Reversed and remanded.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE dissent, agreeing with the three-judge District Court that the Commission correctly employed the statutory standards prescribed by Congress. "The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission." *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480. See also *Alton R. Co.* v. *United States*, 315 U. S. 15, 22–23.

UNITED STATES *v.* CONTINENTAL OIL CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

No. 834. Decided May 4, 1964.

Judgment vacated and case remanded.

Solicitor General Cox, Assistant Attorney General Orrick and *Robert B. Hummel* for the United States.

David T. Searls and *A. T. Seymour* for appellee.

PER CURIAM.

The judgment is vacated and the case is remanded to the United States District Court for the District of New Mexico for a trial on the merits of the case. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464.

Separate Memorandum of MR. JUSTICE HARLAN.

This is an appeal by the Government in an antitrust case wherein the District Court entered summary judgment in favor of the defendant-appellee without opinion, findings of fact, or conclusions of law of any kind. The case is here on a typewritten record of some 2,000 pages, consisting of pleadings, briefs, depositions, exhibits, and the transcript of a pretrial conference. The district judge is now deceased.

The Court vacates the judgment below and remands the case for trial. Short of its being the law that the summary judgment procedure is wholly unavailable in a government antitrust case—a holding not before nor, as I understand matters, now made—I am unable to say that summary judgment was improvidently granted in this instance without making an examination of the entire record; certainly this disposition should not be made simply on the basis of the Government's statements

that triable issues of fact exist. To examine this large record without any illumination by the court below would place an intolerable burden on this Court.

In these circumstances I believe that the proper course is to vacate the judgment below and remand the case to the District Court, with leave to the defendant to renew its motion for summary judgment before another district judge. The Court's action, which deprives the defendant of that opportunity, seems to me unwarranted. If summary judgment were again granted, the District Court would be expected to furnish a statement of its reasons, including such findings of fact and conclusions of law as might be appropriate. Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 662 (concurring-dissenting opinion of HARLAN, J.).

BONTZ *v.* KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 758. Decided May 4, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 192 Kan. 158, 163, 386 P. 2d 201, 205.

Verne M. Laing for appellant.

William M. Ferguson, Attorney General of Kansas, and *Keith Sanborn* for appellee.

PER CURIAM.

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

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted.

SCHNEIDER *v.* RUSK, SECRETARY OF STATE.

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

No. 368. Argued April 2, 1964.—
Decided May 18, 1964.

Appellant, who was born in Germany, came to this country with her parents as a child and acquired derivative American citizenship. She lived abroad since graduation from college, became married to a German national, and, except for two visits back to this country, has lived in Germany for the past eight years. The State Department denied her a passport, certifying that she had lost her American citizenship under § 352 (a) (1) of the Immigration and Nationality Act of 1952, which provides that a naturalized citizen, with exceptions not material here, loses citizenship by continuous residence for three years in the country of origin. She thereupon sued in the District Court for a declaratory judgment that she is still an American citizen and has appealed from that court's adverse decision. *Held:* by a majority of this Court that § 352 (a) (1) is discriminatory and therefore violative of due process under the Fifth Amendment of the Constitution, since no restriction against the length of foreign residence applies to native-born citizens, though some members of that majority believe that Congress lacks constitutional power to effect involuntary divestiture of citizenship. Pp. 164–169.

218 F. Supp. 302, reversed.

Milton V. Freeman argued the cause for appellant. With him on the briefs were *Robert E. Herzstein, Horst Kurnik* and *Charles A. Reich.*

Bruce J. Terris argued the cause for appellee. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg.*

Jack Wasserman, David Carliner and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Immigration and Nationality Act of 1952, 66 Stat. 163, 269, 8 U. S. C. §§ 1101, 1484, provides by § 352:

> "(a) A person who has become a national by naturalization shall lose his nationality by—
>
> "(1) *having a continuous residence for three years* in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title,[1] whether such residence commenced before or after the effective date of this Act . . . ." (Italics added.)

Appellant, a German national by birth, came to this country with her parents when a small child, acquired derivative American citizenship at the age of 16 through her mother, and, after graduating from Smith College, went abroad for postgraduate work. In 1956 while in France she became engaged to a German national, returned here briefly, and departed for Germany, where she married and where she has resided ever since. Since her marriage she has returned to this country on two occasions for visits. Her husband is a lawyer in Cologne where appellant has been living. Two of her four sons, born in Germany, are dual nationals, having acquired American citizenship under § 301 (a)(7) of the 1952 Act. The American citizenship of the other two turns on this case. In 1959 the United States denied her a passport, the State Department certifying that she had lost her American citizenship under § 352 (a)(1), quoted above. Appellant sued for a declaratory judgment that she still is an American citizen. The District Court held against her, 218 F.

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[1] The exceptions relate, *inter alia*, to residence abroad in the employment of the United States and are not relevant here.

Supp. 302, and the case is here on appeal.[2] 375 U. S. 893.

The Solicitor General makes his case along the following lines.

Over a period of many years this Government has been seriously concerned by special problems engendered when naturalized citizens return for a long period to the countries of their former nationalities. It is upon this premise that the argument derives that Congress, through its power over foreign relations, has the power to deprive such citizens of their citizenship.

Other nations, it is said, frequently attempt to treat such persons as their own citizens, thus embroiling the United States in conflicts when it attempts to afford them protection. It is argued that expatriation is an alternative to withdrawal of diplomatic protection. It is also argued that Congress reasonably can protect against the tendency of three years' residence in a naturalized citizen's former homeland to weaken his or her allegiance to this country. The argument continues that it is not invidious discrimination for Congress to treat such naturalized citizens differently from the manner in which it treats native-born citizens and that Congress has the right to legislate with respect to the general class without regard to each factual violation. It is finally argued that Congress here, unlike the situation in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, was aiming only to regulate and not to punish, and that what Congress did had been deemed appropriate not only by this country but by many others and is in keeping with traditional American concepts of citizenship.

We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the "natural born" citizen is eligible to be President. Art. II, § 1.

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[2] For other aspects of the case see 372 U. S. 224.

While the rights of citizenship of the native born derive from § 1 of the Fourteenth Amendment and the rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress, the latter, apart from the exception noted, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." *Osborn* v. *Bank of United States,* 9 Wheat. 738, 827. And see *Luria* v. *United States,* 231 U. S. 9, 22; *United States* v. *MacIntosh,* 283 U. S. 605, 624; *Knauer* v. *United States,* 328 U. S. 654, 658.

Views of the Justices have varied when it comes to the problem of expatriation.

There is one view that the power of Congress to take away citizenship for activities of the citizen is nonexistent absent expatriation by the voluntary renunciation of nationality and allegiance. See *Perez* v. *Brownell,* 356 U. S. 44, 79 (dissenting opinion of JUSTICES BLACK and DOUGLAS); *Trop* v. *Dulles,* 356 U. S. 86 (opinion by CHIEF JUSTICE WARREN). That view has not yet commanded a majority of the entire Court. Hence we are faced with the issue presented and decided in *Perez* v. *Brownell, supra, i. e.,* whether the present Act violates due process. That in turn comes to the question put in the following words in *Perez:*

> "Is the means, withdrawal of citizenship, reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations . . . ?" 356 U. S., at 60.

In that case, where an American citizen voted in a foreign election, the answer was in the affirmative. In the present case the question is whether the same answer should be given merely because the naturalized citizen lived in her former homeland continuously for three years. We think not.

Speaking of the provision in the Nationality Act of 1940, which was the predecessor of § 352 (a)(1), Chairman Dickstein of the House said that the bill would "relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose." 86 Cong. Rec. 11944. And the Senate Report on the 1940 bill stated:

> "These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State nominal citizens of this country who are abroad but whose real interests, as shown by the conditions of their foreign stay, are not in this country." S. Rep. No. 2150, 76th Cong., 3d Sess., p. 4.

As stated by Judge Fahy, dissenting below, such legislation, touching as it does on the "most precious right" of citizenship (*Kennedy* v. *Mendoza-Martinez,* 372 U. S., at 159), would have to be justified under the foreign relations power "by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived." 218 F. Supp. 302, 320.

In *Kennedy* v. *Mendoza-Martinez, supra,* a divided Court held that it was beyond the power of Congress to deprive an American of his citizenship automatically and without any prior judicial or administrative proceedings because he left the United States in time of war to evade or avoid training or service in the Armed Forces. The Court held that it was an unconstitutional use of

congressional power because it took away citizenship as punishment for the offense of remaining outside the country to avoid military service, without, at the same time, affording him the procedural safeguards granted by the Fifth and Sixth Amendments. Yet even the dissenters, who felt that flight or absence to evade the duty of helping to defend the country in time of war amounted to manifest nonallegiance, made a reservation. JUSTICE STEWART stated:

> "Previous decisions have suggested that congressional exercise of the power to expatriate may be subject to a further constitutional restriction—a limitation upon the kind of activity which may be made the basis of denationalization. Withdrawal of citizenship is a drastic measure. Moreover, the power to expatriate endows government with authority to define and to limit the society which it represents and to which it is responsible.
>
> "This Court has never held that Congress' power to expatriate may be used unsparingly in every area in which it has general power to act. Our previous decisions upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country." 372 U. S., at 214.

This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe,* 347 U. S. 497, 499. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live

and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons.

Reversed.

MR. JUSTICE BRENNAN took no part in the decision of this case.

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

The appellant, a derivative citizen since 1950, has voluntarily absented herself from the United States for over a decade, living in her native Germany for the last eight years. In 1956 she married a German citizen there; she has since borne four (German national) sons there, and now says she has no intention to return to the United States.

I, too, sympathize with the appellant for the dilemma in which she has placed herself through her marriage to a foreign citizen. But the policy of our country is involved here, not just her personal consideration. I cannot say that Congress made her a second-class citizen by enacting § 352 (a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U. S. C. § 1484, placing a "badge of lack of allegiance" upon her because she chose to live permanently abroad in her native land. If there is such a citizenship or badge, appellant, not the Congress, created it through her own actions. All that Congress did was face up to problems of the highest national importance by authorizing expatriation, the only adequate remedy. Appellant, with her eyes open to the result, chose by her action to renounce her derivative citizenship. Our cases have so interpreted such action for half

a century. *Mackenzie* v. *Hare,* 239 U. S. 299 (1915). As applied to her I cannot say, as does the Court, that the command of Congress in § 352 (a)(1) is discriminatory and, therefore, violative of due process. *Mackenzie* decided just the contrary, upholding a statute which provided that, although an American male did not suffer loss of citizenship during marriage to a foreign citizen, an American woman did. Here the appellant had statutory notice of the requirement; she voluntarily acted in disregard of it for eight years, intends to continue to do so, and in my view has therefore renounced her citizenship.

I.

There is nothing new about the practice of expatriating naturalized citizens who voluntarily return to their native lands to reside. It has a long-established and widely accepted history. Our concept of citizenship was inherited from England and, accordingly, was based on the principle that rights conferred by naturalization were subject to the conditions reserved in the grant. See *Calvin's Case,* 7 Co. Rep. 1 a, 77 Eng. Rep. 377 (1608). It was with this in mind that the Founders incorporated Art. I, § 8, cl. 4, into our Constitution. This clause grants Congress the power "[t]o establish an uniform Rule of Naturalization . . . ." And, as Madison himself said, these words meant that the "Natl. Legislre. is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of Citizenship . . . ." II Farrand, The Records of the Federal Convention of 1787, 235 (1911). This was confirmed during the debate in the First Congress on the first naturalization bill when Alexander White of Virginia suggested that if the residence requirement were stricken, "another clause ought to be added, depriving [naturalized] persons of the privilege of citizenship, who left the country and staid abroad for a given

length of time." 1 Annals of Congress 1110 (1790). James Madison answered:

> "It may be a question of some nicety, how far we can make our law to admit an alien to the right of citizenship, step by step; but there is no doubt we may, and ought to require residence as an essential." *Id.*, at 1112.

The records show not only that it was the consensus of the members of the House that step-by-step naturalization was permissible but also that not a word was spoken against the Madison statement that required residence was constitutionally allowed. This debate points up the fact that distinctions between naturalized and native-born citizens were uppermost in the minds of the Framers of the Constitution.

The right to renounce citizenship acquired at birth was a serious question during the War of 1812. In 1814 the Government, through Secretary of State Monroe, circulated an anonymous pamphlet, A Treatise on Expatriation, which declared that "[e]xpatriation . . . is nothing more than emigration, with an intention to settle permanently abroad." At 21. Since that time it has traditionally been our policy to withdraw diplomatic protection from naturalized citizens domiciled in their native states. See, *e. g.*, letter from Secretary of State Adams to Shaler (1818), III Moore, Digest of International Law 735–736 (1906); letter from United States Minister to Prussia Wheaton to Knoche (1840), S. Exec. Doc. No. 38, 36th Cong., 1st Sess., 6–7; letter from Secretary of State Fish to Wing (1871), II Wharton, Digest of International Law of the United States 361–362 (2d ed. 1887); communication from Secretary of State Hay to American diplomats (1899), III Moore, *supra*, at 950. During all this period the United States protected all citizens abroad except naturalized ones residing in their

native lands. In 1868 the Bancroft treaty was negotiated with the North German Confederation. It provided that each country would recognize naturalization of its native-born citizens by the other country. It further provided that "[i]f a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization . . . [and] [t]he intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country." 15 Stat. 615, 616–617. The United States has similar rights under existing treaties with 20 countries. All of these rights will be stricken by the decision today.

In the late nineteenth century the Government adopted a practice of informing naturalized citizens residing in their native lands without intent to return that they had expatriated themselves. The doctrine underlying this procedure has since been followed on several occasions by commissions arbitrating the claims of American citizens against foreign governments. See III Moore, History and Digest of International Arbitrations 2562–2572, 2579–2581 (1898).

As early as 1863 President Lincoln had suggested to Congress that it "might be advisable to fix a limit beyond which no citizen of the United States residing abroad may claim the interposition of his Government." 7 Messages and Papers of the Presidents 3382 (Richardson ed. 1897). However, no legislation was enacted in the nineteenth century. In 1906, at the request of Congress, Secretary of State Elihu Root appointed a "citizenship board" to consider this and other related matters. The Board's report stated:

> "Expressed renunciation of American citizenship is, however, extremely rare; but the class of Americans who separate themselves from the United States

> and live within the jurisdiction of foreign countries is becoming larger every year, and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers." H. Doc. No. 326, 59th Cong., 2d Sess., 25.

The Board's recommendations led to the enactment of the Nationality Act of 1907, 34 Stat. 1228. That Act included a rebuttable presumption that residence for two years in the foreign state from which a naturalized American citizen came constituted a forfeiture of American citizenship. This provision proved difficult to administer and in 1933 President Roosevelt appointed a cabinet committee (the Secretary of State, the Attorney General and the Secretary of Labor) to review the nationality laws. The committee issued an extensive report and draft statute which provided for expatriation of naturalized citizens who resided continuously in their country of origin for three years. This provision was incorporated into the Nationality Act of 1940, 54 Stat. 1137, 1170, and was carried over into the Immigration and Nationality Act of 1952, modified so as not to require "uninterrupted physical presence in a foreign state . . . ." 66 Stat. 163, 170, 269.

II.

This historical background points up the international difficulties which led to the adoption of the policy announced in § 352 (a)(1). Residence of United States nationals abroad has always been the source of much international friction and the ruling today will expand these difficulties tremendously. In 1962 alone 919 persons were expatriated on the basis of residence in countries of former nationality. The action of the Court in voiding these expatriations will cause no end of difficulties because thousands of persons living throughout the world will come under the broad sweep of the Court's

decision. It is estimated that several thousand of these American expatriates reside in iron curtain countries alone. Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. Res. 49, 85th Cong., 1st Sess., 133. The protection of American citizens abroad has always been a most sensitive matter and continues to be so today. This is especially true in Belgium, Greece, France, Iran, Israel, Switzerland and Turkey, because of their refusal to recognize the expatriation of their nationals who acquire American citizenship. The dissension that springs up in some of these areas adds immeasurably to the difficulty.

Nor is the United States alone in making residence abroad cause for expatriation. Although the number of years of foreign residence varies from 2 to 10 years, 29 countries, including the United Kingdom and 7 Commonwealth countries, expatriate naturalized citizens residing abroad. Only four—Czechoslovakia, Poland, Afghanistan, and Yugoslavia—apply expatriation to both native-born and naturalized citizens. Even the United Nations sanctions different treatment for naturalized and native-born citizens; Article 7 of the United Nations Convention on the Reduction of Statelessness provides that naturalized citizens who reside abroad for seven years may be expatriated unless they declare their intent to retain citizenship.

III.

The decisions of this Court have consistently approved the power of Congress to enact statutes similar to the one here stricken down. Beginning with *Mackenzie* v. *Hare, supra,* where the Court sustained a statute suspending during coverture the citizenship of a native-born American woman who married a foreigner, the Court has invariably upheld expatriation when there is a concurrence on the part of the citizen. In *Mackenzie* exactly the

same argument was made that appellant urges here. Indeed, the Court uses the same opinion in this case to strike down § 352 (a)(1) as was urged in *Mackenzie,* namely, *Osborn* v. *Bank of the United States,* 9 Wheat. 738 (1824), where Chief Justice Marshall remarked: "The constitution does not authorize Congress to enlarge or abridge . . . [the] rights" of citizens. At 827. But the Court in *Mackenzie,* without dissent on the merits, held:

> "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into [marriage], with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded." At 311–312.

And later in *Savorgnan* v. *United States,* 338 U. S. 491 (1950), we approved the doctrine of *Mackenzie, supra.* Six years ago in *Perez* v. *Brownell,* 356 U. S. 44 (1958), we held that an American citizen voting in a foreign election expatriated himself under § 401 of the Nationality Act of 1940, 54 Stat. 1137. We again cited *Mackenzie, supra,* with approval, describing the central issue in expatriation cases

> "as importing not only something less than complete and unswerving allegiance to the United States but

> also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." At 61.

The present case certainly meets this test. Appellant's prolonged residence in her former homeland, the allegiance her husband and children owe to it, and her intention not to return to the United States all show some measure of allegiance to Germany. At the very least, these factors show much less than "unswerving allegiance to the United States" and are "inconsistent with American citizenship." Indeed, in this respect the instant case is much stronger than *Mackenzie, supra.*

The Court bases its decision on the fact that § 352 (a)(1) applies only to naturalized, not native-born, citizens. It says this results in a discrimination in violation of the Due Process Clause of the Fifth Amendment. I think that in so doing the Court overspeaks itself. If Congress has the power to expatriate all citizens, as the Court's position implies, it would certainly have like power to enact a more narrowly confined statute aimed only at those citizens whose presence in their native homelands can embroil the United States in conflict with such countries. As the history shows, the naturalized citizen who returns to his homeland is often the cause of the difficulties. This fact is recognized by the policy of this country and of 25 others and by a United Nations Convention as well. Through § 352 (a)(1), Congress has restricted its remedy to correction of the precise situations which have caused the problem. In adopting the classification "naturalized citizen" has the Congress acted with reason? Many times this Court has upheld classifications of more significance. *Hirabayashi* v. *United States,* 320 U. S. 81 (1943) (curfew imposed on persons of Japanese ancestry, regardless of citizenship, in military areas during war); *Heim* v. *McCall,* 239 U. S. 175 (1915) (aliens not employable on public works projects); *Ter-*

race v. *Thompson,* 263 U. S. 197 (1923) and *Porterfield* v. *Webb,* 263 U. S. 225 (1923) (aliens who were ineligible for citizenship not permitted to hold land for farming or other purposes); *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392 (1927) (aliens not permitted to conduct pool and billiard rooms). As in *Mackenzie* v. *Hare, supra,* these cases were sustained on the basis that the classification was reasonably devised to meet a demonstrated need. Distinctions between native-born and naturalized citizens in connection with foreign residence are drawn in the Constitution itself. Only a native-born may become President, Art. II, § 1. A naturalized citizen must wait seven years after he obtains his citizenship before he is eligible to sit in the House, Art. I, § 2. For the Senate, the waiting period is nine years, Art. I, § 3. Do these provisions create a second-class citizenship or place a "badge of lack of allegiance" on those citizens? It has never been thought so until today. As I have shown, in the debate in the First Congress on the first naturalization bill, it was proposed to expatriate naturalized citizens who resided abroad. During the entire nineteenth century only naturalized citizens were, as a general rule, expatriated on the grounds of foreign residence, and for nearly 100 years our naturalization treaties have contained provisions authorizing the expatriation of naturalized citizens residing in their native lands. Indeed, during the consideration of the 1952 Act, not a single witness specifically objected to § 352 (a)(1). Even the Americans for Democratic Action suggested that it was a reasonable regulation. It is a little late for the Court to decide in the face of this mountain of evidence that the section has suddenly become so invidious that it must be stricken as arbitrary under the Due Process Clause.

Kennedy v. *Mendoza-Martinez,* 372 U. S. 144 (1963), is not apposite. There expatriation for the offense of remaining outside the country to avoid military service

was held to constitute punishment without a criminal trial. The majority here indicates that a reservation made by MR. JUSTICE STEWART in his dissent in that case supports its present view. I think not. Indeed, my Brother STEWART's conclusion that our cases "upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country," at 214, fits this case like a glove. Here appellant has been away from the country for 10 years, has married a foreign citizen, has continuously lived with him in her native land for eight years, has borne four sons who are German nationals, and admits that she has no intention to return to this country. She wishes to retain her citizenship on a standby basis for her own benefit in the event of trouble. There is no constitutional necessity for Congress to accede to her wish.

I dissent.

CLAY *v.* SUN INSURANCE OFFICE, LTD.

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

No. 470. Argued April 28, 1964.—Decided May 18, 1964.

Petitioner, a few months after purchasing from respondent insurance company in the State where he then resided a personal property floater insurance policy, which barred a claim thereunder twelve months after discovery of loss, moved to and became a resident of the forum State, which permitted claims up to five years after loss notwithstanding contract provisions requiring earlier legal action. Invoking diversity jurisdiction, petitioner brought this action in the Federal District Court of the forum State to recover damages under the policy more than a year after discovery of the loss which occurred in that State. After certification to and resolution by the State Supreme Court of certain local law questions following remand by this Court, the Court of Appeals held that application to the contract of the five-year statute of limitations would violate due process. *Held:* Application of the statute of limitations of the forum State is consistent with due process and full faith and credit requirements, where the activities of the parties to an ambulatory personal property insurance contract were ample within the forum State; the policy made no provision that the law of the state of contract would govern; respondent insurance company had knowledge when it sold the policy that the petitioner might move his property anywhere; and it knew that he had moved to the forum State, where respondent was also licensed to do business and must have known that it could be sued. Pp. 180–183.

319 F. 2d 505, reversed.

Paschal C. Reese argued the cause and filed briefs for petitioner.

Bert Cotton argued the cause for respondent. With him on the brief were *Maurice Mound* and *Hortense Mound.*

James T. Carlisle, Assistant Attorney General of Florida, *pro hac vice,* by special leave of Court, argued the cause for the State of Florida, as *amicus curiae,* urging

reversal. With him on the brief were *James W. Kynes,* Attorney General of Florida, and *Robert J. Kelly,* First Assistant Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, which invoked the diversity jurisdiction of the Federal District Court in a suit to recover damages under an insurance policy, was here before. 363 U. S. 207. The initial question then as now is whether the 12-month-suit clause in the policy governs, in which event the claim is barred, or whether Florida's statutes [1] nullifying such clauses if they require suit to be filed in less than five years are applicable and valid, in which event the suit is timely. The policy was purchased by petitioner in Illinois while he was a citizen and resident of that State. Respondent, a British company, is licensed to do business in Illinois, Florida, and several other States.

A few months after purchasing the policy, petitioner moved to Florida and became a citizen and resident of that State; and it was in Florida that the loss occurred two years later. When the case reached here, the majority view was that the underlying constitutional question—whether consistently with due process, Florida could apply its five-year statute to this Illinois contract—should not be reached until the Florida Supreme Court, through its certificate procedure,[2] had construed that statute and resolved another local law question.[3] On remand the Court of Appeals certified the two questions to the Florida Supreme Court, which answered both questions in

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[1] Fla. Stat. Ann. (1960) §§ 95.03, 95.11 (3).

[2] Fla. Stat. Ann. (1957) § 25.031; Fla. App. Rule 4.61. See *Sun Ins. Office, Ltd.,* v. *Clay,* 133 So. 2d 735. For other instances of our use of that certificate procedure see *Dresner* v. *Tallahassee,* 375 U. S. 136, and *Aldrich* v. *Aldrich,* 375 U. S. 75, 249.

[3] The meaning of an "all risks" clause.

petitioner's favor. 133 So. 2d 735. Thereafter the Court of Appeals held that it was not compatible with due process for Florida to apply its five-year statute to this contract and that judgment should be entered for respondent. 319 F. 2d 505. We again granted certiorari. 375 U. S. 929.

While there are Illinois cases indicating that parties may contract—as here—for a shorter period of limitations than is provided by the Illinois statute,[4] we are referred to no Illinois decision extending that rule into other States whenever claims on Illinois contracts are sought to be enforced there. We see no difficulty whatever under either the Full Faith and Credit Clause or the Due Process Clause. We deal with an ambulatory contract on which suit might be brought in any one of several States. Normally, as the Court held in *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n,* 306 U. S. 493, 502, a State having jurisdiction over a claim deriving from an out-of-state employment contract need not substitute the conflicting statute of the other State (workmen's compensation) for its own statute (workmen's compensation)—where the employee was injured in the course of his employment while temporarily in the latter State. We followed the same route in *Watson* v. *Employers Liability Assurance Corp.,* 348 U. S. 66, where we upheld a state statute allowing direct actions against liability insurance companies in the State of the forum, even though a clause in the contract, binding in the State where it was made, prohibited direct action against the insurer until final determination of the obligation of the insured.

The Court of Appeals relied in the main on *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U. S. 143, and *Home Ins. Co.* v. *Dick,* 281 U. S. 397. Those were cases where the activities in the State of the

[4] See cases cited in 363 U. S., at 217, note 12.

forum were thought to be too slight and too casual, as in the *Delta & Pine Land Co.* case (292 U. S., at 150), to make the application of local law consistent with due process, or wholly lacking, as in the *Dick* case.[5] No deficiency of that order is present here. As MR. JUSTICE BLACK, dissenting, said when this case was here before:

> "Insurance companies, like other contractors, do not confine their contractual activities and obligations within state boundaries. They sell to customers who are promised protection in States far away from the place where the contract is made. In this very case the policy was sold to Clay with knowledge that he could take his property anywhere in the world he saw fit without losing the protection of his insurance. In fact, his contract was described on its face as a 'Personal Property Floater Policy (World Wide).' The contract did not even attempt to provide that the law of Illinois would govern when suits were filed anywhere else in the country. Shortly after the contract was made, Clay moved to Florida and there he lived for several years. His insured property was there all that time. The company knew this fact. Particularly since the company was licensed to do business in Florida, it must have known it might be sued there . . . ." 363 U. S., at 221.

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[5] ". . . [N]othing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico." 281 U. S., at 408.

Order of United Commercial Travelers v. *Wolfe*, 331 U. S. 586, involved a six-month-suit clause; but it is a highly specialized decision dealing with unique facts—a suit on an insurance policy issued by an Ohio fraternal society, incorporating its constitution and by-laws, and involving what the Court called the "indivisible unity" of the fraternal society. *Id.*, at 606. In that case the additional time afforded by the statute of limitations of South Dakota, where the case was tried, was not allowed to be applied to the contract. We do not extend that rule nor apply it here, for Florida has ample contacts with the present transaction and the parties to satisfy any conceivable requirement of full faith and credit or of due process.

Reversed.[6]

[6] A motion to strike a brief *amicus* filed by Florida is denied.

PARDEN ET AL. *v.* TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT ET AL.

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

No. 157. Argued February 26–27, 1964.—Decided May 18, 1964.

Operation of a common carrier railroad in interstate commerce by a State constituted a waiver of its sovereign immunity and consent to a suit brought in a federal court by employees of the railroad under the Federal Employers' Liability Act. Pp. 184–198.

311 F. 2d 727, reversed.

Al G. Rives argued the cause for petitioners. With him on the briefs was *Timothy M. Conway, Jr.*

Willis C. Darby, Jr. argued the cause for respondents. With him on the brief was *Richmond M. Flowers*, Attorney General of Alabama.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether a State that owns and operates a railroad in interstate commerce may successfully plead sovereign immunity in a federal-court suit brought against the railroad by its employee under the Federal Employers' Liability Act.

Petitioners, citizens of the State of Alabama, brought suit in the Federal District Court for the Southern District of Alabama against respondent Terminal Railway of the Alabama State Docks Department. They alleged that the Railway was a "common carrier by railroad . . . engaging in commerce between any of the several States" within the terms of the Federal Employers' Liability Act, 45 U. S. C. §§ 51–60, and sought damages under that Act for personal injuries sustained while employed by the

Railway. Respondent State of Alabama, appearing specially, moved to dismiss the action on the ground that the Railway was an agency of the State and the State had not waived its sovereign immunity from suit. The District Court granted the motion, and the Court of Appeals for the Fifth Circuit affirmed, 311 F. 2d 727. We granted certiorari, 375 U. S. 810. We reverse.

The Terminal Railway is wholly owned and operated by the State of Alabama through its State Docks Department, and has been since 1927. Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit under statutory authority authorizing it to operate "as though it were an ordinary common carrier." 1940 Code of Alabama (recompiled 1958), Tit. 38, § 17.[1] It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods in accordance with the Railway Labor Act, 45 U. S. C. § 151 *et seq.;* maintains its equipment in conformity with the Federal Safety Appliance Act, 45 U. S. C. § 1 *et seq.;* and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission. It is thus indisputably a common carrier by railroad engaging in interstate commerce.

Petitioners contend that it is consequently subject to this suit under the Federal Employers' Liability Act. That statute provides that "every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier

[1] See also Ala. Const. of 1901, amendment 116; 1940 Code of Ala. (recompiled 1958), Tit. 38, §§ 45 (14), (16).

in such commerce," and that "under this chapter an action may be brought in a district court of the United States . . . ." 45 U. S. C. §§ 51, 56. Respondents rely, as did the lower courts in dismissing the action, on sovereign immunity—the principle that a State may not be sued by an individual without its consent. Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama,[2] this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. *Hans* v. *Louisiana,* 134 U. S. 1; *Duhne* v. *New Jersey,* 251 U. S. 311; *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, 51; *Fitts* v. *McGhee,* 172 U. S. 516, 524. See also *Monaco* v. *Mississippi,* 292 U. S. 313. Nor is the State divested of its immunity "on the mere ground that the case is one arising under the Constitution or laws of the United States." *Hans* v. *Louisiana, supra,* 134 U. S., at 10; see *Duhne* v. *New Jersey, supra,* 251 U. S. 311; *Smith* v. *Reeves,* 178 U. S. 436, 447–449; *Ex parte New York,* 256 U. S. 490, 497–498. But the immunity may of course be waived; the State's freedom from suit without its consent does not protect it from a suit to which it has consented. *Clark* v. *Barnard,* 108 U. S. 436, 447; *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273, 284; *Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U. S. 275. We think Alabama has consented to the present suit.

This case is distinctly unlike *Hans* v. *Louisiana, supra,* where the action was a contractual one based on state bond coupons, and the plaintiff sought to invoke the

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[2] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

federal-question jurisdiction by alleging an impairment of the obligation of contract.[3] Such a suit on state debt obligations without the State's consent was precisely the "evil" against which both the Eleventh Amendment and the expanded immunity doctrine of the *Hans* case were directed.[4] Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress. Two questions are thus presented: (1) Did Congress in enacting the FELA intend to subject a State to suit in these circumstances? (2) Did it have the power to do so, as against the State's claim of immunity?

We think that Congress, in making the FELA applicable to "every" common carrier by railroad in interstate commerce, meant what it said.[5] That congressional

[3] Of the other cases cited in which federal-question jurisdiction was asserted, *Smith* v. *Reeves*, 178 U. S. 436, and *Ex parte New York*, 256 U. S. 490, were also commonplace suits in which the federal question did not itself give rise to the alleged cause of action against the State but merely lurked in the background. The former case was a tax-refund suit brought by receivers of a corporation created by Congress, and the latter was an admiralty suit for property damage due to negligence. *Duhne* v. *New Jersey*, 251 U. S. 311, was a suit against the State to restrain it from enforcing the Eighteenth Amendment to the Federal Constitution, on the ground that the Amendment was invalid.

[4] See *Cohens* v. *Virginia*, 6 Wheat. 264, 406–407; *Hans* v. *Louisiana*, 134 U. S. 1, 12–13, 16; The Federalist, No. 81 (Hamilton) (Cooke ed. 1961), at 548–549; Irish and Prothro, The Politics of American Democracy, at 123 (1959), quoted in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 276, n. 1; Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 19 (1963).

[5] Although the language of the Act itself is clear enough, further indication of the congressional desire to cover all rail carriers that constitutionally could be covered is found in the legislative history, where the House Report states that "This bill relates to common carriers by railroad engaged in interstate . . . commerce . . . . It is

statutes regulating railroads in interstate commerce apply to such railroads whether they are state owned or privately owned is hardly a novel proposition; it has twice been clearly affirmed by this Court. In *United States* v. *California,* 297 U. S. 175, the question was whether the federal Safety Appliance Act, 45 U. S. C. §§ 2, 6, applicable by its terms to "any common carrier engaged in interstate commerce by railroad," applied to California's state-owned railroad. The Court unanimously held that it did.[6] In rejecting the argument that "the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them," the Court said, in terms equally pertinent here:

> "No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection." 297 U. S., at 185.

In *California* v. *Taylor,* 353 U. S. 553, the question was whether the Railway Labor Act, 45 U. S. C. § 151 *et seq.,* applicable by its terms to "any . . . carrier by railroad, subject to the Interstate Commerce Act," applied to the same California state railroad. The Court, again unanimous, held that it did.[7] After noting that "fed-

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intended in its scope to cover all commerce to which the regulative power of Congress extends." H. R. Rep. No. 1386, To Accompany H. R. 20310, 60th Cong., 1st Sess. (1908).

[6] The suit had been brought against the State not by an individual but by the United States, to recover the statutory penalty for violation of the Act.

[7] The suit was not against the State, but against members of the National Railroad Adjustment Board to compel them to take jurisdiction over the railroad under the Act. The Court left open, 353

eral statutes regulating interstate railroads, or their employees, have consistently been held to apply to publicly owned or operated railroads," although "none of these statutes referred specifically to public railroads as being within their coverage," 353 U. S., at 562, the Court stated:

> "The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included." 353 U. S., at 564.

As support for this proposition, the Court relied on three decisions involving the precise question presented by the instant case, in all of which it had been held that the FELA did authorize suit against a publicly owned railroad despite a claim of sovereign immunity. *Mathewes* v. *Port Utilities Comm'n,* 32 F. 2d 913 (D. C. E. D. S. C. 1929); *Higginbotham* v. *Public Belt R. Comm'n,* 192 La. 525, 188 So. 395 (1938); *Maurice* v. *State,* 43 Cal. App. 2d 270, 110 P. 2d 706 (Cal. Dist. C. A. 1941). Thus we could not read the FELA differently here without undermining the basis of our decision in *Taylor.*

Nor do we perceive any reason for reading it differently. The language of the FELA is at least as broad and all-embracing as that of the Safety Appliance Act or the Railway Labor Act, and its purpose is no less applicable to state railroads and their employees. If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal

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U. S., at 568, n. 16, the question whether the Eleventh Amendment would bar an employee of the railroad from enforcing an award by the Board in a suit against the State in a Federal District Court.

injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result. We therefore read the FELA as authorizing suit in a Federal District Court against state-owned as well as privately owned common carriers by railroad in interstate commerce.[8]

Respondents contend that Congress is without power, in view of the immunity doctrine, thus to subject a State to suit. We disagree. Congress enacted the FELA in the exercise of its constitutional power to regulate

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[8] Respondents make an argument based on the provision in 45 U. S. C. § 56 that the jurisdiction of the federal courts under the FELA "shall be concurrent with that of the courts of the several States." The contention is that since Alabama's courts would not have taken jurisdiction over this suit, the "concurrent" jurisdiction of the federal courts must be similarly limited. See *Hans* v. *Louisiana, supra,* 134 U. S., at 18–19; but see *Chisholm* v. *Georgia,* 2 Dall. 419; *South Dakota* v. *North Carolina,* 192 U. S. 286, 318. It is clear, however, that Congress did not intend this language to limit the jurisdiction of the federal courts, but merely to provide an alternative forum in the state courts. See *O'Donnell* v. *Elgin, J. & E. R. Co.,* 193 F. 2d 348, 352–353 (C. A. 7th Cir. 1951), cert. denied, 343 U. S. 956; *Trapp* v. *Baltimore & O. R. Co.,* 283 F. 655 (D. C. N. D. Ohio 1922); *Waltz* v. *Chesapeake & O. R. Co.,* 65 F. Supp. 913 (D. C. N. D. Ill. 1946).

interstate commerce. *Second Employers' Liability Cases,* 223 U. S. 1. While a State's immunity from suit by a citizen without its consent has been said to be rooted in "the inherent nature of sovereignty," *Great Northern Life Ins. Co.* v. *Read, supra,* 322 U. S. 47, 51,[9] the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.

> "This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." *Gibbons* v. *Ogden,* 9 Wheat. 1, 196–197.

Thus, as the Court said in *United States* v. *California, supra,* 297 U. S., at 184–185, a State's operation of a railroad in interstate commerce

> "must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . . [T]here is no such limitation upon the plenary power to regulate commerce [as there is upon the federal power to tax

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[9] See also The Federalist, No. 81 (Hamilton) (Cooke ed. 1961), at 548, quoted in *Hans* v. *Louisiana, supra,* 134 U. S., at 13. Compare Jaffe, note 4, *supra,* 77 Harv. L. Rev., at 3, 18.

> state instrumentalities]. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.[10]

Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overridden. It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit. "[B]y engaging in interstate commerce by rail, [the State] has subjected itself to the commerce power, and is liable for a violation of the . . . Act, as are other

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[10] "[B]y engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce." *New York* v. *United States,* 326 U. S. 572, 582 (opinion of Frankfurter, J.).

carriers . . . ." *United States* v. *California, supra,* 297 U. S., at 185; *California* v. *Taylor, supra,* 353 U. S., at 568. We thus agree that

> "[T]he state is liable, upon the theory that, by engaging in interstate commerce by rail, it has subjected itself to the commerce power of the federal government.
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> "It would be a strange situation, indeed, if the state could be held subject to the [Federal Safety Appliance Act] and liable for a violation thereof, and yet could not be sued without its express consent. The state, by engaging in interstate commerce, and thereby subjecting itself to the act, must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent." *Maurice* v. *State, supra,* 43 Cal. App. 2d, at 275, 277, 110 P. 2d, at 710–711.

Accord, *Higginbotham* v. *Public Belt R. Comm'n, supra,* 192 La. 525, 550–551, 188 So. 395, 403; *Mathewes* v. *Port Utilities Comm'n, supra.*[11]

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[11] Respondents argue that Congress could not "directly strip a state of its sovereign immunity from suit by a citizen," and hence cannot constitutionally impose a condition of amenability to suit upon the State's right to operate a railroad in interstate commerce. Reliance is placed on such cases as *Howard* v. *Illinois Central R. Co.,* 207 U. S. 463, 502–503, and *Frost & Frost Trucking Co.* v. *Railroad Comm'n of California,* 271 U. S. 583. In *Howard,* the Court held the first Federal Employers' Liability Act unconstitutional because it applied to intrastate as well as interstate commerce, rejecting the argument that "the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress." 207 U. S., at 502. In *Frost & Frost,* the Court held that since a private carrier could not constitutionally be converted against its will into a common

Respondents deny that Alabama's operation of the railroad constituted consent to suit. They argue that it had no such effect under state law, and that the State did not intend to waive its immunity or know that such a waiver would result. Reliance is placed on the Alabama Constitution of 1901, Art. I, Section 14 of which provides that "the State of Alabama shall never be made a defendant in any court of law or equity"; on state cases holding that neither the legislature nor a state officer has the power to waive the State's immunity; [12] and on cases in this Court to the effect that whether a State has waived its immunity depends upon its intention and is a question of state law

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carrier by mere legislative command, such a condition could not be attached to the carrier's right to use the highways. Both cases are clearly distinguishable because the condition sought to be imposed was deemed by the Court to fall outside the scope of valid regulation. Thus in *Howard* the statute's application to intrastate commerce was described as an attempt by Congress to exercise "power not delegated to it by the Constitution, in other words, . . . the right to legislate concerning matters of purely state concern," 207 U. S., at 502, and in *Frost & Frost* the Court stated that "the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them." 271 U. S., at 591. Here, in contrast, Congress does have authority, within its power to regulate commerce, to subject interstate railroads to suit under the FELA; by imposing a condition requiring state-owned interstate railroads to submit to such suit, Congress is not attempting to extend its regulatory power to objects that would not otherwise be subject to it, but rather to prevent objects otherwise subject to the power from being unjustifiably excepted. That Congress could not make a State suable upon all causes of action does not mean that it cannot do so with respect to this particular cause of action, where imposition of such liability is within its power to regulate commerce and where the State, by operating a railroad in interstate commerce, has voluntarily submitted itself to that power.

[12] *Dunn Construction Co.* v. *State Board of Adjustment*, 234 Ala. 372, 376, 175 So. 383, 386 (1937); *State Tax Comm'n* v. *Commercial Realty Co.*, 236 Ala. 358, 361, 182 So. 31, 35 (1938).

only. *Chandler* v. *Dix,* 194 U. S. 590; *Palmer* v. *Ohio,* 248 U. S. 32; *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 466–470. We think those cases are inapposite to the present situation, where the waiver is asserted to arise from the State's commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, has attached the condition of amenability to suit. More pertinent to such a situation is our decision in *Petty* v. *Tennessee-Missouri Bridge Comm'n, supra.* That was a suit against a bi-state authority created with the consent of Congress pursuant to the Compact Clause of the Constitution. We assumed *arguendo* that the suit must be considered as being against the States themselves, but held nevertheless that by the terms of the compact and of a proviso that Congress had attached in approving it,[13] the States had waived any immunity they might otherwise have had. In reaching this conclusion we rejected arguments, like the one made here, based on the proposition that neither

[13] This proviso was that "nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of . . . any court . . . of the United States over or in regard to any navigable waters or any commerce between the States . . . ." The Court read this as reserving the jurisdiction of the federal courts in suits brought against the bi-state authority under the Jones Act or any other applicable congressional regulation of navigation or commerce. 359 U. S., at 281. The Court's reliance on this congressionally imposed condition in *Petty* is itself sufficient to refute respondents' argument here that since Congress has no power to "directly strip a State of its sovereign immunity," it could not impose such suability as a condition to the State's operation of a railroad in interstate commerce. See note 11, *supra.* It was presumably just as true in *Petty* as it is here that Congress could not directly subject the States to suit in matters falling outside the power granted to Congress by the Constitution. Yet *Petty* held that Congress could impose such suability as a condition to allowing the States to enter into the compact. Similarly, Congress can do so here as a condition to allowing the State to operate an interstate railroad.

of the States under its own law would have considered the language in the compact to constitute a waiver of its immunity. The question of waiver was, we held, one of federal law. It is true that this holding was based on the inclusion of the language in an interstate compact sanctioned by Congress under the Constitution. But such compacts do not present the only instance in which the question whether a State has waived its immunity is one of federal law. This must be true whenever the waiver is asserted to arise from an act done by the State within the realm of congressional regulation; for the congressional power to condition such an act upon amenability to suit would be meaningless if the State, on the basis of its own law or intention, could conclusively deny the waiver and shake off the condition. The broad principle of the *Petty* case is thus applicable here: Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law. Here, as in *Petty,* the States by venturing into the congressional realm "assume the conditions that Congress under the Constitution attached." 359 U. S., at 281–282.

Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. Cf. *South Carolina* v. *United States,* 199 U. S. 437, 463; *New York* v.

United States, 326 U. S. 572. It would surprise our citizens, we think, to learn that petitioners, who in terms of the language and purposes of the FELA are on precisely the same footing as other railroad workers,[14] must be denied the benefit of the Act simply because the railroad for which they work happens to be owned and operated by a State rather than a private corporation. It would be even more surprising to learn that the FELA does make the Terminal Railway "liable" to petitioners, but, unfortunately, provides no means by which that liability may be enforced. Moreover, such a result would bear the seeds of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation. See *South Carolina* v. *United States, supra,* 199 U. S., at 454–455. In a significant and

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[14] An employee regulation of respondent Terminal Railway explicitly recognizes that its employees may have causes of action under the FELA, providing as follows:

"Employees must not make any statement, either oral or written, concerning any accident, claim or suit in which the company is, or may be involved, to any person other than [an] authorized representative of the railway, without permission, [e]xcept in cases arising under the Federal Employers' Liability Act, otherwise known as 'an act relating to the liability of common carriers by railroad to their employees in certain cases.' "

The exception for cases arising under the FELA is required by 45 U. S. C. § 60. Asked about this regulation, respondents' counsel said on oral argument that it did not indicate an intention to be subject to the Act, and could not do so in the face of the Alabama Constitution, see p. 194, *supra,* but had been included inadvertently when the Railway was adopting a number of regulations based upon those used by a private railroad carrier. Nevertheless, the presence of this regulation on the Terminal Railway's books illustrates, we think, the incongruity of considering this railroad to be immune from a statutory obligation imposed on privately owned railroads that are similar in every material respect.

increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will.

Reversed.

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

I agree that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby.

However, the decision to impose such conditions is for Congress and not for the courts. The majority today follows the Court's consistent holdings that an unconsenting State is constitutionally immune from federal court suits brought by its own citizens as well as by citizens of other States. It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and

expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense. Particular deference should be accorded that "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect," *United States* v. *Mine Workers*, 330 U. S. 258, 272, where the rights and privileges find their origin in the Constitution. Far from manifesting such an unequivocal determination, the legislative history of the Federal Employers' Liability Act indicates that Congress did not even consider the possible impact of its legislation upon state immunity from suits. The expressed purpose of the Act was "to change the common-law liability of employers." [1] Certain specific defenses available to a railroad employer in an employee's personal injury suit were removed, but sovereign immunity was not one of them. To require Alabama's immunity defense to yield because of a claimed inconsistency with language of the Act making its provisions applicable to "every common carrier by railroad while engaging in commerce" relegates the States' constitutional immunity, not even mentioned in the Act, to the level of state statutory or common-law defenses, four of which the statute expressly proscribed. A decent respect for the normally preferred position of constitutional rights dictates that if Congress decides to exercise its power to condition privileges within its control on the forfeiture of constitutional rights its intention to do so should appear with unmistakable clarity.

In previous opinions the Court has indicated that waiver of sovereign immunity will be found only where

[1] H. R. Rep. No. 1386, 60th Cong., 1st Sess., 1 (1908). In debate on the House floor Representative Henry also summarized the Act as having "changed four rules of the common law." 42 Cong. Rec. 4427.

stated by "the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171. See *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 468–470. If the automatic consequence of state operation of a railroad in interstate commerce is to be waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the "intentional relinquishment or abandonment of a known right or privilege" which must be shown before constitutional rights may be taken to have been waived. *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Fay* v. *Noia*, 372 U. S. 391. The majority in effect holds that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent.[2]

Preferring to leave the limiting of constitutional defenses to that body empowered to impose such conditions, I respectfully dissent.

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[2] *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275; *California* v. *Taylor*, 353 U. S. 553, and *United States* v. *California*, 297 U. S. 175, are all inapposite. In *Petty* there was an express waiver, the compact itself expressly declaring that the bi-state authority could "sue and be sued." *Taylor* was not a suit against a State but against the members of the National Railroad Adjustment Board requiring them to take action on the plaintiffs' claims under the Railway Labor Act. Though the Court held the Act applicable to the State Belt Railroad it expressly disclaimed deciding any sovereign immunity issue. Footnote 16 of that opinion states: "The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Railroad Adjustment Board in a suit against the State in a United States District Court under § 3, First (p), of the Act is not before us under the facts of this case." 353 U. S., at 568. And the suit to recover the statutory penalty for violation of the federal Safety Appliance Act in *United States* v. *California* was brought by the United States, against whom it has long been recognized there is no state sovereign immunity. *United States* v. *Texas*, 143 U. S. 621.

MASSIAH *v.* UNITED STATES.

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

No. 199. Argued March 3, 1964.—Decided May 18, 1964.

Government agents, while continuing to investigate narcotics activities including those of petitioner, who had retained a lawyer and was free on bail after indictment, without petitioner's knowledge secured an alleged confederate's consent to install a radio transmitter in the latter's automobile. An agent was thereby enabled to overhear petitioner's damaging statements which, despite his objection, were used in the trial which resulted in his conviction. *Held:* Incriminating statements thus deliberately elicited by federal agents from the petitioner, in the absence of his attorney, deprived the petitioner of his right to counsel under the Sixth Amendment; therefore such statements could not constitutionally be used as evidence against him in his trial. Pp. 201–207.

307 F. 2d 62, reversed.

Robert J. Carluccio argued the cause and filed a brief for petitioner.

Solicitor General Cox argued the cause for the United States. With him on the brief were *Assistant Attorney General Miller* and *Jerome Nelson.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was indicted for violating the federal narcotics laws. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence of these statements was introduced against the petitioner at his trial over his objection. He was convicted, and the Court of Appeals affirmed.[1] We granted certiorari to

[1] 307 F. 2d 62.

consider whether, under the circumstances here presented, the prosecution's use at the trial of evidence of the petitioner's own incriminating statements deprived him of any right secured to him under the Federal Constitution. 374 U. S. 805.

The petitioner, a merchant seaman, was in 1958 a member of the crew of the S. S. *Santa Maria.* In April of that year federal customs officials in New York received information that he was going to transport a quantity of narcotics aboard that ship from South America to the United States. As a result of this and other information, the agents searched the *Santa Maria* upon its arrival in New York and found in the afterpeak of the vessel five packages containing about three and a half pounds of cocaine. They also learned of circumstances, not here relevant, tending to connect the petitioner with the cocaine. He was arrested, promptly arraigned, and subsequently indicted for possession of narcotics aboard a United States vessel.[2] In July a superseding indictment was returned, charging the petitioner and a man named Colson with the same substantive offense, and in separate counts charging the petitioner, Colson, and others with having conspired to possess narcotics aboard a United States vessel, and to import, conceal, and facilitate the sale of narcotics.[3] The petitioner, who had retained a lawyer, pleaded not guilty and was released on bail, along with Colson.

A few days later, and quite without the petitioner's knowledge, Colson decided to cooperate with the government agents in their continuing investigation of the narcotics activities in which the petitioner, Colson, and others had allegedly been engaged. Colson permitted an agent named Murphy to install a Schmidt radio trans-

[2] 21 U. S. C. § 184a.

[3] 21 U. S. C. §§ 173, 174.

mitter under the front seat of Colson's automobile, by means of which Murphy, equipped with an appropriate receiving device, could overhear from some distance away conversations carried on in Colson's car.

On the evening of November 19, 1959, Colson and the petitioner held a lengthy conversation while sitting in Colson's automobile, parked on a New York street. By prearrangement with Colson, and totally unbeknown to the petitioner, the agent Murphy sat in a car parked out of sight down the street and listened over the radio to the entire conversation. The petitioner made several incriminating statements during the course of this conversation. At the petitioner's trial these incriminating statements were brought before the jury through Murphy's testimony, despite the insistent objection of defense counsel. The jury convicted the petitioner of several related narcotics offenses, and the convictions were affirmed by the Court of Appeals.[4]

The petitioner argues that it was an error of constitutional dimensions to permit the agent Murphy at the trial to testify to the petitioner's incriminating statements which Murphy had overheard under the circumstances disclosed by this record. This argument is based upon two distinct and independent grounds. First, we are told that Murphy's use of the radio equipment violated the petitioner's rights under the Fourth Amendment, and, consequently, that all evidence which Murphy thereby obtained was, under the rule of *Weeks* v. *United States,* 232 U. S. 383, inadmissible against the petitioner at the trial. Secondly, it is said that the petitioner's

[4] The petitioner's trial was upon a second superseding indictment which had been returned on March 3, 1961, and which included additional counts against him and other defendants. The Court of Appeals reversed his conviction upon a conspiracy count, one judge dissenting, but affirmed his convictions upon three substantive counts, one judge dissenting. 307 F. 2d 62.

Fifth and Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which government agents had deliberately elicited from him after he had been indicted and in the absence of his retained counsel. Because of the way we dispose of the case, we do not reach the Fourth Amendment issue.

In *Spano* v. *New York,* 360 U. S. 315, this Court reversed a state criminal conviction because a confession had been wrongly admitted into evidence against the defendant at his trial. In that case the defendant had already been indicted for first-degree murder at the time he confessed. The Court held that the defendant's conviction could not stand under the Fourteenth Amendment. While the Court's opinion relied upon the totality of the circumstances under which the confession had been obtained, four concurring Justices pointed out that the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help. It was pointed out that under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, "in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." 360 U. S., at 327 (STEWART, J., concurring). It was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him." 360 U. S., at 326 (DOUGLAS, J., concurring).

Ever since this Court's decision in the *Spano* case, the New York courts have unequivocally followed this con-

stitutional rule. "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." *People* v. *Waterman,* 9 N. Y. 2d 561, 565, 175 N. E. 2d 445, 448.[5]

This view no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama,* 287 U. S. 45, where the Court noted that ". . . during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself." *Id.,* at 57. And since the *Spano* decision the same basic constitutional principle has been broadly reaffirmed by this Court. *Hamilton* v. *Alabama,* 368 U. S. 52; *White* v. *Maryland,* 373 U. S. 59. See *Gideon* v. *Wainwright,* 372 U. S. 335.

Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies.[6] *Johnson* v. *Zerbst,* 304

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[5] See also *People* v. *Davis,* 13 N. Y. 2d 690, 191 N. E. 2d 674, 241 N. Y. S. 2d 172 (1963); *People* v. *Rodriguez,* 11 N. Y. 2d 279, 183 N. E. 2d 651, 229 N. Y. S. 2d 353 (1962); *People* v. *Meyer,* 11 N. Y. 2d 162, 182 N. E. 2d 103, 227 N. Y. S. 2d 427 (1962); *People* v. *Di Biasi,* 7 N. Y. 2d 544, 166 N. E. 2d 825, 200 N. Y. S. 2d 21 (1960); *People* v. *Swanson,* 18 App. Div. 2d 832, 237 N. Y. S. 2d 400 (2d Dept. 1963); *People* v. *Price,* 18 App. Div. 2d 739, 235 N. Y. S. 2d 390 (3d Dept. 1962); *People* v. *Wallace,* 17 App. Div. 2d 981, 234 N. Y. S. 2d 579 (2d Dept. 1962); *People* v. *Karmel,* 17 App. Div. 2d 659, 230 N. Y. S. 2d 413 (2d Dept. 1962); *People* v. *Robinson,* 16 App. Div. 2d 184, 224 N. Y. S. 2d 705 (4th Dept. 1962).

[6] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U. S. 458. We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that in the *Spano* case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 307 F. 2d, at 72–73.

The Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S. S. *Santa Maria,* but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal charges against many defendants. Under these circumstances the Solicitor General concludes that the government agents were completely "justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them."

We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth

Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial.

Reversed.

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

The current incidence of serious violations of the law represents not only an appalling waste of the potentially happy and useful lives of those who engage in such conduct but also an overhanging, dangerous threat to those unidentified and innocent people who will be the victims of crime today and tomorrow. This is a festering problem for which no adequate cures have yet been devised. At the very least there is much room for discontent with remedial measures so far undertaken. And admittedly there remains much to be settled concerning the disposition to be made of those who violate the law.

But dissatisfaction with preventive programs aimed at eliminating crime and profound dispute about whether we should punish, deter, rehabilitate or cure cannot excuse concealing one of our most menacing problems until the millennium has arrived. In my view, a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it. This much is necessary even to know the scope of the problem, much less to formulate intelligent countermeasures. It will just not do to sweep these disagreeable matters under the rug or to pretend they are not there at all.

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It is therefore a rather portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it—whether the accused committed the act with which he is charged. Without the evidence, the quest for truth may be seriously impeded and in many cases the trial court, although aware of proof showing defendant's guilt, must nevertheless release him because the crucial evidence is deemed inadmissible. This result is entirely justified in some circumstances because exclusion serves other policies of overriding importance, as where evidence seized in an illegal search is excluded, not because of the quality of the proof, but to secure meaningful enforcement of the Fourth Amendment. *Weeks* v. *United States,* 232 U. S. 383; *Mapp* v. *Ohio,* 367 U. S. 643. But this only emphasizes that the soundest of reasons is necessary to warrant the exclusion of evidence otherwise admissible and the creation of another area of privileged testimony. With all due deference, I am not at all convinced that the additional barriers to the pursuit of truth which the Court today erects rest on anything like the solid foundations which decisions of this gravity should require.

The importance of the matter should not be underestimated, for today's rule promises to have wide application well beyond the facts of this case. The reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not; to admissions made prior to arraignment, at least where the defendant has counsel or asks for it; to the fruits of admissions improperly obtained under the new rule; to criminal proceedings in state courts; and to defendants long since convicted upon evi-

dence including such admissions. The new rule will immediately do service in a great many cases.

Whatever the content or scope of the rule may prove to be, I am unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism—an unsound one, besides—to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before, *Cicenia* v. *Lagay,* 357 U. S. 504; *Crooker* v. *California,* 357 U. S. 433, and its extension in this case requires some further explanation, so far unarticulated by the Court.

Since the new rule would exclude all admissions made to the police, no matter how voluntary and reliable, the requirement of counsel's presence or approval would seem to rest upon the probability that counsel would foreclose any admissions at all. This is nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use in evidence of voluntary out-of-court admissions and confessions made by the accused. Carried as far as blind logic may compel some to go, the notion that statements from the mouth of the defendant should not be used in evidence would have a severe and unfortunate impact upon the great bulk of criminal cases.

Viewed in this light, the Court's newly fashioned exclusionary principle goes far beyond the constitutional privilege against self-incrimination, which neither requires nor suggests the barring of voluntary pretrial admissions. The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against

himself . . . ." The defendant may thus not be compelled to testify at his trial, but he may if he wishes. Likewise he may not be compelled or coerced into saying anything before trial; but until today he could if he wished to, and if he did, it could be used against him. Whether as a matter of self-incrimination or of due process, the proscription is against compulsion—coerced incrimination. Under the prior law, announced in countless cases in this Court, the defendant's pretrial statements were admissible evidence if voluntarily made; inadmissible if not the product of his free will. Hardly any constitutional area has been more carefully patrolled by this Court, and until now the Court has expressly rejected the argument that admissions are to be deemed involuntary if made outside the presence of counsel. *Cicenia* v. *Lagay, supra; Crooker* v. *California, supra.**

The Court presents no facts, no objective evidence, no reasons to warrant scrapping the voluntary-involuntary test for admissibility in this area. Without such evidence I would retain it in its present form.

This case cannot be analogized to the American Bar Association's rule forbidding an attorney to talk to the opposing party litigant outside the presence of his counsel. Aside from the fact that the Association's canons are not of constitutional dimensions, the specific canon argued is inapposite because it deals with the con-

*Today's rule picks up where the Fifth Amendment ends and bars wholly voluntary admissions. I would assume, although one cannot be sure, that the new rule would not have a similar supplemental role in connection with the Fourth Amendment. While the Fifth Amendment bars only compelled incrimination, the Fourth Amendment bars only unreasonable searches. It could be argued, fruitlessly I would hope, that if the police must stay away from the defendant they must also stay away from his house once the right to counsel has attached and that a court must exclude the products of a reasonable search made pursuant to a properly issued warrant but without the consent or presence of the accused's counsel.

duct of lawyers and not with the conduct of investigators. Lawyers are forbidden to interview the opposing party because of the supposed imbalance of legal skill and acumen between the lawyer and the party litigant; the reason for the rule does not apply to nonlawyers and certainly not to Colson, Massiah's codefendant.

Applying the new exclusionary rule is peculiarly inappropriate in this case. At the time of the conversation in question, petitioner was not in custody but free on bail. He was not questioned in what anyone could call an atmosphere of official coercion. What he said was said to his partner in crime who had also been indicted. There was no suggestion or any possibility of coercion. What petitioner did not know was that Colson had decided to report the conversation to the police. Had there been no prior arrangements between Colson and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But if, as occurred here, Colson had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same—the defection of a confederate in crime.

Reporting criminal behavior is expected or even demanded of the ordinary citizen. Friends may be subpoenaed to testify about friends, relatives about relatives and partners about partners. I therefore question the soundness of insulating Massiah from the apostasy of his partner in crime and of furnishing constitutional sanctions for the strict secrecy and discipline of criminal or-

ganizations. Neither the ordinary citizen nor the confessed criminal should be discouraged from reporting what he knows to the authorities and from lending his aid to secure evidence of crime. Certainly after this case the Colsons will be few and far between; and the Massiahs can breathe much more easily, secure in the knowledge that the Constitution furnishes an important measure of protection against faithless compatriots and guarantees sporting treatment for sporting peddlers of narcotics.

Meanwhile, of course, the public will again be the loser and law enforcement will be presented with another serious dilemma. The general issue lurking in the background of the Court's opinion is the legitimacy of penetrating or obtaining confederates in criminal organizations. For the law enforcement agency, the answer for the time being can only be in the form of a prediction about the future application of today's new constitutional doctrine. More narrowly, and posed by the precise situation involved here, the question is this: when the police have arrested and released on bail one member of a criminal ring and another member, a confederate, is cooperating with the police, can the confederate be allowed to continue his association with the ring or must he somehow be withdrawn to avoid challenge to trial evidence on the ground that it was acquired after rather than before the arrest, after rather than before the indictment?

Defendants who are out on bail have been known to continue their illicit operations. See *Rogers* v. *United States,* 325 F. 2d 485 (C. A. 10th Cir.). That an attorney is advising them should not constitutionally immunize their statements made in furtherance of these operations and relevant to the question of their guilt at the pending prosecution. In this very case there is evidence that after indictment defendant Aiken tried to

persuade Agent Murphy to go into the narcotics business with him. Under today's decision, Murphy may neither testify as to the content of this conversation nor seize for introduction in evidence any narcotics whose location Aiken may have made known.

Undoubtedly, the evidence excluded in this case would not have been available but for the conduct of Colson in cooperation with Agent Murphy, but is it this kind of conduct which should be forbidden to those charged with law enforcement? It is one thing to establish safeguards against procedures fraught with the potentiality of coercion and to outlaw "easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection." *McNabb* v. *United States,* 318 U. S. 332, 344. But here there was no substitution of brutality for brains, no inherent danger of police coercion justifying the prophylactic effect of another exclusionary rule. Massiah was not being interrogated in a police station, was not surrounded by numerous officers or questioned in relays, and was not forbidden access to others. Law enforcement may have the elements of a contest about it, but it is not a game. *McGuire* v. *United States,* 273 U. S. 95, 99. Massiah and those like him receive ample protection from the long line of precedents in this Court holding that confessions may not be introduced unless they are voluntary. In making these determinations the courts must consider the absence of counsel as one of several factors by which voluntariness is to be judged. See *House* v. *Mayo,* 324 U. S. 42, 45–46; *Payne* v. *Arkansas,* 356 U. S. 560, 567; *Cicenia* v. *Lagay, supra,* at 509. This is a wiser rule than the automatic rule announced by the Court, which requires courts and juries to disregard voluntary admissions which they might well find to be the best possible evidence in discharging their responsibility for ascertaining truth.

MARKS *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 253. Argued April 2, 1964.—Decided May 18, 1964.

315 F. 2d 673, affirmed by an equally divided Court.

Murray A. Gordon argued the cause and filed briefs for petitioner.

Charles Gordon argued the cause for respondent. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *L. Paul Winings.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE BRENNAN took no part in the decision of this case.

LUCKENBACH STEAMSHIP CO., INC., *v.* FRANCHISE TAX BOARD OF CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, THIRD JUDICIAL DISTRICT.

No. 916. Decided May 18, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 219 Cal. App. 2d 710, 33 Cal. Rptr. 544.

Hart H. Spiegel and *John Hays* for appellant.

Stanley Mosk, Attorney General of California, *James E. Sabine*, Assistant Attorney General, and *Ernest P. Goodman* and *John J. Klee, Jr.*, Deputy Attorneys General, for appellee.

PER CURIAM.

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

SINCLAIR *v.* BAKER ET AL.

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

No. 949. Decided May 18, 1964.

Appeal dismissed and certiorari denied.
Reported below: 219 Cal. App. 2d 817, 33 Cal. Rptr. 522.

PER CURIAM.

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

SWAN *v.* NATION COMPANY.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 771, Misc. Decided May 18, 1964.

Appeal dismissed and certiorari denied.

Alfred Avins for appellant.

John L. Freeman for appellee.

PER CURIAM.

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

HUNTER *v.* ILLINOIS ET AL.

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

No. 1087, Misc. Decided May 18, 1964.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

HIGHWAY EXPRESS LINES, INC., ET AL. *v.* JONES MOTOR CO., INC.

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

No. 900. Decided May 18, 1964.*

218 F. Supp. 133; 223 F. Supp. 835, affirmed.

Robert H. Young and *William E. Zeiter* for appellants in No. 900.

William A. Goichman, Edward Munce and *Joseph C. Bruno* for appellant in No. 977.

Roland Rice and *Christian V. Graf* for appellee.

Solicitor General Cox and *Robert W. Ginnane* filed a memorandum for the United States and the Interstate Commerce Commission in both cases.

PER CURIAM.

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

MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN and MR. JUSTICE GOLDBERG are of the opinion that probable jurisdiction should be noted.

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*Together with No. 977, *Pennsylvania Public Utility Commission* v. *Jones Motor Co., Inc.*, also on appeal from the same court.

GRIFFIN ET AL. *v.* COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY ET AL.

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

No. 592. Argued March 30, 1964.—
Decided May 25, 1964.

This litigation began in 1951 and resulted in this Court's holding in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), that Virginia school segregation laws denied the equal protection of the laws and, after reargument on the question of relief, the remand to the District Court a year later for entry of an order that the Negro complainants in Prince Edward County be admitted to public schools on a racially nondiscriminatory basis "with all deliberate speed." Faced with an order to desegregate, the County Board of Supervisors in 1959 refused to appropriate funds for the operation of public schools although a private foundation operated schools for white children only, who in 1960 became eligible for county and state tuition grants. Public schools continued to operate elsewhere in Virginia. After protracted litigation in the federal and state courts, the District Court in 1961 enjoined the County from paying tuition grants or giving tax credits as long as the public schools remained closed and thereafter, refusing to abstain pending proceedings in the state courts, held that the public schools could not remain closed to avoid this Court's decision while other public schools in the State remained open. The Court of Appeals reversed, holding that the District Court should have awaited state court determination of these issues. *Held:*

1. Though the amended supplemental complaint added new parties and relied on developments occurring after the action had begun, it did not present a new cause of action but constituted a proper amendment under Rule 15 (d) of the Federal Rules of Civil Procedure, since the new transactions were alleged to be part of persistent and continuing efforts to circumvent this Court's holdings. Pp. 226–227.

2. Since the supplemental complaint alleged a discriminatory system unique to one county, although involving some actions of the State, adjudication by a three-judge court was not required under 28 U. S. C. § 2281. Pp. 227–228.

3. This action is not forbidden by the Eleventh Amendment to the Constitution since it charges that state and county officials deprived petitioners of their constitutional rights. *Ex parte Young,* 209 U. S. 123 (1908), followed. P. 228.

4. Because of the long delay resulting from state and county resistance to enforcing the constitutional rights here involved and because the highest state court has now passed on all the state law issues here, federal court abstention pending state judicial resolution of the legality of respondents' conduct under the constitution and laws of Virginia is not required or appropriate in this case. Pp. 228–229.

5. Under the circumstances of this case, closing of the Prince Edward County public schools while at the same time giving tuition grants and tax concessions to assist white children in private segregated schools denied petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Pp. 229–232.

(a) Prince Edward County school children are treated differently from those of other counties since they must go to private schools or none at all. P. 230.

(b) The public schools of Prince Edward County were closed and the private schools operated in their place only for constitutionally impermissible reasons of race. Pp. 231–232.

6. Quick and effective injunctive relief should be granted against the respondents, all of whom have duties relating to financing, supervising, or operating the Prince Edward County schools. Pp. 232–234.

(a) The injunction against county officials paying tuition grants and giving tax credits while public schools remained closed is appropriate and necessary where the grants and credits have been part of the county program to deprive petitioners of a public education enjoyed by children in other counties. P. 233.

(b) The District Court may require the County Supervisors to levy taxes to raise funds for the nonracial operation of the county school system as is the case with other counties. P. 233.

(c) The District Court may if necessary issue an order to carry out its ruling that the Prince Edward County public schools may not be closed to avoid the law of the land while the State permits other public schools to remain open at the expense of the taxpayers. Pp. 233–234.

(d) New parties may be added if necessary to effectuate the District Court's decree. P. 234.

322 F. 2d 332, reversed.

Robert L. Carter argued the cause for petitioners. With him on the brief were *S. W. Tucker* and *Frank D. Reeves.*

R. D. McIlwaine III, Assistant Attorney General of Virginia, and *J. Segar Gravatt* argued the cause for respondents. With *Mr. McIlwaine* on the brief for the State Board of Education of Virginia et al. were *Robert Y. Button,* Attorney General of Virginia, and *Frederick T. Gray.* With *Mr. Gravatt* on the brief for the Board of Supervisors of Prince Edward County was *William F. Watkins, Jr. John F. Kay, Jr.* and *C. F. Hicks* filed a brief for respondents County School Board of Prince Edward County et al.

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Marshall, William J. Vanden Heuvel, Louis F. Claiborne* and *Harold H. Greene.*

Briefs of *amici curiae,* urging reversal, were filed by *William B. Beebe* and *Hershel Shanks* for the National Education Association, and by *Landon Gerald Dowdey, T. Raber Taylor* and *C. Joseph Danahy* for Citizens for Educational Freedom.

Brief of *amicus curiae,* urging affirmance, was filed by *Geo. Stephen Leonard, Paul D. Summers, Jr., D. B. Marshall* and *Richard L. Hirshberg* for the City of Charlottesville.

Mr. Justice Black delivered the opinion of the Court.

This litigation began in 1951 when a group of Negro school children living in Prince Edward County, Virginia, filed a complaint in the United States District Court for the Eastern District of Virginia alleging that they had been denied admission to public schools attended by white children and charging that Virginia laws requiring such school segregation denied complainants the equal protec-

tion of the laws in violation of the Fourteenth Amendment. On May 17, 1954, ten years ago, we held that the Virginia segregation laws did deny equal protection. *Brown* v. *Board of Education,* 347 U. S. 483 (1954). On May 31, 1955, after reargument on the nature of relief, we remanded this case, along with others heard with it, to the District Courts to enter such orders as "necessary and proper to admit [complainants] to public schools on a racially nondiscriminatory basis with all deliberate speed . . . ." *Brown* v. *Board of Education,* 349 U. S. 294, 301 (1955).

Efforts to desegregate Prince Edward County's schools met with resistance. In 1956 Section 141 of the Virginia Constitution was amended to authorize the General Assembly and local governing bodies to appropriate funds to assist students to go to public or to nonsectarian private schools, in addition to those owned by the State or by the locality.[1] The General Assembly met in special session and enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, to pay tuition grants to children in nonsectarian private schools, and to extend state retirement benefits to teachers in newly created private schools.[2] The legislation closing mixed schools and cutting off state funds was later invalidated by the Supreme Court of Appeals of Virginia, which held that these laws violated the Virginia Constitution. *Harrison* v. *Day,* 200 Va. 439, 106 S. E. 2d 636 (1959). In April 1959 the General Assembly abandoned "massive resistance" to desegregation and turned instead to what was

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[1] Virginia tuition grants originated in 1930 as aid to children who had lost their fathers in World War I. The program was expanded until the Supreme Court of Appeals of Virginia held that giving grants to children attending private schools violated the Virginia Constitution. *Almond* v. *Day,* 197 Va. 419, 89 S. E. 2d 851 (1955). It was then that Section 141 was amended.

[2] Va. Code, § 22–188.3 *et seq.;* § 51–111.38:1.

called a "freedom of choice" program. The Assembly repealed the rest of the 1956 legislation, as well as a tuition grant law of January 1959, and enacted a new tuition grant program.[3] At the same time the Assembly repealed Virginia's compulsory attendance laws[4] and instead made school attendance a matter of local option.[5]

In June 1959, the United States Court of Appeals for the Fourth Circuit directed the Federal District Court (1) to enjoin discriminatory practices in Prince Edward County schools, (2) to require the County School Board to take "immediate steps" toward admitting students without regard to race to the white high school "in the school term beginning September 1959," and (3) to require the Board to make plans for admissions to elementary schools without regard to race. *Allen* v. *County School Board of Prince Edward County,* 266 F. 2d 507, 511 (C. A. 4th Cir. 1959). Having as early as 1956 resolved that they would not operate public schools "wherein white and colored children are taught together," the Supervisors of Prince Edward County refused to levy any school taxes for the 1959–1960 school year, explaining that they were "confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color."[6] As a result, the county's public schools did not

[3] Acts, 1959 Ex. Sess., c. 53.

[4] Va. Code, §§ 22–251 to 22–275.

[5] Va. Code, §§ 22–275.1 to 22–275.25.

[6] The Board's public explanation of its June 3, 1959, refusal to appropriate money or levy taxes to carry on the county's public school system was:

"The School Board of this county is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people of this county as we do, we know that it is not possible to operate the schools of this county within the terms of that principle and, at the same time, maintain an atmosphere conducive to the educational benefit of our people."

reopen in the fall of 1959 and have remained closed ever since, although the public schools of every other county in Virginia have continued to operate under laws governing the State's public school system and to draw funds provided by the State for that purpose. A private group, the Prince Edward School Foundation, was formed to operate private schools for white children in Prince Edward County and, having built its own school plant, has been in operation ever since the closing of the public schools. An offer to set up private schools for colored children in the county was rejected, the Negroes of Prince Edward preferring to continue the legal battle for desegregated public schools, and colored children were without formal education from 1959 to 1963, when federal, state, and county authorities cooperated to have classes conducted for Negroes and whites in school buildings owned by the county. During the 1959–1960 school year the Foundation's schools for white children were supported entirely by private contributions, but in 1960 the General Assembly adopted a new tuition grant program making every child, regardless of race, eligible for tuition grants of $125 or $150 to attend a nonsectarian private school or a public school outside his locality, and also authorizing localities to provide their own grants.[7] The Prince Edward Board of Supervisors then passed an ordinance providing tuition grants of $100, so that each child attending the Prince Edward School Foundation's schools received a total of $225 if in elementary school or $250 if in high school. In the 1960–1961 session the major source of financial support for the Foundation was in the indirect form of these state and county tuition grants, paid to children attending Foundation schools. At the same time, the County Board of Supervisors passed an ordinance allowing property tax credits up to 25% for

[7] Va. Code, §§ 22–115.29 to 22–115.35.

contributions to any "nonprofit, nonsectarian private school" in the county.

In 1961 petitioners here filed a supplemental complaint, adding new parties and seeking to enjoin the respondents from refusing to operate an efficient system of public free schools in Prince Edward County and to enjoin payment of public funds to help support private schools which excluded students on account of race. The District Court, finding that "the end result of every action taken by that body [Board of Supervisors] was designed to preserve separation of the races in the schools of Prince Edward County," enjoined the county from paying tuition grants or giving tax credits so long as public schools remained closed.[8] *Allen* v. *County School Board of Prince Edward County,* 198 F. Supp. 497, 503 (D. C. E. D. Va. 1961). At this time the District Court did not pass on whether the public schools of the county could be closed but abstained pending determination by the Virginia courts of whether the constitution and laws of Virginia required the public schools to be kept open. Later, however, without waiting for the Virginia courts to decide the question,[9] the District Court held that "the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers." *Allen* v. *County School Board of Prince Ed-*

[8] On the question of the validity of state tuition grants, the court held that, as a matter of state law, such grants were not meant to be given in localities without public schools; therefore, the court enjoined the county from processing applications for state grants so long as public schools remained closed. 198 F. Supp., at 504.

[9] The Supreme Court of Appeals of Virginia had, in a mandamus proceeding instituted by petitioners, held that the State Constitution and statutes did not impose upon the County Board of Supervisors any mandatory duty to levy taxes and appropriate money to support free public schools. *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S. E. 2d 227 (1962).

ward County, 207 F. Supp. 349, 355 (D. C. E. D. Va. 1962). Soon thereafter, a declaratory judgment suit was brought by the County Board of Supervisors and the County School Board in a Virginia Circuit Court. Having done this, these parties asked the Federal District Court to abstain from further proceedings until the suit in the state courts had run its course, but the District Court declined; it repeated its order that Prince Edward's public schools might not be closed to avoid desegregation while the other public schools in Virginia remained open. The Court of Appeals reversed, Judge Bell dissenting, holding that the District Court should have abstained to await state court determination of the validity of the tuition grants and the tax credits, as well as the validity of the closing of the public schools. *Griffin* v. *Board of Supervisors of Prince Edward County,* 322 F. 2d 332 (C. A. 4th Cir. 1963). We granted certiorari, stating: [10]

> "In view of the long delay in the case since our decision in the *Brown* case and the importance of the questions presented, we grant certiorari and put the case down for argument March 30, 1964, on the merits, as we have done in other comparable situations without waiting for final action by the Court of Appeals." 375 U. S. 391, 392.

For reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment.

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[10] In the meantime, the Supreme Court of Appeals of Virginia had held that the Virginia Constitution did not compel the State to reopen public schools in Prince Edward County. *County School Board of Prince Edward County* v. *Griffin,* 204 Va. 650, 133 S. E. 2d 565 (1963).

I.

Before reaching the substantial questions presented, we shall note several procedural matters urged by respondents in a motion to dismiss the supplemental amended complaint filed July 7, 1961—ten years after this action was instituted. Had the motion to dismiss been granted on any of the grounds assigned, the result would have been one more of what Judge Bell, dissenting in the Court of Appeals, referred to as "the inordinate delays which have already occurred in this protracted litigation . . . ." 322 F. 2d, at 344. We shall take up separately the grounds assigned for dismissal.

(a) It is contended that the amended supplemental complaint presented a new and different cause of action from that presented in the original complaint. The supplemental pleading did add new parties and rely in good part on transactions, occurrences, and events which had happened since the action had begun. But these new transactions were alleged to have occurred as a part of continued, persistent efforts to circumvent our 1955 holding that Prince Edward County could not continue to operate, maintain, and support a system of schools in which students were segregated on a racial basis. The original complaint had challenged racial segregation in schools which were admittedly public. The new complaint charged that Prince Edward County was still using its funds, along with state funds, to assist private schools while at the same time closing down the county's public schools, all to avoid the desegregation ordered in the *Brown* cases. The amended complaint thus was not a new cause of action but merely part of the same old cause of action arising out of the continued desire of colored students in Prince Edward County to have the same opportunity for state-supported education afforded to white people, a desire thwarted before 1959 by segre-

gation in the public schools and after 1959 by a combination of closed public schools and state and county grants to white children at the Foundation's private schools. Rule 15 (d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit,[11] and it follows, of course, that persons participating in these new events may be added if necessary. Such amendments are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice.

(b) When this action was originally brought in 1951, it broadly charged that the constitution and laws of Virginia provided a state system of public schools which unconstitutionally segregated school children on the basis of color. This challenge was heard by a District Court of three judges as required by 28 U. S. C. § 2281. When in *Brown* we held the school segregation laws invalid as a denial of equal protection of the laws under the Fourteenth Amendment and remanded for the District Court to fashion a decree requiring abandonment of segregation "with all deliberate speed," the three-judge court ceased to function, and a single district judge took over. Respondents contend that the single judge erroneously passed on the issues raised by the supplemental complaint and that we should now delay the case still further by vacating his judgment along with that of the Court of Appeals and remanding to the District Court for a completely new trial before three judges. We reject the contention. In *Rorick* v. *Board of Comm'rs of Everglades Drainage Dist.*, 307 U. S. 208, 212 (1939), we said, in interpreting the three-judge statute (then § 266 of the

[11] "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. Rules Civ. Proc. 15 (d).

Judicial Code of 1911, as amended, 28 U. S. C. (1934 ed.) § 380):

> " 'Despite the generality of the language' of that Section, it is now settled doctrine that only a suit involving 'a statute of general application' and not one affecting a 'particular municipality or district' can invoke § 266."

While a holding as to the constitutional duty of the Supervisors and other officials of Prince Edward County may have repercussions over the State and may require the District Court's orders to run to parties outside the county, it is nevertheless true that what is attacked in this suit is not something which the State has commanded Prince Edward to do—close its public schools and give grants to children in private schools—but rather something which the county with state acquiescence and cooperation has undertaken to do on its own volition, a decision not binding on any other county in Virginia. Even though actions of the State are involved, the case, as it comes to us, concerns not a state-wide system but rather a situation unique to Prince Edward County. We hold that the single district judge did not err in adjudicating this present controversy.

(c) It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex parte Young,* 209 U. S. 123 (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment.

(d) It is argued that the District Court should have abstained from passing on the issues raised here in order to await a determination by the Supreme Court of Appeals of Virginia as to whether the conduct complained

of violated the constitution or laws of Virginia. The Court of Appeals so held, 322 F. 2d 332, and this Court has, in cases deemed appropriate, directed that such a course be followed by a district court or approved its having been followed. *E. g., Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U. S. 496 (1941); *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25 (1959). But we agree with the dissenting judge in the Court of Appeals, 322 F. 2d, at 344–345, that this is not a case for abstention. In the first place, the Supreme Court of Appeals of Virginia has already passed upon the state law with respect to all the issues here. *County School Board of Prince Edward County* v. *Griffin,* 204 Va. 650, 133 S. E. 2d 565 (1963). But quite independently of this, we hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown* v. *Board of Education, supra,* had been denied Prince Edward County Negro children. We accordingly reverse the Court of Appeals' judgment remanding the case to the District Court for abstention, and we proceed to the merits.

II.

In *County School Board of Prince Edward County* v. *Griffin,* 204 Va. 650, 133 S. E. 2d 565 (1963), the Supreme Court of Appeals of Virginia upheld as valid under state law the closing of the Prince Edward County public schools, the state and county tuition grants for children who attend private schools, and the county's tax concessions for those who make contributions to private schools. The same opinion also held that each county had "an option to operate or not to operate public

schools." 204 Va., at 671, 133 S. E. 2d, at 580. We accept this case as a definitive and authoritative holding of Virginia law, binding on us, but we cannot accept the Virginia court's further holding, based largely on the Court of Appeals' opinion in this case, 322 F. 2d 332, that closing the county's public schools under the circumstances of the case did not deny the colored school children of Prince Edward County equal protection of the laws guaranteed by the Federal Constitution.

Since 1959, all Virginia counties have had the benefits of public schools but one: Prince Edward. However, there is no rule that counties, as counties, must be treated alike; the Equal Protection Clause relates to equal protection of the laws "between persons as such rather than between areas." *Salsburg* v. *Maryland,* 346 U. S. 545, 551 (1954). Indeed, showing that different persons are treated differently is not enough, without more, to show a denial of equal protection. *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552, 556 (1947). It is the circumstances of each case which govern. *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 539–540 (1942).

Virginia law, as here applied, unquestionably treats the school children of Prince Edward differently from the way it treats the school children of all other Virginia counties. Prince Edward children must go to a private school or none at all; all other Virginia children can go to public schools. Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient. Apart from this expedient, the result is that Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although

designated as private, are beneficiaries of county and state support.

A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature "having in mind the needs and desires of each." *Salsburg* v. *Maryland, supra,* 346 U. S., at 552. A State may wish to suggest, as Maryland did in *Salsburg,* that there are reasons why one county ought not to be treated like another. 346 U. S., at 553–554. But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.[12]

In *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649 (D. C. E. D. La. 1961), a three-judge District Court invalidated a Louisiana statute which provided "a means by which public schools under desegregation orders may be changed to 'private' schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools." *Id.,* at 651. In addition, that statute also provided that where the public schools were "closed," the school board was "charged with responsibility for furnishing free lunches, transportation, and grants-in-aid to the

[12] "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education,* 349 U. S. 294, 300 (1955).

children attending the 'private' schools." *Ibid.* We affirmed the District Court's judgment invalidating the Louisiana statute as a denial of equal protection. 368 U. S. 515 (1962). While the Louisiana plan and the Virginia plan worked in different ways, it is plain that both were created to accomplish the same thing: the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds. See *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958). Either plan works to deny colored students equal protection of the laws. Accordingly, we agree with the District Court that closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws.

III.

We come now to the question of the kind of decree necessary and appropriate to put an end to the racial discrimination practiced against these petitioners under authority of the Virginia laws. That relief needs to be quick and effective. The parties defendant are the Board of Supervisors, School Board, Treasurer, and Division Superintendent of Schools of Prince Edward County, and the State Board of Education and the State Superintendent of Education. All of these have duties which relate directly or indirectly to the financing, supervision, or operation of the schools in Prince Edward County. The Board of Supervisors has the special responsibility to levy local taxes to operate public schools or to aid children attending the private schools now functioning there for white children. The District Court enjoined the county officials from paying county tuition grants or giving tax exemptions and from processing applications for state tuition grants so long as the county's public schools remained closed. We have no doubt of the power of the

court to give this relief to enforce the discontinuance of the county's racially discriminatory practices. It has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights. *E. g., Lincoln County* v. *Luning,* 133 U. S. 529 (1890); *Kennecott Copper Corp.* v. *State Tax Comm'n,* 327 U. S. 573, 579 (1946). The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since those grants and tax credits [13] have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia. For the same reasons the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

The District Court held that "the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers." *Allen* v. *County School Board of Prince Edward County,* 207 F. Supp. 349, 355 (D. C. E. D. Va. 1962). At the same time the court gave notice that it would later consider an order to accomplish this purpose if the public schools were not reopened by September 7, 1962. That day has long passed, and the schools are still closed. On remand, therefore, the court may find it necessary to consider further such an order. An order of this kind is within the court's power if re-

[13] The county has, since the time of the District Court's decree, repealed its tax credit ordinance.

quired to assure these petitioners that their constitutional rights will no longer be denied them. The time for mere "deliberate speed" has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia.

The judgment of the Court of Appeals is reversed, the judgment of the District Court is affirmed, and the cause is remanded to the District Court with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools. And, if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so.

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN disagree with the holding that the federal courts are empowered to order the reopening of the public schools in Prince Edward County, but otherwise join in the Court's opinion.

Syllabus.

MASSACHUSETTS TRUSTEES OF EASTERN GAS & FUEL ASSOCIATES *v.* UNITED STATES.

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

No. 137. Argued February 24, 1964.—
Decided May 25, 1964.

Petitioners chartered ships from the Maritime Commission under a contract providing for payment which included a share of excess profits under a sliding scale of 50 to 90 percent. Section 5 (b) of the Merchant Ship Sales Act of 1946 directed the Commission to fix charter hire at rates which "shall not be less than 15 per centum per annum of the statutory sales price," and shall be consistent with the Act's policy to sell, rather than charter, ships to private owners. The provisions of § 709 (a) of the Merchant Marine Act, 1936, which were made applicable to charters under the 1946 Act by § 5 (c) of the latter statute, stipulated that every charter shall provide that "whenever, at the end of any calendar year . . . the cumulative net voyage profits . . . shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum . . . ." Pursuant to a charter clause permitting termination of the contract, the Commission notified petitioners of its intention to cancel the charter, but advised that the vessels could continue to be used under new terms, to which petitioners agreed, providing that excess profits would be computed for each voyage separately after September 1, 1947. Petitioners' contentions that the Commission was limited under § 709 (a) to 50 percent of the excess profits and that it exceeded its authority by dividing the calendar year 1947 into separate periods through the threat of cancellation were rejected by the lower courts. *Held:*

1. The Commission had authority under § 5 (b) of the Merchant Ship Sales Act of 1946 to utilize a sliding scale of excess profits. Pp. 241–250.

(a) The 50 percent provisions in § 709 (a) of the Merchant Marine Act, 1936, established, in the context of the 1946 Act, a minimum but not a maximum rate. Pp. 243–245.

(b) The use of a sliding scale was authorized by § 5 (b) and the failure of the Commission to indicate the specific source of its authority had no legal significance. Pp. 245–248.

2. There was no limitation of the Commission's power to terminate the existing charter. Pp. 250–251.

(a) The provisions in § 709 (a) calling for computation of additional charter hire "at the end of any calendar year" did not impose such a restriction. Pp. 250–251.

(b) Notification of termination was not a mere threat for an improper purpose; the Commission could terminate all existing charters and then recharter the vessels to accomplish its goals. P. 251.

312 F. 2d 214, affirmed.

J. Franklin Fort argued the cause for petitioners. With him on the briefs were *Jose de Varon* and *T. S. L. Perlman.*

Wayne G. Barnett argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Douglas, Bruce J. Terris, Alan S. Rosenthal* and *Lawrence F. Ledebur.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents the claim that the Maritime Commission exceeded its statutory authority under § 5 of the Merchant Ship Sales Act of 1946, 60 Stat. 43, as amended, 50 U. S. C. App. § 1738, by

> (1) including in its contract with petitioners [1] for the bareboat charter of ships a sliding scale that required payment to the Government of more than 50% of certain excess profits and
>
> (2) using the threat of termination of the charter arrangement to compel agreement to divide the calendar year 1947 into separate periods for the purpose of computing such profits.

[1] Hereafter "Eastern."

Because a considerable number of suits are pending in the lower courts which will turn on resolution of these issues, and because of a conflict among the circuits as to the first issue,[2] we brought the case here. 375 U. S. 809. For reasons to follow, we affirm the judgment below upholding the power of the Commission to act as it did.

I.

The Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U. S. C. §§ 1101–1294, provided for the charter of government vessels by the Maritime Commission to private enterprise. Section 709 (a) of that Act, 49 Stat. 2010, incorporated by reference in the 1946 Act, § 5 (c), 60 Stat. 43, provided:

> "Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided,* That the cumulative net profit so accounted for shall not be included

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[2] Compare the opinion below, 312 F. 2d 214, and *United States* v. *Eastport Steamship Corp.,* 216 F. Supp. 649, with *American Export Lines, Inc.,* v. *United States,* 153 Ct. Cl. 201, 290 F. 2d 925; *Dichman, Wright & Pugh, Inc.,* v. *United States,* 144 F. Supp. 922; *American Mail Line, Ltd.,* v. *United States,* 213 F. Supp. 152; *American President Lines, Ltd.,* v. *United States,* 224 F. Supp. 187.

in any calculation of cumulative net profit in subsequent years."

During World War II, operations of the private merchant marine were disrupted and its fleets reduced by losses and requisition. Meanwhile many vessels were constructed for government operations. Congress by means of the Merchant Ship Sales Act of 1946, *supra,* sought to ensure postwar rehabilitation of the private merchant marine by having the Maritime Commission sell or charter surplus war-built government vessels. The Commission was instructed "so far as practicable and consistent with the policies of this Act, [to] give preference to . . . applicants to purchase" over applicants to charter.[3] Section 5 (b), 60 Stat. 43, of the Act set out standards for the Commission to follow in chartering vessels:

> "The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). . . . [R]ates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission."

As already indicated, § 5 (c) made the provisions of § 709 (a) of the Merchant Marine Act applicable to charters under the 1946 Act.

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[3] § 7 (a), 60 Stat. 44, 50 U. S. C. App. § 1740.

Prior to the Commission's exercising of its authority under the 1946 Act, the War Shipping Administration chartered ships to private interests on an interim basis; it followed the lines of the 1946 Act, specifying a "basic charter hire" which equaled 15% per annum of the statutory sales price and an "additional charter hire" of one-half of any net profits in excess of a 10% annual return on the charterer's capital employed in the operation of the chartered vessels. During this period a Special Charter Committee considered the best way to implement the provisions of the 1946 Act. Existing rentals were believed to be too low and higher rentals were thought necessary to promote the statutory policy of encouraging sales rather than charters. A majority of the Committee preferred a higher profit-sharing rate than that provided in § 709 (a) to any additional firm rental, since the former would permit both the Commission and charterers to adapt to a fluctuating world market, without imposing a greater risk of loss on the charterers. The Maritime Commission adopted this basic suggestion and decided to charge, in addition to the firm rental of 15% of the sales price, 50% of the average net voyage profits in excess of 10% of the charterer's capital necessarily employed up to the first $100 of profits per day, 75% of the next $200 per day, and 90% of such profits above $300 per day.

The Commission adopted a standard Ship Sales Act charter ("SHIPSALESDEMISE 303") incorporating these provisions, and Eastern chartered 10 vessels under such a contract dated October 1, 1946. Market conditions allowed high profits to be earned in the first eight months of 1947. The Commission decided to terminate existing charters, as it was privileged to do under the contract on 15 days' notice, but agreed not to terminate if a charterer accepted an Addendum to its contract providing, among other things, for a separate calculation of profit-sharing

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rentals for the period commencing September 1, 1947. Eastern signed such an Addendum and was not able, as a result, to offset losses incurred in the latter part of 1947 against the excess profits earned before September 1.

Eastern did not attempt to litigate its rights under the 1946 Act until it had completed all the payments required by the charter agreement. In 1955 it filed this *in personam* libel for recovery of money paid pursuant to the profit-sharing provisions and the 1947 "Foreign Trade Addendum." It asserted that § 709 (a) sets a maximum as well as a minimum rate of profit sharing and precluded the Commission from altering that rate under § 5 (b). It claimed further that, even if such power existed, the Commission's apparent reliance on § 709 (a) rather than § 5 (b) renders these charter provisions nugatory. Finally, it argued that the 1947 Addendum conflicted with the statutory mandate of § 709 (a) for calendar year accounting of statutory profits, and that the Commission abused its termination privilege by threatening to terminate the charter agreements of those refusing to accept the split-year profit-sharing arrangement. All of these contentions were rejected by the lower court, the Court of Appeals affirming the District Court, 202 F. Supp. 297; 210 F. Supp. 822, in a thorough opinion, 312 F. 2d 214.

Preliminarily we observe that in the view we take of that case we find it unnecessary to consider the Government's alternative ground for affirmance: that the doctrine of waiver precludes Eastern from challenging the terms of its charter agreement because once having signed the agreement and benefited from the charter, Eastern cannot seek to overturn provisions of the contract that it regards as unfavorable.[4]

[4] The Government does not press the claims here that Eastern cannot recover because of the running of the statute of limitations or because of voluntary payments made to the Commission. It asserts

II.

The basic statutory question is whether the Commission, in light of § 709 (a), had authority under § 5 (b) to impose the sliding scale of additional hire, and, if so, whether its failure to articulate the particular statutory basis for its action vitiates the validity of the profit-sharing terms of the rate set. We approach this problem with three general interpretative guides, all of which point in the Government's favor. Some weight is due to the consistent interpretation of the Maritime Commission, the agency entrusted with administration of the statute. See, *e. g., United States* v. *Zucca,* 351 U. S. 91, 96; *Kern River Co.* v. *United States,* 257 U. S. 147, 153–154. The successive extensions by Congress of the Commission's authority to charter vessels,[5] in the face of the Commission's sliding-scale practice, are certainly not controlling, particularly since it does not appear that Congress ever advertently addressed itself to the claim of invalidity of the sliding scale; they do, however, strengthen to some extent the Commission's conclusions regarding its chartering powers. In 1947, following subcommittee hearings,[6] the House Committee on Merchant Marine and Fisheries, H. R. Rep. No. 725, 80th Cong., 1st Sess. (1947), recommended an extension, subsequently enacted, 61 Stat. 190, 191, of the Commission's chartering authority "with the understanding that the basic rates for the

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that these defenses were pleaded below but were not considered during the hearing; it reserves the right to raise them on remand in the event of a reversal.

[5] See 61 Stat. 190, 191; 62 Stat. 38; 63 Stat. 9; 63 Stat. 349. In 1950, Congress abolished the Maritime Commission and the function of chartering ships was transferred to the Secretary of Commerce, 64 Stat. 308; 64 Stat. 1276, 1277.

[6] Hearings before the Subcommittee on Ship Sales, Charters, and Lay-ups, House Committee on Merchant Marine and Fisheries, 80th Cong., 1st Sess. (1947).

charter of dry-cargo vessels and recapture rates will be immediately increased, thus encouraging the purchase rather than charter of these ships." P. 2. Congressional reports prior to another extension, H. R. Rep. No. 60, 81st Cong., 1st Sess., 2 (1949); S. Rep. No. 55, 81st Cong., 1st Sess., 2 (1949), stated: "It is contemplated that the Maritime Commission will continue to sell, charter, and operate ships in accordance with existing procedures and without [according to the House Report] any change in its present policy." (The Senate Report reads "any changes in policies now effective.")

Further, in light of the congressional policy to encourage the sale of ships, contained in § 7 (a) of the 1946 Act, *supra,* there is an initial presumption that Congress intended that the Commission should have power to establish chartering terms commensurate with making more attractive purchase, instead of charter, of government vessels by private shipowners. Needless to say, these "interpretative aids," neither singly nor in conjunction, could lead to an affirmance here if it were clear that the Commission's action contradicted the requirements of the Merchant Ship Sales Act of 1946. However, they are consistent with, and lend support to, what we believe to be the most sensible view of the statutory framework.

According to § 709 (a) of the 1936 Act, as adopted by the 1946 statute:

> "The charterer *shall* pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum . . . ." (Emphasis added.)

Section 5 (b) of the 1946 Act provides:

> "The charter hire . . . shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, . . . such rate shall not be less than 15 per centum per annum of the statutory sales price . . . ."

Eastern makes the contention that the language of § 5 (b) itself limits the Commission's power under that section to a fixed annual charter rate. It argues that a profit-sharing arrangement is not a "rate" of charter hire in the normal sense nor is it "fixed." The short answer is that it is perfectly reasonable to speak of a "rate" which is based on percentage of profits, and there is no problem in "fixing" a contingent rate. Certainly the reference to the minimum rate of 15% (subject to an exception not relevant here) of the statutory sales price in no way reflects an intent to preclude the Commission from developing other types of rate patterns. We find nothing in § 5 (b) itself to justify strait-jacketing, by proscribing any approach not based on a percentage of the sales price, the Commission's development of rate patterns best serving the policies of the Act.

The position that § 709 (a) is the exclusive profit-sharing provision, that it prohibits what might otherwise be sustained as a proper exercise of power under § 5 (b), is somewhat more arguable. Eastern asserts that § 709 (a) was written as a maximum as well as minimum standard for the Commission's share of excess profits and that its import was not altered by its adoption in the 1946 Act. Significance is placed on Congress' use of the word "shall," rather than a phrase such as "not less than," in fixing the charterer's obligation to pay 50% of its excess profits.

However, when § 709 (a) was passed, rates of charter hire were determined in most situations, under § 707 (a), 49 Stat. 2009, by competitive bidding in individual cases.[7]

[7] Section 714 of the 1936 Act, 49 Stat. 2011, as amended, 46 U. S. C. § 1204, does provide for negotiated rates of charter hire if essential trade routes cannot otherwise be successfully developed. It contains a firm minimum rate. Had this been the primary method of chartering envisioned in 1936, the section's similarity to § 5 (b) of the 1946 Act would have considerable bearing on any interpretation of the relevance of § 709 (a) in the later Act. The exception this provi-

Since the firm rental offered could afford the only basis for assessing "the highest monthly charter hire," individual bidders did not propose profit-sharing arrangements. Under such a system, the primary reliance against rates unreasonably favorable to charterers was the bidding system. In that context, it could plausibly be urged that the Commission had no authority to raise its share of excess profits. Indeed, the Government does not argue that at that time, or after the 1946 Act, § 709 (a) *ex proprio vigore* conferred power on the Commission to raise the rates beyond the prescribed 50%. The relevant question, therefore, is whether as carried into the 1946 Act the section set a maximum as well as minimum rate of profit sharing for the statute as a whole.

First, it may be noted that "shall" plainly denotes a minimum; one cannot pay 50% and at the same time pay less than 50%. On the other hand, the word does not of linguistic necessity denote a maximum; one can pay 50% and also pay 25% more. While, in recognizing this, we do not mean to suggest that standing alone the 50% standard of § 709 (a) would not be read as establishing a maximum as well as a minimum, it is significant that the section's language is not inconsistent with a conclusion that higher percentages are permissible. Congress cannot be expected always to be absolutely precise in its statutory formulations. When it brings forward into a new enactment provisions drafted in a different statutory context and in response to other circumstances and policies, the likelihood of imprecision is increased. In light of the great breadth of discretion apparently given to the Commission under § 5 (b) and the expressed concern of Congress that charter rates not

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sion makes to competitive bidding, however, does not alter the fact that the basic method of rate setting was entirely different under the 1936 Act from that contemplated in 1946. We intimate no view as to the relationship between § 714 and § 709 (a) under the 1936 Act.

be too low to discourage sales, we should be very slow to fetter the flexibility of the Commission to implement, in the most effective way, the policies of the Act. Viewing the 1946 Act as an integrated whole, we refuse to inhibit the Commission under § 5 (b) by resort to an interpretation of § 709 (a) which could be characterized only as arid literalism.[8]

We conclude, therefore, that the Commission had the power under § 5 (b) to impose the sliding scale and that § 709 (a) does not negate that authority. In passing, it may be noted that in addition to the courts below, four other lower courts have reached or assumed the same conclusion. See *Dichman, Wright & Pugh, Inc.*, v. *United States*, 144 F. Supp. 922, 926; *United States* v. *East Harbor Trading Corp.*, 190 F. Supp. 245, 249; *American Mail Line, Ltd.*, v. *United States*, 213 F. Supp. 152, 163; *United States* v. *Eastport Steamship Corp.*, 216 F. Supp. 649, 653–654. But see *American President Lines, Ltd.*, v. *United States*, 224 F. Supp. 187, 190–191. See also *American Export Lines, Inc.*, v. *United States*, 153 Ct. Cl. 201, 208–209, 290 F. 2d 925, 930.

We next turn to the question whether § 5 (b) suffices to support the sliding scale for profit-sharing rentals adopted by the Commission, in the face of the assertion

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[8] Eastern's contention that the legislative history of the 1946 Act confirms its position is not well taken. That Congress did not disapprove of charters and that it provided separate safeguards to encourage sales does not undermine the plainly expressed preference of sales to charters and the concern that charter rates not be so low as to make purchase less profitable than hire. That some legislators believed the 15% rate of § 5 (b) to be high is irrelevant, since the Commission's power to raise rates under § 5 (b) is undisputed and the issue here concerns only the kind of rate structure permissible. Finally, the circumscription of Commission discretion, which Eastern believes was intended by Congress, had to do with the desirability of having set rates instead of individually negotiated charters, rather than with the kinds of rates that might be set.

that the Commission did not purport to act under that section but apparently relied on § 709 alone. Eastern notes that the added obligation respecting excess profits was imposed as a part of "additional charter hire" under clause 13 of the charter agreement ("Form 303"), which included the 50% charge on excess profits less than $100 per day. Under "Form 203," the standard charter employed pending implementation of the 1946 Act, the unembellished 50% rate of § 709 (a) had also been characterized as "additional charter hire" and appeared in clause 13 of that form. In both "Form 203" and "Form 303" provision for the "basic charter hire"—the relevant percent of the sales price—was provided for in clauses E, C (1), and 12. Eastern accordingly concludes that the Commission equated "basic charter hire" with hire under § 5 (b) and "additional charter hire" with that imposed under § 709 (a). Citing a number of cases holding that grounds not relied on by a government agency cannot be invoked to validate an exercise of administrative discretion which has in fact been based on insufficient grounds or reached without requisite procedural safeguards, see, *e. g., Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 196; *Bell* v. *United States,* 366 U. S. 393, 412–413; *Burlington Truck Lines, Inc.,* v. *United States,* 371 U. S. 156, 167–168, Eastern asserts that the failure of the Commission to indicate the statutory basis of its sliding scale for profit sharing renders that aspect of its charter agreements void. It is not entirely clear what the Commission believed the source of its power to be and it is at least arguable that inclusion of the sliding rates within the additional hire clause was not necessarily inconsistent with a supposition of authority under § 5 (b). We find it unnecessary, however, to deal with this question since we agree with the courts below that the intent of the Commission in this regard is irrelevant.

The District Court determined that there is not "the slightest ground for assuming that if the Commission had been apprized of the correct source of its authority, the Commission or the other party would have made a contract different in substance, as distinguished from wording." 202 F. Supp. 297, 305. Eastern does not seriously challenge this determination. Although it alleges that the Commission hesitated to act under § 5 (b) to raise the fixed 15% rate because such an increase would have been passed on to other government agencies as a result of contractual provisions for subcharter, Eastern does not assert that a contingent profit-sharing rate of more than 50% would likewise have been passed on even if the Commission had explicitly referred to § 5 (b) as its source of authority. The subcharter clause appearing in the record indicates that only an increase in the 15% fixed rate would have been passed on.

No doubt is cast on the conclusion of the District Court by anything in § 5 (b) or § 709 (a). Section 5 (b) does not require a hearing or any particular kind of procedure (except when the rate is set below 15% of the sales price). Since § 709 (a) does not itself authorize deviations from the 50% rate on excess profits, that section provides, of course, no criteria for assessing the propriety of any such deviation. Section 5 (b) rates are supposed to be fixed "consistent with the policies of this Act" and (at least if lower than 15% of the statutory sales price) are not to be set at less than the prevailing world market charter rates. Since it is plain that the Commission instituted rates it believed to be consistent with the policies of the 1946 Act, it seems patently clear that its determination would have in no way varied had it paid particular attention to § 5 (b) in establishing the sliding scale.

In light of these factors we find inapposite here cases refusing to validate an exercise of administrative discre-

tion because it could have been supported by principles or facts not considered, or procedures not undertaken, by the responsible body. These cases are aimed at assuring that initial administrative determinations are made with relevant criteria in mind and in a proper procedural manner; when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached, as in this instance (assuming there was such a mistake), the sought extension of the cases cited would not advance the purpose they were intended to serve. The imposition of the sliding scale of additional charter hire was authorized by § 5 (b) and the Commission's failure to indicate explicitly or implicitly that that section was the source of its power is without legal significance.

Eastern claims that if the sliding-scale charge is proper under § 5 (b), the Commission has not followed the statutory scheme for accounting. Section 709 (a) provides for equal division of profits after payment of the "charter hire reserved in the charter . . . ." Eastern equates this language with the "charter hire . . . fixed by the Commission" under § 5 (b). Without attempting the impossible task of reading into the charter contract the following method of accounting, Eastern argues that this procedure is required by the statute: In addition to the required percent of the statutory sales price, the "charter hire reserved in the charter" includes any charge above 50% of profits; after these charges are computed, the Commission is entitled to 50% of remaining excess profits. How this method would work is most easily seen if we hypothesize an attempt by the Commission to acquire 100% of all excess profits. Instead of achieving this goal, the Commission would have to compute the fixed hire plus 50% of the profits (the amount of charge above the 50% set by § 709 (a)). The Commission would then receive 50% of the remaining profits; as a consequence the

charterer would retain 25% of the total excess profits. The effect of this method of accounting, therefore, would be to turn § 709 (a) into a provision limiting, under profit-sharing arrangements effected pursuant to § 5 (b), the Government's share of profits over 10% of capital necessarily employed; the maximum government share would be 75% (instead of the 50% that would result if § 709 (a) were read to prohibit completely any profit-sharing arrangement under § 5 (b)).

We are not compelled to accept this anomalous result. It is not necessary to read the reference in § 709 (a) to "charter hire reserved in the charter" as synonymous with "charter hire . . . fixed by the Commission" in § 5 (b). It is highly doubtful that the draftsmen intended such a result, particularly since § 709 (a) was brought forward without any attempt to spell out carefully its relationship to § 5 (b). A reading which does greater justice to the whole statutory framework is to limit "charter hire reserved in the charter" to any firm rather than contingent hire, regardless of whether § 5 (b) is the source for imposing the hire. Even if Eastern's interpretation of the language were acceptable, however, we see no reason why the Commission cannot reach under § 5 (b) what it would otherwise be paid under § 709 (a). If the sliding scale requires 90% of certain profits to be turned over to the Commission, it makes better sense to say that the Commission can take the full 90% under § 5 (b), thus rendering § 709 (a) superfluous, than to conclude that the Commission's authority under § 5 (b) extends only to the incremental amount. According to Eastern's argument § 709 (a) performs a dual function; it allocates that percent of profits which may be reached as "charter hire . . . fixed by the Commission" and it distributes the remaining profits. We think it clear that it was not intended in the context of the 1946 Act to perform the former role; therefore, even were any rate set under

§ 5 (b) taken to be "charter hire reserved in the charter," no statutory impediment would preclude the Commission from taking the full 75% and 90% of excess profits. A contrary conclusion would require a strained reading of the language of the Act and would conflict with the policies enunciated therein.

III.

Because of the discouragement of sales resulting from the high profits earned by charterers in the first part of 1947, the Commission sent telegrams to Eastern and other charterers on August 15 informing them of the Commission's intention to terminate the charter contracts, a privilege given to both parties under clause 14. The telegrams stated that the charterers would be able to continue use of the vessels if they agreed to new terms and conditions. On August 20, the Commission set out the new terms, including a provision that payment of additional charter hire under clause 13 be computed separately for voyages commencing after September 1. Eastern agreed to the terms; since it suffered losses for its post-August voyages, it was required to pay to the Commission a greater amount than would have been the case had 1947 been treated as a unit for accounting purposes. Eastern claims that the "Foreign Trade Addendum" to its charter was invalid insofar as it purported to divide 1947 into two accounting periods. It argues that § 709 (a) required calendar year accounting, that agreement to the Addendum was insufficient to create a new charter contract, and that the Commission could not use its termination power to accomplish an improper result.

We find this position untenable. There was no explicit limitation on the Commission's power to terminate existing charters, nor do we read § 709 (a), which provides for computation of additional charter hire "at the end of any calendar year," as indirectly imposing such

a restriction. The Commission could, therefore, have terminated all existing charters and rechartered the vessels to accomplish the end it sought. That the notification of termination was not a disingenuous threat to achieve an otherwise improper purpose is evidenced by the number of contracts which were, in fact, terminated subsequent to August 15. The Addendum states that it is to be "treated for accounting purposes as if it constituted a separate charter . . . ." We will not refuse to accord it significance simply because the Commission did not require the charterer to go through the formalities of the execution of a new contract.

Affirmed.

LOCAL 20, TEAMSTERS, CHAUFFEURS & HELPERS UNION *v.* MORTON, DOING BUSINESS AS LESTER MORTON TRUCKING CO.

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

No. 485. Argued April 29, 1964.—Decided May 25, 1964.

During a strike petitioner labor union engaged in secondary activities to induce customers and suppliers to cease dealing with the respondent employer. The respondent filed suit in the Federal District Court under § 303 of the Labor Management Relations Act of 1947 and state common law to recover for business losses caused by the union's unlawful conduct, and was awarded compensatory damages for the union's having encouraged employees of a customer to force its employer to stop doing business with respondent (in violation of § 303); for the union's having persuaded the management of one of the respondent's customers to cease doing business with the respondent, and for its having caused loss of a contract because there were not enough employees available during the strike to perform it (both in violation of state law); and punitive damages (also under state law), although it was held that the strike was free of violence. The Court of Appeals affirmed. *Held:*

1. The action of the union in encouraging the employees of a customer to force their employer to stop doing business with the respondent was a clear violation of § 303. P. 256.

2. State law has been displaced by § 303 in private damage actions based on peaceful union secondary activities. Pp. 256–261.

(a) The union's request to the management of one of respondent's customers to cease doing business with respondent is not prohibited by § 303 (a). Pp. 259–260.

(b) Punitive damages are not provided for in § 303 (b), which is limited to compensatory damages. Pp. 260–261.

3. Peaceful primary strike activity does not violate § 303 (a) even though petitioner may have contemporaneously engaged in unlawful activities elsewhere. Pp. 261–262.

320 F. 2d 505, judgment vacated and case remanded.

David Previant argued the cause for petitioner. With him on the briefs were *David Leo Uelmen* and *Hugh Hafer.*

M. J. Stauffer argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner is a labor organization. The respondent is a company engaged in the business of providing dump trucks and drivers, as a subcontractor on highway construction, with its principal place of business at Tiffin, Ohio. The petitioner represented the respondent's employees from 1950 until 1956 under an oral agreement. In 1956 the parties engaged in negotiations for a written agreement. An impasse in bargaining precipitated a strike which lasted from August to October of that year. During the strike the petitioner engaged in secondary activities involving some of the respondent's customers and suppliers, for the purpose of inducing them to cease doing business with the respondent. Claiming that these activities were unlawful both under § 303 of the Labor Management Relations Act of 1947, 29 U. S. C. § 187,[1] and

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[1] Section 303 of the Labor Management Relations Act of 1947 provided:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise

under the common law of Ohio, the respondent sued the petitioner in the United States District Court for the Northern District of Ohio, claiming damages for business losses caused by the petitioner's allegedly unlawful conduct during the strike.

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dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." 61 Stat. 158, 29 U. S. C. § 187.

Certain amendments to § 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 545, 29 U. S. C. (Supp. IV) § 187, but these amendments are not germane to the questions presented in this case.

After a trial without a jury, the District Court found that the petitioner had encouraged the employees of France Stone Co., a supplier of the respondent, and the employees of C. A. Schoen, Inc., and O'Connel Coal Co., customers of respondent, to force their employers to cease doing business with the respondent, in violation of § 303 of the federal Act.[2] The court awarded the respondent some $1,600 damages for business losses caused by this violation of federal law.[3] The court also determined that during the strike the petitioner had persuaded the management of Launder & Son, Inc., another of the respondent's customers, to refrain from doing business with the respondent. Since there had been no approach to Launder's employees, the court held that the request to Launder management was permissible activity under federal law, but ruled that this conduct violated the common law of Ohio, which, the court said, prohibits "making direct appeals to a struck employer's customers or suppliers to stop doing business with the struck employer . . . ." The respondent was accordingly awarded almost $9,000 as compensatory damages for this violation of Ohio law.[4] In addition, the court awarded the respondent more than $9,000 for the loss of a contract to haul sand for the Wilson Sand & Gravel Co., which loss had resulted from an insufficient number of drivers available during the strike to perform the contract. This award was based upon the court's reasoning that the respondent was entitled to recover damages measured by all of the profits lost as a result of the petitioner's total strike activity, so long as some of that activity was unlawful.[5] Finally, the court awarded punitive damages of $15,000, although expressly finding that the petitioner's

[2] 200 F. Supp. 653, 658–659.

[3] *Id.*, at 661.

[4] *Id.*, at 656, 661.

[5] *Id.*, at 656, 658, 661.

conduct during the strike had at all times been free of any violence.[6]

The Court of Appeals affirmed the award in all respects.[7] Relying on the doctrine of pendent jurisdiction, *Hurn* v. *Oursler*, 289 U. S. 238, and cases involving union violence, *e. g., Flame Coal Co.* v. *United Mine Workers*, 303 F. 2d 39, the appellate court concluded that "[a] nonfederal cause of action is not extinguished because a state court is pre-empted by federal law from providing relief," [8] and that "punitive damages are recoverable for unlawful secondary boycott activities . . . ." [9] Certiorari was granted to consider the issues of federal labor law which this case presents. 375 U. S. 939.

At the outset we affirm the award of compensatory damages for the violation of § 303 of the federal Act. The District Court found that "the defendant encouraged the employees of the O'Connel Company to stop using plaintiff's trucks for the purpose of forcing or requiring the O'Connel Company to cease doing business with the plaintiff . . . ." [10] This finding of a clear violation of § 303 was supported by the evidence, as was the amount of damages awarded therefor.[11]

With respect to the remaining components of the money judgment recovered by the respondent, the central question to be decided is whether a court, state or federal, is free to apply state law in awarding damages resulting from a union's peaceful strike conduct *vis-à-vis* a secondary employer, or is confined in the field of damage actions brought for union secondary activities to the spe-

[6] *Id.*, at 661.

[7] 320 F. 2d 505.

[8] *Id.*, at 507.

[9] *Id.*, at 508.

[10] 200 F. Supp., at 659.

[11] No damages were awarded with respect to the petitioner's dealings with the employees of France Stone Co. or C. A. Schoen, Inc.

cifically limited provisions of § 303 of the federal Act. We disagree with the Court of Appeals that this question can be resolved either by reference to the doctrine of pendent jurisdiction or by reference to the line of precedents which have permitted state law to be applied in situations where union activities involving violence were present.

If the provisions of § 303 mark the limits beyond which a court, state or federal, may not go in awarding damages for a union's secondary activities, then the doctrine of pendent jurisdiction can be of no service. Pendent jurisdiction permits a federal court under some circumstances to determine a state cause of action which otherwise would have to be heard in the state court. *Hurn* v. *Oursler, supra.* But if the state court would be without authority to award damages under state law, then the doctrine of pendent jurisdiction can give "the District Court . . . no greater power to do so." *Lauf* v. *Shinner & Co.,* 303 U. S. 323, 328.

And in cases involving union violence, state law has been permitted to prevail by reason of controlling considerations which are entirely absent in the present case. "[W]e have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell,* 356 U. S. 634; *United Construction Workers* v. *Laburnum Corp.,* 347 U. S. 656. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. . . . In the present case there is no such compelling state interest." *San Diego Bldg. Trades* v. *Garmon,* 359 U. S. 236, 247–248.

It is the respondent's contention, however, that since the petitioner union's peaceful conduct was neither arguably protected under § 7 nor arguably prohibited under § 8 of the National Labor Relations Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this conduct. But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting § 303, "Congress occupied this field and closed it to state regulation." *Automobile Workers* v. *O'Brien*, 339 U. S. 454, 457. The basic question, in other words, is whether "in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law." *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 102. The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines*, 372 U. S. 714, 722.

Section 303 (b) of the Labor Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain secondary boycott activities described in § 303 (a).[12] The type of conduct to be made the subject of a private damage action was considered by Congress, and § 303 (a) comprehensively and with great particularity "describes and condemns specific union conduct directed to specific objectives." *Carpenters Local 1976* v. *Labor Board*, 357 U. S. 93, 98.[13] In selecting which forms of economic pressure

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[12] See note 1, *supra*.

[13] Section 8 (b) (4), 29 U. S. C. § 158 (b) (4), and § 303, 29 U. S. C. § 187, "have an identity of language" but specify two "different remedies." *Longshoremen* v. *Juneau Corp.*, 342 U. S. 237, 244. Section 8 (b) (4) provides that certain conduct constitutes an unfair

should be prohibited by § 303, Congress struck the "balance . . . between the uncontrolled power of management and labor to further their respective interests," *id.*, at 100, by "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and [by] shielding unoffending employers and others from pressures in controversies not their own." *Labor Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. 675, 692.

In this case, the petitioner's request to Launder's management to cease doing business with the respondent was not proscribed by the Act. "[A] union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees." *Carpenters Local 1976* v. *Labor Board, supra.* at 99. This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent.[14] Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761* v. *Labor Board,* 366 U. S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it

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labor practice for which an administrative remedy is afforded. The same conduct under § 303 also gives rise to a claim for damages cognizable in either state or federal courts. As a consequence of the 1959 amendments to the Act, § 303 now incorporates by reference the prohibitions embodied in § 8 (b) (4).

[14] No claim has been made that Launder's voluntary compliance with the petitioner's request, unsupported by any consideration, amounted to an "agreement, express or implied" under § 8 (e) of the Act, added by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. (Supp. IV) § 158 (e).

enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner* v. *Teamsters Union,* 346 U. S. 485, 500. We hold, therefore, that the damages awarded against the petitioner based upon its peaceful persuasion of Launder's management not to do business with the respondent during the strike cannot stand.

The same considerations require reversal of the award of punitive damages. Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute [15] and in its legislative history,[16] that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages. And insofar as punitive damages in this case were based on secondary activities which violated only state law, they cannot stand, because, as we

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[15] Section 303 (b) provides in pertinent part that "[w]hoever shall be injured in his business or property . . . shall recover *the damages by him sustained* . . . ." (Emphasis supplied.)

[16] In the Senate debate on the bill, Senator Taft said, ". . . I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost." 93 Cong. Rec. 4858. Later, in response to Senator Morse's claim that § 303 would impose virtually unlimited liability, Senator Taft said, "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages." 93 Cong. Rec. 4872–4873.

have held, substantive state law in this area must yield to federal limitations. In short, this is an area "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176. Accordingly, we hold that since state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities, the District Court in this case was without authority to award punitive damages.[17]

There remains for consideration only the question of the damage award for the respondent's loss of the Wilson account. The respondent conceded at trial that there was "no evidence of unlawful activity in connection with this [the Wilson] job," and the record makes clear that the respondent lost the Wilson account because his drivers were discouraged from working during the strike by the petitioner's primary strike activity.[18] Since § 303 (b) authorizes an award of damages only in the event of injury "by reason of any violation of subsection (a)" and peaceful primary strike activity does not violate § 303 (a), *Electrical Workers Local 761* v. *Labor Board*, 366 U. S. 667, 672, the District Court was without power to award damages proximately caused by lawful,

[17] See *United Mine Workers* v. *Patton*, 211 F. 2d 742, 747–750; *Overnite Transportation Co.* v. *Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. denied, 371 U. S. 862.

[18] It is argued that the petitioner's unlawful secondary activities made more effective the petitioner's attempts to discourage employees of the respondent from working during the strike. But there is nothing in the record to indicate, and no finding by the trial court, that the petitioner's secondary activities which were unlawful under § 303 had any effect whatsoever on the respondent's employees' decisions not to work during the strike.

primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere. See *Chauffeurs Local 175* v. *Labor Board,* 294 F. 2d 261.

The judgment is vacated and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE GOLDBERG, concurring.

My concurrence in the Court's opinion and judgment does not indicate approval of the Court's holdings in *United Automobile Workers* v. *Russell,* 356 U. S. 634, and *United Construction Workers* v. *Laburnum Corp.,* 347 U. S. 656.

Per Curiam.

CALHOUN ET AL. *v.* LATIMER ET AL.

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

No. 623. Argued March 31, 1964.—Decided May 25, 1964.

Subsequent to the argument in this Court, the Atlanta Board of Education set forth in a resolution its pupil assignment and transfer policy for the ensuing school year. The cause is remanded to the District Court to test the nature and effect of the resolution and the entire plan for school desegregation under considerations set forth in *Watson* v. *City of Memphis*, 373 U. S. 526; *Goss* v. *Board of Education*, 373 U. S. 683; and *Griffin* v. *County School Board of Prince Edward County, ante*, at 218.

321 F. 2d 302, vacated and remanded.

Constance Baker Motley argued the cause for petitioners. With her on the brief were *Jack Greenberg, E. E. Moore, Donald L. Hollowell* and *A. T. Walden.*

A. C. Latimer argued the cause for respondents. With him on the brief was *Newell Edenfield.*

Assistant Attorney General Marshall, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox, Louis F. Claiborne, Harold H. Greene* and *Howard A. Glickstein.*

Eugene Cook, Attorney General of Georgia, *Alfred L. Evans, Jr.,* Assistant Attorney General, and *E. Freeman Leverett,* Deputy Assistant Attorney General, filed a brief for the State of Georgia, as *amicus curiae,* urging affirmance.

PER CURIAM.

During the argument of this case, counsel for respondents stated that after the decree below was entered the Atlanta Board of Education adopted additional provisions

authorizing free transfers with certain limitations in the city's high schools. At our invitation both parties filed supplemental memoranda dealing with this aspect of the case. It appears therefrom that since the argument the Atlanta Board of Education on April 8, 1964, adopted and promulgated a new formal resolution stating the present policy of the Board and the factors it will consider in making initial assignments of pupils and in permitting transfers for the school year 1964–1965. Petitioners deny that this resolution meets the constitutional standards and assert that with respect to students in the elementary schools the plan will not achieve desegregation until sometime in the 1970's.

In light of the developments at and since the argument, we deem it appropriate that the nature and effect of the Board's resolution of April 8, 1964, be appraised by the District Court in a proper evidentiary hearing. To this end we vacate the judgment and remand the cause to the District Court for further proceedings.

Although Atlanta's commendable effort to effect desegregation is recognized, the District Court on remand must, of course, test the entire Atlanta plan by the considerations discussed in *Watson* v. *City of Memphis,* 373 U. S. 526, 529; *Goss* v. *Board of Education,* 373 U. S. 683; and *Griffin* v. *County School Board of Prince Edward County, ante,* at 218, decided subsequent to the District Court's approval of the plan. In *Goss, supra,* at 689, we said:

> "[W]e are not unmindful of the deep-rooted problems involved. Indeed, it was consideration for the multifarious local difficulties and 'variety of obstacles' which might arise in this transition that led this Court eight years ago to frame its mandate in *Brown* in such language as 'good faith compliance at the earliest practicable date' and 'all deliberate speed.' *Brown* v. *Board of Education,* 349 U. S., at

300, 301. Now, however, eight years after this decree was rendered and over nine years after the first *Brown* decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered. Compare *Watson* v. *City of Memphis, supra.*"

Vacated and remanded.

NAGELBERG *v.* UNITED STATES.

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

No. 785. Decided May 25, 1964.

The District Court has discretion to permit withdrawal of a guilty plea where the Government plans to dismiss the indictment and substitute lesser charges.

Certiorari granted; 323 F. 2d 936, judgment vacated and case remanded.

Irwin Klein for petitioner.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

On April 11, 1962, petitioner pleaded not guilty to federal narcotics charges; thereafter, on July 18, 1962, he was permitted to withdraw this plea and plead guilty; in November 1962, when the case came on for sentencing, he moved to withdraw his guilty plea because of facts and circumstances which had changed since the time of the plea, including petitioner's extensive cooperation with the Government. The Government acquiesced in this motion, but the district judge denied it, holding that he had no power to permit withdrawal of the plea on such grounds. The court sentenced petitioner to the minimum statutory term of imprisonment and the Court of Appeals affirmed the conviction, 323 F. 2d 936.

The Government now says that it consented to petitioner's motion to withdraw his plea because it "planned to dismiss the pending indictment against petitioner and substitute lesser charges." The Government admits that this purpose was not expressly stated and that "it may be that the court was misled."

In these circumstances, we believe that the court has discretion to permit withdrawal of the plea. See *Kercheval* v. *United States,* 274 U. S. 220, 224 (1927). Accordingly, we grant the petition for certiorari, vacate the judgment of the Court of Appeals and remand the case to the District Court for further proceedings in conformity with this opinion.

ROGERS ET AL. *v.* CITY OF PINE BLUFF, ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 889. Decided May 25, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 237 Ark. 117, 372 S. W. 2d 620.

Griffin Smith for appellants.

John Harris Jones for appellee.

PER CURIAM.

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

HORNER *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 1156, Misc. Decided May 25, 1964.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

RAYMOND, DOING BUSINESS AS CRESTMARK DAIRY, *v.* WICKHAM, COMMISSIONER OF AGRICULTURE AND MARKETS, ET AL.

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

No. 1096, Misc. Decided May 25, 1964.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

AHLSTRAND *v.* UNITED STATES ET AL.

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

No. 1108, Misc. Decided May 25, 1964.

Appeal dismissed.

Appellant *pro se.*

Solicitor General Cox for the United States, and *John J. Wilson* for the National Rifle Association of America, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction.

LYNCHBURG TRAFFIC BUREAU *v.* UNITED STATES ET AL.

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

No. 931. Decided May 25, 1964.

225 F. Supp. 874, affirmed.

W. G. Burnette for appellant.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Arthur J. Murphy, Jr., Robert W. Ginnane and *Thomas H. Ploss* for the United States and the Interstate Commerce Commission.

Martin A. Meyer, Jr., Robert B. Claytor and *John W. Hanifin* for rail appellees.

PER CURIAM.

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

UNITED STATES *v.* ALUMINUM CO. OF AMERICA ET AL.

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

No. 204. Argued April 23, 1964.—
Decided June 1, 1964.

The United States brought this civil antitrust suit alleging a violation of § 7 of the Clayton Act by Aluminum Company of America's (Alcoa's) 1959 acquisition of the stock and assets of Rome Cable Corporation (Rome), and asking for divestiture. Rome, which manufactured mainly insulated copper products, in 1958 produced 0.3% of the industry production of bare aluminum conductor, 4.7% of insulated aluminum conductor and 1.3% of aluminum conductor (the broader aluminum conductor line consisting of both bare and insulated conductor). Alcoa, which produced no copper conductor, in 1958 produced 32.5% of bare aluminum conductor, 11.6% of insulated aluminum conductor, and 27.8% of aluminum conductor. These products are used almost entirely by electrical utilities for transmission and distribution lines—overhead lines in recent years consisting of mainly bare aluminum conductor and insulated aluminum conductor; underground lines consisting essentially of insulated copper conductor. The District Court found that bare aluminum conductor is a separate "line of commerce," but held that insulated aluminum conductor is not a line of commerce distinct from its copper counterpart, and, consequently that aluminum conductor generally is not a separate line of commerce. It dismissed the complaint. *Held:*

1. Aluminum conductor is a submarket and a separate line of commerce for purposes of § 7. Pp. 274–277.

(a) The degree of competition between insulated aluminum conductor (a component of aluminum conductor) and insulated copper conductor, while enough to justify grouping them in a single product market, does not prevent their division into separate submarkets for § 7 purposes. *Brown Shoe Co.* v. *United States,* 370 U. S. 294, followed. P. 275.

(b) Dividing insulated aluminum conductor and its copper counterpart into separate submarkets is proper, since each has

developed distinctive end uses and the price differential, the most important practical factor in the trade, keeps them apart. P. 276.

(c) Bare and insulated aluminum conductor may be combined into one line of commerce since they are distinct from their copper counterpart in use and price. Pp. 276–277.

2. The merger violated § 7 and divestiture is proper. Pp. 277–281.

(a) The purpose of § 7 is to proscribe mergers with a probable anticompetitive effect. P. 280.

(b) In an oligopolistic industry with a few dominant integrated companies and a small and diminishing group of independents, the prevention of increased concentration is important. Pp. 278–281.

(c) Rome ranked ninth among all companies and fourth among independents in the aluminum conductor market and eighth and fourth respectively in the insulated aluminum line. Alcoa was the leading producer of aluminum conductor and third in the insulated aluminum field. Pp. 278, 280–281.

(d) The acquisition by Alcoa of Rome, though adding but 1.3% to Alcoa's share of the aluminum conductor market, would, in the framework of this industry, likely result in a substantial reduction of competition. P. 280.

214 F. Supp. 501, reversed and remanded.

Solicitor General Cox argued the cause for the United States. With him on the brief were *Assistant Attorney General Orrick, Frank Goodman, Robert B. Hummel, Donald F. Melchior, Charles D. Mahaffie, Jr.* and *Richard J. Wertheimer.*

Herbert A. Bergson argued the cause for appellees. With him on the brief were *Howard Adler, Jr., Hugh Latimer* and *William K. Unverzagt.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question is whether the 1959 acquisition by the Aluminum Company of America (Alcoa) of the stock and assets of the Rome Cable Corporation (Rome) "may

be substantially to lessen competition, or to tend to create a monopoly" in the production and sale of various wire and cable products and accessories within the meaning of § 7 of the Clayton Act.[1] The United States, claiming that § 7 had been violated, instituted this civil suit and prayed for divestiture. The District Court, after a trial, held that there was no violation and dismissed the complaint. 214 F. Supp. 501. The case is here on appeal, 15 U. S. C. § 29; and we noted probable jurisdiction. 375 U. S. 808.

I.

The initial question concerns the identification of the "line of commerce," as the term is used in § 7.

Aluminum wire and cable (aluminum conductor) is a composite of bare aluminum wire and cable (bare aluminum conductor) and insulated or covered wire and cable (insulated aluminum conductor). These products are designed almost exclusively for use by electric utilities in carrying electric power from generating plants to consumers throughout the country. Copper conductor wire and cable (copper conductor) is the only other product utilized commercially for the same general purpose. Rome produced both copper conductor and aluminum conductor. In 1958—the year prior to the merger—it produced 0.3% of total industry production of bare alu-

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[1] Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Celler-Kefauver Antimerger Act, 64 Stat. 1125, 15 U. S. C. § 18, provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

minum conductor, 4.7% of insulated aluminum conductor, and 1.3% of the broader aluminum conductor line.

Alcoa produced no copper conductor. In 1958 it produced 32.5% of the bare aluminum conductor, 11.6% of insulated aluminum conductor, and 27.8% of aluminum conductor.

These products, as noted, are most often used by operating electrical utilities. Transmission and distribution lines [2] are usually strung above ground, except in heavily congested areas, such as city centers, where they are run underground. Overhead, where the lines are bare or not heavily insulated, aluminum has virtually displaced copper, except in seacoast areas, as shown by the following table:

Percent of Aluminum Conductor in Gross Additions to Overhead Utility Lines.

	1950	*1955*	*1959*
Transmission Lines (All Bare Conductor)...	74.4%	91.0%	94.4%
Distribution Lines:			
Bare Conductor.....	35.5	64.4	79.0
Insulated Conductor.....	6.5	51.6	77.2
Total, Transmission and Distribution Lines..	25.0	60.9	80.1

Underground, where the conductor must be heavily insulated, copper is virtually the only conductor used. In sum, while aluminum conductor dominates the overhead field, copper remains virtually unrivaled in all other conductor applications.

The parties agree, and the District Court found, that bare aluminum conductor is a separate line of commerce. The District Court, however, denied that status to the broader aluminum conductor line because it found that insulated aluminum conductor is not an appropriate line

[2] Transmission lines are the "wholesale" lines which carry current at high voltages to substations. Distribution lines are the "retail" lines which carry current from the substations to the consumers.

of commerce separate and distinct from its copper counterpart. The court said the broad product group cannot result in a line of commerce, since a line of commerce cannot be composed of two parts, one of which independently qualifies as a line of commerce and one of which does not.

Admittedly, there is competition between insulated aluminum conductor and its copper counterpart, as the District Court found. Thus in 1959 insulated copper conductor comprised 22.8% of the gross additions to insulated overhead distribution lines. This is enough to justify grouping aluminum and copper conductors together in a single product market. Yet we conclude, contrary to the District Court, that that degree of competitiveness does not preclude their division for purposes of § 7 into separate submarkets, just as the existence of broad product markets in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, did not preclude lesser submarkets.[3]

Insulated aluminum conductor is so intrinsically inferior to insulated copper conductor that in most applications it has little consumer acceptance. But in the field of overhead distribution it enjoys decisive advantages—its share of total annual installations increasing from 6.5% in 1950 to 77.2% in 1959. In the field of overhead distribution the competition of copper is rapidly decreasing. As the record shows, utilizing a high-cost metal, fabricators of insulated

[3] Cf. *United States* v. *Philadelphia National Bank,* 374 U. S. 321, where we held it proper to make commercial banking a line of commerce for purposes of § 7 even though in some services, *e. g.,* the making of small loans, banks compete with other institutions. We said that commercial banks enjoy "such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions." *Id.,* at 356. And see *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 593; *Reynolds Metals Co.* v. *Federal Trade Comm'n,* 309 F. 2d 223, 229; *United States* v. *Corn Products Refining Co.,* 234 F. 964, 976.

copper conductor are powerless to eliminate the price disadvantage under which they labor and thus can do little to make their product competitive, unless they enter the aluminum field. The price of most insulated aluminum conductors is indeed only 50% to 65% of the price of their copper counterparts; and the comparative installed costs are also generally less. As the District Court found, aluminum and copper conductor prices do not respond to one another.

Separation of insulated aluminum conductor from insulated copper conductor and placing it in another submarket is, therefore, proper. It is not inseparable from its copper equivalent though the class of customers is the same. The choice between copper and aluminum for overhead distribution does not usually turn on the quality of the respective products, for each does the job equally well. The vital factors are economic considerations. It is said, however, that we should put price aside and *Brown Shoe, supra,* is cited as authority. There the contention of the industry was that the District Court had delineated too broadly the relevant submarkets—men's shoes, women's shoes, and children's shoes—and should have subdivided them further. It was argued, for example, that men's shoes selling below $8.99 were in a different product market from those selling above $9. We declined to make price, particularly such small price differentials, the determinative factor in that market. A purchaser of shoes buys with an eye to his budget, to style, and to quality as well as to price. But here, where insulated aluminum conductor pricewise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business.

The combination of bare and insulated aluminum conductor products into one market or line of commerce

seems to us proper.[4] Both types are used for the purpose of conducting electricity and are sold to the same customers, electrical utilities. While the copper conductor does compete with aluminum conductor, each has developed distinctive end uses—aluminum as an overhead conductor and copper for underground and indoor wiring, applications in which aluminum's brittleness and larger size render it impractical. And, as we have seen, the price differential further sets them apart.

Thus, contrary to the District Court, we conclude (1) that aluminum conductor and copper conductor are separable for the purpose of analyzing the competitive effect of the merger and (2) that aluminum conductor (bare and insulated) is therefore a submarket and for purposes of § 7 a "line of commerce."

II.

Taking aluminum conductor as an appropriate "line of commerce" we conclude that the merger violated § 7.

Alcoa is a leader in markets in which economic power is highly concentrated. Prior to the end of World War II it was the sole producer of primary aluminum and the sole fabricator of aluminum conductor. It was held in 1945 to have monopolized the aluminum industry in violation of § 2 of the Sherman Act. See *United States* v. *Aluminum Co.*, 148 F. 2d 416. Relief was deferred while the United States disposed of its wartime aluminum fa-

[4] The dissent criticizes this grouping of bare and insulated aluminum conductor into one line of commerce. This overlooks the fact that the parties agree, and the District Court found, that bare aluminum conductor and conductor generally (aluminum and copper, bare and insulated) constitute separate lines of commerce. Having concluded above that insulated aluminum conductor and insulated copper conductor are separable even though some interproduct competition exists, the conclusion that aluminum conductor (bare and insulated) is a line of commerce is a logical extension of the District Court's findings.

cilities under a congressional mandate to establish domestic competition in the aluminum industry.[5] As a result of that policy and further federal financing and assistance, five additional companies entered the primary aluminum field so that by 1960 the primary producers showed the following capacity:

Aluminum Ingot Capacity Existing or Under Construction at the End of 1960.

[SHORT TONS]

Company	*Capacity*	*% of U. S.*
Aluminum Company of America	1,025,250	38.6
Reynolds Metals Company	701,000	26.4
Kaiser Aluminum & Chemical Corp.	609,500	23.0
Ormet, Inc.	180,000	6.8
Harvey Aluminum	75,000	2.8
Anaconda Aluminum Company	65,000	2.4
United States total	2,655,750	100.0

In 1958—the year prior to the merger—Alcoa was the leading producer of aluminum conductor, with 27.8% of the market; in bare aluminum conductor, it also led the industry, with 32.5%. Alcoa plus Kaiser controlled 50% of the aluminum conductor market and, with its three leading competitors, more than 76%. Only nine concerns (including Rome with 1.3%) accounted for 95.7% of the output of aluminum conductor. In the narrower market of insulated aluminum conductor, Alcoa was third with 11.6% and Rome was eighth with 4.7%. Five companies controlled 65.4% and four smaller ones, including Rome, added another 22.8%.

In other words, the line of commerce showed highly concentrated markets, dominated by a few companies but

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[5] See the Surplus Property Act of 1944, 58 Stat. 765; *United States* v. *Aluminum Co.*, 91 F. Supp. 333; *United States* v. *Aluminum Co.*, 153 F. Supp. 132. Litigation was terminated on June 28, 1957. *Ibid.* Twelve days later, Alcoa made its first attempt to acquire Rome.

served also by a small, though diminishing,[6] group of independents. Such decentralization as has occurred resulted from the establishment of a few new companies through federal intervention, not from normal, competitive decentralizing forces.

The proposition on which the present case turns was stated in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 365, n. 42, as follows:

> "It is no answer that, among the three presently largest firms (First Pennsylvania, PNB, and Girard), there will be no increase in concentration. If this argument were valid, then once a market had become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."

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[6] The absorption of Rome by Alcoa was one of the five acquisitions by producers of primary aluminum since 1957. In that year Olin Mathieson (a one-half owner of Ormet, Inc.) acquired Southern Electric Corporation, then the largest independent manufacturer of aluminum conductor; and Kaiser acquired the Bristol, Rhode Island, plant of the U. S. Rubber Company, one of the top 10 in the insulated aluminum field. These moves, and the threat they were thought to pose, were specifically identified as factors influencing Alcoa's 1959 decision to acquire Rome. And it was partly in response to the three prior acquisitions that Reynolds, in 1961, acquired the wire and cable facilities of John A. Roebling's Sons Division of the Colorado Fuel and Iron Company, a small fabricator. Finally, in February 1963, too late to be noted in the record below, Aluminium, Ltd., of Canada announced the acquisition of Central Cable Corporation, one of the largest of the independents. As a result of this series of mergers, there now remain only four nonintegrated fabricators of aluminum conductor whose individual shares of total industry production (based on 1959 figures, the latest in the record) amounted to more than 1%.

The Committee Reports on § 7 show, as respects the Celler-Kefauver amendments in 1950, that the objective was to prevent accretions of power which "are individually so minute as to make it difficult to use the Sherman Act test against them." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 5. And see H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 3. As the Court stated in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 323:

> "Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act."

See also *United States* v. *Philadelphia National Bank,* 374 U. S., at 362, and *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651, 658.

The acquisition of Rome added, it is said, only 1.3% to Alcoa's control of the aluminum conductor market. But in this setting that seems to us reasonably likely to produce a substantial lessening of competition within the meaning of § 7. It is the basic premise of that law that competition will be most vital "when there are many sellers, none of which has any significant market share." *United States* v. *Philadelphia National Bank,* 374 U. S., at 363. It would seem that the situation in the aluminum industry may be oligopolistic. As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors. Though percentagewise Rome may have seemed small in the year prior to the merger, it ranked ninth among all companies and fourth

among independents in the aluminum conductor market; and in the insulated aluminum field it ranked eighth and fourth respectively. Furthermore, in the aluminum conductor market, no more than a dozen companies could account for as much as 1% of industry production in any one of the five years (1955–1959) for which statistics appear in the record. Rome's competition was therefore substantial. The record shows indeed that Rome was an aggressive competitor. It was a pioneer in aluminum insulation and developed one of the most widely used insulated conductors. Rome had a broad line of high-quality copper wire and cable products in addition to its aluminum conductor business, a special aptitude and skill in insulation, and an active and efficient research and sales organization. The effectiveness of its marketing organization is shown by the fact that after the merger Alcoa made Rome the distributor of its entire conductor line. Preservation of Rome, rather than its absorption by one of the giants, will keep it "as an important competitive factor," to use the words of S. Rep. No. 1775, *supra,* p. 3. Rome seems to us the prototype of the small independent that Congress aimed to preserve by § 7.

The judgment is reversed and since there must be divestiture, the case is remanded to the District Court for proceedings in conformity with this opinion.

Reversed and remanded.

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

In this civil action, brought under § 7 of the Clayton Act, as amended, the District Court found that the Government had failed to sustain its burden of proof as to both the "line of commerce" and competitive effect issues. Because I think the Government clearly failed to prove its "line of commerce" claims, I dissent from today's reversal of the trial court's judgment.

A four-week trial was held—after 22 months of extensive pretrial discovery. Five hundred documentary exhibits were received in evidence, and 50 witnesses were heard. The record amounts to more than 3,500 pages. The district judge wrote a long and careful opinion, accompanied by meticulous findings of fact and thoroughly reasoned conclusions of law. In determining the relevant lines of commerce involved here, the trial judge conscientiously applied the standards postulated by this Court in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 325, and made detailed findings of fact fully supporting his determinations. 214 F. Supp. 501. The Government has not claimed that any of these findings of fact are clearly erroneous, nor does the Court today hold them to be. Nevertheless, the Court reverses the judgment. I find it difficult to understand the Court's conclusion, and impossible to agree with it.

A "[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act." *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 593. In order to prove that this was a horizontal merger in violation of § 7, the Government was therefore faced with the necessity of showing substantial percentages of market shares in competitive products.[1] Alcoa manufactured no copper cable, and in the conductor field was chiefly a producer of bare aluminum cable. Over 90% of Rome's production was in insulated copper products, and its production of bare aluminum cable was *de minimis* (.3% of the market share). The District Court found that conductor wire and cable (both bare and insulated, aluminum and copper), and insulated conductor (both aluminum and copper), were lines of commerce, but that Alcoa's and Rome's market shares in these broad product markets were insufficient to support a find-

[1] See *United States* v. *Philadelphia Bank,* 374 U. S. 321.

ing of requisite anticompetitive effect, 214 F. Supp., at 518–519—a conclusion which the Government does not question here. More substantial market share percentages would be forthcoming, however, if aluminum conductors could be set apart from the rest of the conductor manufacturing industry. Accordingly, the Government asked the District Court to find aluminum conductors in general, and insulated aluminum conductors in particular, to be separate lines of commerce.

The District Court declined to make such a finding, and for good reason. A line of commerce is an "area of effective competition," to be determined in accordance with the principles laid down in our prior decisions. In *Brown Shoe,* this Court held that there are broad product markets within which there may be "well-defined" and "economically significant" submarkets. 370 U. S., at 325. The Court in that case did not attempt to formulate any rigid standard for determining submarket boundaries, but indicated that a broad-ranging pragmatic evaluation of market realities was required. The federal trial courts were admonished to examine "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Ibid.* These "practical indicia" to be considered in determining submarket boundaries express in practical terms the basic economic concept that markets are to be defined in terms of the close substitutability of either product (demand) or production facilities (supply), since it is ultimately the degree of substitutability that limits the exercise of market power, and it is only by delimiting the area of effective competition that an acquisition's competitive effects can be ascertained.

The District Court applied these practical indicia with meticulous care, and found that the conductor industry does not differentiate between copper and aluminum insulated products; that copper and aluminum products are functionally interchangeable; and that there are no unique production facilities, distinct customers or specialized vendors for insulated aluminum conductor products. 214 F. Supp., at 509. The trial judge did not, as the Court implies, ignore the fact that the prices of copper and aluminum insulated products are generally distinct. It explicitly recognized this fact, but concluded on closer examination of the industry that this price difference did not foreclose "actual competition." *Ibid.* Accordingly, making a practical judgment based on the *Brown Shoe* submarket indicia, the District Court concluded that insulated aluminum conductor had not been established as a line of commerce. And since the other alleged line of commerce—aluminum conductor generally—was no more than the sum of bare and insulated aluminum conductors, the court concluded that it, too, could not constitute an "area of effective competition," since as to the insulated segment, important competitive copper elements would be improperly and arbitrarily excluded. *Id.*, at 510.

The District Court, in other words, did a careful and thoughtful job. It applied the proper law, and its reasoning was impeccable. Yet this Court overrules its decision with little more than a wave of the hand. On the basis of two assertions, that the record shows "fabricators of insulated copper conductor are powerless to eliminate the price disadvantage under which they labor and thus can do little to make their product competitive," and that the difference in price between aluminum and copper conductors is "the single, most important, practical factor in the business," both of which are contrary to the explicit findings of the District Court, the Court summarily con-

cludes that aluminum conductor is "for purposes of § 7 a 'line of commerce.' "

The District Court found that neither insulated aluminum nor insulated copper conductor products are recognized as a separate economic entity. Insulated products are identified and defined by the industry and reported to the Bureau of the Census in accordance with their function or type, "not according to the metal used as conductor," and manufacturers regard themselves simply as insulators of wire and cable products. Moreover, there is complete manufacturing interchangeability between copper and aluminum, and manufacturers constantly review their product lines and "switch readily from one product or conductor metal to another in accordance with market conditions." As a result, if a fabricator should feel himself at a competitive disadvantage because of his use of copper, he is not, as the Court asserts, powerless to eliminate a price disadvantage. The supply flexibility which this implies exerts a profound restraint upon an aluminum cable manufacturer's power to achieve any sort of market advantage.

The Court points to nothing in the record justifying its second assertion that "price . . . is . . . the single, most important, practical factor in the business." Whether it is or not is a matter of fact, and the trial judge found upon substantial evidence that "[s]ince copper and aluminum products are completely interchangeable from a performance standpoint, utility companies choose between copper and aluminum insulated or covered overhead products solely on the basis of economics. The decision requires *evaluation of numerous economic factors in addition to the cost of the wire or cable itself.*" (Emphasis supplied.) The record amply supports this finding. There was undisputed testimony that in some situations, the final installed cost of aluminum conductor may be greater than its copper counterpart because of other economic factors

such as the higher cost of connectors which must be used with aluminum and the fact that the copper-aluminum cost difference becomes less significant the more complex the conductor required for the job. That the copper-aluminum price difference is not always the determining factor is further borne out by other findings of the trial judge, fully supported by the record, that even in areas where aluminum has gained "increasing use," there is a "lively competition between aluminum and copper products"; that the aluminum-copper price difference does not foreclose "actual competition" and that, in fact, "substantial quantities" of the copper version of overhead distribution products are sold.

But even if insulated aluminum conductor is a proper line of commerce, there is no basis in logic, or in the competitive realities of the conductor industry, for lumping together in one line of commerce bare and insulated aluminum conductors. Even the Government does not claim that the two are competitive; different equipment and engineering skills are required for their manufacture and sale; and, as the District Court found, the combination of bare and insulated aluminum conductors is not generally "recognized in the industry as a separate economic entity" or submarket. The grouping of bare and insulated aluminum conductors into one line of commerce, therefore, is not, as the Court says, "a logical extension of the District Court's findings," [2] but a repudiation of those findings. And it adds nothing to note, as the Court does, that both bare and insulated aluminum conductors are used to conduct electricity and are sold to electrical utilities. All electrical conductors are used for this purpose and sold to these customers. Such a *non-sequitur* cannot justify the separation of aluminum conductors from the rest of the electrical conductor field.

[2] See note 4 of the Court's opinion.

The short of it is, there is here no relevant market upon which to predicate a violation of § 7. The District Court correctly described this acquisition as "the combination of an aluminum and an essentially copper manufacturing company," undertaken by Alcoa "in the face of its declining market," for the purpose of obtaining insulating know-how and diversification needed "to overcome a market disadvantage rather than to obtain a captive market . . . or to eliminate a competitor." 214 F. Supp., at 512. I am totally unable to join the Court in its *ipse dixit* transformation of this essentially "know-how" acquisition into a horizontal merger in violation of § 7.

I would affirm the judgment of the District Court.

729-256 O-65-23

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. FLOWERS, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 169. Argued March 24, 1964.—Decided June 1, 1964.

Alleging noncompliance with Alabama's corporate registration and business qualification laws, the State in 1956 brought ouster proceedings against the petitioner, National Association for the Advancement of Colored People (NAACP), a New York membership corporation with an office in Alabama and doing business there, and it was barred under an *ex parte* restraining order from operating in the State. Before any hearing on the merits, a contempt judgment, which the State Supreme Court on procedural grounds refused to review, was rendered against the NAACP for failure to produce its membership lists and other records under court order. Without reaching the validity of the underlying restraining order, this Court reversed, and, following reinstatement by the State Supreme Court of the contempt judgment, reversed again. In 1960 the NAACP, still prohibited from operating in Alabama, sued in a federal court alleging failure by the Alabama courts to afford it a hearing on the merits. The case reached this Court a third time and in 1961 was remanded with instructions that the Federal District Court be directed to try the case on the merits unless the State did so by a certain time. The State Circuit Court then heard the case; found that the NAACP had violated the State's constitution and laws; and permanently enjoined it from doing business in the State. The State Supreme Court affirmed, solely on the basis of a procedural rule, which it applied to the NAACP's brief, that where unrelated assignments of error are argued together and one is without merit, the others will not be considered. *Held:*

1. There was substantial compliance with the procedural rule, and failure to consider petitioner's asserted constitutional rights was wholly unwarranted. Pp. 293–302.

2. In view of what has gone before, this Court is deciding the case on its merits rather than remanding it to the State Supreme Court for that purpose. P. 302.

3. Alabama's corporate registration requirements are to ensure amenability of foreign corporations to suit in state courts and do not provide for a corporation's permanent ouster for failure to register or because it engaged in other activities, which, in any event, furnished no proper basis for excluding the petitioner from Alabama. Pp. 302–310.

4. This case does not involve the privilege of a corporation to do "business" in a State; it involves the freedom of individuals to associate for the collective advocacy of ideas. P. 309.

5. While this Court has power to formulate a decree for entry in the state courts, as held in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, the case is remanded to the State Supreme Court for prompt entry of a decree vacating the permanent injunction order against petitioner and permitting it to operate in the State, failing which the NAACP may apply to this Court for further appropriate relief. P. 310.

274 Ala. 544, 150 So. 2d 677, reversed and remanded.

Robert L. Carter argued the cause for petitioner. With him on the brief were *Fred D. Gray, Arthur D. Shores, Orzell Billingsley* and *Peter Hall.*

Gordon Madison, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Richmond M. Flowers,* Attorney General of Alabama.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case, involving the right of the petitioner, the National Association for the Advancement of Colored People, to carry on activities in Alabama, reaches this Court for the fourth time. In 1956 the Attorney General of Alabama brought a suit in equity to oust the Association, a New York "membership" corporation, from the State. The basis of the proceeding was the Association's alleged failure to comply with Alabama statutes requiring foreign corporations to register with the Alabama Secretary of State and perform other acts in order to

qualify to do business in the State;[1] the complaint alleged also that certain of the petitioner's activities in Alabama, detailed below, were inimical to the well-being of citizens of the State.

On the day the complaint was filed, the Attorney General obtained an *ex parte* restraining order barring the Association, *pendente lite,* from conducting any business within the State and from taking any steps to qualify to do business under state law. Before the case was heard on the merits, the Association was adjudged in contempt for failing to comply with a court order directing it to produce various records, including membership lists. The Supreme Court of Alabama dismissed a petition for certiorari to review the final judgment of contempt on procedural grounds, 265 Ala. 349, 91 So. 2d 214, which this Court, on review, found inadequate to bar consideration of the Association's constitutional claims. *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449. Upholding those claims, we reversed the judgment of contempt without reaching the question of the validity of the underlying restraining order.

In the second round of these proceedings, the Supreme Court of Alabama, on remand "for proceedings not inconsistent" with this Court's opinion, 357 U. S., at 467, again affirmed the judgment of contempt which this Court had overturned. 268 Ala. 531, 109 So. 2d 138. This decision was grounded on belief that this Court's judgment had rested on a "mistaken premise." *Id.,* at 532, 109 So. 2d, at 139. Observing that the premise of our prior decision had been one which the State had "plainly accepted" throughout the prior proceedings here, this Court ruled that the State could not, for the first time on remand, change its stance. 360 U. S. 240, 243. We noted that the Supreme Court of Alabama "evidently was not ac-

[1] Code of Alabama of 1940, Tit. 10, §§ 192–194. See note 9, *infra,* p. 304.

quainted with the detailed basis of the proceedings here" when it reaffirmed the judgment of contempt, *id.*, at 243–244, and again remanded without considering the validity of the restraining order. In so doing, the Court said: "We assume that the State Supreme Court . . . will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings . . ." rendered in the prior case. *Id.*, at 245.

Our second decision was announced on June 8, 1959. Unable to obtain a hearing on the merits in the Alabama courts, the Association, in June 1960, commenced proceedings in the United States District Court to obtain a hearing there. Alleging that the restraining order and the failure of the Alabama courts to afford it a hearing on the validity of the order were depriving it of constitutional rights, the Association sought to enjoin enforcement of the order. Without passing on the merits, the District Court dismissed the action, because it would not assume that the executive and judicial officers of Alabama involved in the litigation would fail to protect "the constitutional rights of all citizens." 190 F. Supp. 583, 586. The Court of Appeals agreed that the matter "should be litigated initially in the courts of the State." 290 F. 2d 337, 343. It, however, vacated the judgment below and remanded the case to the District Court, with instructions "to permit the issues presented to be determined with expedition in the State courts," but to retain jurisdiction and take steps necessary to protect the Association's right to be heard on its constitutional claims. *Ibid.*

The jurisdiction of this Court was invoked a third time. On October 23, 1961, we entered an order as follows:

> ". . . The judgment below is vacated, and the case is remanded to the Court of Appeals with instructions to direct the District Court to proceed

> with the trial of the issues in this action unless within a reasonable time, no later than January 2, 1962, the State of Alabama shall have accorded to petitioner an opportunity to be heard on its motion to dissolve the state restraining order of June 1, 1956, and upon the merits of the action in which such order was issued. Pending the final determination of all proceedings in the state action, the District Court is authorized to retain jurisdiction over the federal action and to take such steps as may appear necessary and appropriate to assure a prompt disposition of all issues involved in, or connected with, the state action. . . ." 368 U. S. 16–17.

In December 1961, more than five years after it was "temporarily" ousted from Alabama, the Association obtained a hearing on the merits in the Circuit Court of Montgomery County, the court which had issued the restraining order in 1956. On December 29, 1961,[2] the Circuit Court entered a final decree in which the court found that the Association had continued to do business in Alabama "in violation of the Constitution and laws of the state relating to foreign corporations" and that the Association's activities in the State were "in violation of other laws of the State of Alabama and are and have been a usurpation and abuse of its corporate functions and detrimental to the State of Alabama . . . ." The decree permanently enjoined the Association and those affiliated with it from doing "any further business of any description or kind" in Alabama and from attempting to qualify to do business there. The Association appealed to the Supreme Court of Alabama, which, on February 28, 1963, affirmed the judgment below without considering the

[2] This was four days before the date on which, by this Court's order of October 23, 1961, the Federal District Court was to proceed with a trial on the merits if the Alabama courts had not yet granted the petitioner a hearing. See *supra*.

merits. 274 Ala. 544, 150 So. 2d 677. The Supreme Court relied wholly on procedural grounds, detailed more fully below. This Court again granted certiorari, 375 U. S. 810.

I.

We consider first the nonfederal basis of the decision of the Alabama Supreme Court, which is asserted by the State as a barrier to consideration of the constitutionality of the Association's ouster from Alabama.

In its Assignment of Errors to the Supreme Court of Alabama, the Association specified 23 claimed errors in the proceedings in the trial court.[3] Each claim of error was separately numbered and set off in a separate paragraph. Most of the claims alleged that the error involved deprived the Association and those connected with it of rights protected by the Federal Constitution. The brief filed by the Association in the State Supreme Court is divided into four sections: "Statement of Case," "Statement of Facts," "Propositions of Law" (containing 15 separately numbered and paragraphed propositions of law, with a separate list of cases supporting each), and "Argument."[4] The "Argument" section is subdivided into five parts by Roman numerals unaccompanied by any headings. There is a specific reference in the "Argument" to each assignment of error on which the Association relied.[5] Only one assignment of error is mentioned

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[3] The Assignment of Errors is part of the typewritten record filed with this Court.

[4] There is also a "Conclusion," which requests reversal of the judgment below.

The brief is reproduced in Appendix B to the petition for certiorari in this Court; the accuracy of the reproduction is not questioned by the State.

[5] One assignment of error was not mentioned in the Association's brief at all, and was deemed waived by the Alabama Supreme Court. 274 Ala., at 549, 150 So. 2d, at 682.

more than once; that assignment is mentioned twice, both times in connection with the same substantive issue. In only two paragraphs is there a reference to more than one assigned error, one paragraph including a discussion of two related assignments and another including a discussion of four related assignments.

The Supreme Court of Alabama based its decision entirely on the asserted failure of the Association's brief to conform to rules of the court. Although it referred to Rule 9 of its Rules, which concerns the form of an appellant's brief,[6] the Supreme Court gave no indication of any respect in which the Association's brief fell short of the requirements of that Rule, and appears to have placed no reliance on it at all. See 274 Ala., at 546, 150 So. 2d,

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[6] Rule 9 provides:

"Appellant's brief under separate headings shall contain: (a) under the heading 'Statement of the Case,' a concise statement of so much of the record as fully presents every error and exception relied upon referring to the pages of the transcript; (b) under the heading 'Statement of the Facts,' a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely, referring to the pages of the transcript, and if the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, then the statement shall contain a condensed recital of the evidence given by each witness in narrative form bearing on the points in issue so as to fully present the substance of the testimony of the witness clearly and concisely; (c) under the heading 'Propositions of Law,' a concise statement, without argument, of each rule or proposition of law relied upon to sustain the errors assigned, together with the authorities relied upon in support of each, and in citing cases, the names of parties must be given, with the book and page where reported; (d) argument with respect to errors assigned which counsel desire to insist upon. Assignments of error not substantially argued in brief will be deemed waived and will not be considered by the court. The statements made by appellant under the headings 'Statement of the Case' and 'Statement of the Facts' will be taken to be accurate and sufficient for decision, unless the opposite party in his brief shall make the necessary corrections or additions." 261 Ala. XXII.

at 679. The basis of the decision below was rather "a rule of long standing and frequent application that where unrelated assignments of error are argued together and one is without merit, the others will not be considered." *Ibid.* Proceeding to apply that rule to the Association's brief, the Supreme Court held that at least one of the assignments of error contained in each of the five numbered subdivisions of the "Argument" section of the brief was without merit, and that it would therefore not consider the merit of any of the other assignments.[7] The Attorney

[7] The fifth subdivision of the "Argument" section of the petitioner's brief, which is illustrative of the whole, is as follows:

"V

"The evidence discloses that these proceedings are singular in that there is no showing that such proceedings had been taken against any similar foreign corporation since 1918. It is clear from the manner in which these proceedings were instituted, without notice to appellant, that state officials were attempting to misuse the law to oust appellant from the state purely because appellant's aims and objectives are at variance with views held by state officials. The question of denial of Fourteenth Amendment rights here involved is before the Court under Assignment of Error Number 10. As pointed out in Proposition Number 1, ante, racial discrimination of any kind is unlawful when imposed and enforced by governmental authorities whether in schools, *Brown* v. *Board of Education,* supra; recreational facilities, *Dawson* v. *Mayor,* supra; in public parks, *Holmes* v. *City of Atlanta,* supra; in intrastate commerce, *Gayle* v. *Browder,* supra; in interstate commerce, *Bailey* v. *Patterson,* supra; and in any and all kinds of public facilities.

"The courts have consistently struck down state regulations and actions which in purpose and effect seek to impose discrimination. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Oyama* v. *California,* 332 U. S. 633; *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410.

"It is also clear that the state may not impose restrictions upon persons to prevent their advocating by lawful means the elimination of racial discrimination and segregation, *N. A. A. C. P.* v. *Alabama,* supra. What the state is here attempting to do is to prevent the appellant, and those who work in concert with it, from taking lawful action in opposition to illegal state policy which seeks to perpetuate

General of Alabama argues that this is a nonfederal ground of decision adequate to bar review in this Court of the serious constitutional claims which the Association presents. We find this position wholly unacceptable.

Paying full respect to the state court's opinion, it seems to us crystal clear that the rule invoked by it cannot reasonably be deemed applicable to this case. In its brief, the Association referred to each of its assignments of error separately, and specified the argument pertaining thereto. A separate paragraph was devoted to each of the assignments of error except, as noted above, for two related assignments included in one paragraph and four other related assignments included in another paragraph.

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an unconstitutional pattern of segregation and discrimination, as submitted under Assignment of Error Number 16. In short, the state is using these proceedings to accomplish racial discrimination forbidden by the Fourteenth Amendment, and the judgment herein, in effect, constitutes a forbidden discrimination in violation of the Constitution of the United States. Cf. *Gomillion* v. *Lightfoot*, supra.

"Under these circumstances, denial of appellant's motion for a rehearing was error, as submitted under Assignment of Error Number 23, and a deprivation of due process as guaranteed under the Fourteenth Amendment."

The Supreme Court of Alabama dealt with the arguments thus presented as follows:

"Assignments of error 10, 16 and 23 are argued together in Subsection V of appellant's brief. No. 10 is unrelated to the others and charges that the court erred in denying appellant's motion for rehearing.

"It is settled that a decree denying an application for rehearing will not support an appeal; nor is such a decree subject to review on assignments of error on appeal from the final decree. . . . [Citations omitted.]

"Since assignment of error 10 is without merit and is argued with Nos. 16 and 23, the others are not considered. Taylor v. Taylor, 251 Ala. 374, 37 So. 2d 645." 274 Ala., at 548–549, 150 So. 2d, at 681–682.

This is illustrative of the disposition below of the remainder of the petitioner's "Argument."

These six assignments, like all the others, were specified and explicitly tied to the argument relating to each. We are at a loss to understand how it could be concluded that the structure of the brief did not fully meet the requirement that unrelated assignments of error not be "argued together." Had the petitioner simply omitted the Roman numerals which subdivide its "Argument" section, intended presumably as an organizational *aid* to understanding, there would have been no conceivable basis for the suggestion that the various errors were argued "in bulk"; and, indeed, the sole basis mentioned in the Alabama court's opinion for the conclusion that these errors were grouped for argument is the numbering of subdivisions.[8] The numbering was a mere stylistic device, which cannot well be regarded as detracting from the brief's full conformity with the rule in question. The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense. *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Staub* v. *City of Baxley,* 355 U. S. 313, 318–320. To the same effect, see this Court's discussion of a similar aspect of prior proceedings in this case, 357 U. S., at 454–458.

The Alabama courts have not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown here. In the early case of *Bell* v. *Fulgham,* 202 Ala. 217, 218, 80 So. 39, 40, the court said:

> "The brief filed by appellant is characterized by a degree of informality and an apparent lack of attention to Rule 10 . . . [predecessor to the present

[8] "The argument section of appellant's brief is divided into five different subdivisions, each dealing with the argument of two or more assignments of error." 274 Ala., at 546, 150 So. 2d, at 679. See also the first sentence of the portion of the court's opinion quoted in note 7, *supra,* p. 296.

> Rule 9]; but the rule is directory, and from the time of its adoption the court has exercised its discretion in the consideration of briefs which fairly and helpfully make the points upon which appellant relies. Agreeably with the practice thus established, the brief for appellant has been considered."

More recently, in *Bolton* v. *Barnett Lumber & Supply Co.,* 267 Ala. 74, 75, 100 So. 2d 9, the court stated again that its rule governing the form of an appellant's brief was "directory" and said that "if appellant's brief, even though not in compliance with the rule, fairly and helpfully makes the points upon which appellant relies, this court may, in its discretion, consider it." The court noted that it saw "no reason why there should be any real difficulty in complying with these rules." *Ibid.*

Other cases are in accord. In *Brothers* v. *Brothers,* 208 Ala. 258, 259, 94 So. 175, 177, the Alabama Supreme Court said:

> "It is true that the brief for appellant does not refer to the tenth and eleventh assignments of error by number, as it should in strictness have done. But, in view of the simplicity of the record, and of the facts that only four or five rulings are discussed, and that specific reference to the assignments was not necessary to our understanding of the argument, we have preferred to condone the fault in this instance."

In *Madison Limestone Co.* v. *McDonald,* 264 Ala. 295, 302, 87 So. 2d 539, 544, the court treated as sufficient three assignments of error which were "not properly expressed." In *City of Montgomery* v. *Mott,* 266 Ala. 422, 96 So. 2d 766, there were 25 assignments of error, none of which was referred to by number in the appellant's brief. The Alabama Supreme Court said that the brief did not "strictly conform" to the rules governing "the form and contents" of appellants' briefs, but that it

did "not feel that the defects in the brief warrant a dismissal of the appeal." *Id.*, at 424, 96 So. 2d, at 767. The court stated: "We have condoned noncompliance with the rule in question when the record is short and simple and when a strict compliance with the rule is not essential to an understanding of the assignments of error which are argued in appellant's brief." *Ibid.* *Kendall Alabama Co.* v. *City of Fort Payne*, 262 Ala. 465, 466, 79 So. 2d 801, 802, is to the same effect.

In *State* v. *Farabee*, 268 Ala. 437, 439, 108 So. 2d 148, 149–150, the court said:

> "As pointed out by the appellee, appellant's brief has not complied fully with the standards required by Supreme Court Rule 9 . . . . A concise statement of so much of the record as fully presents every error and exception relied upon referring to the pages of the transcript did not appear under the heading, 'Statement of the Case.' Only two general propositions of law were set out to sustain the seven assignments of error presented on appeal. *And only one case was cited in appellant's argument, which seemed to argue several assignments together.* Nevertheless, we will exercise our discretion and give consideration to the points argued. . . ." (Italics added.)

The court thus regarded as too unimportant to prevent consideration of the merits the very ground on which it relies here, even though it was accompanied by other failures to comply with the rules. In *Shelby County* v. *Baker*, 269 Ala. 111, 116, 110 So. 2d 896, 900, the court said:

> "Appellant has assigned thirty separate grounds as error, but has argued them in groups, so as to make available to this Court application of the rule that where assignments of error not kindred in nature are argued together and one of them is without merit,

> the others in the group will not be examined. . . . However, many of the assignments seem to be somewhat kindred, and, in deference to counsel, we will consider them." (Citations omitted.)

In *Brooks* v. *Everett,* 271 Ala. 380, 124 So. 2d 100, the court considered assignments of error although there were 38 of them and none had been "specifically referred to in appellant's brief." *Id.,* at 381, 124 So. 2d, at 102. The court said: ". . . [W]e have held that although appellant's brief does not comply with the rule, if it fairly and helpfully makes the points upon which appellant relies this court may, in its discretion, consider those points on their merits." *Ibid.* See also *Stariha* v. *Hagood,* 252 Ala. 158, 162, 40 So. 2d 85, 89; *Quinn* v. *Hannon,* 262 Ala. 630, 632–633, 80 So. 2d 239, 241; *Thompson* v. *State,* 267 Ala. 22, 25, 99 So. 2d 198, 200.

The cases cited in the Alabama Supreme Court's opinion and in the brief of the State Attorney General in this Court quite evidently do not support the State's position. In some, there were no assignments of error, *Dobson* v. *Deason,* 258 Ala. 219, 61 So. 2d 764, or none was mentioned in the appellant's brief, *Bolton* v. *Barnett Lumber & Supply Co., supra; Pak-A-Sak of Alabama, Inc.,* v. *Lauten,* 271 Ala. 276, 279, 123 So. 2d 122, 125. In another group of cases, several different allegations of error were joined in a single assignment of error. *Mobile, Jackson & Kansas City R. Co.* v. *Bromberg,* 141 Ala. 258, 273, 37 So. 395, 398; *Alabama Chemical Co.* v. *Hall,* 212 Ala. 8, 10, 101 So. 456, 458; *Snellings* v. *Jones,* 33 Ala. App. 301, 303, 33 So. 2d 371, 372. The remaining cases are the only ones which are at all related to the present case. In them, the Supreme Court of Alabama held that if any one of a group of unrelated assignments of error which had been argued together, or "in bulk," was insufficient, all of them must fall. *Ford* v. *Bradford,* 218 Ala. 62, 65, 117 So.

429, 431; *Taylor* v. *Taylor,* 251 Ala. 374, 383, 37 So. 2d 645, 652–653; *First National Bank of Birmingham* v. *Lowery,* 263 Ala. 36, 41, 81 So. 2d 284, 287; *Thompson* v. *State,* 267 Ala. 22, 25, 99 So. 2d 198, 200; *Bertolla* v. *Kaiser,* 267 Ala. 435, 440, 103 So. 2d 736, 740; *McElhaney* v. *Singleton,* 270 Ala. 162, 167, 117 So. 2d 375, 380; *Mize* v. *Mize,* 273 Ala. 369, 370, 141 So. 2d 200, 201. While it does not always appear in the opinions how the assignments of error were argued, every indication is that, unlike the situation here, they were grouped together "for the purpose of argument," *First National Bank of Birmingham, supra,* at 41, 81 So. 2d, at 287, and were in fact argued as a group, as the words used by the court suggest. In *McElhaney, supra,* at 166, 117 So. 2d, at 380, for example, the court quoted the appellant's brief, as follows: "Proposition No. 2 refers to and is covered by Assignments 2, 3 & 4 . . . ." In the remainder of the discussion of these Assignments in the brief, also quoted, *ibid.,* they are never again mentioned or distinguished. In *Taylor, supra,* at 383, 37 So. 2d, at 652, 51 assignments of error were "grouped and argued together in brief." None of these cases even approaches a ruling that when, as here, assignments of error are individually specified in connection with the argument relevant to each, they are to be regarded as "argued in bulk" because, forsooth, the argument as a whole is divided on the pages of the brief into numbered subdivisions.

In sum, we think that what we said when this litigation was first here, with respect to the procedural point there asserted as a state ground of decision adequate to bar review on the merits, also fits the present situation:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 357 U. S., at 457–458.

The State has urged that if the nonfederal ground relied on below be found inadequate, as we find it to be, the case be remanded to the Supreme Court of Alabama for decision on the merits. While this might be well enough in other circumstances, in view of what has gone before, we reject that contention and proceed to the merits.

II.

The complaint against the Association, as finally amended, alleged that it was a New York corporation maintaining an office and doing business in Alabama. The acts charged against the Association were:

> (1) that it had "employed or otherwise paid money" to Authurine Lucy and Polly Meyers Hudson to encourage them to enroll as students in the University of Alabama in order to test the legality of its policy against admitting Negroes;
>
> (2) that it had furnished legal counsel to represent Authurine Lucy in proceedings to obtain admission to the University;
>
> (3) that it had "engaged in organizing, supporting and financing an illegal boycott" to compel a bus line in Montgomery, Alabama, not to segregate passengers according to race;
>
> (4) that it had "falsely charged" officials of the State and the University of Alabama with acts in violation of state and federal law;
>
> (5) that it had "falsely charged" the Attorney General of Alabama and the Alabama courts with "arbitrary, vindictive, and collusive" acts intended to prevent it from contesting its ouster from the State "before an impartial judicial forum," and had "falsely charged" the Circuit Court and Supreme Court of the State with deliberately denying it a hearing on the merits of its ouster;

(6) that it had "falsely charged" the State and its Attorney General with filing contempt proceedings against it, knowing the charges therein to be false;

(7) that it had "willfully violated" the order restraining it from carrying on activities in the State;

(8) that it attempted to "pressure" the mayor of Philadelphia, the Governor of Pennsylvania, and the Penn State football team into "a boycott of the Alabama football team" when the two teams were to play each other in the Liberty Bowl;

(9) that it had "encouraged, aided, and abetted the unlawful breach of the peace in many cities in Alabama for the purpose of gaining national notoriety and attention to enable it to raise funds under a false claim that it is for the protection of alleged constitutional rights";

(10) that it had "encouraged, aided, and abetted a course of conduct within the State of Alabama, seeking to deny to the citizens of Alabama the constitutional right to voluntarily segregate"; and

(11) that it had carried on its activities in Alabama without complying with state laws requiring foreign corporations to register and perform other acts in order to do business within the State.

All of these acts were alleged to be "causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief . . . ." The complaint stated also that "the said conduct, procedure, false allegations, and methods used by Respondent render totally unacceptable to the State of Alabama and its people the said Respondent corporation and the activities and business it transacts in this State."

The last allegation, that the Association has failed to comply with the statutory requirements for a foreign cor-

poration to do business in Alabama, furnishes no basis under Alabama law for its ouster. The requirements in question are set out in the Code of Alabama of 1940, Tit. 10, §§ 192–194. These provisions require that before doing business in Alabama a foreign corporation file with the Secretary of State its articles of incorporation and a written instrument designating a place of business within the State and an authorized agent residing there. There is a filing fee of $10. The corporation must file notice of amendments to its articles of incorporation and changes in its place of business or authorized agent.[9]

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[9] "Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file with the secretary of state a certified copy of its articles of incorporation or association and file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall amend its articles of incorporation or association, or shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state.

"Such instrument when filed by a corporation engaged in any business of insurance must be filed in the office of the superintendent of insurance, and when filed by a corporation engaged in any other business than that of insurance must be filed in the office of the secretary of state, and there shall be paid at the same time for filing such instrument to the officer with whom the same is filed the sum of ten dollars for the use of the state.

"It is unlawful for any foreign corporation to engage in or transact any business in this state before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the state the sum of one thousand dollars." Code of Alabama of 1940, Tit. 10, §§ 192–194.

These provisions are carried forward, with some changes, in the Code of Alabama (1958 Recomp.), Tit. 10, §§ 21 (90)–21 (92). Since

There is nothing in these sections which attaches the consequence of permanent ouster to a foreign corporation which fails to register.[10] That this is not the effect of the statute is conclusively demonstrated by § 194, which provides the State with a different and complete remedy: ". . . [A]ny . . . [foreign] corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the state the sum of one thousand dollars."

Alabama cases confirm that the registration requirements are what they appear on their face to be: provisions ensuring that foreign corporations will be amenable to suit in Alabama courts.[11] "They constitute a police regulation for the protection of the property interests of the citizens of the state . . . . The doing of a single act of business, if it be in the exercise of a corporate function, is prohibited. The policy of the Constitution and statute is to protect our citizens against the fraud and imposition

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the Association has been restrained since 1956 from complying with the statutory requirements, the 1940 provisions are applicable to this case.

The complaint alleged also that the Association was violating Art. 12, § 232, of the Alabama Constitution, which provides:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

[10] Compare, *e. g.*, the provisions of Mass. Gen. Laws Ann., c. 181, § 19; Vermont Statutes Ann., Tit. 11, § 861.

[11] See the second sentence of Art. 12, § 232, of the Alabama Constitution, quoted in note 9, *supra*.

of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from our courts in favor of citizens having cause of complaint." *Alabama Western R. Co.* v. *Talley-Bates Const. Co.*, 162 Ala. 396, 402–403, 50 So. 341, 342. See *Armour Packing Co. of La., Ltd.*, v. *Vinegar Bend Lumber Co.*, 149 Ala. 205, 42 So. 866; *George M. Muller Mfg. Co.* v. *First National Bank of Dothan*, 176 Ala. 229, 57 So. 762. The Attorney General of Alabama has referred us to no case, and we have been able to find none, in which a foreign corporation was ousted from Alabama for failing to comply with the registration statute.[12]

The other asserted grounds for excluding the petitioner from Alabama furnish no better foundation for the action below. The first two grounds relied on are manifestly untenable. Before these proceedings were commenced, this Court had upheld the right of Authurine Lucy and

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[12] The Circuit Court's decree, presumably an exercise of the court's general powers in equity, was not accompanied by any opinion, but was evidently based on the court's finding that the other allegations of the complaint were proved by the evidence, and, along with the Association's failure to register, warranted its ouster from the State. (The court reserved the right "at a future date to state in an opinion its full and complete findings of fact and its rulings on the law in this case, with appropriate citations of authorities." So far as we are presently advised, no opinion has been filed.) Nothing in the decree suggests that the court regarded failure to register by itself as a sufficient basis for ouster under Alabama law.

Even if Alabama law were otherwise, past failure to register could not constitutionally be made the basis for *permanently* preventing the Association from registering and thereby denying its members the right to associate in Alabama. See *infra*, pp. 309–310.

Since we think it clear from the foregoing that the Association may not, under Alabama law, be ousted from the State merely for failure to register, it is unnecessary for us to consider the petitioner's other contentions that, as a nonprofit organization, it is exempt from the registration requirement, and that, having knowingly permitted the Association to carry on its activities in Alabama since 1918, the State was barred by laches from invoking the registration requirement in 1956.

Polly Anne Meyers to enroll at the University of Alabama. *Lucy* v. *Adams,* 350 U. S. 1. Neither furnishing them with financial assistance, in effect a scholarship, to attend the University, nor providing them with legal counsel to assist their efforts to gain admission was unlawful or could, consistently with the decisions of this Court, be inhibited because contrary to the University's policy against admitting Negroes. *NAACP* v. *Button,* 371 U. S. 415.

The third charge listed above is scarcely more substantial. Even if we were to indulge the doubtful assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law, such a violation could not constitutionally be the basis for a permanent denial of the right to associate for the advocacy of ideas by lawful means. As we said at a prior stage in this litigation:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U. S., at 460.

This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See *id.,* at 463–464. ". . . [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut,* 310 U. S. 296, 304. ". . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly

achieved." *Shelton* v. *Tucker,* 364 U. S. 479, 488 (footnote omitted). For other cases elaborating this principle, see *Lovell* v. *Griffin,* 303 U. S. 444, 451; *Schneider* v. *State,* 308 U. S. 147, 161, 165; *Martin* v. *Struthers,* 319 U. S. 141, 146–149; *Saia* v. *New York,* 334 U. S. 558; *American Communications Assn.* v. *Douds,* 339 U. S. 382; *Kunz* v. *New York,* 340 U. S. 290, 294–295; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293. This principle is applicable here even though the ouster of the petitioner from Alabama has been accomplished solely by judicial act; "whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." 357 U. S., at 463.

In the first proceedings in this case, we held that the compelled disclosure of the names of the petitioner's members would entail "the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." 357 U. S., at 462. It is obvious that the complete suppression of the Association's activities in Alabama which was accomplished by the order below is an even more serious abridgment of that right. The allegations of illegal conduct contained in the third charge against the petitioner suggest no legitimate governmental objective which requires such restraint. Compare *Kunz* v. *New York, supra,* at 294–295.

The fourth, fifth, and sixth charges against the petitioner all involve alleged "false charges" made by the Association or its representatives against state officials.[13]

[13] The "false charges" with which the fourth charge against the Association is concerned were made (and later withdrawn) by Authurine Lucy, in proceedings in the Federal District Court to compel officials in the University of Alabama to vacate an order suspending her from attendance at classes. See *Lucy* v. *Adams,* Civ. No. 652, decided in the United States District Court for the Northern District of Alabama on January 24, 1957.

The fifth and sixth charges against the Association concern the proceedings in this case, and were added to the complaint, along with the fourth charge, by amendment in 1961.

Without speculating on other possible constitutional infirmities to which these allegations may be subject, cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, we conclude that, for the reasons discussed above, they furnish no basis for the restriction of the right of the petitioner's members to associate in Alabama. So too with the seventh charge, which alleges violation of the "temporary" restraining order in effect from 1956 to 1961 (when it was made permanent). We dispose of this charge on the same basis as the others, without considering the sufficiency of the evidence to support the finding that there was a violation of the order or the serious constitutional questions raised by an order which restrained for so long a time the exercise of unquestionable constitutional rights on the grounds involved here. We pass the eighth charge without comment; by no stretch can it be considered germane to the present controversy. The ninth charge, involving alleged breaches of the peace, falls with the third. "There are appropriate public remedies to protect the peace and order of the community . . . ," *Kunz, supra,* at 294, which do not infringe constitutional rights. The tenth charge, if it adds anything to those which have gone before, simply challenges the right of the petitioner and its members to express their views, by words and lawful conduct, on a subject of vital constitutional concern. Such a challenge cannot stand.

There is no occasion in this case for us to consider how much survives of the principle that a State can impose such conditions as it chooses on the right of a foreign corporation to do business within the State, or can exclude it from the State altogether. *E. g., Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129, 137. This case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas. "Freedoms such as . . . [this] are protected not only against heavy-handed frontal attack, but also from being stifled by more

subtle governmental interference." *Bates* v. *City of Little Rock,* 361 U. S. 516, 523. Nor is *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, which involved New York's application of a regulatory statute to the Ku Klux Klan, more relevant here than it was at the earlier stage of these proceedings where we said that it "involved markedly different considerations in terms of the interest of the State . . . ," 357 U. S., at 465. The Court noted *inter alia,* that the *Bryant* decision was "based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice." *Ibid.*

The judgment below must be reversed. In view of the history of this case, we are asked to formulate a decree for entry in the state courts which will assure the Association's right to conduct activities in Alabama without further delay. While such a course undoubtedly lies within this Court's power, *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, we prefer to follow our usual practice and remand the case to the Supreme Court of Alabama for further proceedings not inconsistent with this opinion. Such proceedings should include the prompt entry of a decree, in accordance with state procedures, vacating in all respects the permanent injunction order issued by the Circuit Court of Montgomery County, Alabama, and permitting the Association to take all steps necessary to qualify it to do business in Alabama. Should we unhappily be mistaken in our belief that the Supreme Court of Alabama will promptly implement this disposition, leave is given the Association to apply to this Court for further appropriate relief.

Reversed and remanded.

RED BALL MOTOR FREIGHT, INC., ET AL. *v.* SHANNON ET AL., DOING BUSINESS AS E. & R. SHANNON.

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

No. 406. Argued April 28, 1964.—Decided June 1, 1964.*

Appellees are dealers in livestock and commodities in San Antonio, Texas, who made deliveries in their own trucks to customers in Louisiana, where they bought sugar for resale in San Antonio. The Interstate Commerce Commission (ICC) held that the backhaul of sugar was for-hire carriage not exempt from ICC regulation under § 203 (c) of the Interstate Commerce Act as "transportation . . . within the scope, and in furtherance, of a primary business enterprise . . . ." A three-judge District Court set aside the ICC order. *Held:* Section 203 (c) does not prohibit all backhauling but codifies the primary business test which exempts from ICC regulation an operator whose transportation functions are only incidental to its primary activities. Here the evidence showed that the backhaul furthered appellees' primary general mercantile business and was exempt private carriage. Pp. 312–321.

219 F. Supp. 781, affirmed.

Amos M. Mathews argued the cause for appellants in No. 406. With him on the briefs were *Phillip Robinson, Charles D. Mathews, Roland Rice* and *John S. Fessenden.*

Robert W. Ginnane argued the cause for the United States et al. in No. 421. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Elliott Moyer* and *Fritz R. Kahn.*

Walter C. Wolff, Jr. argued the cause and filed a brief for appellees in both cases.

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*Together with No. 421, *United States et al.* v. *Shannon et al., doing business as E. & R. Shannon,* also on appeal from the same court.

Briefs of *amici curiae,* urging reversal, were filed by *Robert E. Redding* for the Transportation Association of America, by *James E. Wilson* for the Common Carrier Conference—Irregular Route of the American Trucking Associations, Inc., and by *Joseph E. Keller* and *William H. Borghesani, Jr.* for the Private Carrier Conference, Inc.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Interstate Commerce Act provides that it is unlawful for any person engaged in a business other than transportation to "transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person." § 203 (c), 49 U. S. C. § 303 (c).[1] Appellees deal in livestock and commodities from a place of business in San Antonio, Texas. They make deliveries in their own trucks to customers in Louisiana, and buy sugar at Supreme, Louisiana, which they backhaul 525 miles for resale to customers in San Antonio. The Interstate Commerce Commission held that this backhaul was not exempt under § 203 (c) as "transportation . . . within the scope, and in furtherance, of a pri-

[1] Section 203 (c), as added in 1957, 71 Stat. 411, provided in pertinent part:

". . . no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce . . . unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation."

In 1958, 72 Stat. 574, the section was amended to add the provision here involved providing,

"nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

mary business enterprise . . ." of appellees, but was "conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required." 81 M. C. C. 337, 347.[2] A three-judge court in the District Court for the Western District of Texas set aside the ICC order. 219 F. Supp. 781.[3] We noted probable jurisdiction. 375 U. S. 901. We affirm.

Section 203 (c) was designed explicitly to authorize the ICC to eliminate transportation which, though carried on in the guise of private carriage, was in effect for-hire carriage, and thus might lawfully be carried on only by an authorized common or contract carrier. Before the enactment of § 203 (c) the ICC was able to reach such abuses by interpreting § 203 (a)(17), 49 U. S. C. § 303 (a)(17), so as to exclude such "pseudo-private" carriage from its definition of a "private carrier of property by motor vehicle" as a person, not a "common" or "contract" carrier, who transports property of which he "is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." Many of the cases involved nonauthorized carriers in the transportation business who resorted to transparent "buy-and-sell" devices to evade ICC regulation. A typical buy-and-sell arrangement is one under which the carrier "buys" property at a shipping point, transports it to a delivery point and there "sells" it to the real purchaser, the "profit" to the carrier amounting to the price of the transportation between the

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[2] The 1957 version of § 203 (c) was enacted after the examiner submitted his report but as amended in 1958 was part of the Interstate Commerce Act when Division 1 of the Commission served its report.

[3] Appellees' action was brought pursuant to 28 U. S. C. §§ 1336, 1398. The statutory three-judge court was convened under 28 U. S. C. § 2325.

two points.[4] Similar evasions through the use of spurious buy-and-sell agreements were found in cases where property was transported in trucks regularly used by noncarrier businesses to make pickups and deliveries.[5] The ICC was faced with the necessity of determining on the facts of each case whether the transportation constituted private carriage beyond the scope of ICC economic regulation, or for-hire transportation subject to all relevant provisions of the Act. In other words, here, as in *United States* v. *Drum,* 368 U. S. 370, 374, in which we dealt with another aspect of the "pseudo-private" carriage problem, the ICC has also "had to decide whether a particular arrangement gives rise to that 'for-hire' carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage as to which Congress determined that the [noncarrier's] interest . . . should prevail."

In the course of discriminating between this pseudo-private carriage and that transportation which was in fact in furtherance of a noncarrier business, the ICC developed the so-called "primary business" test. This test was first enunciated by the full Commission in *Lenoir Chair Co.,* 51 M. C. C. 65, aff'd, *sub nom. Brooks Transportation Co.* v. *United States,* 93 F. Supp. 517, aff'd, 340 U. S. 925. A chair manufacturer delivered some of its products in its own trucks. Whenever possible, it also used the vehicles to backhaul manufacturing materials for use and processing in its own plant. The ICC concluded, 51 M. C. C., at 76, that the delivery of goods and the backhaul were lawful private carriage because undertaken "as a bona fide incident to and in furtherance of

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[4] See, *e. g., Lyle H. Carpenter,* 2 M. C. C. 85; *B. E. Farnsworth,* 4 M. C. C. 164; *Thomas Stanley Redding,* 7 M. C. C. 608; *ICC* v. *Tank Car Oil Corp.,* 151 F. 2d 834 (C. A. 5th Cir.).

[5] See, *e. g., T. J. McBroom,* 1 M. C. C. 425; *Triangle Motor Co.,* 2 M. C. C. 485. Cf. *Congoleum-Nairn, Inc.,* 2 M. C. C. 237.

[its] primary business . . . ." The governing standard was stated as follows, *id.*, at 75:

> "If the facts establish that the primary business of an operator is the supplying of transportation for compensation then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale. . . . If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. In our opinion, they cannot be both."

The ICC believed, however, that § 203 (a)(17) was not sufficiently explicit, particularly since decisions of some lower courts after *Brooks* raised doubts whether a truck operator could be found to be an unauthorized "for-hire" carrier in the absence of some affirmative showing that his operations brought him within the definitions of common or contract carriage.[6] Consequently the Commission sought additional legislation.[7] The original ICC bill in this area would have amended the definition of "private carrier" in § 203 (a)(17) to prohibit the buy-and-sell device employed by pseudo-private carriers as a subterfuge to avoid regulation. See S. 1677, H. R. 5825, 85th Cong., 1st Sess. This was withdrawn, however, in favor of a

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[6] See, *e. g.*, *ICC* v. *Woodall Food Prods. Co.*, 207 F. 2d 517 (C. A. 5th Cir.); *Taylor* v. *ICC*, 209 F. 2d 353 (C. A. 9th Cir.). See the discussion of *Taylor* in the Commission's Sixty-eighth Annual Report (1954), p. 82.

[7] The Commission pressed for amendments in its Annual Reports from 1953 through 1957: 1953 Report, p. 55; 1954 Report, p. 5; 1955 Report, p. 99; 1956 Report, p. 2; 1957 Report, pp. 137–138.

more broadly phrased provision, sponsored by the Transportation Association of America, which encompassed not only buy-and-sell devices, but also similar subterfuges which might be employed to engage in unauthorized for-hire transportation.[8] The second clause of § 203 (c) is substantially the TAA proposal.

The 1958 amendment appears on its face to codify the primary business test as the standard for determining whether a particular carrier is engaged in a private or for-hire operation. The appellants argue, however, that the amendment was intended to impose a broader limitation in the case of backhaul operations of the kind engaged in by appellees. The United States urges in its brief that Congress in 1958 was particularly concerned with the diversion of traffic from regulated carriers by backhauling operations, and that one object of the 1958 amendment was "to make plain that the purchase and sale of goods solely to take advantage of available backhaul capacity cannot qualify as a 'primary business enterprise (other than transportation).'" We understand this argument to be that Congress in effect enacted a *per se* test outlawing trucking operations limited to backhaul capacity without inquiry into whether that operation was undertaken pursuant to a bona fide noncarrier business enterprise. We find no support in either the words of the amendment or its legislative history for putting that gloss upon the amendment. On the contrary, we are persuaded that

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[8] In amending § 203 (c) rather than the definitional sections, the TAA proposal also met the protests of private carriers who opposed ICC's proposal on the ground that it might be construed to throw doubt on the *Brooks* test, and unduly restrict the scope of private carriage. See Remarks of Frazor T. Edmondson, Private Truck Council of America, Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1384, 85th Cong., 1st Sess., 163 (1957); Remarks of R. J. Van Liew, Private Carrier Conference, American Trucking Associations, *id.*, at 275.

Congress meant only to codify the primary business test which, as applied by the ICC, requires an analysis of the backhaul operation in the factual setting of each case.

The legislative history fully supports this view. The ICC Chairman, speaking in support of the TAA amendment, expressly stated that, in his view, its effect would be to "incorporate the primary business test into the statute." [9] Similarly, the President of TAA, speaking directly to the backhaul problem, said that "Our proposal . . . would affect . . . the carrier who delivers his own goods in one direction, as a legal private carrier, but then resorts to the buy-and-sell practice to get a return load." [10] The Senate and House Reports, while less crystal clear, nevertheless reveal no purpose beyond codification of the *Brooks* test. Thus the Senate Report states that the amendment "accurately reflects the holding in the Brooks case." [11] Although the House Report includes a discussion of the backhaul problem in language which tracks the statement in the ICC 1953 Annual Report—where the Commission first directed the attention of Congress to the problem of buy-and-sell arrangements [12]—the House Report concludes: "There is no in-

[9] See Remarks of Chairman Clarke, Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1384, 85th Cong., 1st Sess., 13, 19 (1957).

[10] See Statement of Mr. Baker, President, Transportation Association of America, *id.*, at 244, 246.

[11] S. Rep. No. 1647, 85th Cong., 2d Sess., 5 (1958).

[12] In its 1953 Annual Report the Commission said (p. 55):

"Merchandising by motortruck, whether actual or pretended, over long distances is increasing to such an extent that it is becoming a major factor in the transportation of freight between distant points. Manufacturers and mercantile establishments, which deliver in their own trucks articles which they manufacture or sell, are increasingly purchasing merchandise at or near their point of delivery and transporting such articles to their own terminal for sale to others. Such transportation is performed for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the

tention on the part of this Committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the Brooks case." [13] Moreover, the managers of the bills in both Senate and House gave assurances that the object of the amendment was to incorporate the primary business test into positive law.[14] No application of the primary business test by the ICC or the courts gave conclusive effect to backhauling. The critical determination made in each case was between spurious buy-and-sell arrangements, whether or not as part of a backhaul, and a true wholesaling operation utilizing the operator's own trucks. Backhauls were treated as merely one aspect of the buy-and-sell problem, since the presence of backhaul capacity presents a special temptation to indulge in pseudo-private carriage.

We therefore conclude that § 203 (c) merely codifies the primary business test, and embodies no outright prohibition of backhauling practices. The statutory scheme recognizes that mere availability and use of backhaul capacity may in particular cases be completely consistent with the bona fide conduct of a noncarrier business. Thus the question in this case is a narrow one: whether, applying the standards developed under the primary business test, appellees' backhauling of sugar was within the scope, and in furtherance, of a primary, noncarrier business.

In developing and applying the primary business standard, the ICC has elaborated criteria characteristic of the spurious buy-and-sell device. Among these are

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purchase and sale is a bona fide merchandising venture. In other cases, arrangements are made with the consignee of such merchandise for the 'buy-and-sell' arrangement in order that the consignee may receive transportation at a reduced cost." Compare H. R. Rep. No. 1922, 85th Cong., 2d Sess., 18 (1958).

[13] See *id.*, at 19.

[14] See 104 Cong. Rec. 12535–12536 (1958) (House); 104 Cong. Rec. 10818 (1958) (Senate).

the large investment of assets or payroll in transportation operations; [15] negotiating the sale of goods transported in advance of dispatching a truck to pick them up; [16] direct delivery of the transported goods from the truck to the ultimate buyer, rather than from warehoused stocks; [17] solicitation of the order by the supplier rather than the truck owner; [18] and inclusion in the sales price of an amount to cover transportation costs.[19]

We are not persuaded from our examination of the record that there is sufficient evidence to support the ICC's conclusion that the appellees' sugar operation was for-hire transportation and not transportation within the scope, and in furtherance, of appellees' noncarrier business enterprise. The ICC found that appellees "have long been buying and selling certain commodities and in connection therewith transporting them to purchasers, in bona fide furtherance of their primary business, as a dealer in those commodities." 81 M. C. C., at 345. The ICC found further that "The more usual arrangement under which [appellees] operate . . . appears to be one in which the [appellees] have no preexisting sugar order, but buy with the intention of selling later either en route or after the transportation is accomplished. This procedure is ordinarily coordinated with a backhaul, and the

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[15] See *Virgil P. Stutzman,* 81 M. C. C. 223, 226; *Joseph V. Hofer,* 84 M. C. C. 527, 540.

[16] See *Lyle H. Carpenter,* 2 M. C. C. 85, 86; *Thomas Stanley Redding,* 7 M. C. C. 608, 609; *Jay Cee Transport Co.,* 68 M. C. C. 758, 759; *Church Point Wholesale Beverage Co.,* 82 M. C. C. 457, 459, aff'd, *sub nom. Church Point Wholesale Beverage Co.* v. *United States,* 200 F. Supp. 508 (D. C. W. D. La.).

[17] See *L. A. Woitishek,* 42 M. C. C. 193; *Jay Cee Transport Co., supra; William Stewart,* 89 M. C. C. 281, 286.

[18] See *Subler Transfer, Inc.,* 79 M. C. C. 561, 565; *Riggs Dairy Express, Inc.,* 78 M. C. C. 574, 575–576; *Donald L. Wilson,* 82 M. C. C. 651, 661.

[19] See *Riggs Dairy Express, Inc., supra.*

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purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction." 81 M. C. C., at 346. But these findings, on this record, are consistent with an operation "within the scope, and in furtherance, of a primary business enterprise." Appellees began their business in 1934 as dealers in livestock. They gradually added a feed mill and the buying and selling of corn, oats, wheat, bran, molasses, salt and fertilizer. They added sugar in 1954. Moreover, in addition to the absence of the element—usually found in spurious buy-and-sell arrangements—of obtaining orders for a commodity (in this case sugar) before purchasing it, other indicia are absent. Appellees' assets are not in large part composed of transportation facilities, nor is transportation a major item of expense; appellees bear the full risk of damage in transit and, since they sell at market price, also of loss in value due to price changes; they buy the sugar on credit with a discount for payment in 10 days, and sell on the same terms; their sugar accounts receivable at the date of hearing exceeded $10,000, and amounted to $20,000 or $30,000 during the previous year. It is true that they warehoused only a small stock of sugar and that generally the trucks delivered the sugar directly to buyers upon, or within a day or two after, arrival in San Antonio. Appellees offered an entirely reasonable explanation for this, however: sugar is a perishable commodity, the preservation of which apparently requires air conditioning facilities with which their warehouse is not equipped; the ICC offered nothing to the contrary. And the ICC offered no evidence that other sugar dealers in San Antonio conducted their businesses differently from appellees. It is also true that since the motor carrier rate for transporting sugar from Supreme is 69 cents, and the rail rate $1.09 per hundred pounds, appellees could not have conducted the sugar

business but for the availability of the backhaul capacity of their trucks. This shows no more than that appellees were able to make efficient use of their equipment; on these facts it does not prove, as the ICC found, that the "transportation . . . is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed . . . ." 81 M. C. C., at 347. We agree with the District Court that, rather, "The record clearly indicates that [appellees] are in a general mercantile business buying and selling many items, including sugar." 219 F. Supp., at 782. As such, on the facts shown, their purchase of sugar at Supreme to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio is within the scope, and in furtherance, of their primary general mercantile business enterprise.

Affirmed.

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

I agree with the Court "that § 203 (c) merely codifies the primary business test," *ante,* at 318, enunciated by the Commission in the *Brooks* case.* I also agree that "the primary business test . . . , as applied by the ICC, requires an analysis of the backhaul operation in the factual setting of each case." *Ante,* at 317.

This is all that we need and should decide. The Court errs, in my view, in deciding the purely factual question of "whether, applying the standards developed under the primary business test, appellees' backhauling of sugar

**Lenoir Chair Co.*, 51 M. C. C. 65, aff'd, *sub nom. Brooks Transportation Co., Inc.*, v. *United States,* 93 F. Supp. 517, aff'd, 340 U. S. 925.

was within the scope, and in furtherance, of a primary, noncarrier business." *Ante,* at 318.

The primary responsibility for granting or denying enforcement of Commission orders is in the District Courts and not in this Court. 28 U. S. C. § 1336; cf. *Labor Board* v. *Pittsburgh Steamship Co.,* 340 U. S. 498, 502. The District Court in enjoining enforcement of the Commission's order in this case did not refer explicitly or implicitly to § 203 (c) of the Act. It did not cite any cases enunciating the "primary business test" as a basis for its decision. Moreover, the District Court did not discuss the facts upon which the Commission based its determination that appellees' backhaul transportation of sugar was not within the scope and in furtherance of a primary business enterprise other than transportation. See 219 F. Supp. 781; compare *United States* v. *Drum,* 368 U. S. 370, 385.

Having determined, as the Court does, that § 203 (c) codifies the primary business test, I would remand the case to the District Court for that court to decide the issue of unsubstantiality of the evidence under the proper test. Under this disposition of the case, the District Court would have to be mindful that this is the kind of case which "belongs to the usual administrative routine" of the agency, *Gray* v. *Powell,* 314 U. S. 402, 411, and that the Commission's application of the statutory test to the specific facts of this case "is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Labor Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 131; *United States* v. *Drum, supra,* at 386.

MR. JUSTICE WHITE, dissenting.

I join the dissenting opinion of my Brother GOLDBERG. I add that the Court has failed to demonstrate how appellees' sugar business qualifies as a "primary" business when it clears only 35 cents per 100 pounds of sugar over

and above the cost of the sugar at Supreme, Louisiana. This is less than the normal costs of transportation from Supreme to San Antonio. No one without backhaul capacity could make a viable business out of selling Supreme sugar in the San Antonio market and appellees admit that they are "backhauling to make a profit." I therefore cannot view the sugar business as a bona fide primary business to which a private transportation operation is only an incident. It would be more appropriate to say that this catch-as-catch-can sugar business is wholly incidental to an otherwise empty backhaul.

HOSTETTER ET AL. *v.* IDLEWILD BON VOYAGE LIQUOR CORP.

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

No. 116. Argued March 23, 1964.—Decided June 1, 1964.

Appellee, who under Federal Bureau of Customs supervision purchases bottled intoxicants at wholesale outside New York, brings them into the State and at an airport there sells them at retail for delivery abroad to international airline travelers, brought this action for an injunction and declaratory judgment against State Liquor Authority members who claimed that appellee's business violated state law. After long procedural delays, a three-judge District Court granted the requested relief. *Held:*

1. Abstention, which is not automatically required, and which had been requested by neither party, was not warranted in this protracted litigation, there being no danger that a federal decision would disrupt state regulation. Pp. 328–329.

2. Though the State has power under the Twenty-first Amendment to regulate transportation through its territory of intoxicants to avoid their diversion into domestic channels, the Commerce Clause deprives the State of power to prevent transactions supervised by the Bureau of Customs involving intoxicants for delivery to consumers in foreign countries. Pp. 329–334.

212 F. Supp. 376, affirmed.

Irving Galt, Assistant Solicitor General of New York, argued the cause for appellants. With him on the briefs were *Louis J. Lefkowitz,* Attorney General of New York, and *George D. Zuckerman,* Assistant Attorney General.

Charles H. Tuttle argued the cause for appellee. With him on the brief was *John F. Kelly.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The Twenty-first Amendment to the Constitution, which repealed the Eighteenth, provides in its second section that "The transportation or importation into any

State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This appeal requires consideration of the relationship of this provision of the Twenty-first Amendment to other provisions of the Constitution, particularly the Commerce Clause.[1]

The appellee (Idlewild) is engaged in the business of selling bottled wines and liquors to departing international airline travelers at the John F. Kennedy Airport in New York. Its place of business is leased from the Port of New York Authority for use solely as "an office in connection with the sale . . . of in-bond wines and liquors." Idlewild accepts orders only from travelers whose tickets and boarding cards indicate their imminent departure. A customer gets nothing but a receipt at the time he gives his order and makes payment. The liquor which he orders is transferred directly to the departing aircraft on documents approved by United States Customs, and is not delivered to the customer until he arrives at his foreign destination.

The beverages sold by Idlewild are purchased by it from bonded wholesalers located outside New York State who deal in tax-free liquors for export. Merchandise ordered by Idlewild is withdrawn from bonded warehouses on approved Customs documents, copies of which are mailed by the wholesalers both to Idlewild and to the United States Customs Office at the airport. A third sealed copy of the document is given to the bonded trucker who delivers it to the Customs Office at the airport after he has transported the shipment to Idlewild's place of business. The contents of each shipment are recorded by Idlewild, as are withdrawals from inventory

[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3.

whenever a sale is made, and when an entire shipment has been sold, these records are turned over to Customs officials. Idlewild's records and its physical inventory, as well as the transfer of the liquor from the bonded trucks to Idlewild's premises and from those premises to the departing aircraft, are at all times open to inspection by the Bureau of Customs. Before Idlewild commenced these business operations in 1960, the Bureau of Customs inspected its place of business and explicitly approved its proposed method of operations.

Idlewild commenced doing business in the spring of 1960. A few weeks later, the New York State Liquor Authority, whose members are the appellants in this case, informed Idlewild, upon the advice of the Attorney General of New York, that its business was illegal under the provisions of the New York Alcoholic Beverage Control Law, because the business was unlicensed and unlicensable under that law.[2] Idlewild thereupon brought the present

[2] The opinion of the New York Attorney General was based primarily upon the following provisions of the New York law:

" 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state." New York Alcoholic Beverage Control Law, § 3, Subd. 28.

"No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter." New York Alcoholic Beverage Control Law, § 100, Subd. 1.

"No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal." New York Alcoholic Beverage Control Law, § 105, Subd. 2.

action for an injunction restraining the appellants from interfering with its business, and for a judgment declaring that the provisions of the New York statute, as applied to its business, were repugnant to the Commerce Clause of the Constitution, and, under the Supremacy Clause, to the Tariff Act of 1930, under which the Bureau of Customs had approved Idlewild's business operations.[3]

After lengthy procedural delays,[4] a three-judge District Court granted the requested relief. 212 F. Supp. 376. The court expressed doubt that the New York Alcoholic Beverage Control Law was intended to apply to a business such as that carried on by Idlewild, both because of the manifest irrelevance to such a business of many of the law's provisions,[5] and because the New York courts

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[3] See 19 U. S. C. § 1311. The complaint also relied on the Export-Import Clause of the Constitution, Art. I, § 10, cl. 2, but such reliance was obviously misplaced, because New York has not sought to "lay any Imposts or Duties" upon the merchandise sold by Idlewild.

[4] The appellee's original motion to empanel a three-judge court under 28 U. S. C. §§ 2281 and 2284 was denied by a single district judge, who retained jurisdiction pending resolution of the substantive issues by the state courts. 188 F. Supp. 434. The Court of Appeals for the Second Circuit dismissed on appeal on the ground that it was without jurisdiction, though expressing the view that a three-judge court should have been convened. 289 F. 2d 426. The appellee's renewed request for a three-judge court was then denied by a district judge on the ground that previous District Court rulings in the litigation had established the "law of this case" and that the Court of Appeals' statement that a three-judge court should have been convened was "dictum." 194 F. Supp. 3. After granting certiorari and a motion for leave to file a petition for a writ of mandamus, 368 U. S. 812, this Court, holding that a three-judge court should have been empaneled, remanded the case to the District Court "for expeditious action" to that end. 370 U. S. 713.

[5] The court noted, for example: "The definition of sale in Section 3 (28) provides that ' "To sell" . . . shall include the delivery of any alcoholic beverage in the state.' This, of course, is inapplicable to plaintiff's sales. Whatever may be the purpose of Section 105 (2) in requiring that a retail liquor store have an entrance from the

had held that the law was inapplicable to the sale of liquor in the Free Trade Zone of the Port of New York. *During* v. *Valente,* 267 App. Div. 383, 46 N. Y. S. 2d 385. See also *Rosenblum* v. *Frankel,* 279 App. Div. 66, 108 N. Y. S. 2d 6. In view of the posture of the litigation, the court declined, however, to defer deciding the merits of the controversy pending a construction of the statute by the New York courts, although recognizing that "a technical application of the doctrine of abstention" would under ordinary circumstances counsel such a course.

On the merits the court concluded, after reviewing the relevant cases, that the Commerce Clause rendered constitutionally impermissible New York's attempt wholly to terminate Idlewild's business operations. The court conceded that New York has broad power under the Twenty-first Amendment to supervise and regulate the transportation of liquor through its territory for the purpose of guarding against a diversion of such liquor into domestic channels, but pointed out that "the Liquor Authority has neither alleged nor proved the diversion of so much as one bottle of plaintiff's merchandise to users within the state of New York." 212 F. Supp., at 386. We noted probable jurisdiction, 375 U. S. 809, and for the reasons which follow, we affirm the judgment of the District Court.

We hold first that the District Court did not err in declining to defer to the state courts before deciding this controversy on its merits. The doctrine of abstention is equitable in its origins, *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, 500–501, and this Court has held that, even

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street level and be located on a public thoroughfare, the requirements, which may be appropriate where liquor purchases are delivered directly to the customer, seem quite irrelevant to a concern which sells liquor exclusively for delivery in a foreign country." 212 F. Supp., at 379.

though constitutional issues be involved, "reference to the state courts for construction of the statute should not automatically be made." *N. A. A. C. P.* v. *Bennett,* 360 U. S. 471. Unlike many cases in which abstention has been held appropriate, there was here no danger that a federal decision would work a disruption of an entire legislative scheme of regulation.[6] We therefore accept the District Court's decision that abstention was unwarranted here, where neither party requested it and where the litigation had already been long delayed, despite the plaintiff's efforts to expedite the proceedings.[7]

Turning, then, to the merits of this controversy, the basic issue we face is whether the Twenty-first Amendment so far obliterates the Commerce Clause as to empower New York to prohibit absolutely the passage of liquor through its territory, under the supervision of the United States Bureau of Customs acting under federal law,[8] for delivery to consumers in foreign countries. For it is not disputed that, if the commodity involved here were not liquor, but grain or lumber, the Commerce Clause would clearly deprive New York of any such power. *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Texas & N. O. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111; *Oklahoma* v. *Kansas Nat. Gas Co.,* 221 U. S. 229.

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[6] Cf. *Government Employees* v. *Windsor,* 353 U. S. 364; *American Federation of Labor* v. *Watson,* 327 U. S. 582; *Great Lakes Co.* v. *Huffman,* 319 U. S. 293; *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 323–325; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168.

[7] See *Louisiana P. & L. Co.* v. *Thibodaux City,* 360 U. S. 25, 29, 31; *Allegheny County* v. *Mashuda Co.,* 360 U. S. 185, 196–197.

[8] The appellants have argued that Idlewild's operations do not in fact conform to the various federal statutory and administrative standards under authority of which the operations are conducted. But there is no indication that the Bureau of Customs has ever questioned the regularity of Idlewild's operations under the relevant federal law and regulations.

This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. Thus, in upholding a State's power to impose a license fee upon importers of beer, the Court pointed out that "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, . . . because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide." *State Board* v. *Young's Market Co.*, 299 U. S. 59, 62.[9] In the same vein, the Court upheld a Michigan statute prohibiting Michigan dealers from selling beer manufactured in a State which discriminated against Michigan beer. *Brewing Co.* v. *Liquor Comm'n*, 305 U. S. 391. "Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause . . . ." *Id.*, at 394. See also *Finch & Co.* v. *McKittrick*, 305 U. S. 395.

This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned. See *California* v. *Washington*, 358 U. S. 64. Thus, in *Ziffrin, Inc.*, v. *Reeves*, 308 U. S. 132, there was involved a Kentucky statute, "a long, comprehensive measure (123 sections)

[9] Likewise, in *Mahoney* v. *Triner Corp.*, 304 U. S. 401, the Court held that the Equal Protection Clause is not applicable to imported intoxicating liquor. "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." *Id.*, at 404.

designed rigidly to regulate the production and distribution of alcoholic beverages through means of licenses and otherwise. The manifest purpose is to channelize the traffic, minimize the commonly attendant evils; also to facilitate the collection of revenue. To this end manufacture, sale, transportation, and possession are permitted only under carefully prescribed conditions and subject to constant control by the State." *Id.*, at 134. The Court upheld a provision of that "comprehensive measure" which prohibited a domestic manufacturer of liquor from delivering his product to an unlicensed private carrier. The Court noted that "Kentucky has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well-known evils, and secure payment of revenue. The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the State; and property so circumstanced cannot be regarded as a proper article of commerce." *Id.*, at 139.[10]

To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to

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[10] Quite independently of the Twenty-first Amendment, the Court has sustained a State's power, within the confines of the Commerce Clause, to regulate and supervise the transportation of intoxicants through its territory. See *Duckworth* v. *Arkansas*, 314 U. S. 390; *Carter* v. *Virginia*, 321 U. S. 131. In *Duckworth*, Mr. Justice Jackson relied on the Twenty-first Amendment in concurring in the judgment. 314 U. S., at 397. In *Carter*, MR. JUSTICE BLACK, Mr. Justice Frankfurter, and Mr. Justice Jackson wrote separate concurrences, relying upon the Twenty-first Amendment. 321 U. S., at 138, 139. Cf. *Gordon* v. *Texas*, 355 U. S. 369, upholding a similar state statute in a *per curiam* citing both the Twenty-first Amendment and *Carter* v. *Virginia*, *supra*.

"repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect. In *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, "the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States." The Court's response to this theory was a blunt one: "We see no substance in this contention." *Id.,* at 172–173. See also *United States* v. *Frankfort Distilleries,* 324 U. S. 293. (Sherman Act.)

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

This principle is reflected in the Court's decision in *Collins* v. *Yosemite Park Co.,* 304 U. S. 518. There it was held that the Twenty-first Amendment did not give California power to prevent the shipment into and through her territory of liquor destined for distribution and consumption in a national park. The Court said that this traffic did not involve "transportation into California 'for delivery or use therein' " within the meaning of the Amendment. "The delivery and use is in the Park, and under a distinct sovereignty." *Id.,* at 538. This ruling was later characterized by the Court as hold-

ing "that shipment through a state is not transportation or importation into the state within the meaning of the Amendment." *Carter* v. *Virginia*, 321 U. S. 131, 137.[11] See also *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, aff'g, 137 F. 2d 274.

We may assume that if in *Collins* California had sought to regulate or control the transportation of the liquor there involved from the time of its entry into the State until its delivery at the national park, in the interest of preventing unlawful diversion into her territory, California would have been constitutionally permitted to do so.[12] But the Court held that California could not prevent completely the transportation of the liquor across the State's territory for delivery and use in a federal enclave within it.

A like accommodation of the Twenty-first Amendment with the Commerce Clause leads to a like conclusion in the present case. Here, ultimate delivery and use is not in New York, but in a foreign country. The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this case does not involve "measures aimed at preventing unlawful

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[11] Prior to the Eighteenth Amendment, Congress passed laws giving the States a large degree of autonomy in regulating the importation and distribution of intoxicants. These laws, the Wilson Act and the Webb-Kenyon Act, are still in force. 27 U. S. C. §§ 121, 122. In *United States* v. *Gudger*, 249 U. S. 373, the Court held that under the Reed amendment of 1917—passed by Congress to strengthen these laws, 39 Stat. 1058, 1069—a prohibition upon transportation "into" a State did not prohibit the "movement through one State as a mere incident of transportation to the [place] into which it is shipped." *Id.*, at 375.

[12] See cases cited in note 10, *supra*.

diversion or use of alcoholic beverages within New York." 212 F. Supp., at 386. Rather, the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do.

Affirmed.

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

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

The appellee, Idlewild Bon Voyage Liquor Corporation, buys wines and intoxicating liquors from bonded wholesale warehouses, brings them into the State of New York, and sells them at retail in the John F. Kennedy Airport. Idlewild does not have and cannot obtain a New York license; therefore its business is in violation of New York law. Idlewild keeps a stock of liquor in New York under Customs inspection, and customers come into Idlewild's shop, choose the kind of liquor they want, and pay for it. These retail sales are just like sales made by New York's licensed and regulated liquor dealers, with a single difference: other New York retailers normally make delivery across the counter while Idlewild arranges with its customers to put their purchases, under United States Customs supervision, aboard planes so that the customers take physical possession of the liquor, not in New York, but at destinations abroad. The airport where the sales take place is not a federal enclave where even as to liquor federal law can constitutionally control,[1]

[1] Compare *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938); *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383 (1944).

but is New York territory subject to New York, not federal, jurisdiction. The Court nevertheless strikes down New York's law barring Idlewild from selling intoxicating liquors in New York. The ground for invalidating the law is that it conflicts with the Commerce Clause and with Treasury regulations promulgated under 19 U. S. C. § 1311 under which Idlewild's sales and deliveries to foreign-bound planes are for customs purposes supervised by Customs officials. I think, however, that while Customs officials have the right to perform their duties relative to customs, the Twenty-first Amendment confers exclusive jurisdiction upon the State of New York to regulate all liquor business carried on in New York. Section 2 of this Amendment, which became effective December 1933, provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Even though the language of this Amendment clearly leaves the States free to control the importation of and traffic in liquors within their boundaries, it was argued in *State Board* v. *Young's Market Co.*, 299 U. S. 59 (1936), that it would be a violation of the Commerce Clause and of the Equal Protection Clause for a State to require a fee of persons importing beer from outside the State. Pointing out that such a discrimination would have violated the Commerce Clause before adoption of the Twenty-first Amendment, this Court held that since that Amendment a State was not required to "let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it." *Id.*, at 62. The Court went on to hold that the claim that the State's discriminatory "statutory provisions and the regulations are void under

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the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." *Id.*, at 64. Following the *Young's Market* case, this Court has said and repeated that since the Twenty-first Amendment "the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Joseph S. Finch & Co.* v. *McKittrick,* 305 U. S. 395, 398 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n,* 305 U. S. 391, 394 (1939). The principles of these cases have been uniformly followed until today. *E. g., California* v. *Washington,* 358 U. S. 64 (1958); *Ziffrin, Inc.,* v. *Reeves,* 308 U. S. 132 (1939). The Court today attempts to distinguish this case from our previous cases, but I find myself unpersuaded by the Court's distinction.

In *Young's Market,* the Court found it so clear that the "broad language" of the Twenty-first Amendment gave States exclusive power to regulate or tax liquor transactions in those States that it rather impatiently refused to consider the Amendment's history urged in limitation of that language. *Young's Market, supra,* 299 U. S., at 63–64. I agree with Justice Brandeis that history should not be necessary to prove what is obvious. But now that the Amendment is interpreted in a way that takes away part of the power that I think was given to the States by the Amendment and confers it on Customs officials, it becomes appropriate to look to the history of the Amendment's adoption. As reported by the Senate Committee on the Judiciary in S. J. Res. 211, 72d Cong., 2d Sess., the proposed amendment provided in Section 2, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." 76 Cong. Rec. 4138 (1933). That language is in the present Amendment.

But the proposal also contained a Section 3, not found in the present Amendment; that Section provided, "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Ibid.* Proposing to leave even this remnant of federal control over liquor traffic gave rise to the only real controversy over the language of the proposed Amendment. Senator Wagner of New York, who could not have known that his State would because of today's opinion be the first to be denied control of liquor traffic within the State, opposed Section 3 because it would defeat the proposed Amendment's purpose "to restore to the States control of their liquor problem." *Id.*, at 4145. Senator Wagner argued that giving the Federal Government even "apparently limited power" would allow that power to be "extended to boundaries now undreamed of and unsuspected" by those supporting the proposed Amendment. *Id.*, at 4147. It is clear that the opposition to Section 3 and its elimination from the proposed Amendment rested on the fear, often voiced during the Senate debate,[2] that any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States by Section 2. Having heard those fears expressed, Senator Robinson of Arkansas, the Senate Majority Leader, asked for a vote "to strike out section 3." *Id.*, at 4171. It was because of these fears that the Senate then voted to take Section 3 out of the proposed Amendment while retaining Section 2 and its broad grant of power to the States. *Id.*, at 4179.

During the debate the Senators brought out quite clearly what plenary powers Section 2, as it now appears in the Twenty-first Amendment, meant to give the States.

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[2] *E. g.*, 76 Cong. Rec. 4143 (1933) (Senator Blaine); 4144–4148 (Senator Wagner); 4177–4178 (Senator Black).

Senator Blaine of Wisconsin, chairman of the subcommittee which had held hearings on the resolution and floor manager of the resolution in the Senate, agreed that Section 3 "ought to be taken out of the resolution" and Section 2 left in, because the "purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." *Id.*, at 4143. Speaking of the same section, Senator Walsh of Montana, also a member of the subcommittee, said, "The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter." *Id.*, at 4219.

The legislative history, of which these passages are typical, should be enough to prove that when the Senators agreed to Section 2 they thought they were returning "absolute control" of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed. Moreover, by rejecting Section 3, they thought they were seeing to it that the Federal Government could not interfere with or restrict the State's exercise of the power conferred by the Amendment. Therefore, that the liquor in this case is supervised by United States Customs officials for customs purposes is immaterial. The Amendment promises that each State shall decide what is best for itself in regulating liquor traffic within its boundaries, and the Amendment no more empowers Customs officials to make that decision for a State than it empowers Congress to make it. This view was forcefully expressed by Senator Wagner, who, when urging that Section 3 be eliminated from the proposed Amendment and the States be given complete control of liquor traffic, said: "let the people of each State deal with that subject, and they will do it more effectively

and more successfully than the Federal Government has done, because it is not the business of the Federal Government." *Id.*, at 4146.

That the liquors involved in this case have, in Walsh's and Blaine's words, "passed the State line" and "enter[ed] the confines" of the State is beyond dispute. The debates from which I have quoted show that the Senators intended that, once the liquors should enter New York, they would be subject to the "absolute control" of that State. The Twenty-first Amendment promises New York no less.

Idlewild's liquors, once in the State, are sold at retail to airline passengers at Kennedy Airport. No one disputes that Idlewild thus competes with other New York liquor dealers for the trade of these consumers of liquor. To allow this business to go unregulated by New York is to interfere with the regulatory power which this Court, in *State Board* v. *Young's Market Co., supra,* said each State has under the Twenty-first Amendment. There, *id.*, at 63, the Court said that a State is perfectly free to set up a state liquor monopoly or to confer a liquor monopoly upon some one dealer in the State. It is equally obvious that New York is free to allow only a limited number of dealers to engage in the liquor business. It might do this because it wanted to discourage consumption, or to make it easier to police the liquor traffic, or to accomplish some other objective the State thought worthwhile to protect against the evils which can flow from the traffic. In particular New York might want to see that sales are not diverted to Idlewild from other dealers licensed and regulated by the State. Yet today's interpretation of the Amendment renders New York impotent to prevent such diversions. Justification for this result is sought by saying that the Customs officials must be unhampered in their duties. But giving Customs officials the power to prevent evasion of customs duties does not immunize

liquor dealers from state regulation. Nor does state regulation interfere with federal officials' performance of their duties. Whether Idlewild stays in business is no legitimate concern of the Customs officials; their concern is that, if Idlewild does do a liquor business, tax-free liquor not be diverted within the country and customs duties not thereby be evaded. Nothing in the New York licensing scheme interferes with the federal officials' performance of their duty.

The invalidation of New York's regulation of Idlewild, I think, makes inroads upon the powers given the States by the Twenty-first Amendment. Ironically, it was against just this kind of judicial encroachment that Senators were complaining when they agreed to S. J. Res. 211 and paved the way for the Amendment's adoption. Senator Borah of Idaho traced the history of state regulation of liquor traffic from Justice Taney's decision in the *License Cases,* 5 How. 504 (1847), which upheld state power over liquor, through *Bowman* v. *Chicago & N. R. Co.,* 125 U. S. 465 (1888), which Senator Borah said "wiped out the Taney decision," to *Leisy* v. *Hardin,* 135 U. S. 100 (1890), which made the States "powerless to protect themselves against the importation of liquor into the States." 76 Cong. Rec. 4170–4171 (1933). Because of this judicial history, Senator Borah, wanting to guarantee that the States would not be rendered powerless over liquor traffic, expressed his uneasiness at leaving anything less than a Constitutional Amendment "to the protection of the Supreme Court of the United States." *Ibid.* Yet, instead of protecting the States' power to control liquor traffic, today's interpretation of the Twenty-first Amendment leaves New York powerless to regulate Idlewild's business and others like it and puts the power instead in the hands of United States Customs officials. I would not interpret the Amendment that way.

DEPARTMENT OF REVENUE *v.* JAMES B. BEAM DISTILLING CO.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

No. 389. Argued March 23, 1964.—Decided June 1, 1964.

Respondent is a distributor of whisky produced in Scotland and shipped through United States ports directly to bonded warehouses in Kentucky. State law provided for a tax of ten cents per gallon on the importation of whisky into the State, which tax was collected while the Scotch whisky was in unbroken packages in the importer's possession. Respondent's claim for refund of the taxes on the basis of violation of the Export-Import Clause of the Constitution was upheld by the highest state court. *Held:* A tax on the whisky, which retained its character as an import in the original package, was clearly proscribed by the Export-Import Clause, which was not, insofar as intoxicants are concerned, repealed by the Twenty-first Amendment. Pp. 341–346.

367 S. W. 2d 267, affirmed.

William S. Riley, Assistant Attorney General of Kentucky, argued the cause for petitioner. With him on the brief were *John B. Breckinridge,* Attorney General of Kentucky, *Francis D. Burke* and *Hal O. Williams.*

Millard Cox argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case requires consideration of the relationship between the Export-Import Clause [1] and the Twenty-first Amendment [2] of the Constitution.

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[1] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports

[*Footnote 2 is on p. 342*]

The respondent, a Kentucky producer of distilled spirits, is also the sole distributor in the United States of "Gilbey's Spey Royal" Scotch whisky. This whisky is produced in Scotland and is shipped via the ports of Chicago or New Orleans directly to the respondent's bonded warehouses in Kentucky. It is subsequently sold by the respondent to customers in domestic markets throughout the United States.

A Kentucky law provides:

> "No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment." KRS 243.680 (2)(a).

Under the authority of this statute the Kentucky Department of Revenue, petitioner, required the respondent to pay a tax of 10 cents on each proof gallon of whisky which it thus imported from Scotland. It is not disputed that, as stated by the Kentucky Court of Appeals, "the tax was collected while the whisky remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer." The respondent filed a claim for refund of the taxes, upon the ground that their imposition violated the Export-Import Clause of the Constitution. The Kentucky Tax Commission and a Kentucky Circuit Court denied the claim, but on appeal the Kentucky Court of Appeals upheld it. 367 S. W. 2d 267. We granted certiorari to consider the

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or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." U. S. Const., Art. I, § 10, cl. 2.

[2] "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U. S. Const., Amend. XXI, § 2.

constitutional issue which the case presents. 375 U. S. 811.

The Kentucky Court of Appeals held that the tax in question, although an occupational or license tax in form, is a tax on imports in fact. "[T]he incidence of the tax is the act of transporting or shipping the distilled spirits under consideration into this state." 367 S. W. 2d, at 270. The court further held that the tax cannot be characterized as an inspection measure, in view of the fact that neither the statute nor the regulations implementing it provide for any actual inspection. Concluding, therefore, that the tax falls squarely within the interdiction of the Export-Import Clause, the court held that this provision of the Constitution has not been repealed, insofar as intoxicants are concerned, by the Twenty-first Amendment.[3] Accordingly, the court ruled that the respondent was entitled to a refund of the taxes it had paid. We agree with the Kentucky Court of Appeals and affirm the judgment before us.

The tax here in question is clearly of a kind prohibited by the Export-Import Clause. *Brown* v. *Maryland,* 12 Wheat. 419. As this Court stated almost a century ago in *Low* v. *Austin,* 13 Wall. 29, a case involving a California *ad valorem* tax on wine imported from France and stored in original cases in a San Francisco warehouse, "the goods imported do not lose their character as imports, . . . until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition." *Id.,* at 34. See *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652.

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[3] As the Kentucky Court of Appeals noted, two other state courts have reached the same conclusion. *Parrott & Co.* v. *San Francisco,* 131 Cal. App. 2d 332, 280 P. 2d 881; *State* v. *Board of Review,* 15 Wis. 2d 330, 112 N. W. 2d 914.

As we noted in *Hostetter* v. *Idlewild Liquor Corp., ante,* p. 330, "[t]his Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." [4] What is involved in the present case, however, is not the generalized authority given to Congress by the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad. "We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not." *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 665–666.

This Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids. In *State Board* v. *Young's Market Co.,* 299 U. S. 59, 62, the Court said that the Twenty-first Amendment "abrogated the right to import free [from Missouri or Wisconsin, under the Commerce Clause] so far as concerns intoxicating liquors." In that case the appellee had argued in its brief that such a holding would imply an invalidation of the Export-Import Clause as well,[5] but

[4] See *State Board* v. *Young's Market Co.,* 299 U. S. 59; *Brewing Co.* v. *Liquor Comm'n,* 305 U. S. 391; *Finch & Co.* v. *McKittrick,* 305 U. S. 395.

[5] See brief for appellees, No. 22, 1936 Term, pp. 24–25.

the Court's opinion was careful to note, "[t]he plaintiffs insist that to sustain the exaction of the importer's license-fee would involve a declaration that the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization." *Id.,* at 64. In *Gordon* v. *Texas,* 355 U. S. 369, the Court in a brief *per curiam* affirmed a Texas conviction for illegal possession of 11 bottles of rum which had been imported without a permit and to which the required Texas tax stamps were not affixed. The state tax in that case had been held to be not a tax on imports.[6] It is clear that the gravamen of the offense in *Gordon* was the failure to obtain, or even apply for, a permit as required by state law. Such permits, in addition to other functions, serve to channelize the traffic in liquor and thus to prevent diversion of that traffic into unauthorized channels. In the present case the respondent has both applied for and obtained the requisite permit. The relief it requests is not the abrogation of that requirement, but simply a refund of the import tax.

To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned.[7] Nothing in the language of the Amendment nor

[6] "It is apparent that the tax involved is not an import tax nor a tax upon an importation. In fact, the instant tax could not become an import tax because the importation must have been completed before the tax here levied attached." *Gordon* v. *State,* 166 Tex. Cr. R. 24, 27, 310 S. W. 2d 328, 330.

[7] Prior to the Eighteenth Amendment Congress passed the Webb-Kenyon Act and the Wilson Act, giving the States a large degree of autonomy in regulating the importation and distribution of intoxicants. Those laws are still in force. 27 U. S. C. §§ 121, 122. In *De Bary* v. *Louisiana,* 227 U. S. 108, the Court upheld under the

in its history leads to such an extraordinary conclusion. This Court has never intimated such a view, and now that the claim for the first time is squarely presented, we expressly reject it.

We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost on these imports from abroad.

Affirmed.

MR. JUSTICE BRENNAN took no part in the disposition of this case.

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

This case, like *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, also decided today, *ante*, p. 324, deprives the States of a large part of the power which I think the Twenty-first Amendment gives them to regulate the liquor business by taxation or otherwise. That Amendment provides in part that "The transportation or importation into any State . . . for delivery or use therein of intoxicating

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Wilson Act a Louisiana license tax imposed on the business of *selling* in their original packages wines and liquors imported from abroad. There is nothing in that decision, nor in the language of either the Wilson Act or the Webb-Kenyon Act, to support the view that Congress intended by those laws to consent to state taxation upon importation of liquor.

liquors, in violation of the laws thereof, is hereby prohibited." Kentucky requires persons transporting distilled spirits into the State from without the State to obtain a permit and pay a tax of 10 cents per gallon. This Kentucky tax as applied to liquors imported into Kentucky from another State is, since the Twenty-first Amendment, unquestionably valid against objections based on either the Commerce or Equal Protection Clauses. Such was the holding of this Court, soon after the Amendment's adoption, in *State Board* v. *Young's Market Co.*, 299 U. S. 59 (1936), where the Court held that a State is free under the Twenty-first Amendment to levy a "heavy importation fee" on beer brought into the State. In that case, the beer was imported from Missouri and Wisconsin, but there is nothing in the Court's opinion to suggest that the holding would have been different if the beer had come from, say, Canada. See *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939). Yet here, because the liquors Kentucky has taxed are imports from Scotland rather than imports from another part of the United States, the Court holds that the Kentucky tax is barred because Art. I, § 10, cl. 2, of the Constitution provides that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws . . . ." I think this clause forbidding a State to tax imports from abroad no more limits a State's right to tax intoxicating liquors than does the Commerce Clause. In the first place, the Commerce Clause applies to foreign and interstate commerce alike. Further, the clause against taxing imports is general like the Commerce Clause itself. Section 2 of the Twenty-first Amendment, by contrast, is not general in its application. It was adopted with one specific object: to give the States un-

fettered power to regulate intoxicating liquors. *State Board* v. *Young's Market Co., supra,* and our other cases expressly held the State's power not to be limited either by the Commerce Clause or by the Equal Protection Clause. Surely the Export-Import Clause is no more exalted and no more worthy to be excepted from the Twenty-first Amendment than are the Commerce and Equal Protection Clauses. It seems a trifle odd to hold that an Amendment adopted in 1933 in specific terms to meet a specific twentieth-century problem must yield to a provision written in 1787 to meet a more general, although no less important, problem. Since the Twenty-first Amendment was designed to empower the States to tax "intoxicating liquors" imported into the States, I cannot take it upon myself to say that a State can tax liquors made in this country but not those made in Scotland—a distinction not suggested by the Amendment's language or its history. The Amendment, after all, does not talk about "foreign" liquors or "domestic" liquors; it simply speaks of "liquors"—all liquors, whatever their origin. The purpose of the Amendment was to give States power to regulate, by taxation or otherwise, all liquors within their boundaries. To free from state taxation liquors imported from abroad is to place States at the mercy of liquor importers who want to use a State as a storage place for distribution of their imports. It deprives a State of the power the Twenty-first Amendment gives each State—that is, plenary power to decide which liquors shall be admitted into the State for storage, sale, or distribution within the State. A State may choose to have wine only, beer only, Scotch only, bourbon only, or none of these. As the Court said in *State Board* v. *Young's Market Co., supra,* at 63, a State can "either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations . . . ." Although I was brought up to believe

that Scotch whisky would need a tax preference to survive in competition with Kentucky bourbon, I never understood the Constitution to require a State to give such preference. (My dissenting Brother asks me to say that this statement does not necessarily represent his views on the respective merits of Scotch and bourbon.)

As recently as 1958, this Court reviewed the Texas conviction of a man who had brought some bottles of rum into Texas from Mexico on his way to his home in North Carolina, and had refused to pay Texas alcoholic beverage taxes when asked to do so. Over objections that this tax violated both the Export-Import Clause and the Commerce Clause, this Court, in a three-line *per curiam* opinion, unanimously affirmed the conviction. *Gordon* v. *Texas,* 355 U. S. 369 (1958). Briefs filed by Texas in that case had argued that the tax was really one on "possession," not on "importation," but these labels cannot obscure the fact that both in *Gordon* and in this case the same conduct was involved: the physical importation of liquor from abroad into the State, at which point the State's interest in regulating or taxing the liquor came into play. *Gordon* did not—just as the Twenty-first Amendment does not—draw nice distinctions about where imported liquor comes from. Nor is there one word in the debates in Congress preceding the adoption of the Amendment to suggest that the backers of the Amendment, in seeking to give the States full and unhampered power over liquor traffic, thought liquor coming from abroad was less of a problem than domestic liquor or should be treated at all differently.

A final word concerning the Court's statement that "To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned." *Ante,* p. 345. This, I think, is not correct. What the

Twenty-first Amendment does mean, I believe, is that whenever liquor imported from anywhere outside the State, including foreign countries, is transported physically into a State, there to come to rest to be stored for sale and distribution, it then and there becomes a state problem and like all other liquors is subject to state laws of all kinds. It cannot be treated as if it were liquor passing straight through the State—although even then the State would have the power to impose regulations to prevent diversions or other possible evils. See *Carter* v. *Virginia*, 321 U. S. 131 (1944). Whatever may have been the virtue or the constitutional soundness of the fiction that articles imported from abroad are "imports" so long as they remain "in their original packages," see *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945), and dissent at 686–691, that doctrine was expressly attacked in the Senate debate on the Twenty-first Amendment as rendering the States "powerless to protect themselves against the importation of liquor into the States."* 76 Cong. Rec. 4171 (1933). The Amendment was meant to bury that obstacle to state power over liquor, and the doctrine of "original package," which the Senate consciously rejected, should not be revived after 30 years' interment, once again to be used to deprive States of power the Senate so clearly wanted them to have and the people so clearly granted them. Section 2 of the Amendment, born of long and bitter experience in the field of liquor regulation, should not be frustrated by us.

I would uphold the Kentucky tax.

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*"The State of Iowa passed a prohibition law prohibiting the manufacture or sale of intoxicating liquors, except under certain specifications made. The Supreme Court in the case of Leisy *v.* Hardin (135 U. S. 100) held the law unconstitutional, in so far as it applied to the sale by the importer in the original package or keg. . . .

"The States therefore were powerless to protect themselves against the importation of liquor into the States." 76 Cong. Rec. 4171 (1933) (Senator Borah).

UNITED STATES *v.* VERMONT ET AL.

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

No. 509. Argued April 21, 1964.—Decided June 1, 1964.

A State assessed a solvent taxpayer for unpaid state taxes under a law providing that the amount owed shall be a lien in favor of the State upon the taxpayer's property and that the lien arises at the time the assessment is made. Later, the Commissioner of Internal Revenue, proceeding under 26 U. S. C. §§ 6321 and 6322, provisions virtually identical with the state law, assessed the taxpayer for federal taxes. The State thereafter sued and secured a judgment in the state court against the taxpayer and a bank which held sums owing to the taxpayer. The United States then sued in federal court to foreclose the federal lien; the District Court upheld the State's contention that its original assessment gave its lien priority; and the Court of Appeals affirmed. *Held:* The state lien had priority over the later federal lien. Pp. 354–359.

(a) The State's lien was choate since the identity of the lienor, the property subject to the lien and the amount of the lien were established. *United States* v. *New Britain,* 347 U. S. 81, followed. Pp. 354–355, 358.

(b) Where in a case involving a solvent debtor a federal tax lien arises under §§ 6321 and 6322 subsequent to a state tax lien, it is not necessary that property be reduced to the possession of the state tax lienor to defeat the federal claim, as would have been the case under R. S. § 3466, which accords the United States priority with respect to a claim against an insolvent debtor. *United States* v. *Gilbert Associates,* 345 U. S. 361, distinguished. Pp. 356–359.

317 F. 2d 446, affirmed.

Daniel M. Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner.*

Charles E. Gibson, Jr., Attorney General of Vermont, argued the cause and filed a brief for respondents.

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MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves a conflict between two liens upon the property of a solvent Vermont taxpayer—a federal tax lien arising under the provisions of 26 U. S. C. §§ 6321 and 6322 [1] and an antecedent state tax lien based on a Vermont law worded in terms virtually identical to the provisions of those federal statutes.

On October 21, 1958, the State of Vermont made an assessment and demand on Cutting & Trimming, Inc., for withheld state income taxes of $1,628.15. The applicable Vermont statute, modeled on the comparable federal enactments, provides that if an employer required to withhold a tax fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and that "[s]uch lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable." [2]

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[1] 26 U. S. C. § 6321 provides:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

26 U. S. C. § 6322 provides:

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

[2] 32 V. S. A. § 5765.

More than three months later, on February 9, 1959, the Commissioner of Internal Revenue made an assessment against Cutting & Trimming of $5,365.96 for taxes due under the Federal Unemployment Tax Act. Under §§ 6321 and 6322, this amount became "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person," which arose "at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time." [3]

On May 21, 1959, the State instituted suit in a state court against Cutting & Trimming, joining as a defendant Chittenden Trust Company, a Burlington bank which, as the result of a writ served on May 25, disclosed that it had in hand sums owing to Cutting & Trimming. On October 23, 1959, judgment was entered against Cutting & Trimming and against Chittenden Trust Company.

In 1961, the United States brought the present action in the Federal District Court for Vermont to foreclose the federal lien against the property of Cutting & Trimming

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[3] See note 1, *supra*. Notice of the federal lien was filed on June 2, 1959, pursuant to 26 U. S. C. § 6323, which provides:

"(a) *Invalidity of lien without notice.* Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate— . . . ."

No claim is made here that Vermont's lien comes within any of the four classifications to which § 6323 accords priority until notice of the federal tax lien has been filed. Consequently, we put to one side such cases as *United States* v. *Pioneer American Ins. Co.*, 374 U. S. 84, *United States* v. *Ball Construction Co.*, 355 U. S. 587, and *United States* v. *Scovil*, 348 U. S. 218, which are concerned with the federal standards to be applied in determining whether the security interests envisaged in that provision have in fact been created. See also *United States* v. *Gilbert Associates*, 345 U. S. 361, 363–365.

held by the Trust Company. Vermont's answer alleged that the state assessment of October 21, 1958, gave its lien priority over the federal lien. On cross-motions for judgment on the pleadings, the District Court held that the state lien had priority, and directed the Trust Company to apply the moneys which it held first to the payment of principal and interest on that lien, and to pay any balance to the United States. 206 F. Supp. 951.

The Court of Appeals affirmed, reasoning that, under this Court's decision in *United States* v. *New Britain,* 347 U. S. 81, "[i]t would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently 'choate' to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be 'choate' enough to prime a later and equally general federal tax lien," 317 F. 2d 446, 452. Accordingly, the appellate court applied "the 'cardinal rule' laid down by Chief Justice Marshall in Rankin & Schatzell v. Scott, 12 Wheat. (25 U. S.) 177, 179 (1827): 'The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds . . . .'" *Id.,* at 450. Because of the importance of the question in the administration of the state and federal revenue laws, we granted certiorari. 375 U. S. 940. For the reasons which follow, we affirm the judgment of the Court of Appeals.

Both parties urge that decision here is governed by *United States* v. *New Britain,* 347 U. S. 81. In that case, involving conflicting municipal and federal statutory liens, the Court held that "the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate." *Id.,* at 86. In determining the choateness of the liens involved, the Court "accept[ed] the [state court's] holding as to the specificity of the City's liens since they attached to specific pieces of real property for the taxes assessed and

water rent due," but it went on to stress that "liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established. The federal tax liens are general and, in the sense above indicated, perfected." *Id.,* at 84. Vermont's claim for the priority of its lien over the later federal lien is based on the fact that its lien is as completely "perfected" as was the federal lien in *New Britain.* Opposing this claim, the United States urges that different standards of choateness apply to federal and state liens, even where, as here, they are based on statutes identical in every material respect. The argument, in short, is that an antecedent state lien, in order to obtain priority over a federal lien based on §§ 6321 and 6322, cannot, like the federal lien, attach to all of the taxpayer's property, but must rather, like the municipal liens in *New Britain,* attach to specifically identified portions of that property.

The requirement that a competing lien must be choate in order to take priority over a later federal tax lien stems from the decision in *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47. There, an attachment lien which gave no right to proceed against the attached property unless judgment was obtained within three years or within an extension provided by the statute was held junior to a federal tax lien which had arisen after the date of the attachment but prior to the date of judgment on the ground that "[n]umerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists." *Id.,* at 50. The *Security Trust* rationale has since been applied in a case where a federal tax lien arose prior to judgment on a garnishment lien, *United States* v.

Liverpool & London Ins. Co., 348 U. S. 215,[4] and comparable defects have been held to require the according of priority to the federal lien in a series of cases involving competing mechanics' liens.[5]

In addition to setting out the specific ground of decision, however, the *Security Trust* opinion went on to state:

> "In cases involving a kindred matter, *i. e.*, the federal priority under R. S. § 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. . . . If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here." 340 U. S., at 51.

Relying on this statement, the United States urges us to read *Security Trust* as establishing the proposition that federal tax liens are entitled to priority, not only over "a *lis pendens* notice that a right to perfect a lien exists," but over any antecedent lien which is not sufficiently perfected to prevail against the explicit priority which R. S. § 3466 gives to claims of the United States in situations involving insolvency.[6] More particularly, it is suggested

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[4] See also *United States* v. *Acri*, 348 U. S. 211 (attachment lien).

[5] *United States* v. *Hulley*, 358 U. S. 66; *United States* v. *Vorreiter*, 355 U. S. 15; *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010; *United States* v. *Colotta*, 350 U. S. 808.

[6] Revised Statutes § 3466 provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his

that the state liens at issue here did not meet the standards of "specificity" until Vermont attached the funds held by the Chittenden Trust Company, at which time the federal tax lien had already come into existence. This argument fails to discriminate between the standards applicable under the federal tax lien provisions and those applicable to an insolvent debtor under R. S. § 3466.

Section 3466 on its face permits no exception whatsoever from the statutory command that "[w]henever any person indebted to the United States is insolvent . . . debts due to the United States shall be first satisfied." The statute applies to all the insolvent's debts to the Government, whether or not arising from taxes, and whether or not secured by a lien. In *United States* v. *Gilbert Associates,* 345 U. S. 361, without questioning that the lienor was identified, the amount of the lien certain or the property subject to the lien definite, this Court accorded priority to subsequently arising claims of the United States against an insolvent debtor on the ground that:

> "In claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. . . . The taxpayer had not been divested by the Town of either title or possession. The Town, therefore, had only a general, unperfected lien." *Id.,* at 366.[7]

The state tax commissioner's assessment and demand in the present case clearly did not meet that standard,

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debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[7] See also *Illinois* v. *Campbell,* 329 U. S. 362, 375–376; *United States* v. *Waddill Co.,* 323 U. S. 353, 359–360.

nor, so far as that goes, did the writ of attachment served on the Chittenden Trust Company.[8] But the *New Britain* case, 347 U. S. 81, in which "[t]he taxpayer had not been divested by the Town of either title or possession," makes quite clear that different standards apply where the United States' claim is based on a tax lien arising under §§ 6321 and 6322.[9] "When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, whether secured by liens or otherwise, by § 3466 of the Revised Statutes, 31 U. S. C. . . . § 191. In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an absolute priority [citing *United States* v. *Gilbert Associates,* 345 U. S. 361; *United States* v. *Waddill, Holland & Flinn,* 323 U. S. 353]. Where the debtor is not insolvent, Congress has failed to expressly provide for federal priority . . . although the United States is free to pursue the whole of the debtor's property wherever situated." *United States* v. *New Britain,* 347 U. S. 81, 85.

It is undisputed that the State's lien here meets the test laid down in *New Britain* that "the identity of the lienor, the property subject to the lien, and the amount of the lien are established." 347 U. S., at 84. Moreover, unlike those cases in which the *Security Trust* rationale was applied to subordinate liens on the ground that judgment had not been obtained prior to the time the federal lien

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[8] Indeed, this Court has repeatedly reserved the question whether the priority given the United States by R. S. § 3466 can be overcome even by a prior specific and perfected lien. *United States* v. *Gilbert Associates,* 345 U. S. 361, 365; *Illinois* v. *Campbell,* 329 U. S. 362, 370; *United States* v. *Waddill Co.,* 323 U. S. 353, 355–356; *United States* v. *Texas,* 314 U. S. 480, 484–486; *New York* v. *Maclay,* 288 U. S. 290, 294; *Spokane County* v. *United States,* 279 U. S. 80, 95.

[9] See also *Crest Finance Co.* v. *United States,* 368 U. S. 347.

arose,[10] it is as true of Vermont's lien here [11] as it was of the federal lien in *New Britain* that "The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt." *Bull* v. *United States,* 295 U. S. 247, 260.[12]

For these reasons, we hold that this antecedent state lien arising under a statute modeled after §§ 6321 and 6322 is sufficiently choate to obtain priority over the later federal lien arising under those provisions. Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[10] See notes 4 and 5, *supra,* and accompanying text.

[11] See 317 F. 2d, at 448, n. 2.

[12] The municipal liens accorded priority in *New Britain* were also characterized as summarily enforceable. See Brief for the United States, No. 92, 1953 Term, p. 27, n. 13.

BAGGETT ET AL. *v.* BULLITT ET AL.

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

No. 220. Argued March 24, 1964.—Decided June 1, 1964.

This class action was brought by members of the faculty, staff, and students of the University of Washington for a judgment declaring unconstitutional 1931 and 1955 state statutes requiring the taking of oaths, one for teachers and the other for all state employees, including teachers, as a condition of employment. The 1931 oath requires teachers to swear, by precept and example, to promote respect for the flag and the institutions of the United States and the State of Washington, reverence for law and order and undivided allegiance to the Government of the United States. The 1955 oath for state employees, which incorporates provisions of the state Subversive Activities Act, requires the affiant to swear that he is not a "subversive person": that he does not commit, or advise, teach, abet or advocate another to commit or aid in the commission of any act intended to overthrow or alter, or assist in the overthrow or alteration, of the constitutional form of government by revolution, force or violence. "Subversive organization" and "foreign subversive organization" are defined in similar terms and the Communist Party is declared a subversive organization. A three-judge District Court held that the 1955 statute and oath were not unduly vague and did not violate the First and Fourteenth Amendments, and it abstained from ruling on the 1931 oath until it was considered by the state courts. *Held:*

1. The provisions of the 1955 statute and the 1931 Act violate due process since they, as well as the oaths based thereon, are unduly vague, uncertain and broad. *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, followed. Pp. 361–372.

2. A State cannot require an employee to take an unduly vague oath containing a promise of future conduct at the risk of prosecution for perjury or loss of employment, particularly where the exercise of First Amendment freedoms may thereby be deterred. Pp. 373–374.

3. Federal courts do not automatically abstain when faced with a doubtful issue of state law, since abstention involves a discretionary exercise of equity power. Pp. 375–379.

(a) There are no special circumstances warranting application of the doctrine here. P. 375.

(b) Construction of the 1931 oath cannot eliminate the vagueness from its terms, and would probably raise other constitutional issues. P. 378.

(c) Abstention leads to piecemeal adjudication and protracted delays, a costly result where First Amendment freedoms may be inhibited. Pp. 378–379.

215 F. Supp. 439, reversed.

Arval A. Morris and *Kenneth A. MacDonald* argued the cause and filed a brief for appellants.

Herbert H. Fuller, Deputy Attorney General of Washington, argued the cause for appellees. With him on the brief were *John J. O'Connell,* Attorney General of Washington, and *Dean A. Floyd,* Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellants, approximately 64 in number, are members of the faculty, staff and student body of the University of Washington who brought this class action asking for a judgment declaring unconstitutional two Washington statutes requiring the execution of two different oaths by state employees and for an injunction against the enforcement of these statutes by appellees, the President of the University, members of the Washington State Board of Regents and the State Attorney General.

The statutes under attack are Chapter 377, Laws of 1955, and Chapter 103, Laws of 1931, both of which require employees of the State of Washington to take the oaths prescribed in the statutes as a condition of their employment. The 1931 legislation applies only to teachers, who, upon applying for a license to teach or renewing an existing contract, are required to subscribe to the following:

"I solemnly swear (or affirm) that I will support the constitution and laws of the United States of

> America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." Wash. Laws 1931, c. 103.

The oath requirements of the 1955 Act, Wash. Laws 1955, c. 377, applicable to all state employees, incorporate various provisions of the Washington Subversive Activities Act of 1951, which provides generally that "[n]o subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." Wash. Rev. Code § 9.81.060. The term "subversive person" is defined as follows:

> " 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." Wash. Rev. Code § 9.81.010 (5).

The Act goes on to define at similar length and in similar terms "subversive organization" and "foreign subversive organization" and to declare the Communist Party a sub-

versive organization and membership therein a subversive activity.[1]

On May 28, 1962, some four months after this Court's dismissal of the appeal in *Nostrand* v. *Little,* 368 U. S. 436, also a challenge to the 1955 oath,[2] the University

[1] " 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence." Wash. Rev. Code § 9.81.010 (2).

" 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." Wash. Rev. Code § 9.81.010 (3).

"COMMUNIST PARTY DECLARED A SUBVERSIVE ORGANIZATION.

"The communist party is a subversive organization within the purview of chapter 9.81 and membership in the communist party is a subversive activity thereunder." Wash. Rev. Code § 9.81.083.

[2] Although the 1931 Act has not been the subject of previous challenge, an attack upon the 1955 loyalty statute was instituted by two of the appellants in the present case, Professors Howard Nostrand and Max Savelle, who brought a declaratory judgment action in the Superior Court of the State of Washington asking that Chapter 377, Laws of 1955, be declared unconstitutional and that its enforcement be enjoined. The Washington Supreme Court held that one section was unconstitutional but severable from the rest of the Act, whose validity was upheld. *Nostrand* v. *Balmer,* 53 Wash. 2d 460, 335 P. 2d 10. On appeal to this Court the decision of the Washington court was vacated and the case remanded for a determination of whether employees who refused to sign the oath would be afforded a hearing at which they could explain or defend

President, acting pursuant to directions of the Board of Regents, issued a memorandum to all University employees notifying them that they would be required to take an oath. Oath Form A [3] requires all teaching per-

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the reasons for their refusal. *Nostrand* v. *Little,* 362 U. S. 474. The Washington Supreme Court held upon remand that since Professors Nostrand and Savelle were tenured professors the terms of their contracts and rules promulgated by the Board of Regents entitled them to a hearing. *Nostrand* v. *Little,* 58 Wash. 2d 111, 361 P. 2d 551. This Court dismissed a further appeal, *Nostrand* v. *Little,* 368 U. S. 436. The issue we find dispositive of the case at bar was not presented to this Court in the above proceedings.

[3] "Oath Form A

"STATE OF WASHINGTON

"Statement and Oath for Teaching Faculty of the University of Washington

"I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

"I further certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083, which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury.

.....
(SIGNATURE)

.....
(TITLE AND DEPARTMENT)

"Subscribed and sworn (or affirmed) to before me this..... day of....., 19.....

.....
NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT.....

[*Footnote 3 is continued on p. 365*]

sonnel to swear to the oath of allegiance set out above, to aver that they have read, are familiar with and understand the provisions defining "subversive person" in the Subversive Activities Act of 1951 and to disclaim being a subversive person and membership in the Communist Party or any other subversive or foreign subversive organization. Oath Form B [4] requires other state employees to subscribe to all of the above provisions except the 1931 oath. Both forms provide that the oath and

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"(To be executed in duplicate, one copy to be retained by individual.)

"NOTE: Those desiring to affirm may strike the words 'swear' and 'sworn to' and substitute 'affirm' and 'affirmed,' respectively."

[4] "Oath Form B

"STATE OF WASHINGTON

"Statement and Oath for Staff of the University of Washington Other Than Teaching Faculty

"I certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury.

.....

(SIGNATURE)

.....

(TITLE AND DEPARTMENT OR OFFICE)

"Subscribed and sworn (or affirmed) to before me this..... day of....., 19.....

.....

NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT.....

"(To be executed in duplicate, one copy to be retained by individual.)

"NOTE: Those desiring to affirm may strike the words 'swear' and 'sworn to' and substitute 'affirm' and 'affirmed,' respectively."

statements pertinent thereto are made subject to the penalties of perjury.

Pursuant to 28 U. S. C. §§ 2281, 2284, a three-judge District Court was convened and a trial was had. That court determined that the 1955 oath and underlying statutory provisions did not infringe upon any First and Fourteenth Amendment freedoms and were not unduly vague. In respect to the claim that the 1931 oath was unconstitutionally vague on its face, the court held that although the challenge raised a substantial constitutional issue, adjudication was not proper in the absence of proceedings in the state courts which might resolve or avoid the constitutional issue. The action was dismissed. 215 F. Supp. 439. We noted probable jurisdiction because of the public importance of this type of legislation and the recurring serious constitutional questions which it presents. 375 U. S. 808. We reverse.

I.

Appellants contend in this Court that the oath requirements and the statutory provisions on which they are based are invalid on their face because their language is unduly vague, uncertain and broad. We agree with this contention and therefore, without reaching the numerous other contentions pressed upon us, confine our considerations to that particular question.[5]

In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, the Court invalidated an oath requiring teachers and other employees of the State to swear that they had never lent their "aid, support, advice, counsel or influence to the Communist Party" because the oath was lacking in

[5] Since the ground we find dispositive immediately affects the professors and other state employees required to take the oath, and the interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel, we have no occasion to pass on the standing of the students to bring this suit.

"terms susceptible of objective measurement" and failed to inform as to what the State commanded or forbade. The statute therefore fell within the compass of those decisions of the Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *United States* v. *Cardiff*, 344 U. S. 174; *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210.

The oath required by the 1955 statute suffers from similar infirmities. A teacher must swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force or violence. A subversive organization is defined as one which engages in or assists activities intended to alter or overthrow the Government by force or violence or which has as a purpose the commission of such acts. The Communist Party is declared in the statute to be a subversive organization, that is, it is presumed that the Party does and will engage in activities intended to overthrow the Government.[6] Persons required to swear they under-

[6] The drafters of the 1951 Subversive Activities Act stated to the Washington Legislature that "[t]he [Communist Party] dovetailed, nation-wide program is designed to . . . create unrest and civil strife, and impede the normal processes of state and national government, all to the end of weakening and ultimately destroying the United States as a constitutional republic and thereby facilitating the avowed Soviet purpose of substituting here a totalitarian dictatorship." First Report of the Joint Legislative Fact-Finding Committee on Un-American Activities in Washington State, 1948, p. IV.

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stand this oath may quite reasonably conclude that any person who aids the Communist Party or teaches or advises known members of the Party is a subversive person because such teaching or advice may now or at some future date aid the activities of the Party. Teaching and advising are clearly acts, and one cannot confidently assert that his counsel, aid, influence or support which adds to the resources, rights and knowledge of the Communist Party or its members does not aid the Party in its activities, activities which the statute tells us are all in furtherance of the stated purpose of overthrowing the Government by revolution, force, or violence. The questions put by the Court in *Cramp* may with equal force be asked here. Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party? The susceptibility of the statutory language to require forswearing of an undefined variety of "guiltless knowing behavior" is what the Court condemned in *Cramp*. This statute, like the one at issue in *Cramp*, is unconstitutionally vague.[7]

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[7] The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in *Gerende* v. *Board of Supervisors*, 341 U. S. 56, is without merit. It was forcefully argued in *Gerende* that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged " 'in the attempt to overthrow the

The Washington statute suffers from additional difficulties on vagueness grounds. A person is subversive not only if he himself commits the specified acts but if he abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional government. The Washington Supreme Court has said that knowledge is to be read into every provision and we accept this construction. *Nostrand* v. *Balmer,* 53 Wash. 2d 460, 483–484, 335 P. 2d 10, 24; *Nostrand* v. *Little,* 58 Wash. 2d 111, 123–124, 361 P. 2d 551, 559. But what is it that the Washington professor must "know"? Must he know that his aid or teaching will be used by another and that the person aided has the requisite guilty intent or is it sufficient that he know that his aid or teaching would or might be useful to others in the commission of acts intended to overthrow the Government? Is it subversive activity, for example, to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries? What about the editor of a scholarly journal who analyzes and criticizes the manuscripts of Communist scholars submitted for publication? Is selecting outstanding scholars from Communist countries as visiting professors and advising, teaching, or consulting with them at the University of Washington a subversive activity if such scholars are known to be Communists, or regardless of their affiliations, regularly teach students

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government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." *Id.,* at 56–57 (emphasis in original). The Court said: "At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is *Affirmed.*" *Id.,* at 57.

who are members of the Communist Party, which by statutory definition is subversive and dedicated to the overthrow of the Government?

The Washington oath goes beyond overthrow or alteration by force or violence. It extends to alteration by "revolution" which, unless wholly redundant and its ordinary meaning distorted, includes any rapid or fundamental change. Would, therefore, any organization or any person supporting, advocating or teaching peaceful but far-reaching constitutional amendments be engaged in subversive activity? Could one support the repeal of the Twenty-second Amendment or participation by this country in a world government? [8]

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[8] It is also argued that § 2 of the Smith Act, 18 U. S. C. § 2385, upheld over a vagueness challenge in *Dennis* v. *United States*, 341 U. S. 494, proscribes the same activity in the same language as the Washington statute. This argument is founded on a misreading of § 2 and *Dennis* v. *United States*, *supra*.

That section provides:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State . . . by force or violence . . . ."

The convictions under this provision were sustained in *Dennis*, *supra*, on the construction that the statute means "teaching and advocacy of action for the accomplishment of [overthrowing or destroying organized government] by language reasonably and ordinarily calculated to incite persons to such action . . . as speedily as circumstances would permit." *Id.*, at 511–512. In connection with the vagueness attack, it was noted that "[t]his is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. . . ." *Id.*, at 502.

In reversing convictions under this section in *Yates* v. *United States*, 354 U. S. 298, the Court made quite clear exactly what all the above terms do and do not proscribe: "[T]he Smith Act reaches only advocacy of action for the overthrow of government by force and violence." *Id.*, at 324.

II.

We also conclude that the 1931 oath offends due process because of vagueness. The oath exacts a promise that the affiant will, by precept and example, promote respect for the flag and the institutions of the United States and the State of Washington. The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed. The teacher who refused to salute the flag or advocated refusal because of religious beliefs might well be accused of breaching his promise. Cf. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. Even criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath. And what are "institutions" for the purposes of this oath? Is it every "practice, law, custom, etc., which is a material and persistent element in the life or culture of an organized social group" or every "established society or corporation," every "establishment, esp[ecially] one of a public character"? [9] The oath may prevent a professor from criticizing his state judicial system or the Supreme Court or the institution of judicial review. Or it might be deemed to proscribe advocating the abolition, for example, of the Civil Rights Commission, the House Committee on Un-American Activities, or foreign aid.

It is likewise difficult to ascertain what might be done without transgressing the promise to "promote . . . undivided allegiance to the government of the United States." It would not be unreasonable for the serious-minded oathtaker to conclude that he should dispense with lectures voicing far-reaching criticism of any old or new policy followed by the Government of the United

[9] Webster's New Int. Dictionary (2d ed.), at 1288.

States. He could find it questionable under this language to ally himself with any interest group dedicated to opposing any current public policy or law of the Federal Government, for if he did, he might well be accused of placing loyalty to the group above allegiance to the United States.

Indulging every presumption of a narrow construction of the provisions of the 1931 oath, consistent, however, with a proper respect for the English language, we cannot say that this oath provides an ascertainable standard of conduct or that it does not require more than a State may command under the guarantees of the First and Fourteenth Amendments.

As in *Cramp* v. *Board of Public Instruction*, "[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." 368 U. S. 278, 287. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker—teachers and public servants—to "steer far wider of the unlawful zone," *Speiser* v. *Randall*, 357 U. S. 513, 526, than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.[10]

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[10] "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face . . . is so vague and indefinite as to permit the punishment of

Smith v. *California,* 361 U. S. 147; *Stromberg* v. *California,* 283 U. S. 359, 369. See also *Herndon* v. *Lowry,* 301 U. S. 242; *Thornhill* v. *Alabama,* 310 U. S. 88; and *Winters* v. *New York,* 333 U. S. 507.

III.

The State labels as wholly fanciful the suggested possible coverage of the two oaths. It may well be correct, but the contention only emphasizes the difficulties with the two statutes; for if the oaths do not reach some or any of the behavior suggested, what specific conduct do the oaths cover? Where does fanciful possibility end and intended coverage begin?

It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. "It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human." *Cramp, supra,* at 286–287. Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Nor should we encourage the casual taking of oaths by upholding the discharge or exclusion from public employ-

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the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Stromberg* v. *California,* 283 U. S. 359, 369. "[S]tatutes restrictive of or purporting to place limits to those [First Amendment] freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb . . . and . . . the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." *United States* v. *Congress of Industrial Organizations,* 335 U. S. 106, 141–142 (Rutledge, J., concurring).

ment of those with a conscientious and scrupulous regard for such undertakings.

It is further argued, however, that, notwithstanding the uncertainties of the 1931 oath and the statute on which it is based, the oath does not offend due process because the vagaries are contained in a promise of future conduct, the breach of which would not support a conviction for perjury. Without the criminal sanctions, it is said, one need not fear taking this oath, regardless of whether he understands it and can comply with its mandate, however understood. This contention ignores not only the effect of the oath on those who will not solemnly swear unless they can do so honestly and without prevarication and reservation, but also its effect on those who believe the written law means what it says. Oath Form A contains both oaths, and expressly requires that the signer "understand that this statement and oath are made subject to the penalties of perjury." Moreover, Wash. Rev. Code § 9.72.030 provides that "[e]very person who, whether orally or in writing . . . shall knowingly swear falsely concerning any matter whatsoever" commits perjury in the second degree. Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of a prosecution cannot be gainsaid. The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where "the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U. S. 147, 151. "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refg. Co.* v. *Corporation Comm'n of Oklahoma,* 286 U. S. 210, 243; cf. *Small Co.* v. *American Refg. Co.,* 267 U. S. 233.

IV.

We are asked not to examine the 1931 oath statute because, although on the books for over three decades, it has never been interpreted by the Washington courts. The argument is that ever since *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, the Court on many occasions has ordered abstention where state tribunals were thought to be more appropriate for resolution of complex or unsettled questions of local law. *A. F. L.* v. *Watson*, 327 U. S. 582; *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101; *Harrison* v. *NAACP*, 360 U. S. 167. Because this Court ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented, *Fox* v. *Washington*, 236 U. S. 273; *Poulos* v. *New Hampshire*, 345 U. S. 395, an interpretation of the 1931 oath in the Washington courts in light of the vagueness attack may eliminate the necessity of deciding this issue.

We are not persuaded. The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the "special circumstances," *Propper* v. *Clark*, 337 U. S. 472, prerequisite to its application must be made on a case-by-case basis. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 500; *NAACP* v. *Bennett*, 360 U. S. 471.[11] Those special circumstances are not present here. We doubt, in the first place, that a construction of the oath provisions, in light of the vagueness challenge, would

[11] "When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication before a United States District Court, reference to the state courts for construction of the statute should not automatically be made." *NAACP* v. *Ben-*

avoid or fundamentally alter the constitutional issue raised in this litigation. See *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77. In the bulk of abstention cases in this Court,[12] including those few cases where vagueness was at issue,[13] the unsettled issue of state law principally

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nett, 360 U. S. 471. See also *United States* v. *Livingston*, 179 F. Supp. 9, 12–13 (D. C. E. D. S. C.), aff'd, *Livingston* v. *United States*, 364 U. S. 281: "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." *Shelton* v. *McKinley*, 174 F. Supp. 351 (D. C. E. D. Ark.) (abstention inappropriate where there are no substantial problems of statutory construction and delay would prejudice constitutional rights); *All American Airways* v. *Village of Cedarhurst*, 201 F. 2d 273 (C. A. 2d Cir.); *Sterling Drug* v. *Anderson*, 127 F. Supp. 511, 513 (D. C. E. D. Tenn.).

[12] See, *e. g.*, *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U. S. 101; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368; *Shipman* v. *DuPre*, 339 U. S. 321; *Albertson* v. *Millard*, 345 U. S. 242; *Leiter Minerals, Inc.*, v. *United States*, 352 U. S. 220; *Government & Civic Employees Organizing Committee, C. I. O.*, v. *Windsor*, 353 U. S. 364; *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639.

[13] In *Musser* v. *Utah*, 333 U. S. 95, the appellants were convicted of committing "acts injurious to public morals." The vagueness challenge to the statute, either as applied or on its face, was raised for the first time in oral argument before this Court, and the Court vacated the conviction and remanded for a determination of whether the conviction for urging persons to commit polygamy rested solely on this broad-challenged provision. In *Albertson* v. *Millard*, 345 U. S. 242, the Communist Party of the State of Michigan and its secretary sought to enjoin on several constitutional grounds the application to them of a state statute, five days after its passage, requiring registration, under pain of criminal penalties, of "any organization which is substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites, or which . . . acts to further, the world communist movement" and

concerned the applicability of the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation. Here the

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of members of such an organization. They argued that the definitions were vague and failed to inform them if a local Communist organization and its members were required to register. The lower court took judicial notice of the fact that the Communist Party of the United States, with whom the local party was associated, was a part of the world Communist movement dominated by the Soviet Union, and held the statute constitutional in all other respects. This Court vacated the judgment and declined to pass on the appellants' constitutional claims until the Michigan courts, in a suit already pending, construed the statutory terms and determined if they required the local Party and its secretary, without more, to register. The approach was that the constitutional claims, including the one founded on vagueness, would be wholly eliminated if the statute, as construed by the state court, did not require all local Communist organizations without substantial ties to a foreign country and their members to register. Stated differently, the question was whether this statute applied to these plaintiffs, a question to be authoritatively answered in the state courts.

In *Harrison* v. *NAACP*, 360 U. S. 167, the NAACP and the NAACP Legal Defense and Education Fund sought a declaratory judgment and injunction on several constitutional grounds in respect to numerous recently enacted state statutes. The lower court enjoined the implementation of three statutes, including one provision on vagueness grounds, and ordered abstention as to two others, finding them ambiguous. This Court ordered abstention as to all the statutes, finding that they were all susceptible of constructions that would limit or eliminate their effect on the litigative and legal activities of the NAACP and construction might thereby eliminate the necessity for passing on the many constitutional questions raised. The vagueness issue, for example, would not require adjudication if the state courts found that the challenged provisions did not restrict the activities of the NAACP or require the NAACP to register. Unlike the instant case, the necessity for deciding the federal constitutional issues in the above and other abstention cases turned on whether the restrictions or requirements of an uncertain or unclear state statute were imposed on the persons bringing the action or on their activities as defined in the complaint.

uncertain issue of state law does not turn upon a choice between one or several alternative meanings of a state statute. The challenged oath is not open to one or a few interpretations, but to an indefinite number. There is no uncertainty that the oath applies to the appellants and the issue they raise is not whether the oath permits them to engage in certain definable activities. Rather their complaint is that they, about 64 in number, cannot understand the required promise, cannot define the range of activities in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms. In these circumstances it is difficult to see how an abstract construction of the challenged terms, such as precept, example, allegiance, institutions, and the like, in a declaratory judgment action could eliminate the vagueness from these terms. It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this.

Other considerations also militate against abstention here. Construction of this oath in the state court, abstractly and without reference to concrete, particularized situations so necessary to bring into focus the impact of the terms on constitutionally protected rights of speech and association, *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341 (Brandeis, J., concurring), would not only hold little hope of eliminating the issue of vagueness but also would very likely pose other constitutional issues for decision, a result not serving the abstention-justifying end of avoiding constitutional adjudication.

We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, thereby delaying ultimate adjudication on the merits

for an undue length of time, *England, supra; Spector, supra; Government & Civic Employees Organizing Committee* v. *Windsor,* 353 U. S. 364,[14] a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms. Indeed the 1955 subversive person oath has been under continuous constitutional attack since at least 1957, *Nostrand* v. *Balmer,* 53 Wash. 2d 460, 463, 335 P. 2d 10, 12, and is now before this Court for the third time. Remitting these litigants to the state courts for a construction of the 1931 oath would further protract these proceedings, already pending for almost two years, with only the likelihood that the case, perhaps years later, will return to the three-judge District Court and perhaps this Court for a decision on the identical issue herein decided. See *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, 84; *Public Utilities Comm'n of Ohio* v. *United Fuel Co.,* 317 U. S. 456.[15] Meanwhile, where the vagueness of the statute deters constitutionally protected conduct, "the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U. S. 147, 151.

V.

As in *Cramp* v. *Board of Public Instruction, supra,* we do not question the power of a State to take proper measures safeguarding the public service from disloyal con-

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[14] See Clark, Federal Procedural Reform and States' Rights, 40 Tex. L. Rev. 211 (1961); Note, 73 Harv. L. Rev. 1358, 1363 (1960).

[15] "Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible." 317 U. S. 456, at 463.

duct. But measures which purport to define disloyalty must allow public servants to know what is and is not disloyal. "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso* v. *Watkins*, 367 U. S. 488, 495–496.

Reversed.

MR. JUSTICE CLARK, whom MR. JUSTICE HARLAN joins, dissenting.

The Court strikes down, as unconstitutionally vague, two Acts of the State of Washington. The first, the Act of 1955, requires every state employee to swear or affirm that he is not a "subversive person" as therein defined. The second, the Act of 1931, which requires that another oath be taken by teachers, is declared void without the benefit of an opinion of either a state or federal court. I dissent as to both, the first on the merits, and the latter, because the Court refuses to afford the State an opportunity to interpret its own law.

I.

The Court says that the Act of 1955 is void on its face because it is "unduly vague, uncertain and broad." The Court points out that the oath requires a teacher to "swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force or violence." The Court further finds that the Act declares the Communist Party to be a subversive organization. From these premises, the Court then reasons that under the 1955 Act "any person who aids the Communist Party

or teaches or advises known members of the Party is a subversive person" because "at some future date" such teaching may aid the activities of the Party. This reasoning continues with the assertion that "one cannot confidently assert that his counsel, aid, influence or support which adds to the resources, rights and knowledge of the Communist Party or its members does not aid the Party . . . in furtherance of the stated purpose of overthrowing the Government by revolution, force, or violence." The Court then interrogates itself: Does the statute reach "endorsement or support for Communist candidates for office? . . . a lawyer who represents the Communist Party or its members? . . . [defense of the] constitutional rights of the Communist Party or its members . . . [or support of] any cause which is likewise supported by Communists or the Communist Party?" Apparently concluding that the answers to these questions are unclear, the Court then declares the Act void, citing *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961). Let us take up this reasoning in reverse order.

First, *Cramp* is not apposite. The majority has failed to recognize that the statute in *Cramp* required an oath of much broader scope than the one in the instant case: *Cramp* involved an oath "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party . . . ." That oath was replete with defects not present in the Washington oath. As MR. JUSTICE STEWART pointed out in *Cramp:*

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement." At 286.

These factors which caused the Court to find the *Cramp* oath unconstitutionally vague are clearly not present in the Washington oath. Washington's oath proscribes only the commission of an *act* of overthrow or alteration of the constitutional form of government by revolution, force or violence; or advising, teaching, abetting or advocating by any means another person to commit or aid in the commission of any act intended to overthrow or alter or to assist the overthrow or alteration of the constitutional form of government by revolution, force or violence. The defects noted by the Court when it passed on the *Cramp* oath have been cured in the Washington statute.

It is strange that the Court should find the language of this statute so profoundly vague when in 1951 it had no such trouble with the identical language presented by another oath in *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. There, the constitutionality of Maryland's Ober Law, written in language identical to Washington's 1955 Act, was affirmed by a unanimous Court against the same attack of vagueness. It is unfortunate that *Gerende* is overruled so quickly.* Other state laws have been copied from the Maryland Act—just as Washington's 1955 Act was—primarily because of our approval of it, and now this Court would declare them void. Such action cannot command the dignity and respect due to the judicial process. It is, of course, absurd to say that, under the words of the Washington Act,

*It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in *Gerende*, but a review of the record in that case conclusively demonstrates to the contrary. Further, while the *Gerende* opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague.

a professor risks violation when he teaches German, English, history or any other subject included in the curriculum for a college degree, to a class in which a Communist Party member might sit. To so interpret the language of the Act is to extract more sunbeams from cucumbers than did Gulliver's mad scientist. And to conjure up such ridiculous questions, the answers to which we all know or should know are in the negative, is to build up a whimsical and farcical straw man which is not only grim but Grimm.

In addition to the Ober Law the Court has also found that other statutes using similar language were not vague. An unavoidable example is the Smith Act which we upheld against an attack based on vagueness in the landmark case of *Dennis* v. *United States,* 341 U. S. 494 (1951). The critical language of the Smith Act is again in the same words as the 1955 Washington Act.

> "Whoever knowingly or willfully *advocates, abets, advises,* or *teaches* the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . ." 18 U. S. C. § 2385. (Emphasis supplied.)

The opinion of the Court in *Dennis* uses this language in discussing the vagueness claim:

> "We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. . . . We think [the statute] well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand." At 515–516.

It appears to me from the statutory language that Washington's 1955 Act is much more clear than the Smith Act. Still the Court strikes it down. Where does this leave the constitutionality of the Smith Act?

II.

Appellants make other claims. They say that the 1955 Act violates their rights of association and free speech as guaranteed by the First and Fourteenth Amendments. But in light of *Konigsberg* v. *State Bar of California,* 366 U. S. 36 (1961); *In re Anastaplo,* 366 U. S. 82 (1961); *Adler* v. *Board of Education,* 342 U. S. 485 (1952); *Garner* v. *Board of Public Works,* 341 U. S. 716 (1951); and *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950), this claim is frivolous. Likewise in view of the decision of Washington's highest court that tenured employees would be entitled to a hearing, *Nostrand* v. *Little,* 58 Wash. 2d 111, 131, 361 P. 2d 551, 563, the due process claim is without foundation. This conclusion would also apply to those employees without tenure, since they would be entitled to a hearing under Washington's Civil Service Act, Rev. Code Wash. § 41.04 *et seq.* and its Administrative Procedure Act, Rev. Code Wash. § 34.04.010 *et seq.*

III.

The Supreme Court of Washington has never construed the oath of allegiance required by the 1931 Act. I agree with the District Court that Washington's highest court should be afforded an opportunity to do so. As the District Court said:

> "The granting or withholding of equitable or declaratory relief in federal court suits which seek to limit or control state action is committed to the sound discretion of the court. Accordingly, in the absence

of a concrete factual showing that any plaintiff or any member of the classes of state employees here represented has suffered actual injury by reason of the application of the oath of allegiance statute (Chapter 103, Laws of 1931) this court will decline to render a declaratory judgment as to the constitutionality of that statute in advance of an authoritative construction by the Washington Supreme Court." 215 F. Supp. 439, 455.

For these reasons, I dissent.

HUDSON DISTRIBUTORS, INC., *v.* ELI LILLY & CO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 490. Argued April 30, 1964.—Decided June 1, 1964.*

Under the McGuire Act a trademark owner may, where sanctioned by a state fair-trade act, enforce a minimum retail price established by written agreements with some retailers in the State against a notified retailer who has not signed such an agreement. Pp. 386–395.

174 Ohio St. 487, 190 N. E. 2d 460, affirmed.

Myron N. Krotinger argued the cause for appellant in both cases. With him on the briefs were *Leonard Lane* and *Morton L. Stone.*

Ralph M. Carson argued the cause for appellee in No. 489. With him on the brief was *Henry L. King.*

Everett I. Willis argued the cause for appellee in No. 490. With him on the brief was *Louis S. Peirce.*

Briefs of *amici curiae,* urging affirmance, were filed by *James A. Gorrell* for Corning Glass Works et al., and by *R. W. Kilbourne* for Ohio Hardware Association et al.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

These appeals raise the question of whether the McGuire Act, 66 Stat. 631, 15 U. S. C. §§ 45 (a)(1)–(5), permits the application and enforcement of the Ohio Fair Trade Act against appellant in support of appellees' systems of retail price maintenance. For the reasons stated below, we hold that the Ohio Act, as applied to the facts of these cases, comes within the provisions of the McGuire Act exempting certain resale price systems from the

*Together with No. 489, *Hudson Distributors, Inc.*, v. *Upjohn Company*, also on appeal from the same court, argued April 29, 1964.

prohibitions of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 *et seq.*

The two appeals, one involving The Upjohn Co. and one involving Eli Lilly & Co., were considered together in the Ohio courts.[1] For simplicity we state only the facts of the *Lilly* case. Appellant, Hudson Distributors, Inc., owns and operates a retail drug chain in Cleveland, Ohio. Appellee, Eli Lilly & Co., manufactures pharmaceutical products bearing its trademarks and trade names. Lilly sells its products directly to wholesalers and makes no sales to retailers. Hudson purchases Lilly brand products from Regal D. S., Inc., a Michigan wholesaler.

In June 1959, the Ohio Legislature enacted a new Fair Trade Act, Ohio Revised Code §§ 1333.27–1333.34. Subsequently Lilly sent letters to all Ohio retailers of Lilly products, including Hudson, to notify them of Lilly's intention to establish minimum retail resale prices for its trademarked products pursuant to the new Ohio Act and to invite the retailers to enter into written fair-trade contracts. More than 1,400 Ohio retailers of Lilly products (about 65% of all the retail pharmacists in Ohio) signed fair-trade contracts with Lilly. Hudson, however, refused to enter into a written contract with Lilly and ignored the specified minimum resale prices. Lilly formally notified Hudson that the Ohio Act required Hudson to observe the minimum retail resale prices for Lilly commodities. Hudson, nevertheless, continued to purchase and then to resell Lilly products at less than the stipulated minimum retail resale prices.

Hudson thereupon filed a petition in the Court of Common Pleas for Cuyahoga County, Ohio, for a judgment declaring the Ohio Act invalid under the State Constitu-

[1] The Supreme Court of Ohio stated: "The facts in both cases are similar and the law applicable is the same. The appeals will be treated together, since the assignments of errors in both cases are exactly the same." 174 Ohio St. 487, 190 N. E. 2d 460.

tion and federal law. Lilly answered and cross-petitioned for enforcement of the Ohio Act against Hudson. The Court of Common Pleas held the Ohio Act unconstitutional under the State Constitution. On appeal, the Court of Appeals for Cuyahoga County, after discussing the federal and state legislation, 117 Ohio App. 207, 176 N. E. 2d 236, reversed the trial court and entered a judgment declaring that the Ohio Act was not "in violation of the Constitution of the State of Ohio nor of the Constitution of the United States . . . ." The court remanded the case "for further proceedings according to law with respect to the cross-petition . . . ." [2] On further appeal, the Supreme Court of Ohio affirmed [3] the

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[2] Hudson, in its second amended answer to the cross-petition, allegedly raised the following defenses:

"(1) Hudson did not wilfully resell at less than Lilly's fair trade prices;

"(2) Lilly, a foreign corporation, was not properly licensed to transact business in the State of Ohio;

"(3) paragraph 6 of Lilly's fair trade contract [which provides that: "Retailer agrees not to knowingly sell any of Manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof"] compelled retailers to enter into unlawful horizontal price fixing agreements in violation of Section 1 of the Sherman Anti-Trust Act . . . ;

"(4) Lilly was not uniformly enforcing its fair trade program on trade-marked commodities in Ohio; and

"(5) Lilly modified its fair trade program by abandoning enforcement on its prescription products in Ohio."

The issues on the cross-petition are pending in the Court of Common Pleas, Cuyahoga County; further proceedings have been stayed by that court pending the outcome of this appeal.

[3] The decision was affirmed by a 3-to-4 vote. The Ohio Constitution, Art. IV, § 2, provides: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

judgment of the Court of Appeals.[4] 174 Ohio St. 487, 190 N. E. 2d 460. This Court noted probable jurisdiction. 375 U. S. 938, 939.

Hudson contends that the provisions of the Ohio Act under which Lilly established minimum resale prices are not authorized by the McGuire Act, 66 Stat. 631, 15 U. S. C. §§ 45 (a)(1)–(5).[5] Section 2 of the McGuire Act provides in pertinent part as follows:

> "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, . . . when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State . . . ."

Section 3 of the McGuire Act reads as follows:

> "Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for

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[4] The fact that separate and unresolved issues are pending in the Ohio courts and subject to "further proceedings" therein on the cross-petition does not render the judgment of the Ohio Supreme Court on the issue here considered and decided nonfinal or unappealable within the meaning of 28 U. S. C. § 1257. Cf. *Local No. 438 Construction & General Laborers' Union, AFL–CIO*, v. *Curry*, 371 U. S. 542, 548–552; *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 557–558.

[5] The McGuire Act amended § 5 (a) of the Federal Trade Commission Act, as amended. Section 5 (a)(2) of the latter statute as thus amended, 15 U. S. C. § 45 (a)(2), is referred to herein simply as Section 2 of the McGuire Act, and § 5 (a)(3), 15 U. S. C. § 45 (a)(3), is referred to as Section 3 of the McGuire Act.

> sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby."

Before the enactment of the McGuire Act, this Court in 1951 in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, considered whether the Miller-Tydings Act, 50 Stat. 693, 15 U. S. C. § 1, removed from the prohibition of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 *et seq.*, a state statute which authorized a trademark owner, by notice, to require a retailer who had not executed a written contract to observe resale price maintenance. Respondents in that case argued that since the Sherman Act outlawed "contracts" in restraint of trade and since the Miller-Tydings amendment to the Sherman Act excepted "contracts or agreements prescribing minimum prices for the resale" of a commodity where such contracts or agreements were lawful under state law, the Miller-Tydings Act therefore immunized all arrangements involving resale price maintenance authorized by state law. 341 U. S., at 387. After examining the history of the Miller-Tydings Act, the Court concluded that Congress had intended the words "contracts or agreements" as contained in that Act to be used "in their normal and customary meaning," *id.*, at 388, and to cover only arrangements whereby the retailer voluntarily agreed to be bound by the resale price restrictions. The Court held therefore that the state resale price maintenance law could not be applied to nonsigners—"recalcitrants . . . dragged in by the heels and compelled to submit to price fixing." *Id.*, at 390. The Court stated that:

> "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state

> regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements,' the inference is strong that Congress left the noncontracting group to be governed by preexisting law." *Id.*, at 395.

Shortly after the *Schwegmann* decision, Congress passed the McGuire Act,[6] 66 Stat. 631, 15 U. S. C. §§ 45 (a) (1)–(5). The Report of the House Committee on Interstate and Foreign Commerce, which accompanied the McGuire Act, declared that:

> "The primary purpose of the [McGuire] bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended to enact into law when it passed the Miller-Tydings Act . . . , to the effect that the application and enforcement of State fair-trade laws—including the nonsigner provisions of such laws—with regard to interstate transactions shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann* v. *Calvert Distillers Corpora-*

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[6] The purpose of the McGuire Act is stated in its preamble: *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce." 66 Stat. 631–632.

tion (341 U. S. 384, May 21, 1951). In that case, six members of the Court held that the Miller-Tydings Act did not exempt from these Federal laws enforcement of State fair trade laws with respect to nonsigners. Three members of the Court held that the Miller-Tydings Act did so apply.

"The end result of the Supreme Court decision has been seriously to undermine the effectiveness of the Miller-Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. H. R. 5767, as *amended, is designed to restore the effectiveness of these acts by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers.*" (Emphasis added.) H. R. Rep. No. 1437, 82d Cong., 2d Sess., at 1–2.

This authoritative report evinces the clear intention of Congress that, where sanctioned by a state fair-trade act, a trademark owner such as Lilly could be permitted to enforce, even against a nonsigning retailer such as Hudson, the stipulated minimum prices established by written contracts with other retailers.[7]

Without disputing this interpretation of the McGuire Act, Hudson argues that the Ohio Act as interpreted by the Ohio courts reaches beyond the exemptive terms of the federal Act by permitting the maintenance of resale prices "by notice alone" where no contract has been entered into between the owner of the trademark and any retailer. Hudson emphasizes that the Ohio courts sustained the Ohio Act under the State Constitution on the theory that Hudson, simply by acquiring Lilly's products

[7] See *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 311, n. 14: "The McGuire Act . . . specifically exempts from the antitrust laws price fixing under 'fair trade' agreements which bind not only retailers who are parties to the agreement but also retailers who refuse to sign the agreement."

with notice of the stipulated prices, impliedly contracted to observe the minimum prices. This implied contract theory was deemed necessary by the Ohio Legislature and by the Ohio courts to satisfy the State Constitution which had recently been held to invalidate the enforcement of resale prices against nonsigners. *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481 (1958). Whatever merit there may be in the argument that the logic of the Ohio implied contract theory would apply to prices set by notice alone and without any conventional or express contracts, on the facts of the present case we need not and do not consider whether a state statute so applied would involve "contracts or agreements" in the sense in which those terms are used in the McGuire Act.[8] The undisputed facts show that Lilly had established a system of resale price maintenance involving written contracts with some 1,400 Ohio retailers. Section 1333.29 (A) of the Ohio Act authorizes the establishment of minimum prices through such contracts. Under these circumstances the fact that the Ohio law, as construed for purposes of assessing its validity under the State Constitution, regards Hudson as a "contractor" (or "implied contractor") rather than as a nonsigner does not control the application and effect of the federal statute—the McGuire Act. Section 3 of the federal Act plainly upholds "any right or right of action created by any statute . . . in effect in any State . . . which in substance" permits enforcement of resale prices prescribed in contracts whether or not the violating seller was a party to those contracts. For the purposes of § 3 of the McGuire Act, therefore, it is clear that these cases involve the requisite contracts with retailers,[9] that, regard-

[8] See Note, 77 Harv. L. Rev. 763, 766–767 (1964).

[9] The Court of Appeals for Cuyahoga County expressly noted that: "These [manufacturers] have entered into many written contracts with retail pharmaceutical establishments in Ohio, determining the

less of whether Hudson itself entered into "contracts" within the meaning of the McGuire Act, Hudson was at least a nonsigner, and that under such circumstances Congress plainly intended "to let State fair-trade laws apply . . . with respect to nonsigners as well as signers." H. R. Rep. No. 1437, 82d Cong., 2d Sess., at 2. Accordingly we hold that the Ohio Act, as applied to the facts of these cases, comes within the terms of the McGuire Act.

Hudson also argues that the Ohio statute can be read to authorize fair-trade prices to be established by persons other than the owner of the trademark or trade name. This contention raises a hypothetical issue: Lilly is the owner of all trademarks affixed to its goods and the Ohio Supreme Court has not interpreted the statute as applying to persons other than owners. Hudson further argues that § 1333.29 (A) of the Ohio Act authorizes a proprietor to establish minimum resale prices for wholesale distributors with whom it competes and therefore conflicts with the McGuire Act under this Court's decision in *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305. This argument also raises a hypothetical question for, as noted, Lilly sells only to wholesalers and does not sell to retailers.[10]

The questions raised by Hudson in its second amended answer to the cross-petition,[11] including the contention

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retail resale price for their trademarked or branded commodities and have caused notice of these contracts and the prices therein established to be served on [Hudson]." 117 Ohio App. 207, 208; 176 N. E. 2d 236, 237.

[10] Hudson contends that the *Upjohn* case is distinguishable in this regard for Upjohn allegedly does not sell only to retailers. It is clear, however, that this contention was reserved for future determination by the Ohio courts pursuant to a stipulation of the parties and was not in any event passed upon in the decision from which the present appeal is taken.

[11] See note 2, *supra*.

that Paragraph 6 of the Lilly fair-trade contracts compels retailers to enter into allegedly unlawful horizontal price-fixing agreements in violation of § 1 of the Sherman Act, are not properly before us. They are pending and unresolved in the Ohio Court of Common Pleas, Cuyahoga County. Hudson's remaining questions are not properly presented for resolution on this appeal; they concern issues involving alleged interpretations of the Ohio Act not made or considered by the Ohio courts or not raised by the facts of the case. *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 213–214; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 470–471.

The price fixing authorized by the Ohio Fair Trade Act and involving goods moving in interstate commerce would be, absent approval by Congress, clearly illegal under the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 *et seq. Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U. S. 373. "Fixing minimum prices, like other types of price fixing, is illegal *per se.*" *Schwegmann Bros.* v. *Calvert Distillers Corp., supra,* at 386. Congress, however, in the McGuire Act has approved state statutes sanctioning resale price maintenance schemes such as those involved here. Whether it is good policy to permit such laws is a matter for Congress to decide. Where the statutory language and the legislative history clearly indicate the purpose of Congress that purpose must be upheld. We therefore affirm the judgments of the Supreme Court of Ohio.

Affirmed.

MR. JUSTICE HARLAN, dissenting.

I would dismiss these appeals for lack of jurisdiction. Under well-established principles, the judgments on review here are not "final," as required by 28 U. S. C.

§ 1257,[1] even assuming that the federal question which the Court decides can be deemed to have been passed on by the Supreme Court of Ohio.[2]

The appellant, Hudson, filed its petitions for a declaratory judgment that the Ohio Fair Trade Act [3] was invalid as soon as the Act went into effect.[4] The appellees, Upjohn and Lilly, filed answers and cross-petitions alleging Hudson's refusal to comply with the Act and seeking injunctive relief and damages. Pursuant to a stipulation of the parties and as permitted by Ohio procedure, the issue raised by the petition for a declaratory judgment—the "general" validity of the Ohio Act—was tried separately and in advance of the trial of all other factual and legal issues raised by the answers and cross-petitions and the responses thereto. In this posture, the cases, decided together at every level, proceeded through the Ohio courts. The Court of Common Pleas for Cuyahoga County decided that the Ohio Fair Trade Act was invalid under the Ohio Constitution, because it involved an unlawful delegation of legislative power. On appeal, the Court of Appeals for Cuyahoga County reversed, 117 Ohio App. 207, 176 N. E. 2d 236, and remanded the case

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[1] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

[2] See note 5, *infra*, p. 398.

[3] Ohio Rev. Code §§ 1333.27–1333.34.

[4] The Act became effective on October 22, 1959. In the *Upjohn* case, No. 489, Hudson filed its original petition in August 1959, after the Act had been passed by the Ohio Legislature, and filed several amended petitions after the Act became effective. The original petition in *Lilly*, No. 490, was filed on October 22, 1959; it also was later amended.

to the Court of Common Pleas "for further proceedings according to law with respect to the cross-petition filed in this cause . . . ." The Supreme Court of Ohio affirmed. 174 Ohio St. 487, 190 N. E. 2d 460.

Although the distinction between final and nonfinal judgments, for purposes of this Court's jurisdiction, has been "faint and faltering at times," *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 69, it has not disappeared altogether. The nature of the distinction and the reasons for maintaining it have repeatedly been stated. To be reviewed in this Court, a state court judgment must be "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co.* v. *Railroad Comm'n,* 324 U. S. 548, 551. It "must end the litigation by fully determining the rights of the parties . . . ." *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 546. See also, *e. g., Mower* v. *Fletcher,* 114 U. S. 127, 128; *Cobbledick* v. *United States,* 309 U. S. 323, 324–325; *Department of Banking* v. *Pink,* 317 U. S. 264, 267–268; *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 381–382.

> "Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance . . . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential con-

> flict between the courts of two different governments. . . . This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc.*, v. *Johnson*, 326 U. S. 120, 123–124.

One would have thought that the judgments reviewed here were paradigms of the nonfinal judgment. Assuming that the federal question which the Court decides was really passed on by the Ohio Supreme Court,[5] it is

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[5] The Court of Common Pleas did not reach any federal question, since it found the Ohio Act invalid under the State Constitution. On appeal, the Court of Appeals described the cases as follows:

"The actions seek a declaratory judgment declaring the Ohio Fair Trade Act invalid and unconstitutional. Both cases involve similar facts and, with the questions to be determined by this court the same in each case, the appeals will be considered together. The assignment of error is identical in both cases.

" 'For its assignment of error, the defendant-appellant asserts that the Court of Common Pleas of Cuyahoga County erred in declaring Sections 1333.27 through 1333.34 of the Ohio Revised Code to be in violation of the Constitution of the state of Ohio, and therefore void and not binding upon the plaintiff-appellee, and in granting judgment for the plaintiff-appellee on its petition and dismissing the cross-petition of the defendant-appellant.' " 117 Ohio App. 207–208, 176 N. E. 2d, 237.

There followed a long discussion of the "historical background," *id.*, at 208, 176 N. E. 2d, 238, of the Ohio Act, which included consideration of major federal legislation and cases. It is entirely clear from the opinion that federal law was considered only as part of the demonstration "that not only the great majority of state legislatures but also the Congress of the United States have determined that there is need to provide reasonable controls in this field [of fair trade], under the police powers of the sovereign power." *Id.*, at 224, 176 N. E. 2d, 247. There is nothing to indicate that the court considered anything beyond the single contention that the Court of Common Pleas had erred in holding the Act invalid under the State Constitution. A dissenting opinion states: "On this appeal, the single question presented is whether the 1959 Fair Trade Act . . . has the effect of nullifying the decision of the Supreme Court [of Ohio]

clear nonetheless that this litigation is still in its early stages. No rights have yet been established; no liabilities have been incurred. The Court acknowledges that federal questions, involving unresolved issues of fact and interpretations of the Ohio Act, must still be decided by the Ohio courts. In *Upjohn,* No. 489, a federal question concerning the possible application of our decision in *United States* v. *McKesson & Robbins, Inc.,* 351 U. S. 305, "was reserved for future determination by the Ohio courts pursuant to a stipulation of the parties . . . ." *Ante,* p. 394, note 10. And in *Lilly,* No. 490, other questions, including at least one federal question, "are pending and unresolved in the Ohio Court of Common Pleas . . . ." *Ante,* p. 395. The Court can only hope that it will not prove to have wasted its time altogether in these "piecemeal proceedings," *Pope* v. *Atlantic Coast Line R. Co., supra,* at 381, because a subsequent decision of the Ohio courts renders the decision here "unnecessary and irrelevant to a complete disposition of the litigation." *Id.,* at 382 (footnote omitted). If that does not happen, there is every likelihood that the cases will be brought back to this Court for a second time, for consideration of the questions now unresolved. In *Radio Station WOW, supra,* at 127, this Court stated: "Of course, where the remaining litigation may raise other federal questions

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in *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc.,* 167 Ohio St., 182." *Id.,* at 230, 176 N. E. 2d, 251. The *Union Carbide* case was concerned solely with the validity of a prior Fair Trade Act under the Ohio Constitution. In a petition for rehearing (which was denied) the appellant itself urged that the court appeared to have ignored the question whether the Ohio Act was consistent with federal law, in particular the McGuire Act. Only the formal judgment, from which the Court quotes, *ante,* p. 388, contains any intimation that the Court of Appeals considered any federal question.

On review in the Supreme Court of Ohio, neither the majority opinion nor the dissenting opinion even once mentions the McGuire Act or this Court's cases construing it. 174 Ohio St. 487, 497, 190 N. E. 2d 460, 466.

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that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews." The Court ignores that "decisive objection."

In addition to making an uneconomic use of its own time, the Court's entertainment of these appeals has interfered with the orderly procedures of the Ohio courts. In its brief to this Court, Lilly states that proceedings in the Court of Common Pleas have been stayed "pending the outcome of this appeal." Brief, p. 11. Upjohn states in its brief that it has not yet taken action to bring to trial the issues reserved in its case, Brief, p. 13, presumably because of the pendency of the present proceedings. So far as the litigants are concerned, this march to the well for an eye-dropper of water does them no good either, except insofar as delay may be temporarily useful to one party or the other. Now that this Court's decision is rendered, the action will presumably go forward in the state courts; the litigants are no better informed of their ultimate rights than they were before the case came here, and the case is not a jot closer to its conclusion.

The Court gives no explanation at all for its departure from established principles. There is not the faintest suggestion of compelling public considerations requiring a determination of whatever issue it is that the Court does actually decide.[6] Nor are there any private interests at

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[6] Indeed, so far as I can tell, the Court decides nothing at all which is not already established law. In *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 311, note 14, this Court stated:

". . . [The McGuire Act] specifically exempts from the antitrust laws price fixing under 'fair trade' agreements which bind not only retailers who are parties to the agreement but also retailers who refuse to sign the agreement."

As I read the Court's opinion in this case, its sole holding is that "where sanctioned by a state fair-trade act, a trademark owner such as Lilly could be permitted to enforce, even against a nonsigning retailer such as Hudson, the stipulated minimum prices established by

stake which will be irremediably lost unless the Court acts, since no rights or liabilities were determined below or have been determined here. The fact that under Ohio procedure Hudson's petition for a declaratory judgment was separable from the cross-petition and could be determined independently of it has no bearing on whether that determination was final for purposes of this Court's jurisdiction.[7] *E. g., Department of Banking* v. *Pink, supra,* at 268; *Market Street R. Co.* v. *Railroad Comm'n, supra,* at 551.

Ninety percent of this case remains submerged. I suspect that the explanation for the Court's snipping off and deciding the 10% that has reached the surface lies in the fact that the Court failed to dismiss the appeal when it was first presented, 375 U. S. 938, 939, because the jurisdictional objections to review were not then so apparent.[8] I am at a loss to understand why the Court chooses to compound the original error, rather than to correct it.

I would dismiss both appeals.

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written contracts with other retailers." *Ante,* p. 392. This is nothing more than a restatement of the passage quoted from *McKesson & Robbins,* with the names of the parties in this case filled in. No special questions which might be raised by the facts of this case or by particular features of the Ohio Act are decided here, since the Court properly leaves all such questions for the initial decision of the Ohio courts.

The triviality, given the established law, of the question which the Court decides makes its determination to reach the question the more puzzling.

[7] The fact that Hudson's original petition was for a declaratory judgment has no bearing on the jurisdictional question present here. Such fact does not *defeat* this Court's jurisdiction, *Nashville, Chattanooga & St. Louis R. Co.* v. *Wallace,* 288 U. S. 249; but it surely does not *create* jurisdiction which would otherwise be lacking.

[8] The jurisdictional question was not called to the attention of the Court by either of the appellees at the time probable jurisdiction was noted. Upjohn filed no response to the jurisdictional statement; Lilly, then represented by other counsel, filed a motion to dismiss, but did not mention the jurisdictional question.

CHAMBERLIN ET AL. *v.* DADE COUNTY BOARD OF PUBLIC INSTRUCTION ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 939. Decided June 1, 1964.

Devotional Bible reading required by statute, and reciting prayers, in Florida public schools are unconstitutional. *School District of Abington Township* v. *Schempp,* 374 U. S. 203, followed. As to other issues, appeal dismissed for want of properly presented federal questions.

160 So. 2d 97, reversed in part, appeal dismissed in part.

Leo Pfeffer and *Howard W. Dixon* for appellants.

George C. Bolles for appellees.

PER CURIAM.

The motion to use the record in No. 520, October Term 1962, is granted. The judgment of the Florida Supreme Court is reversed with respect to the issues of the constitutionality of prayer, and of devotional Bible reading pursuant to a Florida statute, Fla. Stat. (1961) § 231.09, in the public schools of Dade County. *School District of Abington Township* v. *Schempp,* 374 U. S. 203. As to the other questions raised, the appeal is dismissed for want of properly presented federal questions. *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 213–214.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, concurring in part.

I join in reversing the Supreme Court of Florida on the main issue in the case.

The "other questions raised" which the Court refuses to consider because not "properly presented" involve the constitutionality under the First and Fourteenth Amendments of baccalaureate services in the schools, a reli-

gious census among pupils, and a religious test for teachers. The Florida Supreme Court disposed of those issues on the authority of *Doremus* v. *Board of Education,* 342 U. S. 429, which held that a taxpayer lacks standing to challenge religious exercises in the public schools. Irrespective of *Doremus* v. *Board of Education, supra,* I think it is arguable that appellant-taxpayers do have standing to challenge these practices.

I think, however, that two of those "other questions"—the baccalaureate services and the religious census—do not present substantial federal questions, and so I concur in the dismissal of the appeal as to them. As to the religious test for teachers,* I think a substantial question is presented. Cf. *Torcaso* v. *Watkins,* 367 U. S. 488. I would therefore put that question down for argument, postponing the question of jurisdiction to the merits.

MR. JUSTICE STEWART would note probable jurisdiction of this appeal and set it down for argument on the merits.

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*Applicants for teaching positions are required to answer the question, "Do you believe in God?" Religious attitudes are also considered in making promotions.

UNION OIL CO. OF CALIFORNIA *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 968. Decided June 1, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 60 Cal. 2d 441, 386 P. 2d 496.

Hart H. Spiegel for appellant.

Stanley Mosk, Attorney General of California, *Dan Kaufmann,* Assistant Attorney General, and *Ernest P. Goodman* and *John J. Klee, Jr.,* Deputy Attorneys General, for appellee.

PER CURIAM.

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

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

WILLIAMS *v.* UNITED STATES ET AL.

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

No. 1022, Misc. Decided June 1, 1964.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

MEEKS *v.* GEORGIA SOUTHERN & FLORIDA RAILWAY CO.

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

No. 981. Decided June 1, 1964.*

Certiorari granted and judgments reversed.

Reported below: No. 981, 108 Ga. App. 808, 134 S. E. 2d 555.

Thomas J. Lewis and *Thomas J. Lewis, Jr.* for petitioner in No. 981.

W. Graham Claytor, Jr., Charles J. Bloch, Denmark Groover, Jr. and *William H. Allen* for respondent in No. 981.

George R. Wolf for petitioner in No. 1004.

Robert Broderick for respondent in No. 1004.

PER CURIAM.

The petitions for writs of certiorari are granted and the judgments are reversed. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting in No. 981, and dissenting in part and concurring in part in No. 1004.

These are two more negligence cases, neither of which should have been brought here since both involve only questions of the sufficiency of the evidence to support the jury verdicts. See, *e. g.*, my dissenting opinion in *Dennis* v. *Denver & Rio Grande W. R. Co.*, 375 U. S. 208, 212, and

*Together with No. 1004, *Braswell, Administratrix,* v. *New York, Chicago & St. Louis Railroad Co.*, on petition for writ of certiorari to the Supreme Court of Illinois.

those in the cases therein cited; cf. my dissenting opinion in *Eichel* v. *New York Central R. Co.*, 375 U. S. 253, 256.

Feeling obliged, however, to reach the merits because the cases are before us, see my opinion in *Rogers* v. *Missouri P. R. Co.*, 352 U. S. 500, 559–562, I dissent from the judgment in No. 981 and concur in the judgment in No. 1004.

ZAPATA *v.* CALIFORNIA.

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

No. 1025, Misc. Decided June 1, 1964.

Appeal dismissed and certiorari denied.

Reported below: 220 Cal. App. 2d 903, 34 Cal. Rptr. 171.

Samuel Carter McMorris for appellant.

Stanley Mosk, Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Roger E. Venturi,* Deputy Attorney General, for appellee.

PER CURIAM.

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

MARDER *v.* MASSACHUSETTS.

APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS, SUFFOLK COUNTY.

No. 819. Decided June 1, 1964.

Appeal dismissed for want of a substantial federal question.

Reported below: See 346 Mass. 408, 193 N. E. 2d 695.

Appellant *pro se.*

Edward W. Brooke, Attorney General of Massachusetts, for appellee.

PER CURIAM.

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

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

This appeal raises the question of whether a person charged with a traffic violation (or presumably any other criminal offense) may be forced by a statute, General Laws of Mass., c. 90, §§ 20 and 20A, to choose between foregoing a trial by pleading guilty and paying a small fine, or going to trial and thereby exposing himself to the possibility of a greater punishment if found guilty. I express no view on the merits of this question. But I would note probable jurisdiction, since the issue, in my view, presents a substantial federal question, and since I am not convinced that the generally sound advice to "pay the two dollars" necessarily reflects a constitutionally permissible requirement.

MR. JUSTICE WHITE is of the opinion that probable jurisdiction should be noted.

DONOVAN ET AL. *v.* CITY OF DALLAS ET AL.

CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT.

No. 264. Argued April 22, 1964.—Decided June 8, 1964.

A state court cannot enjoin plaintiffs from prosecuting or appealing an *in personam* action in a federal court which has jurisdiction of the parties and the subject matter, nor can this federal right be divested by state contempt or other proceedings, even though a judgment of a state court in the same controversy has already been rendered against certain petitioners. The case is remanded to the state trial court to consider whether it would have punished petitioners for contempt had it known that the restraining order petitioners violated was invalid. Pp. 408–414.

365 S. W. 2d 919, reversed.

368 S. W. 2d 240 (Tex. Civ. App.), judgment vacated and cause remanded.

James P. Donovan argued the cause and filed a brief for petitioners.

H. P. Kucera argued the cause for respondents. With him on the brief were *Charles S. Rhyne, Brice W. Rhyne* and *Alfred J. Tighe, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented here is whether a state court can validly enjoin a person from prosecuting an action *in personam* in a district or appellate court of the United States which has jurisdiction both of the parties and of the subject matter.

The City of Dallas, Texas, owns Love Field, a municipal airport. In 1961, 46 Dallas citizens who owned or had interests in property near the airport filed a class suit in a Texas court to restrain the city from building an additional runway and from issuing and selling mu-

nicipal bonds for that purpose. The complaint alleged many damages that would occur to the plaintiffs if the runway should be built and charged that issuance of the bonds would be illegal for many reasons. The case was tried, summary judgment was given for the city, the Texas Court of Civil Appeals affirmed,[1] the Supreme Court of Texas denied review, and we denied certiorari.[2] Later 120 Dallas citizens, including 27 of the plaintiffs in the earlier action, filed another action in the United States District Court for the Northern District of Texas seeking similar relief. A number of new defendants were named in addition to the City of Dallas, all the defendants being charged with taking part in plans to construct the runway and to issue and sell bonds in violation of state and federal laws. The complaint sought an injunction against construction of the runway, issuance of bonds, payment on bonds already issued, and circulation of false information about the bond issue, as well as a declaration that all the bonds were illegal and void. None of the bonds would be approved, and therefore under Texas law none could be issued, so long as there was pending litigation challenging their validity.[3] The city filed a motion to dismiss and an answer to the complaint in the federal court. But at the same time the city applied to the Texas Court of Civil Appeals for a writ of prohibition to bar all the plaintiffs in the case in the United States District Court from prosecuting their case there. The Texas Court of Civil Appeals denied relief, holding that it was without power to enjoin litigants from prosecuting an action in a federal court and that the defense of *res judicata* on which the city relied could be raised and adjudicated in the United States District

[1] *Atkinson* v. *City of Dallas*, 353 S. W. 2d 275 (Tex. Civ. App.).

[2] 370 U. S. 939.

[3] Vernon's Tex. Ann. Civ. Stat. Art. 1269j–5, § 3. See *City of Dallas* v. *Dixon*, 365 S. W. 2d 919, 925.

Court.[4] On petition for mandamus the Supreme Court of Texas took a different view, however, held it the duty of the Court of Civil Appeals to prohibit the litigants from further prosecuting the United States District Court case, and stated that a writ of mandamus would issue should the Court of Civil Appeals fail to perform this duty.[5] The Court of Civil Appeals promptly issued a writ prohibiting all the plaintiffs in the United States District Court case from any further prosecution of that case and enjoined them "individually and as a class . . . from filing or instituting . . . any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds . . . or from in any manner interfering with . . . the proposed bonds . . . ." The United States District Court in an unreported opinion dismissed the case pending there. Counsel Donovan, who is one of the petitioners here, excepted to the dismissal and then filed an appeal from that dismissal in the United States Court of Appeals for the Fifth Circuit. The Texas Court of Civil Appeals thereupon cited Donovan and the other United States District Court claimants for contempt and convicted 87 of them on a finding that they had violated its "valid order."[6] Donovan was sentenced to serve 20 days in jail, and the other 86 were fined $200 each, an aggregate of $17,200. These penalties were imposed upon each contemner for having either (1) joined as a party plaintiff in the United States District Court case; (2) failed to request and contested the dismissal of that case; (3) taken exceptions to the dismissal preparatory to appealing to the Court of Appeals; or (4) filed a separate action in the Federal District Court seeking to enjoin the Supreme Court of Texas from interfering with

[4] *City of Dallas* v. *Brown,* 362 S. W. 2d 372 (Tex. Civ. App.).

[5] *City of Dallas* v. *Dixon,* 365 S. W. 2d 919.

[6] *City of Dallas* v. *Brown,* 368 S. W. 2d 240 (Tex. Civ. App.).

the original federal-court suit. After the fines had been paid and he had served his jail sentence,[7] counsel Donovan appeared in the District Court on behalf of himself and all those who had been fined and moved to dismiss the appeal to the United States Court of Appeals. His motion stated that it was made under duress and that unless the motion was made "the Attorney for Defendant City of Dallas and the Chief Judge of the Court of Civil Appeals have threatened these Appellants and their Attorney with further prosecution for contempt resulting in additional fines and imprisonment." The United States District Court then dismissed the appeal.[8]

We declined to grant certiorari to review the United States District Court's dismissal of the case before it or its dismissal of the appeal brought on by the state court's coercive contempt judgment, but we did grant certiorari to review the State Supreme Court's judgment directing the Civil Court of Appeals to enjoin petitioners from prosecuting their action in the federal courts and also granted certiorari to review the Civil Court of Appeals' judgment of conviction for contempt. 375 U. S. 878. We think the Texas Court of Civil Appeals was right in its first holding that it was without power to enjoin these litigants from prosecuting their federal-court action, and we therefore reverse the State Supreme Court's judgment upsetting that of the Court of Appeals. We vacate the later contempt judgment of the Court of Civil Appeals,

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[7] While in jail counsel Donovan sought habeas corpus from both the Supreme Court of Texas and the United States Court of Appeals for the Fifth Circuit. Both courts denied relief without opinion.

[8] The District Court a week later dismissed as moot the action petitioners had brought in that court against the Supreme Court of Texas to enjoin the Texas court from interfering with the prosecution of the federal-court suit. *Donovan* v. *Supreme Court of Texas*, unreported. We denied certiorari sought to review that judgment. 375 U. S. 878.

which rested on the mistaken belief that the writ prohibiting litigation by the federal plaintiffs was "valid."

Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings.[9] That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida* v. *Thompson*, 305 U. S. 456, 465–468. In *Princess Lida* this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Id.*, at 466. See also *Kline* v. *Burke Construction Co.*, 260 U. S. 226. It may be that a full hearing in an appropriate court would justify a finding that the state-court judgment in favor of Dallas in the first suit barred the issues raised in the second suit, a question as to which we express no opinion. But plaintiffs in the second suit chose to file that case in the federal court. They had a right to do this, a right which is theirs by reason of congressional enactments passed pursuant to congressional policy. And whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court to decide. While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances,[10] it has in no way relaxed the old and well-established judicially declared

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[9] See, *e. g.*, *M'Kim* v. *Voorhies*, 7 Cranch 279; *Diggs* v. *Wolcott*, 4 Cranch 179.

[10] See 28 U. S. C. § 2283; see also 28 U. S. C. § 1651.

rule [11] that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here. And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself. For the heart of the rule as declared by this Court is that:

> ". . . where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. . . . The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." [12]

Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented, and to appeal to the Court of Appeals from the District Court's dismissal. They have been punished both for prosecuting their federal-court case and for appealing it. They dismissed their appeal because of threats to punish them more if they did not do so. The legal effect of such a coerced dismissal on their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies is. That right was granted by Congress and cannot be taken away by the State. The Texas courts were without power to

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[11] See, *e. g.*, *United States* v. *Council of Keokuk*, 6 Wall. 514, 517; *Weber* v. *Lee County*, 6 Wall. 210; *Riggs* v. *Johnson County*, 6 Wall. 166, 194–196; *M'Kim* v. *Voorhies*, 7 Cranch 279.

[12] *Peck* v. *Jenness*, 7 How. 612, 625. See also *Central National Bank* v. *Stevens*, 169 U. S. 432; cf. *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, 54, n. 23.

take away this federal right by contempt proceedings or otherwise.[13]

It is argued here, however, that the Court of Civil Appeals' judgment of contempt should nevertheless be upheld on the premise that it was petitioners' duty to obey the restraining order whether that order was valid or invalid. The Court of Civil Appeals did not consider or pass upon this question, but acted on the assumption that petitioners were guilty of "wilfull disobedience of a *valid* order." 368 S. W. 2d, at 244. (Emphasis supplied.) Since we hold the order restraining petitioners from prosecuting their case in the federal courts was not valid, but was invalid, petitioners have been punished for disobeying an invalid order. Whether the Texas court would have punished petitioners for contempt had it known that the restraining order petitioners violated was invalid, we do not know. However, since that question was neither considered nor decided by the Texas court, we leave it for consideration by that court on remand. We express no opinion on that question at this time.

The judgment of the Texas Supreme Court is reversed, the judgment of the Texas Court of Civil Appeals is vacated, and the case is remanded to the Court of Civil Appeals for further proceedings not inconsistent with this opinion.

It is so ordered.

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

The question presented by this case is not the general one stated by the Court at the outset of its opinion, but

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[13] In *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, the Court did not reach the question before us, since the decision there was rested on the special venue provisions of the Federal Employers' Liability Act. See 36 Stat. 291, as amended, 45 U. S. C. § 56.

a much narrower one: May a state court enjoin resident state-court suitors from prosecuting in the federal courts vexatious, duplicative litigation which has the effect of thwarting a state-court judgment already rendered against them? Given the Texas Supreme Court's finding, amply supported by the record and in no way challenged by this Court, that this controversy "has reached the point of vexatious and harassing litigation," 365 S. W. 2d 919, 927,[1] I consider both the state injunction and the ensuing contempt adjudication to have been perfectly proper.

I.

The power of a court in equity to enjoin persons subject to its jurisdiction from conducting vexatious and harassing litigation in another forum has not been doubted until now. In *Cole* v. *Cunningham,* 133 U. S. 107, 111, this Court affirmed "a decree of the Supreme Judicial Court of Massachusetts, restraining citizens of that commonwealth from the prosecution of attachment suits in New York, brought by them for the purpose of evading the laws of their domicil . . . ." The Court stated:

> "The jurisdiction of the English Court of Chancery to restrain persons within its territorial limits and

[1] Under Texas law, the mere filing of suit in the Federal District Court prevented the issuance of bonds to finance construction at Love Field, the Dallas municipal airport. The city's right to issue such bonds had been upheld in *Atkinson* v. *City of Dallas,* 353 S. W. 2d 275, a case which both the Supreme Court of Texas and this Court (370 U. S. 939) declined to review. As found by the Supreme Court of Texas, "an analysis of the petition in Brown [the District Court case] discloses that the issues sought to be litigated are essentially the same as the issues litigated in Atkinson, and the prayer is for the same ultimate relief." 365 S. W. 2d, at 927. In an oral opinion dismissing the action in the Federal District Court, the district judge found the same thing, stating: "In my opinion there is no justiciable issue to be presented in the Federal court case. All the issues have been decided in the Atkinson case."

> under its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act, *in pais,* or the institution or the prosecution of an action in a foreign court, is well settled." *Id.,* at 116–117.

The Court quoted with approval the following passage from Mr. Justice Story's Equity Jurisprudence, Vol. II (10th ed. 1870), 89: "It is now held that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require; and with that view to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country." [2] *Id.,* at 119. See also *Simon* v. *Southern R. Co.,* 236 U. S. 115.

This Court, in 1941, expressly recognized the power of a state court to do precisely what the Texas court did here. In *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44, 51–52, the Court, although denying the state court's power to issue an injunction in that case, said:

> "The real contention of petitioner is that, despite the admitted venue, respondent is acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum is at respondent's

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[2] In the next sentence, Story stated that there was an exception to this doctrine, based "upon peculiar grounds of municipal and constitutional law"; state courts could not enjoin proceedings in federal courts and vice versa. *Ibid.* It is apparent from the cases cited to support this exception that Story had in mind the kind of situation presented in cases like those relied on by the present majority, which, as will be shown in Part II of this opinion, *infra,* pp. 418–421, deal not with injunctions to prevent vexatious litigation but with injunctions issued in very different contexts. See *id.,* at 89, notes 2–4.

> doorstep. Under such circumstances, petitioner asserts power, abstractly speaking, in the Ohio court to prevent a resident under its jurisdiction from doing inequity. *Such power does exist.*" (Footnote omitted; emphasis supplied.)

Mr. Justice Frankfurter, dissenting because of disagreement with the particular basis for the Court's refusal to give effect to the general principle, see *infra*, p. 418, observed that the opinion of the Court did "not deny the historic power of courts of equity to prevent a misuse of litigation by enjoining resort to vexatious and oppressive foreign suits," *id.*, at 55,[3] and that the decision did not "give new currency to the discredited notion that there is a general lack of power in the state courts to enjoin proceedings in federal courts," *id.*, at 56.

Apart from these express statements in both the majority and dissenting opinions, the Court's reasoning in the *Baltimore & Ohio R. Co.* case clearly implies a view contrary to the one taken by the majority here. Kepner, an injured employee of the railroad, filed suit against it in the District Court for the Eastern District of New York. The accident out of which his injuries arose occurred in Ohio, which was also the State in which he resided. Jurisdiction was based on the provision of the Federal Employers' Liability Act which permitted an employee to bring suit in a district in which the defendant was doing business.[4] The railroad brought a proceeding

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[3] Many decisions of the state courts have recognized this equitable power. See, *e. g.*, *O'Haire* v. *Burns*, 45 Colo. 432, 101 P. 755; *Royal League* v. *Kavanagh*, 233 Ill. 175, 84 N. E. 178; *Oates* v. *Morningside College*, 217 Iowa 1059, 252 N. W. 783; *Pere Marquette Railway* v. *Slutz*, 268 Mich. 388, 256 N. W. 458; *Wilser* v. *Wilser*, 132 Minn. 167, 156 N. W. 271.

[4] "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant

in the Ohio state courts to enjoin Kepner from continuing to prosecute his suit in the federal court in New York. It argued that more appropriate state and federal courts were open and that the large cost to itself of defending the suit in a distant forum was needless. Deciding solely on the basis that the venue provisions of the Federal Employers' Liability Act gave an injured employee a privilege which state legislative or judicial action could not override, the Court denied the power of the Ohio courts to issue an injunction. Quite evidently, this basis of decision would have been meaningless unless it was presumed that in the absence of the venue provisions of the statute the Ohio court would have had power to enjoin. Nor is it even necessary to resort to this obvious inference. For the Court made it express: "As courts of equity admittedly possessed this power [to enjoin improper resort to the courts of a foreign jurisdiction] before the enactment of § 6 [of the F. E. L. A.] . . . ." *Id.*, at 53. See also *Blanchard* v. *Commonwealth Oil Co.*, 294 F. 2d 834, 841.

In light of the foregoing, there was no impropriety in the issuance of the state court's injunction in the present case.

II.

None of the cases on which the Court relies deals with, or in any way negatives, the power of a state court to enjoin federal litigation in circumstances such as those involved here. None of them was concerned with vexatious litigation.

The issue in *McKim* v. *Voorhies*, 7 Cranch 279 (*ante*, p. 412, note 9), was whether a state court could stay pro-

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shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." Act of April 5, 1910, 36 Stat. 291, as amended, 45 U. S. C. § 56.

ceedings on a federal court's judgment which had already been rendered when the state court acquired jurisdiction and which, therefore, involved no element of harassment at all. Similarly, in *Diggs* v. *Wolcott,* 4 Cranch 179 (cited *ibid.*), in which the position of the courts was in reverse, suit was first commenced in the state court. *Riggs* v. *Johnson County,* 6 Wall. 166 (*ante,* p. 413, note 11), resembled *McKim, supra;* it involved the power of a state court to issue an injunction which had the effect of preventing a federal court from enforcing its judgment, entered before the state court ever got its hands on the case. The other two cases which the Court cites with *Riggs* (*ibid.*) are the same and were decided on the authority of *Riggs. Weber* v. *Lee County,* 6 Wall. 210, 212; *United States* v. *Council of Keokuk,* 6 Wall. 514, 517.

Kline v. *Burke Construction Co.,* 260 U. S. 226, 230 (*ante,* p. 412), held, with respect to state and federal courts, that "where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." The *dictum* from *Princess Lida* v. *Thompson,* 305 U. S. 456, 466, which the Court quotes (*ante,* p. 412), is to the same effect. In neither case is there any discussion of a court's power in equity to prevent persons subject to its jurisdiction from maintaining vexatious and harassing suits elsewhere. Moreover, the opinions in both cases explain the rule permitting state and federal courts to issue injunctions protective of their jurisdiction in *in rem* actions—a rule which the Court here does not question, see *ante,* p. 412—on the ground that the rule is necessary to permit the court which first acquires jurisdiction over the subject matter of a controversy "effectively [to] exercise the jurisdiction vested in it . . . ," *Princess Lida, supra,* at 467. See *Kline, supra,* at 229. That reasoning is fully applicable here, since maintenance of the suit in

the federal court has the automatic effect of nullifying the Texas court's decree.

The Court cites three cases for the proposition that it is immaterial, for purposes of this case, that the Texas court's injunction runs to the parties rather than to the District Court. See *ante*, p. 413, note 12. None of them is apposite. In *Peck* v. *Jenness*, 7 How. 612, the question, as in *Diggs, supra,* was whether a federal court "was vested with any power or authority to oust" a state court of its properly established jurisdiction over a cause commenced in the state court long before any action was taken in the federal court. *Id.*, at 624. *Central National Bank* v. *Stevens*, 169 U. S. 432, again involved a state court's attempt to enjoin private individuals from giving effect to the final decree of a federal court rendered before the suit was begun in the state court. *Baltimore & Ohio R. Co.* v. *Kepner, supra,* has already been discussed; it is expressly and by unmistakable implication directly contrary to the result now reached by the Court.

There can be no dispute, therefore, that all the weight of authority, including that of a recent pronouncement of this Court, is contrary to the position which the Court takes in this case. It is not necessary to comment on the Court's assertion, *ante*, p. 413, that the petitioners "had a right granted by Congress" to maintain their suit in the federal court, for that is the very question at issue. In any event, the statutory boundaries of federal jurisdiction are hardly to be regarded as a license to conduct litigation in the federal courts for the purpose of harassment.[5]

[5] As the cases cited in Part II of this opinion illustrate, this Court's power to review judgments of the state courts is available to prevent interference with the *legitimate* invocation of federal jurisdiction. The parallel development of the two distinct lines of cases which are now confused for the first time itself demonstrates that the possibility of abuse in some cases is no ground for denying altogether the traditional equitable power to prevent improper resort to the courts.

The exception which the Court recognizes for *in rem* actions demonstrates that no such view of federal jurisdiction is tenable; for in those cases, too, the federal courts have statutory jurisdiction to proceed.

In short, today's decision rests upon confusion between two distinct lines of authority in this Court, one involving vexatious litigation and the other not.

I would affirm.

WILBUR-ELLIS CO. ET AL. *v.* KUTHER.

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

No. 109. Argued February 20, 1964.—Decided June 8, 1964.

Respondent, who owned a combination patent covering a canning machine, authorized the sale of machines made thereunder designed to pack fish into "1-pound" cans. Petitioner company bought four of these machines second-hand, three of them rusted, corroded and inoperable, and all four requiring cleaning and sandblasting to become usable. The machines were reconditioned and six of the 35 elements of the patent combination were resized to enable the machines to pack "5-ounce" cans. The District Court and the Court of Appeals held for respondent in his suit for patent infringement. *Held:* Adapting the machine for use on a different-sized commodity is within the patent rights purchased and is not an infringement. Pp. 424–425.

(a) In adapting the machines to a related use and lengthening the useful capacity of the old combination on which royalties were paid, petitioners were closer to permissible "repairing" than infringing "reconstructing." P. 425.

(b) The fact that the adaptation made the machines more useful did not make it "reconstruction." P. 425.

(c) Petitioner's license to use the machines is not for "1-pound" cans only, as they were sold outright and with no restrictions. P. 425.

314 F. 2d 71, reversed.

Frank A. Neal argued the cause for petitioners. With him on the brief was *James M. Naylor.*

Carlisle M. Moore argued the cause for respondent. With him on the brief was *Oscar A. Mellin.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent is the owner of a combination patent covering a fish-canning machine. A number of machines covered by the patent were manufactured and sold under

his authorization. Among them were the four machines in suit, petitioner Wilbur-Ellis Company being the second-hand purchaser. Respondent received out of the original purchase price a royalty of $1,500 per machine. As originally constructed each of these machines packed fish into "1-pound" cans: 3 inches in diameter and $4^{11}/_{16}$ inches high. Three of the machines when acquired by Wilbur-Ellis were corroded, rusted, and inoperative; and all required cleaning and sandblasting to make them usable. Wilbur-Ellis retained petitioner Leuschner to put the machines in condition so they would operate and to resize six of the 35 elements that made up the patented combination. The resizing was for the purpose of enabling the machines to pack fish into "5-ounce" cans: $2^1/_8$ inches in diameter and $3^1/_2$ inches long. One of the six elements was so corroded that it could be rendered operable only by grinding it down to a size suitable for use with the smaller "5-ounce" can.

This suit for infringement followed; and both the District Court, 200 F. Supp. 841, and the Court of Appeals, 314 F. 2d 71, held for respondent. The case is here on certiorari. 373 U. S. 921.

We put to one side the case where the discovery or invention resided in or embraced either the size or locational characteristics of the replaced elements of a combination patent or the size of the commodity on which the machine operated. The claims of the patent before us do not reach that far. We also put to one side the case where replacement was made of a patented component of a combination patent. We deal here with a patent that covered only a combination of unpatented components.

The question in terms of patent law precedents is whether what was done to these machines, the original manufacture and sale of which had been licensed by the patentee, amounted to "repair," in which event there was no infringement, or "reconstruction," in which event there

was.* The idea of "reconstruction" in this context has the special connotation of those acts which would impinge on the patentee's right *"to exclude others from making,"* 35 U. S. C. § 154, the article. As stated in *Wilson* v. *Simpson,* 9 How. 109, 123, ". . . when the material of the combination ceases to exist, in whatever way that may occur, the right to renew it depends upon the right to make the invention. If the right to make does not exist, there is no right to rebuild the combination." On the other hand, "When the wearing or injury is partial, then repair is restoration, and not reconstruction." *Ibid.* Replacing worn-out cutting knives in a planing machine was held to be "repair," not "reconstruction," in *Wilson* v. *Simpson, supra.* Our latest case was *Aro Mfg. Co.* v. *Convertible Top Replacement Co.,* 365 U. S. 336, which a majority of the Court construe as holding that it was not infringement to replace the worn-out fabric of a patented convertible automobile top, whose original manufacture and sale had been licensed by the patentee. See No. 75, *Aro Mfg. Co.* v. *Convertible Top Replacement Co.,* decided this day. *Post,* p. 476.

Whatever view may be taken of the holding in the first *Aro* case, the majority believe that it governs the present one. These four machines were not spent; they had years of usefulness remaining though they needed cleaning and repair. Had they been renovated and put to use on the "1-pound" cans, there could be no question but that they were "repaired," not "reconstructed," within the meaning of the cases. When six of the 35 elements of the combination patent were resized or relocated, no invasion of the patent resulted, for as we have said the size of cans serviced by the machine was no part of the invention; nor were characteristics of size, location, shape and con-

*See *Cotton-Tie Co.* v. *Simmons,* 106 U. S. 89 (reconstruction); *Heyer* v. *Duplicator Mfg. Co.,* 263 U. S. 100 (repair).

struction of the six elements in question patented. Petitioners in adapting the old machines to a related use were doing more than repair in the customary sense; but what they did was kin to repair for it bore on the useful capacity of the old combination, on which the royalty had been paid. We could not call it "reconstruction" without saying that the patentee's right "to exclude others from making" the patented machine, 35 U. S. C. § 154, had been infringed. Yet adaptation for use of the machine on a "5-ounce" can is within the patent rights purchased, since size was not an invention.

The adaptation made in the six nonpatented elements improved the usefulness of these machines. That does not, however, make the adaptation "reconstruction" within the meaning of the cases. We are asked in substance to treat the case as if petitioners had a license for use of the machines on "1-pound" cans only. But the sales here were outright, without restriction. *Adams* v. *Burke,* 17 Wall. 453, 456, therefore controls:

> ". . . when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use."

And see *United States* v. *Univis Lens Co.,* 316 U. S. 241, 250.

Reversed.

MR. JUSTICE HARLAN would affirm the judgment substantially for the reasons given in the majority opinion in the Court of Appeals, 314 F. 2d 71.

J. I. CASE CO. ET AL. *v.* BORAK.

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

No. 402. Argued April 22–23, 1964.—Decided June 8, 1964.

Respondent, stockholder of petitioner company, brought a civil action in federal court for deprivation of his and other stockholders' pre-emptive rights by reason of a merger involving the company, allegedly effected through use of a false and misleading proxy statement. The complaint has two counts, one based on diversity and claiming a breach of directors' fiduciary duty to stockholders and the other alleging a violation of § 14 (a) of the Securities Exchange Act of 1934. The District Court held that, in a private suit, it could grant only declaratory relief under § 27 of the Act as to the second count and that a state statute requiring security for expenses in derivative actions applied to everything but that part of Count 2 seeking a declaratory judgment. The Court of Appeals reversed, holding that the state law was inapplicable and that the District Court had power to grant remedial relief. *Held:*

1. Private suits are permissible under § 27 for violation of § 14 (a) for both derivative and direct causes. Pp. 430–431.

2. Federal courts will provide the remedies required to carry out the congressional purpose of protecting federal rights. Pp. 433–435.

(a) Remedies are not limited to prospective or declaratory relief, but the overriding federal law controls the measure of redress. P. 434.

(b) The character of the right remains federal, although state law questions must also be decided. P. 434.

(c) The determination of a remedy in this case must await trial on the merits. P. 435.

317 F. 2d 838, affirmed.

Malcolm K. Whyte argued the cause for petitioner J. I. Case Co. With him on the briefs was *Robert P. Harland.* *Walter S. Davis* argued the cause for petitioners Barr et al. With him on the brief were *Clark M. Robertson, H. Maxwell Manzer* and *Ray T. McCann.*

Alex Elson argued the cause for respondent. With him on the brief were *Arnold I. Shure, Willard J. Lassers, Aaron S. Wolff* and *Bruno V. Bitker.*

Philip A. Loomis, Jr., by special leave of Court, argued the cause for the Securities and Exchange Commission, as *amicus curiae,* urging affirmance. With him on the brief were *Solicitor General Cox, Stephen J. Pollak* and *David Ferber.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a civil action brought by respondent, a stockholder of petitioner J. I. Case Company, charging deprivation of the pre-emptive rights of respondent and other shareholders by reason of a merger between Case and the American Tractor Corporation. It is alleged that the merger was effected through the circulation of a false and misleading proxy statement by those proposing the merger. The complaint was in two counts, the first based on diversity and claiming a breach of the directors' fiduciary duty to the stockholders. The second count alleged a violation of § 14 (a)[1] of the Securities Exchange Act of 1934 with reference to the proxy solicitation material. The trial court held that as to this count it had no power to redress the alleged violations of the Act but was limited solely to the granting of declara-

[1] Section 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n (a), provides: "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

tory relief thereon under § 27 of the Act.[2] The court held Wis. Stat., 1961, § 180.405 (4), which requires posting security for expenses in derivative actions, applicable to both counts, except that portion of Count 2 requesting declaratory relief. It ordered the respondent to furnish a bond in the amount of $75,000 thereunder and, upon his failure to do so, dismissed the complaint, save that part of Count 2 seeking a declaratory judgment. On interlocutory appeal the Court of Appeals reversed on both counts, holding that the District Court had the power to grant remedial relief and that the Wisconsin statute was not applicable. 317 F. 2d 838. We granted certiorari. 375 U. S. 901. We consider only the question of whether § 27 of the Act authorizes a federal cause of action for rescission or damages to a corporate stockholder with respect to a consummated merger which was authorized pursuant to the use of a proxy statement alleged to contain false and misleading statements violative of § 14 (a) of the Act. This being the sole question raised by petitioners in their petition for certiorari, we will not consider other questions subsequently presented.

[2] Section 27 of the Act, 48 Stat. 902–903, 15 U. S. C. § 78aa, provides in part: "The district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

See Supreme Court Rule 40 (1)(d)(2);[3] *Local 1976, United Brotherhood of Carpenters* v. *Labor Board,* 357 U. S. 93, 96 (1958); *Irvine* v. *California,* 347 U. S. 128, 129–130 (1954).

I.

Respondent, the owner of 2,000 shares of common stock of Case acquired prior to the merger, brought this suit based on diversity jurisdiction seeking to enjoin a proposed merger between Case and the American Tractor Corporation (ATC) on various grounds, including breach of the fiduciary duties of the Case directors, self-dealing among the management of Case and ATC and misrepresentations contained in the material circulated to obtain proxies. The injunction was denied and the merger was thereafter consummated. Subsequently successive amended complaints were filed and the case was heard on the aforesaid two-count complaint. The claims pertinent to the asserted violation of the Securities Exchange Act were predicated on diversity jurisdiction as well as on § 27 of the Act. They alleged: that petitioners, or their predecessors, solicited or permitted their names to be used in the solicitation of proxies of Case stockholders for use at a special stockholders' meeting at which the proposed merger with ATC was to be voted upon; that the proxy solicitation material so circulated was false and misleading in violation of § 14 (a) of the Act and Rule 14a–9 which the Commission had promulgated thereunder;[4]

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[3] "The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

[4] 17 CFR § 240.14a–9 provides: "*False or misleading statements.* No solicitation subject to §§ 240.14a–1 to 240.14a–10 shall be made

that the merger was approved at the meeting by a small margin of votes and was thereafter consummated; that the merger would not have been approved but for the false and misleading statements in the proxy solicitation material; and that Case stockholders were damaged thereby. The respondent sought judgment holding the merger void and damages for himself and all other stockholders similarly situated, as well as such further relief "as equity shall require." The District Court ruled that the Wisconsin security for expenses statute did not apply to Count 2 since it arose under federal law. However, the court found that its jurisdiction was limited to declaratory relief in a private, as opposed to a government, suit alleging violation of § 14 (a) of the Act. Since the additional equitable relief and damages prayed for by the respondent would, therefore, be available only under state law, it ruled those claims subject to the security for expenses statute. After setting the amount of security at $75,000 and upon the representation of counsel that the security would not be posted, the court dismissed the complaint, save that portion of Count 2 seeking a declaration that the proxy solicitation material was false and misleading and that the proxies and, hence, the merger were void.

II.

It appears clear that private parties have a right under § 27 to bring suit for violation of § 14 (a) of the

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by means of any proxy statement, form of proxy, notice of meeting, or other communication written or oral containing any statement which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

Act. Indeed, this section specifically grants the appropriate District Courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" under the Act. The petitioners make no concessions, however, emphasizing that Congress made no specific reference to a private right of action in § 14 (a); that, in any event, the right would not extend to derivative suits and should be limited to prospective relief only. In addition, some of the petitioners argue that the merger can be dissolved only if it was fraudulent or non-beneficial, issues upon which the proxy material would not bear. But the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial, not here. We therefore do not discuss this point further.

III.

While the respondent contends that his Count 2 claim is not a derivative one, we need not embrace that view, for we believe that a right of action exists as to both derivative and direct causes.

The purpose of § 14 (a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13. It was intended to "control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." *Id.*, at 14. "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S. Rep. No. 792, 73d Cong., 2d Sess., 12. These broad remedial purposes are evidenced in the language of

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the section which makes it "unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest *or for the protection of investors.*" (Italics supplied.) While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result.

The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group. To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements. The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it. Indeed, on the allegations of respondent's complaint, the proxy material failed to disclose alleged unlawful market manipulation of the stock of ATC, and this unlawful manipulation

would not have been apparent to the Commission until after the merger.

We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. As was said in *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, 176 (1942):

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted."

See also *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210, 213 (1944); *Deitrick* v. *Greaney,* 309 U. S. 190, 201 (1940). It is for the federal courts "to adjust their remedies so as to grant the necessary relief" where federally secured rights are invaded. "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood,* 327 U. S. 678, 684 (1946). Section 27 grants the District Courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this title . . . ." In passing on almost identical language found in the Securities Act of 1933, the Court found the words entirely sufficient to fashion a remedy to rescind a fraudulent sale, secure restitution and even to enforce the right to restitution against a third party holding assets of the vendor. *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282 (1940). This significant language was used:

> "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." At 288.

See also *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288 (1960); *Schine Chain Theatres, Inc.*, v. *United States*, 334 U. S. 110 (1948).

Nor do we find merit in the contention that such remedies are limited to prospective relief. This was the position taken in *Dann* v. *Studebaker-Packard Corp.*, 288 F. 2d 201, where it was held that the "preponderance of questions of state law which would have to be interpreted and applied in order to grant the relief sought . . . is so great that the federal question involved . . . is really negligible in comparison." At 214. But we believe that the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law, for it "is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957). In addition, the fact that questions of state law must be decided does not change the character of the right; it remains federal. As Chief Justice Marshall said in *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824):

> "If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn . . . ." At 819–820.

Moreover, if federal jurisdiction were limited to the granting of declaratory relief, victims of deceptive proxy statements would be obliged to go into state courts for remedial relief. And if the law of the State happened

to attach no responsibility to the use of misleading proxy statements, the whole purpose of the section might be frustrated. Furthermore, the hurdles that the victim might face (such as separate suits, as contemplated by *Dann* v. *Studebaker-Packard Corp., supra,* security for expenses statutes, bringing in all parties necessary for complete relief, etc.) might well prove insuperable to effective relief.

IV.

Our finding that federal courts have the power to grant all necessary remedial relief is not to be construed as any indication of what we believe to be the necessary and appropriate relief in this case. We are concerned here only with a determination that federal jurisdiction for this purpose does exist. Whatever remedy is necessary must await the trial on the merits.

The other contentions of the petitioners are denied.

Affirmed.

GENERAL MOTORS CORP. *v.* WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 115. Argued February 26, 1964.—Decided June 8, 1964.

Appellant, a Delaware corporation, manufactures motor vehicles and parts outside the State of Washington some of which it sells to retail dealers in that State. It operates through substantially independent "Divisions," here three automotive and one parts, all but the latter maintaining zone offices in Oregon which handle sales and other orders from dealers in Washington. Sales originate through projection of orders of estimated needs, for practical purposes "a purchase order," worked out between the dealers and the corporation's district managers who conduct business from their homes in Washington and constantly call upon dealers, assisting in sales promotion, training of salesmen, etc.; service contacts are maintained through service representatives. One automotive division has a small branch office in Washington to expedite delivery of cars for dealers in all but nine counties. During the pertinent period, the automotive and parts divisions had about 40 employees resident or principally employed in the State. In addition, out-of-state zone office personnel visited dealers in the State from time to time. The parts division maintains warehouses in Oregon and Washington from which orders from Washington dealers are filled (though only the tax on Oregon shipments is protested). Appellant claims that its products taxed by Washington are manufactured in St. Louis, which levies a license tax measured by sales before shipment. This litigation arises from application of Washington's tax on the privilege of doing business in the State measured by the wholesale sales of appellant within the State. Appellant contended that it constituted a tax on unapportioned gross receipts in violation of the Commerce and Due Process Clauses. The lower court upheld this view except for some of the business conducted from appellant's local branch office. The State Supreme Court reversed, holding that all appellant's activities in the State were subject to the tax which was measured by its wholesale sales and was found to bear a reasonable relation to appellant's in-state activities. *Held:*

1. Though interstate commerce cannot be subjected to the burdens of multiple taxation, a tax measured by gross receipts is constitutionally proper if fairly apportioned. Pp. 439–440.

2. The burden of establishing exemption from a tax rests upon a taxpayer claiming immunity therefrom. *Norton Co.* v. *Department of Revenue,* 340 U. S. 534, followed. P. 441.

3. The bundle of appellant's corporate activities or "incidents" in Washington afforded the State a proper basis for imposing a tax. Pp. 442–448.

4. The evidence was sufficient to warrant the finding by the state court of a nexus between appellant's in-state activities and its sales there, especially where its taxable business was so enmeshed with what it claimed was nontaxable. P. 448.

5. This Court does not pass upon appellant's claim of "multiple taxation" in violation of the Commerce Clause because appellant did not show what definite burden in a constitutional sense the St. Louis tax places on the identical interstate shipments by which Washington measures its tax or that Oregon levies any tax on appellant's activity bearing on Washington sales. Pp. 448–449.

60 Wash. 2d 862, 376 P. 2d 843, affirmed.

Donald K. Barnes argued the cause for appellant. With him on the briefs were *Aloysius F. Power, Thomas J. Hughes* and *Dewitt Williams.*

John W. Riley, Special Assistant Attorney General of Washington, and *Timothy R. Malone,* Assistant Attorney General, argued the cause for appellees. With them on the brief were *John J. O'Connell,* Attorney General of Washington, and *James A. Furber* and *Lloyd W. Peterson,* Assistant Attorneys General.

MR. JUSTICE CLARK delivered the opinion of the Court.

This appeal tests the constitutional validity, under the Commerce and Due Process Clauses, of Washington's tax imposed upon the privilege of engaging in business activities within the State.[1] The tax is measured by the

[1] Relevant sections of the Washington statute as they were in force during the taxable period in this case, January 1, 1949, through June 30, 1953, are:

"Section 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax

appellant's gross wholesale sales of motor vehicles, parts and accessories delivered in the State. Appellant claims that the tax is levied on unapportioned gross receipts from such sales and is, therefore, a tax on the privilege of engaging in interstate commerce; is inherently discriminatory; results in the imposition of a multiple tax burden; and is a deprivation of property without due process of law. The Washington Superior Court held that the presence of a branch office in Seattle rendered some of the Chevrolet transactions subject to tax, but, as to the remainder, held that the application of the statute would be repugnant to the Commerce and the Due Process Clauses of the United States Constitution. On appeal, the Supreme Court of Washington reversed the latter finding, holding that all of the appellant's transactions were sub-

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for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

. . . . . .

"(e) Upon every person . . . engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent;

. . . . . .

"Section 5. For the purposes of this title . . .

. . . . . .

"(e) The term 'sale at wholesale' or 'wholesale sale' means any sale of tangible personal property and any sale of or charge made for labor and services rendered in respect to real or personal property, which is not a sale at retail;

"(f) The term 'gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses." Laws of Wash., 1949, c. 228, at 814–819.

ject to the tax on the ground that the tax bore a reasonable relation to the appellant's activities within the State. 60 Wash. 2d 862, 376 P. 2d 843. Probable jurisdiction was noted. 374 U. S. 824. We have concluded that the tax is levied on the incidents of a substantial local business in Washington and is constitutionally valid and, therefore, affirm the judgment.

I.

We start with the proposition that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 254 (1938). "Even interstate business must pay its way," *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 259 (1919), as is evidenced by numerous opinions of this Court. For example, the Court has approved property taxes on the instruments employed in commerce, *Western Union Telegraph Co.* v. *Attorney General,* 125 U. S. 530 (1888); on property devoted to interstate transportation fairly apportioned to its use within the State, *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18 (1891); on profits derived from foreign or interstate commerce by way of a net income tax, *William E. Peck & Co.* v. *Lowe,* 247 U. S. 165 (1918), and *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321 (1918); by franchise taxes, measured by the net income of a commercially domiciled corporation from interstate commerce attributable to business done in the State and fairly apportioned, *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113 (1920); by a franchise tax measured on a proportional formula on profits of a unitary business manufacturing and selling ale, "the process of manufacturing resulting in no profits until it ends in sales," *Bass, Ratcliff & Gretton, Ltd.,* v. *State Tax Comm'n,* 266 U. S. 271, 282 (1924); by a personal prop-

erty tax by a domiciliary State on a fleet of airplanes whose home port was in the taxing State, despite the fact that personal property taxes were paid on part of the fleet in other States, *Northwest Airlines, Inc.*, v. *Minnesota*, 322 U. S. 292 (1944); by a net income tax on revenues derived from interstate commerce where fairly apportioned to business activities within the State, *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959); and by a franchise tax levied on an express company, in lieu of taxes upon intangibles or rolling stock, measured by gross receipts, fairly apportioned, and derived from transportation within the State, *Railway Express Agency, Inc.*, v. *Virginia*, 358 U. S. 434 (1959).

However, local taxes measured by gross receipts from interstate commerce have not always fared as well. Because every State has equal rights when taxing the commerce it touches, there exists the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce. Cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 170 (1954); *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 346 (1887). Such burdens would destroy interstate commerce and encourage the re-erection of those trade barriers which made the Commerce Clause necessary. Cf. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 521–522 (1935). And in this connection, we have specifically held that interstate commerce cannot be subjected to the burden of "multiple taxation." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, *supra*, at 170. Nevertheless, as we have seen, it is well established that taxation measured by gross receipts is constitutionally proper if it is fairly apportioned.

A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation.

For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, *i. e.,* the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities. As was said in *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444 (1940), "[t]he simple but controlling question is whether the state has given anything for which it can ask return."

Here it is admitted that General Motors has entered the State and engaged in activities therein. In fact, General Motors voluntarily pays considerable taxes on its Washington operations but contests the validity of the tax levy on four of its Divisions, Chevrolet, Pontiac, Oldsmobile and General Motors Parts. Under these circumstances appellant has the burden of showing that the operations of these divisions in the State are "dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." *Norton Co.* v. *Department of Revenue,* 340 U. S. 534, 537 (1951). And, as we also said in that case, this burden is not met

> "by showing a fair difference of opinion which as an original matter might be decided differently. This corporation, by submitting itself to the taxing power . . . [of the State], likewise submitted itself to its judicial power to construe and apply its taxing statute insofar as it keeps within constitutional bounds. Of course, in constitutional cases, we have power to examine the whole record to arrive at an

independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence." At 537–538.

With these principles in mind, we turn to the facts.

II.

1. General Motors' Corporate Organization and Sales Operation.

General Motors is a Delaware corporation which was engaged in business in Washington during the period of time involved in this case, January 1, 1949, through June 30, 1953. Chevrolet, Pontiac, Oldsmobile and General Motors Parts are divisions of General Motors, but they operate substantially independently of each other. The corporation manufactures automobiles, trucks and other merchandise which are sold to dealers in Washington. However, all of these articles are manufactured in other States. In order to carry on the sale, in Washington, of the products of Chevrolet, Pontiac, Oldsmobile and General Motors Parts, the corporation maintains an organization of employees in each of these divisions on a national, regional and district level. During the taxing period in question, the State of Washington was located in the western region of the corporation's national organization and each division, except General Motors Parts, maintained a zone office at Portland, Oregon. These zone offices serviced General Motors' operations in Oregon, Washington, Idaho, portions of Montana and Wyoming and all of the then Territory of Alaska. Chevrolet Division also maintained a branch office at Seattle which was under the jurisdiction of the Portland zone office and which rendered special service to all except the nine southern counties of Washington, which were still serviced by the Portland office. The zone offices of each divi-

sion were broken down into geographical district offices and it is in these districts that the dealers, to whom the corporation sold its products for re-sale, were selected and located.[2] The orders for these products were sent by the dealers to the zone office located at Portland. They were accepted or rejected there or at the factory and the sales were completed by shipments f. o. b. the factories.

2. Personnel Residing Within the State and Their Activities.

The sales organizations of the Chevrolet, Pontiac and Oldsmobile Divisions were similar in most respects. The zone manager was located in Portland and had charge of the sales operation. His job was "to secure and maintain a quality dealer organization . . . to administer and promote programs, plans and procedures that will cause that dealer organization to give . . . the best possible business representation in this area." R. 76. The district managers lived within the State of Washington and their jobs were "the maintenance of a quality organization—dealer organization—and the follow-through and administration of programs, plans and procedures within their district, that will help to develop the dealer organization, for the best possible financial and sales results." R. 109. While he had no office within the State, the district manager operated from his home where he received mail and telephone calls and otherwise carried on the corporation's business. He called upon each dealer in his district on an average of at least once a month, and often saw the larger dealers weekly. A district manager had from 12 to 30 dealers under his supervision and functioned as the zone manager's direct con-

[2] The dealers are independent merchants, often financing themselves, owning their own facilities and paying for all products upon delivery.

tact with these dealers, acting "in a supervisory or advisory capacity to see that they have the proper sales organization and to acquaint them with the Divisional sales policies and promotional and training plans to improve the selling ability of the sales organization." R. 246. In this connection, the district manager also assisted in the organization and training of the dealer's sales force. At appropriate times he distributed promotional material and advised on used car inventory control.

It was also the duty of the district manager to discuss and work out with the dealer the 30-, 60- and 90-day projection of orders of estimated needs which the dealer or the district manager then filed with the zone manager. These projections indicated the number of cars a dealer needed during the indicated period and also included estimates for accessories and equipment. The projected orders were prepared and filed each month and the estimates contained in them could, for all practical purposes, be "construed as a purchase order." [3]

In addition to the district manager, each of the Chevrolet, Pontiac and Oldsmobile Divisions also maintained service representatives who called on the dealers with regularity, assisting the service department in any troubles it experienced with General Motors products. These representatives also checked the adequacy of the service department inventory to make certain that the dealer's agreement was being complied with and to ensure the best possible service to customers. It was also their duty to note the appearance of the dealer's place of business

[3] R. 341. A Chevrolet zone manager said that: "Once that projection and estimate has been made, and a meeting of minds between the district manager and the dealer, or his representative, arrived at, the dealer then places individual orders with us on a separate form for the merchandise. Those separate forms, of course, are to allow him to specifically specify color option, and things of that character." R. 124.

and, where needed, to require rehabilitation, improved cleanliness or any other repairs necessary to achieve an attractive sales and service facility. At the dealer's request, or on direction from his zone superior, the service representative also conducted service clinics at the dealer's place of business, for the purpose of teaching the dealer and his service personnel the proper techniques necessary to the operation of an efficient service department. The service representative also gave assistance to the dealer with the more difficult customer complaints, some of which were registered with the dealer, but others of which were registered with the corporation.

During the tax period involved here the Chevrolet, Oldsmobile and Pontiac Divisions had an average of about 20 employees resident or principally employed in Washington.[4] General Motors Parts Division employed about 20 more.

The Chevrolet Division's branch office at Seattle consisted of one man and his secretary. That office performed the function of getting better service for Washington dealers on orders of Chevrolet Division products. The branch office had no jurisdiction over sales or over other Chevrolet personnel in the State. Since January 1, 1954, Chevrolet Division has maintained a zone office in Seattle and has paid the tax without dispute.

3. Out-of-State Personnel, Performing In-State Activities.

The zone manager, who directed all zone activities, visited with each Washington dealer on the average of once each 60 days, the larger ones, each month. About one-half of these visits were staged at the dealer's place of business and the others were at Portland. The zone

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[4] At times, Pontiac had three, Oldsmobile six and Chevrolet 17 assigned personnel in the State.

business management manager was the efficiency expert for the zone and supervised the capital structure and financing of the Washington dealers. The zone parts and service manager held responsibility for the adequacy of the Washington dealer services to customers. He worked through the local Washington service representative, but also made personal visits to Washington dealers and conducted schools for the promotion of good service policies. The zone used car manager (for the Chevrolet Division only) assisted Washington dealers in the disposition of used cars through appropriate display and reconditioning.

4. Activities of General Motors Parts Division.

During the period of this tax, the General Motors Parts Division warehoused, sold and shipped parts and accessories to Washington dealers for Chevrolet, Pontiac and Oldsmobile vehicles. It maintained warehouses in Portland and Seattle. No personnel of this division visited the dealers, but all of the Chevrolet, Pontiac and Oldsmobile dealers in Washington obtained their parts and accessories from these warehouses. Items carried by the Seattle warehouse were shipped from it, and those warehoused at Portland were shipped from there. The Seattle warehouse, which carried the items most often called for in Washington, employed from 20 to 28 people during the taxing period. The Portland warehouse carried the less frequently needed parts. The tax on the orders filled at the Seattle warehouse was paid but the tax on the Portland shipments is being protested.

III.

"[I]t is beyond dispute," we said in *Northwestern States Portland Cement Co.* v. *Minnesota, supra,* at 458, "that a State may not lay a tax on the 'privilege' of engaging in interstate commerce." But that is not this case. To so contend here is to overlook a long line of cases of

this Court holding that an in-state activity may be a sufficient local incident upon which a tax may be based. As was said in *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U. S. 602, 609 (1951), "[t]he State is not precluded from imposing taxes upon other activities or aspects of this [interstate] business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State." This is exactly what Washington seeks to do here and we cannot say that appellant has shown that its activities within the State are not such incidents as the State can reach. *Norton Co.* v. *Department of Revenue, supra,* at 537. Unlike *Field Enterprises, Inc.*, v. *Washington,* 47 Wash. 2d 852, 289 P. 2d 1010, aff'd, 352 U. S. 806 (1956), citing *Norton, supra,* the Pontiac and Oldsmobile Divisions of General Motors had no branch offices in Washington. But these divisions had district managers, service representatives and other employees who were residents of the State and who performed substantial services in relation to General Motors' functions therein, particularly with relation to the establishment and maintenance of sales, upon which the tax was measured. We place little weight on the fact that these divisions had no formal offices in the State, since in actuality the homes of these officials were used as corporate offices. Despite their label as "homes" they served the corporation just as effectively as "offices." In addition, the corporation had a Chevrolet branch office and a General Motors Parts Division warehouse in Seattle.

Thus, in the bundle of corporate activity, which is the test here, we see General Motors' activity so enmeshed in local connections that it voluntarily paid taxes on various of its operations but insists that it was not liable on others. Since General Motors elected to enter the State in this fashion, we cannot say that the Supreme Court of Washington erred in holding that these local incidents were

sufficient to form the basis for the levy of a tax that would not run contrary to the Constitution. *Norton Co.* v. *Department of Revenue, supra.*

IV.

The tax that Washington levied is measured by the wholesale sales of the respective General Motors divisions in the State. It is unapportioned and, as we have pointed out, is, therefore, suspect. We must determine whether it is so closely related to the local activities of the corporation as to form "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, 344–345 (1954). On the basis of the facts found by the state court we are not prepared to say that its conclusion was constitutionally impermissible. *Norton Co.* v. *Department of Revenue, supra,* at 538. Here, just as in *Norton,* the corporation so mingled its taxable business with that which it claims nontaxable that we can only "conclude that, in the light of all the evidence, the judgment attributing . . . [the corporation's Washington sales to its local activity] was within the realm of permissible judgment. Petitioner has not established that such services as were rendered . . . [through in-state activity] were not decisive factors in establishing and holding this market." *Ibid.* Although mere entry into a State does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain that same degree of immunity.

V.

A more difficult question might arise from appellant's claim of multiple taxation. *Gwin, White & Prince, Inc.,* v. *Henneford,* 305 U. S. 434, 440 (1939). General Motors

claims that some of its products taxed by Washington are manufactured in St. Louis where a license tax, measured by sales before shipment, is levied. See *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459 (1919). It is also urged that General Motors' Oregon-based activity which concerns Washington sales might afford sufficient incidents for a similar tax by Oregon. The Court touched upon the problem of multiple taxation in *Northwest Airlines* v. *Minnesota, supra,* at 295, but laid it to one side as "not now before us." Thereafter, in *Northwestern States Portland Cement Co.* v. *Minnesota, supra,* at 463, we held that "[i]n this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense." Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. Cf. *International Harvester Co.* v. *Evatt,* 329 U. S. 416, 421–423 (1947). And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of "multiple taxation," *e. g., Northwestern States Portland Cement Co.* v. *Minnesota, supra,* and we adhere to that position.

Affirmed.

MR. JUSTICE BRENNAN, dissenting.

This case presents once again the thorny problem of the power of a State to tax the gross receipts from interstate sales arising from activities occurring only partly within its borders. In upholding the Washington gross receipts tax the Court has, in my judgment, confused two quite different issues raised by the case, and in doing so has ignored a fatal defect in the Washington statute.

In order to tax any transaction, the Due Process Clause requires that a State show a sufficient "nexus between

such a tax and transactions within a state for which the tax is an exaction." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 464. This question, which we considered in *McLeod* v. *J. E. Dilworth Co.,* 322 U. S. 327, and *Norton Co.* v. *Department of Revenue,* 340 U. S. 534, is the most fundamental precondition on state power to tax. But the strictures of the Constitution on this power do not stop there. For in the case of a gross receipts tax imposed upon an interstate transaction, even though the taxing State can show "some minimum connection," *Northwestern States Portland Cement Co., supra,* at 465, the Commerce Clause requires that "taxation measured by gross receipts from interstate commerce . . . [be] fairly apportioned to the commerce carried on within the taxing state." *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 256. See *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307.

The Court recognizes that "taxation measured by gross receipts is constitutionally proper if it is fairly apportioned," *ante,* p. 440. In concluding that the tax in this case includes a fair apportionment, however, the Court relies upon the fact that Washington has sufficient contacts with the sale to satisfy the *Norton* standard, which was formulated to meet the quite different problem of defining the requirements of the Due Process Clause. See Part IV, *ante.* Our prior decisions clearly indicate that a quite different scheme of apportionment is required. Of course, when a sale may be localized completely in one State, there is no danger of multiple taxation, and, as in the case of a retail sales tax, the State may use as its tax base the total gross receipts arising within its borders. See *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33. But far more common in our complex economy is the kind of sale presented in this case, which exhibits significant contacts with more than one State. In such a situation, it is the commercial

activity within the State, and not the sales volume, which determines the State's power to tax, and by which the tax must be apportioned. While the ratio of in-state to out-of-state sales is often taken into account as one factor among others in apportioning a firm's total net income, see, *e. g.*, the description of the "Massachusetts Formula" in Note, 75 Harv. L. Rev. 953, 1011 (1962), it nevertheless remains true that if commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part. Such a tax must be apportioned to reflect the business activity within the taxing State. Cf. my concurring opinion in *Railway Express Agency* v. *Virginia,* 358 U. S. 434, 446. Since the Washington tax on wholesales is, by its very terms, applied to the "gross proceeds of sales" of those "engaging within this state in the business of making sales at wholesale," Rev. Code Wash. 82.04.270, it cannot be sustained under the standards required by the Commerce Clause.

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

The issue presented is whether the Commerce Clause permits a State to assess an unapportioned gross receipts tax on the interstate wholesale sales of automobiles delivered to dealers for resale in that State. In upholding the tax involved in this case, the Court states as a general proposition that "taxation measured by gross receipts [from interstate sales] is constitutionally proper if it is fairly apportioned." *Ante,* at 440. The Court concludes from this that the validity of Washington's wholesale sales tax may be determined by asking " 'the simple but controlling question [of] whether the state has given anything for which it can ask return.' " *Ante,* at 441. This elusively simple test and its application to this case repre-

sent an important departure from a fundamental purpose of the Commerce Clause and from an established principle which had heretofore provided guidance in an area otherwise fraught with complexities and inconsistencies.

The relevant facts, which are undisputed, merit brief restatement. General Motors manufactures in California, Missouri and Michigan motor vehicles, parts and accessories which are sold at wholesale to independent dealers. The corporation manufactures none of these products within the State of Washington but does sell them to local Washington retail dealers. General Motors conducts business through "Divisions" which although not separately incorporated are operated as substantially independent entities. This case involves wholesale sales by the Chevrolet, Pontiac, Oldsmobile and General Motors Parts Divisions to independent dealers in Washington. As a general matter the sales and orders involved in this case were handled and approved by zone offices in Portland, Oregon. General Motors has a limited number of sales representatives ("district managers") who reside in Washington and who maintain contacts with the local dealers in order to facilitate the sales of General Motors products, but these sales representatives conducted no business in Washington other than the promotion of their wholesale interstate sales. The orders for automobiles were sent directly to the Portland zone offices where they were accepted for shipment, f. o. b., from points outside of Washington. For the purposes of this case, however, it is useful to divide the transactions—the taxability of which is in dispute—into three categories:

> (1) Pontiac and Oldsmobile Divisions Sales: These Divisions had no office, establishment or intrastate business in Washington; they operated entirely through Portland zone offices and the Washington sales representatives.

(2) General Motors Parts Division Sales: This Division maintained warehouses in both Seattle, Washington, and Portland, Oregon. The Seattle warehouse sold directly to local Washington dealers and the tax imposed on such sales has been paid and is not disputed here. The sales to Washington dealers of parts and accessories ordered from and delivered by the Portland warehouse were, however, also taxed and those taxes are disputed here.

(3) Chevrolet Division Sales—"Class A and B" Sales: The Chevrolet Division maintained a one-man branch office in Seattle, Washington; and all sales within the territorial jurisdiction of that office have been referred to in this litigation as "Class A" transactions. This one-man office operated under the direction of the Portland zone office and conducted no business in the State of Washington other than to facilitate the management and handling of sales and orders through the Portland zone office. The Seattle office, however, dealt only with Washington's northern counties and did not deal with nine of Washington's southern counties; the sales to dealers in those southern counties have been labeled "Class B" sales and had no connection with Chevrolet's Seattle office. The "Class B" sales were therefore similar to those in category (1) above.

All of the above transactions have been subjected to an unapportioned gross receipts tax which the State of Washington assesses for the privilege of "engaging within this state in the business of making sales at wholesale." Rev. Code Wash. 82.04.270; Wash. Laws 1949, c. 228, § 1 (e).[1]

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[1] The tax periods involved in this case are from January 1, 1949, through June 30, 1953.

On these facts the Court holds that the activities of the sales representatives constitute "an in-state activity" forming "a sufficient local incident upon which a tax may be based." *Ante,* at 447. This decision departs from *Norton Co.* v. *Department of Revenue,* 340 U. S. 534, and adopts a test there rejected. *Norton* involved a Massachusetts corporation which operated "a branch office and warehouse" in Chicago, Illinois, from which it made "local sales at retail." *Id.,* at 535. The Massachusetts corporation was admittedly engaging in intrastate business within Illinois and was making local sales concededly subject to taxation by the State. In addition to "over-the-counter" Chicago sales, the Massachusetts firm made two other types of sales to Illinois inhabitants: (1) Sales based on orders or shipments which at some point were routed through or utilized the Chicago outlet and (2) sales based on orders from Illinois inhabitants sent directly to Massachusetts and filled by direct shipment to the purchasers. The Illinois tax was imposed upon all receipts obtained by Norton from sales to Illinois residents regardless of whether those sales were associated or connected with the local office and warehouse which was conducting intrastate business. The Court stated that when, "as here, the corporation has gone into the State to do local business," the firm could be exempted from taxation on sales "only by" sustaining the burden of "showing that the particular transactions are dissociated from the local business and interstate in nature." *Id.,* at 537. The Court held in part that "the judgment attributing to the Chicago branch income from all sales that *utilized it* either in receiving the orders or distributing the goods was within the realm of permissible judgment." *Id.,* at 538. (Emphasis added.) But in spite of the burden of persuasion resting on a firm having an office doing intrastate business, the Court concluded that the tax on *all* sales by Norton to Illinois customers was

not wholly within "the realm of permissible judgment." The Court held that those sales involving goods and orders which proceeded directly from Massachusetts to the Illinois customers without becoming associated with the Chicago outlet were so clearly "interstate in character" that they could not be subjected to the Illinois tax. *Id.*, at 539. In so holding the Court stated that the out-of-state corporation "could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce . . . ." *Id.*, at 538.

The facts and holdings of *Norton* should be compared with the facts and decision of the Court in the present case. The *Norton* decision surely requires immunity for the sales in category (1) (Pontiac and Oldsmobile Divisions Sales) for those sales were not only interstate in character but were wholly free from association with any local office or warehouse conducting intrastate business.

With respect to the transactions in category (2) (General Motors Parts Division Sales), it appears that the offices and warehouses operated by the Parts Division in Seattle, Washington, and in Portland, Oregon, create a situation strikingly similar to that in *Norton* where the Massachusetts firm maintained an outlet in Chicago, Illinois. Here as in *Norton* the Court is presented with an identifiable group of sales transactions (those involving sales at the local Seattle warehouse) which appear to have been over-the-counter and intrastate in character and with a readily distinguishable group of sales transactions (those involving only the Portland warehouse) which were not connected with an intrastate business and which were interstate in character. In *Norton* the latter type of purely interstate sales, those unconnected with any intrastate business, were squarely held nontaxable.

Finally, with respect to transactions in category (3) (Chevrolet Division Sales—"Class A and B" Sales),

those in "Class B," which by definition lacked any connection with an in-state office, would seem to be precisely like those in *Norton* which had no connection with an in-state establishment and which accordingly were exempted. And, as to the "Class A" sales which were connected with the one-man Seattle office, it is important to note that this in-state "office," unlike the "office and warehouse" involved in *Norton,* made no intrastate or retail sales, stocked no products and had no authority to accept sales orders. In fact the Seattle "office" simply operated to facilitate the interstate sales directed by the zone office in Portland, Oregon.

Although the opinion of the Court seems to imply that there still is some threshold requirement of in-state activity which must be found to exist before a "fairly apportioned" tax may be imposed on interstate sales, it is difficult to conceive of a state gross receipts tax on interstate commerce which could not be sustained under the rationale adopted today. Every interstate sale invariably involves some local incidents—some "in-state" activity. It is difficult, for example, to distinguish between the in-state activities of the representatives here involved and the in-state activities of solicitors or traveling salesmen—activities which this Court has held are insufficient to constitute a basis for imposing a tax on interstate sales. *McLeod* v. *J. E. Dilworth Co.,* 322 U. S. 327; cf. *Real Silk Hosiery Mills* v. *City of Portland,* 268 U. S. 325; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489. Surely the distinction cannot rest on the fact that the solicitors or salesmen make hotels or motels their "offices" whereas in the present case the sales representatives made their homes their "offices." In this regard, the *Norton* decision rested solidly on the fact that the taxpayer had a branch office and warehouse making intrastate retail sales.

The opinion of the Court goes beyond a consideration of whether there has been in-state activity of appropriate

character to satisfy a threshold requirement for imposing a tax on interstate sales. The Court asserts as a general principle that the validity of a tax on interstate commerce "rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation." *Ante,* at 440. What is "fair"? How are we to determine whether a State has exerted its power in "proper proportion to appellant's activities within the State"? *Ante,* at 441. See Note, Developments—Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 957 (1962). I submit, with due respect for the complexity of the problem, that the formulation suggested by the Court is unworkable. Constitutional adjudication under the Commerce Clause would find little guidance in a concept of state interstate sales taxation tested and limited by the tax's "fair" proportion or degree. The attempt to determine the "fairness" of an interstate sales tax of a given percentage imposed on given activities in one State would be almost as unseemly as an attempt to determine whether that same tax was "fairly" apportioned in light of taxes levied on the same transaction by other States. The infinite variety of factual configurations would readily frustrate the usual process of clarification through judicial inclusion and exclusion. The only coherent pattern that could develop would, in reality, ultimately be based on a wholly permissive attitude toward state taxation of interstate commerce.

The dilemma inhering in the Court's formulation is revealed by its treatment of the "more difficult," but inextricably related, question arising from the alleged multiple taxation. The Court would avoid the basic question by saying that appellant "has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments . . . . And further, it has not been shown that Oregon levies

any tax on appellant's activity bearing on Washington sales." [2] *Ante,* at 449. These problems are engendered by the rule applied here and cannot be evaded. For if it is "fair" to subject the interstate sales to the Washington wholesale sales tax because of the activities of the sales representatives in Washington, then it would seem equally "fair" for Oregon, which is the site of the office directing and consummating these sales, to tax the same gross sales receipts. Moreover, it would seem "fairer" for California, Michigan or Missouri—States in which automobiles are manufactured, assembled or delivered—to impose a tax measured by, and effectively bearing upon, the same gross sales receipts. See Note, 38 Wash. L. Rev. 277, 281 (1963). Presumably, if there is to be a limitation on the taxing power of each of these States, that limitation surely cannot be on a first-come-first-tax basis. Alternatively, if diverse local incidents can afford bases for multistate taxation of the same interstate sale, then the Court is left to determine, out of some hypothetical maximum taxable amount, which proportion is "fair" for each of

[2] With respect to the view that the application of the Commerce Clause depends upon the existence of actual, as distinguished from potential, multiple taxation, compare *Freeman* v. *Hewit,* 329 U. S. 249, 256: "It is suggested . . . that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce."

the States having a sufficient "in-state" contact with the interstate transaction.

The burden on interstate commerce and the dangers of multiple taxation are made apparent by considering Washington's tax provisions. The Washington provision here involved—the "tax on wholesalers"—provides that every person "engaging within this state in the business of making sales at wholesale" shall pay a tax on such business "equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent." Rev. Code Wash. 82.04.270; Wash. Laws 1949, c. 228, § 1 (e).[3] In the same chapter Washington imposes a "tax on manufacturers" which similarly provides that every person "engaging within this state in business as a manufacturer" shall pay a tax on such business "equal to the value of the products . . . manufactured, multiplied by the rate of one-quarter of one per cent." Rev. Code Wash. 82.04.240; Wash. Laws 1949, c. 228, § 1 (b). Then in a provision entitled "Persons taxable on multiple activities" the statute endeavors to insure that local Washington products will not be subjected both to the "tax on manufacturers" and to the "tax on wholesalers." Rev. Code Wash. 82.04.440; Wash. Laws 1949, c. 228, § 2–A. Prior to its amendment in 1950 the exemptive terms of this "multiple activities" provision were designed so that a Washington manufacturer-wholesaler would pay the manufacturing tax and be exempt from the wholesale tax. This provision, on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers. In 1950, however, the "multiple activities" provision was amended, reversing the tax and the exemption, so that a Washington manufacturer-wholesaler would first be sub-

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[3] See note 1, *supra*.

jected to the wholesale tax and then, to the extent that he is taxed thereunder, exempted from the manufacturing tax. Rev. Code Wash. 82.04.440; Wash. Laws 1950 (special session), c. 5, § 2. See *McDonnell & McDonnell* v. *State,* 62 Wash. 2d 553, 557, 383 P. 2d 905, 908. This amended provision would seem to have essentially the same economic effect on interstate sales but has the advantage of appearing nondiscriminatory.

Even under the amended "multiple activities" exemption, however, an out-of-state firm manufacturing goods in a State having the same taxation provisions as does Washington would be subjected to two taxes on interstate sales to Washington customers. The firm would pay the producing State a local manufacturing tax measured by sales receipts and would also pay Washington a tax on wholesale sales to Washington residents. Under such taxation programs, if an out-of-state manufacturer competes with a Washington manufacturer, the out-of-state manufacturer may be seriously disadvantaged by the duplicative taxation. Even if the out-of-state firm has no Washington competitors, the imposition of interstate sales taxes, which add to the cost of producing, may diminish the demand for the product in Washington and thus affect the allocation of resources in the national economy. Moreover, the threat of duplicative taxation, even where there is no competitor manufacturing in the consuming State, may compel the out-of-state producer to relocate his manufacturing operations to avoid multiple taxation. Thus taxes such as the one upheld today may discourage the development of multistate business operations and the most advantageous distribution of our national resources; the economic effect inhibits the realization of a free and open economy unencumbered by local tariffs and protective devices. As the Court said in *McLeod* v. *J. E. Dilworth Co.,* 322 U. S., at 330–331: "The very purpose of the Commerce Clause was to create an area of free

trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States."

It may be urged that the Washington tax should be upheld because it taxes in a nondiscriminatory fashion all wholesale sales, intrastate and interstate, to Washington purchasers. The Commerce Clause, however, was designed, as Mr. Justice Jackson said in *H. P. Hood & Sons, Inc.*, v. *Du Mond,* 336 U. S. 525, 538, to create a "federal free trade unit"—a common national market among the States; and the Constitution thereby precludes a State from defending a tax on interstate sales on the ground that the State taxes intrastate sales generally. Nondiscrimination alone is no basis for burdening the flow of interstate commerce. The Commerce Clause "does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance." *Freeman* v. *Hewit,* 329 U. S., at 252. A State therefore should not be enabled to put out-of-state producers and merchants at a disadvantage by imposing a tax to "equalize" their costs with those of local businessmen who would otherwise suffer a competitive disadvantage because of the State's own taxation scheme. The disadvantage stemming from the wholesale sales tax was created by the State itself and therefore the fact that the State simultaneously imposes the same tax on interstate and intrastate transactions should not obscure the fact that interstate commerce is being burdened in order to protect the local market.[4]

[4] Cf. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523: "To give entrance to that excuse ["the economic welfare of the farmers or of any other class or classes" of local businessmen] would be to invite

In my view the rules set forth in *Norton Co.* v. *Department of Revenue, supra,* reflect an attempt to adhere to the basic purposes of the Commerce Clause. Therefore, in dealing with unapportioned taxes on interstate sales, I would adhere to the *Norton* rules instead of departing from them by adopting a standard of "fairness." I would hold that a manufacturer or wholesaler making interstate sales is not subject to a state gross receipts tax merely because those sales were solicited or processed by agents living or traveling in the taxing State. As *Norton* recognized, a different rule may be applied to the taxation of sales substantially connected with an office or warehouse making intrastate sales. The test adopted by the Court today, if followed logically in future cases, would seem to mean that States will be permitted to tax wholly interstate sales by any company selling through local agents or traveling salesmen. Such a rule may leave only mail-order houses free from state taxes on interstate sales. With full sympathy for the revenue needs of States, I believe there are other legitimate means of raising state revenues without undermining the common national market created by the Commerce Clause. I therefore respectfully dissent.

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a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." See *H. P. Hood & Sons, Inc.*, v. *Du Mond*, 336 U. S. 525, 532–539.

UNITED STATES *v.* TATEO.

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

No. 328. Argued April 20, 1964.—Decided June 8, 1964.

Respondent, when informed during trial of the trial judge's expressed intention if the jury found him guilty to impose a life sentence on a kidnaping charge and consecutive sentences on other felony charges, pleaded guilty, whereupon the jury was discharged, the kidnaping count dismissed, and sentence imposed on the remaining counts. In a subsequent proceeding under 28 U. S. C. § 2255, another district judge, doubting that respondent's guilty plea was voluntary, set aside the conviction and granted a new trial. A third trial judge dismissed all charges, holding that reprosecution was barred by the Double Jeopardy Clause of the Fifth Amendment. *Held:* Retrial of a defendant whose conviction is set aside on collateral attack for error in the proceedings leading to conviction is not barred for double jeopardy. *United States* v. *Ball*, 163 U. S. 662, followed; *Downum* v. *United States*, 372 U. S. 734, distinguished. Pp. 463–468.

216 F. Supp. 850, reversed and remanded.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Philip B. Heymann* and *Jerome Nelson.*

Robert Kasanof argued the cause for appellee. With him on the brief was *O. John Rogge.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents the question whether a federal criminal defendant who has had his conviction overturned in collateral proceedings on the ground that a guilty plea entered by him during trial was not voluntary but induced in part by comments of the trial judge, may be tried again for the same crimes or is protected against such

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a prosecution by the Double Jeopardy Clause of the Fifth Amendment. We hold that under these circumstances retrial does not infringe the constitutional protection against double jeopardy.

On May 15, 1956, the appellee, Tateo, and another were brought to trial before a jury on a five-count indictment charging bank robbery (18 U. S. C. § 2113 (a)); kidnaping in connection with the robbery (18 U. S. C. § 2113 (e)); taking and carrying away bank money (18 U. S. C. § 2113 (b)); receiving and possessing stolen bank money (18 U. S. C. § 2113 (c)); and conspiracy (18 U. S. C. § 371) to commit some of these substantive offenses. On the fourth day of trial, the judge informed Tateo's counsel that if Tateo were found guilty by the jury he would impose a life sentence on the kidnaping charge and consecutive sentences on the other charges. Upon being told of the judge's position and advised by his counsel that the likelihood of conviction was great, Tateo pleaded guilty, as did his codefendant. Thereupon the jury was discharged; the kidnaping count was dismissed with the prosecution's consent; and Tateo was sentenced to a total of 22 years and 6 months imprisonment on the other counts.

In a later proceeding under 28 U. S. C. § 2255, another district judge (Judge Weinfeld) granted Tateo's motion to set aside the judgment of conviction and for a new trial, determining that the cumulative impact of the trial testimony, the trial judge's expressed views on punishment, and the strong advice given by his counsel rendered it doubtful that Tateo possessed the freedom of will necessary for a voluntary plea of guilty. 214 F. Supp. 560.

After being reindicted on the kidnaping charge, Tateo was brought before a third district judge (Judge Tyler) for trial on that charge and the four bank robbery charges to which he had earlier pleaded guilty. Upon motions by the defense, Judge Tyler dismissed both the

kidnaping count, now abandoned by the Government, and the other four counts. He reasoned that, since neither genuine consent nor an "exceptional circumstance" underlay the termination of the first trial and no "waiver" of the double jeopardy claim had been made by Tateo, the Government was precluded from retrying him. 216 F. Supp. 850. The Government appealed, in accord with 18 U. S. C. § 3731, which permits direct appeal to this Court from a decision of a District Court sustaining a motion in bar before the defendant has been put in jeopardy. We noted probable jurisdiction, 375 U. S. 877. For reasons given below, we reverse the judgment of the District Court.

The Fifth Amendment provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb . . . ." The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence. In this respect we differ from the practice obtaining in England. The rule in this country was explicitly stated in *United States* v. *Ball,* 163 U. S. 662, 671–672, a case in which defendants were reindicted after this Court had found the original indictment to be defective. It has been followed in a variety of circumstances; see, *e. g., Stroud* v. *United States,* 251 U. S. 15 (after conviction reversed because of confession of error); *Bryan* v. *United States,* 338 U. S. 552 (after conviction reversed because of insufficient evidence); *Forman* v. *United States,* 361 U. S. 416 (after original conviction reversed for error in instructions to the jury).[1]

[1] *Green* v. *United States,* 355 U. S. 184, does not undermine this settled practice; it holds only that when one is convicted of a lesser offense included in that charged in the original indictment, he can be retried only for the offense of which he was convicted rather than that with which he was originally charged.

That a defendant's conviction is overturned on collateral rather than direct attack is irrelevant for these purposes, see *Robinson* v. *United States,* 144 F. 2d 392, 396, 397, aff'd on another ground, 324 U. S. 282. Courts are empowered to grant new trials under 28 U. S. C. § 2255, and it would be incongruous to compel greater relief for one who proceeds collaterally than for one whose rights are vindicated on direct review.

While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. The underlying purpose of permitting retrial is as much furthered by application of the rule to this case as it has been in cases previously decided.

Tateo contends that his situation must be distinguished from one in which an accused has been found guilty by a jury, since his involuntary plea of guilty deprived him of the opportunity to obtain a jury verdict of acquittal. We find this argument unconvincing. If a case is reversed because of a coerced confession improperly admitted, a

deficiency in the indictment, or an improper instruction, it is presumed that the accused did not have his case fairly put to the jury. A defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial.[2] Appellee's argument is considerably less strong than a similar one rejected in *Bryan* v. *United States, supra.* In that case the Court held that despite the Court of Appeals' determination that defendant had been entitled—because of insufficiency in the evidence—to a directed verdict of acquittal, reversal of the conviction with a direction of a new trial was a permissible disposition.

Downum v. *United States,* 372 U. S. 734, is in no way inconsistent with permitting a retrial here. There the Court held that when a jury is discharged because the prosecution is not ready to go forward with its case, the accused may not then be tried before another jury. The opinion recognized, however, that there are circumstances in which a mistrial does not preclude a second trial, see, *e. g., United States* v. *Perez,* 9 Wheat. 579 (jury unable to agree); *Simmons* v. *United States,* 142 U. S. 148 (likelihood that a juror subject to bias). In *Gori* v. *United States,* 367 U. S. 364, we sustained a second conviction after the original trial judge declared a mistrial on the ground of possible prejudice to the defendant, although the judge acted without defendant's consent and the wisdom of granting a mistrial was doubtful. If Tateo had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him. See *Gori* v. *United States,* 367

[2] It is also difficult to understand why Tateo should be treated differently from one who is coerced into pleading guilty before a jury is impaneled.

U. S., at 368; see also 367 U. S., at 370 (dissenting opinion of DOUGLAS, J.).[3] Although there may be good reasons why Tateo and his counsel chose not to make such a motion before the trial judge, it would be strange were Tateo to benefit because of his delay in challenging the judge's conduct.[4]

We conclude that this case falls squarely within the reasoning of *Ball* and subsequent cases allowing the Government to retry persons whose convictions have been overturned. The judgment below is therefore reversed and the case remanded to the District Court with instructions to reinstate the four bank robbery counts.

It is so ordered.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

I would affirm the District Court's holding, 216 F. Supp. 850, that under our decision last term in *Downum* v.

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[3] If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain.

[4] The dissent (*post*, p. 474) entirely misconceives the thrust of this argument. The point is not whether one could have expected Tateo to ask for a mistrial. Rather, it is whether, *if* such a request had been made and either had been granted or had underlain reversal on direct review, Tateo could have been tried again. If he could have been tried again, a decision proscribing retrial if attack is collateral would mean that any lawyer worth his salt would forbear requesting a mistrial in similar circumstances, even were he certain that his position would be sustained by the trial judge or on review. That any judicial system should encourage litigants to raise objections at the earliest rather than latest possible time seems self-evident. In other words, simple logic compels the conclusion that if the Court precluded retrial here, it would also have to preclude retrial in a similar case in which a mistrial is granted. Such a result would contradict the language of both the prevailing and dissenting opinions in *Gori*.

United States, 372 U. S. 734, the Double Jeopardy Clause of the Fifth Amendment protects Tateo against reprosecution. The Court today departs from *Downum* and in so doing substantially weakens the constitutional guarantee. *Downum* was correctly decided and deserves a life longer than that accorded it by the decision today. Rather than making any real effort to distinguish *Downum,* the Court limits it to its particular facts and reaffirms, indeed extends, the doubtful holding of the narrow majority in *Gori* v. *United States,* 367 U. S. 364 [1]—a holding which, in my view, departs from *Downum's* more hospitable attitude toward the "policy of the Bill of Rights . . . to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice." *Gori* v. *United States, supra,* at 373 (DOUGLAS, J., dissenting).[2] A comparison of the facts and rationale of *Downum* with those here reveals that this case calls more loudly than *Downum* for protection against double jeopardy.

In *Downum,* on the morning the case was called for trial both sides announced ready. A jury was selected, sworn, and instructed to return at 2 p. m. When it returned the prosecution asked that the jury be discharged because its key witness on two counts of the indictment was not present—a fact discovered by the prosecutor only during the noon recess. It was not contended that the failure to secure the attendance of this witness was in any way deliberate or based upon the prosecutor's conclusion

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[1] In *Gori* v. *United States,* 367 U. S. 364, the Court expressly refused to decide whether reprosecution would be permitted in situations "in which the discretion of the trial judge may be abused . . . or in which a judge exercises his authority to help the prosecution . . . ." *Id.,* at 369. Here, the Court holds, in effect, that reprosecution is permissible in those situations.

[2] See Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272, 1278–1279 (1964).

that the impaneled jury was likely to acquit. Instead, the "jury first selected to try petitioner and sworn was discharged because a prosecution witness had not been served with a summons and because no other arrangements had been made to assure his presence." *Downum* v. *United States, supra,* at 737. In sustaining the claim of double jeopardy as to a retrial commenced two days later, this Court said:

> "At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an imperious necessity to do so. *Wade* v. *Hunter, supra,* 690. Differences have arisen as to the application of the principle. See *Brock* v. *North Carolina,* 344 U. S. 424; *Green* v. *United States,* 355 U. S. 184, 188. Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States, supra,* 369. But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in *United States* v. *Coolidge,* 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' *United States* v. *Ball,* 163 U. S. 662, 669." *Id.*, at 736.

The Court further said:

> "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.'" *Id.,* at 738.

The Court thus held that Downum could not be reprosecuted, since, by virtue of prosecutorial neglect, he was denied his constitutional right to have the impaneled jury hear and decide his case.

In the present case, after four days of trial, the trial judge, as he put it at the time of sentencing, told defendant's counsel:

> ". . . [If he is convicted] by the jury I [intend] to give [him] the absolute maximum sentence, a life sentence plus all of these years to follow the life sentence.
>
> "If anybody wonders how one can serve a sentence after he has served a life sentence, it is very simple, because in a life sentence you are eligible for parole in fifteen years; but with a sentence to follow a life sentence, you are not eligible for parole on the life sentence, and you have to stay in jail for the rest of your life."

As a result of this coercion by the trial judge, Tateo entered a plea of guilty and was sentenced to imprisonment for 22 years and 6 months.

After Tateo served almost seven years in prison, District Judge Weinfeld granted his motion under 28 U. S. C. § 2255 to vacate the conviction. Judge Weinfeld found that:

> "The choice open to this defendant when apprised during the trial of the Court's statement was rather severely limited. If, as was his constitutional right, he continued with the trial and were found guilty, he faced, in the light of the Court's announced attitude, the imposition of a life sentence upon the kidnapping charge, plus additional time upon the other counts, a sentence which his lawyer informed him and which he believed, not without reason, meant life imprisonment." 214 F. Supp., at 565–566.

. . . . .

> "No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty—that if he persists in the assertion of his right and is found guilty, he faces, in view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term." *Id.*, at 567.
>
> . . . . . .
>
> "The realities of human nature and common experience compel the conclusion that the defendant was enveloped by a coercive force resulting from the knowledge conveyed to him of the Court's attitude as to sentence which, under all the circumstances, foreclosed a reasoned choice by him at the time he entered his plea of guilty." *Id.*, at 568.

Tateo was thereupon re-indicted by the Government and brought before Judge Tyler for retrial. Judge Tyler sustained defense motions to dismiss the indictment and ordered Tateo discharged from prison just one month short of seven years after the original sentence.

Judge Tyler found that Tateo "was coerced from availing himself of his Fifth Amendment right to go to the original jury for its verdict of guilt or innocence." 216 F. Supp., at 853. Applying *Downum*, Judge Tyler held that "[s]ince neither constitutionally sound consent nor an 'exceptional circumstance' underpinned the termination here, a second trial is constitutionally impermissible." *Id.*, at 852.

The Government does not, and indeed cannot, challenge Judge Weinfeld's and Judge Tyler's conclusion that Ta-

teo's guilty plea was coerced by the trial judge. Nor can it be contended that the injury to Tateo was less substantial than the injury to Downum. Each was deprived of his "valued right to have his trial completed by a particular tribunal," *Wade* v. *Hunter,* 336 U. S. 684, 689: Downum by reason of prosecutorial oversight or neglect; Tateo by reason of the trial judge's threat to impose a sentence that would make him "stay in jail for the rest of [his] life." If anything, Tateo's deprivation is more serious. The *purpose* of the judicial coercion in his case was to deny him the right to have the impaneled jury decide his fate, whereas this was merely the effect of the prosecutorial negligence in *Downum.* Moreover, Downum was not subjected to the taking of evidence, whereas Tateo's trial had been in progress for four days before its abortive ending.

The reasons advanced by the Court to support its holding are similar to the arguments presented by the Government and, in effect, rejected by the Court in *Downum.* The Court suggests, as the Government unsuccessfully argued in *Downum,* that if such double jeopardy pleas are sustained then, logically, reprosecution would have to be barred in any case where error is committed at the trial. Under the decisions of this Court, however, this is a *non sequitur.* In this country, contrary to English practice, a defendant may be retried after reversal because of errors at the trial—including errors in instructions, in rulings on the evidence, in admitting confessions, or in permitting prejudicial comments or conduct by the prosecutor.[3] But, in such instances, the realities are that, notwithstanding the errors, the defendant has had a jury trial, albeit not the error-free jury trial to which by law he is entitled. Tateo, however, was deprived of his valued right to have the original jury con-

[3] *United States* v. *Ball,* 163 U. S. 662; Note, 77 Harv. L. Rev., at 1283.

sider his case at all. *Wade* v. *Hunter, supra.* Any experienced trial lawyer aware of the realities of jury trials will recognize the difference between the two cases. Many juries acquit defendants after trials in which reversible error has been committed, and many experienced trial lawyers will forego a motion for a mistrial in favor of having his case decided by the jury.

The Court says further that "[i]f Tateo had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him." *Ante,* at 467. This completely overlooks Judge Weinfeld's unchallenged finding that Tateo was so "enveloped by [the] coercive force" of the trial judge's threat that he had no choice but to plead guilty. 214 F. Supp., at 568. To hypothesize the results of a defense *request* for a mistrial under these circumstances obscures the issue. Here it was the trial judge, not the defendant, who took the case away from the jury by coercing the guilty plea.

The Court also intimates that if Tateo's plea of double jeopardy is accepted then, logically, it will be necessary to bar reprosecutions under the Double Jeopardy Clause of persons whose guilty pleas, made before the jury is sworn, are ultimately found to be coerced. But again, under this Court's decisions, this does not follow. By settled interpretation the protection of the Double Jeopardy Clause does not attach before a jury is impaneled and sworn or, in a nonjury trial, before the court has begun to hear evidence.[4] Thus, the application of the double jeopardy guarantee to Tateo's case, where the plea was coerced after four days of trial, will in no way impair the settled interpretation.

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[4] *E. g., Downum* v. *United States,* 372 U. S. 734; *Cornero* v. *United States,* 48 F 2d 69; compare, *e. g., Bassing* v. *Cady,* 208 U. S. 386; *United States* v. *Dickerson,* 106 U. S. App. D. C. 221, 271 F. 2d 487.

It is also suggested that Tateo could have proceeded to verdict and appealed the sentence. The reply to this by his counsel in this Court seems to me unanswerable: "But it would be an audacious trial lawyer indeed who would advise a client in a Federal Court to risk a life in prison without hope of parole on the basis of an appellate review of his sentence, for there is no power to review a sentence within the statutory maximum either in the Supreme Court (*Gore* v. *United States,* 357 U. S. 386, 393) or in the Court of Appeals (*Pependrea* v. *United States,* 275 F. 2d 325, 329 (C. A. 9))." [5]

The Court's final point is that its decision is necessary to protect "the societal interest in punishing one whose guilt is clear"—an interest which the Court here prefers to the right of an accused not to be subjected to double jeopardy. *Ante,* at 466. With all deference, I suggest that the Constitution has resolved this question of competing interests of the Government and the individual in favor of protecting the individual from the harassment and danger of reprosecution. I agree with my Brother DOUGLAS dissenting in *Gori* v. *United States,* 367 U. S., at 373 that: "The question is not . . . whether a defendant is 'to receive absolution for his crime' . . . . The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the Government." As in *Downum* I would "resolve any doubt 'in favor of the liberty of the citizen.' "

For these reasons, I dissent.

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[5] Whether counsel is correct in this conclusion, compare *United States* v. *Wiley,* 278 F. 2d 500; Note, 109 U. of Pa. L. Rev. 422 (1961), is beside the point; the dilemma is real under the authorities.

ARO MANUFACTURING CO., INC., ET AL. *v.* CONVERTIBLE TOP REPLACEMENT CO., INC.

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

No. 75. Argued February 17, 1964.—Decided June 8, 1964.

Respondent was the assignee of certain territorial rights in a combination patent for a top-structure for convertible automobiles. The patent covered only the combination of several unpatented components and made no claim to invention based on the fabric used in the top-structure. Top-structures using the patented combination were included in 1952–1954 cars made by General Motors Corp., pursuant to a patent license, and by Ford Motor Co., which had no license during that period. Respondent filed an infringement suit against petitioners, who, without a license, made and sold replacement fabrics to fit cars using the patented top-structures. The patent owner (respondent's assignor) notified petitioners on January 2, 1954, that petitioners' sale of fabrics to fit Ford tops would be contributory infringement. On July 21, 1955, Ford paid the patent owner $73,000, and it was agreed that Ford, its dealers, customers and users, were released from all claims of infringement of the patent, other than with respect to "replacement top fabrics." The patent owner reserved the right to license the manufacture, use and sale of such replacement fabrics under the patent. Respondent's claim of contributory infringement was upheld in the District Court and the Court of Appeals. That holding was reversed here (365 U. S. 336) on the ground that the fabric replacement was permissible "repair" and not infringing "reconstruction," so that there was no direct infringement by the car owner to which petitioners could contribute. On remand, the District Court dismissed the complaint as to both General Motors and Ford cars. The Court of Appeals reinstated the judgment for respondent with respect to Ford cars, holding that, since Ford had not been licensed to produce the top-structures on those cars, petitioners' sale of replacement fabrics for them constituted contributory infringement even though the replacement was merely "repair." The Court of Appeals thus concluded that its "previous decision in this case was not reversed insofar as unlicensed Ford cars are concerned." *Held:*

1. This Court's previous decision did not reverse the Court of Appeals' holding as it applied to Ford cars. P. 480.

2. Persons who purchased cars from Ford, which infringed the patent by manufacturing and selling them with the top-structures, likewise infringed by using or repairing the top-structures; and the supplier of replacement fabrics for use in such infringing repair was a contributory infringer under § 271 (c) of the Patent Code. Pp. 482–488.

3. A majority of the Court is of the view that § 271 (c) requires knowledge by the alleged contributory infringer, not merely that the component sold by him was especially designed for use in a certain machine or combination, but also that the combination for which the component was designed was both patented and infringing. Pp. 488–493.

(a) This knowledge requirement affords petitioners no defense with respect to replacement-fabric sales after January 2, 1954, since they then had been notified of Ford's infringement. Pp. 489–491.

(b) Petitioners are not liable for contributory infringement with respect to sales before that date, absent a showing on remand of their previous knowledge of Ford's infringement. P. 491.

4. The patent owner's attempt, in the agreement with Ford, to reserve the right to license future replacement sales was invalid, since he cannot in granting the right to use patented articles impose conditions as to unpatented replacement parts to be used with those articles. After July 21, 1955, Ford car owners had authority to use and repair the patented top-structures; hence they were no longer direct infringers, and hence petitioners as sellers of replacement fabrics for such use and repair were not contributory infringers. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336, followed. Pp. 496–500.

5. The agreement with Ford did not eliminate petitioners' liability for sales prior to July 21, 1955, for, although a contributory infringer is a species of joint-tortfeasor, the common-law rule by which a release of one joint-tortfeasor necessarily released another is not applied to contributory infringement. Pp. 500–502.

6. For the guidance of the District Court, four Justices express the following views to the effect that the agreement of July 21, 1955, limits the damages that respondent may recover for the pre-agreement infringement:

(a) In contributory-infringement cases as in other instances of joint-tortfeasors' liability, payment by one joint-tortfeasor diminishes the amount that may be recovered from another. P. 503.

(b) Under 35 U. S. C. § 284, only damages, or loss to the patent owner, are recoverable for infringement, and not the infringer's profits. Pp. 503–507.

(c) Respondent's damages should not be measured by a royalty on petitioners' sales of replacement fabrics, since respondent could never have licensed those sales, which involved unpatented materials to be used in the mere repair of patented articles. Pp. 507–509.

(d) If the payment by Ford to the patent owner was the equivalent of the royalties the patent owner would have received by licensing Ford in the first instance, petitioners would be liable only for nominal damages. Pp. 512–513.

312 F. 2d 52, reversed in part, affirmed in part, and remanded.

Charles Hieken argued the cause for petitioners. With him on the briefs was *David Wolf*.

Elliott I. Pollock argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent Convertible Top Replacement Co., Inc., (CTR) acquired by assignment from the Automobile Body Research Corporation (AB) all rights for the territory of Massachusetts in United States Patent No. 2,569,724, known as the Mackie-Duluk patent. This is a combination patent covering a top-structure for automobile "convertibles." Structures embodying the patented combination were included as original equipment in 1952–1954 models of convertibles manufactured by the General Motors Corporation and the Ford Motor Company. They were included in the General Motors cars by authority of a license granted to General Motors by AB; Ford, however, had no license during the 1952–1954

period, and no authority whatever under the patent until July 21, 1955, when it entered into an agreement, discussed later, with AB; Ford's manufacture and sale of the automobiles in question therefore infringed the patent. Petitioner Aro Manufacturing Co., Inc. (Aro), which is not licensed under the patent, produces fabric components designed as replacements for worn-out fabric portions of convertible tops; unlike the other elements of the top-structure, which ordinarily are usable for the life of the car, the fabric portion normally wears out and requires replacement after about three years of use. Aro's fabrics are specially tailored for installation in particular models of convertibles, and these have included the 1952–1954 General Motors and Ford models equipped with the Mackie-Duluk top-structures.

CTR brought this action against Aro in 1956 to enjoin the alleged infringement and contributory infringement, and to obtain an accounting, with respect to replacement fabrics made and sold by Aro for use in both the General Motors and the Ford cars embodying the patented structures. The interlocutory judgment entered for CTR by the District Court for the District of Massachusetts, 119 U. S. P. Q. 122, and affirmed by the Court of Appeals for the First Circuit, 270 F. 2d 200, was reversed here. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336 (*"Aro I"*), petition for rehearing or alternative motion for amendment or clarification denied, 365 U. S. 890. Our decision dealt, however, only with the General Motors and not with the Ford cars. Like the Court of Appeals, we treated CTR's right to relief as depending wholly upon the question whether replacement of the fabric portions of the convertible tops constituted infringing "reconstruction" or permissible "repair" of the patented combination. The lower courts had held it to constitute "reconstruction," making the car owner for whom it was performed a direct infringer and Aro, which made

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and sold the replacement fabric, a contributory infringer; we disagreed and held that it was merely "repair." The reconstruction-repair distinction is decisive, however, only when the replacement is made in a structure whose original manufacture and sale have been licensed by the patentee, as was true only of the General Motors cars; when the structure is unlicensed, as was true of the Ford cars, the traditional rule is that even repair constitutes infringement. Thus, the District Court had based its ruling for CTR with respect to the Ford cars on the alternative ground that, even if replacement of the fabric portions constituted merely repair, the car owners were still guilty of direct infringement, and Aro of contributory infringement, as to these unlicensed and hence infringing structures. 119 U. S. P. Q. 122, 124. This aspect of the case was not considered or decided by our opinion in *Aro I*.

On remand, however, another judge in the District Court read our opinion as requiring the dismissal of CTR's complaint as to the Ford as well as the General Motors cars, and entered judgment accordingly. CTR appealed the dismissal insofar as it applied to the Ford cars, and the Court of Appeals reinstated the judgment in favor of CTR to that extent. 312 F. 2d 52. In our view the Court of Appeals was correct in holding that its "previous decision in this case was not reversed insofar as unlicensed Ford cars are concerned." 312 F. 2d, at 57.[1]

[1] The repair-versus-reconstruction issue had been the only issue expressly considered or decided by the Court of Appeals on review of the District Court's original interlocutory judgment, see 270 F. 2d, at 202, and was thus the focal point of the briefs and arguments here in *Aro I*. See, *e. g.*, Brief for the United States as Amicus Curiae, at 2–3 and n. 1; but see Brief for the Respondent, at 73–76. That the Court considered no other issue, and thus dealt only with the General Motors and not with the Ford cars, is evident from its statement of the "determinative question" as being that of repair versus reconstruction, 365 U. S., at 342; from its failure to

However, we granted certiorari, 372 U. S. 958, to consider that question, and to consider also the issue that had not been decided in *Aro I:* whether Aro is liable for contributory infringement, under 35 U. S. C. § 271 (c), with respect to its manufacture and sale of replacement fabrics for the Ford cars.[2]

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consider the body of authority holding that even repair of an infringing article constitutes infringement; and from, among other such statements in its opinion, see *id.*, at 344, 346, its reliance on the proposition that "a license to use a patented combination includes the right" to repair it, *id.*, at 345—a proposition that of course was not applicable to the Ford cars, whose owners had purchased the patented structures from an unlicensed manufacturer and thus had no "license to use" them. The three other opinions in *Aro I* were likewise directed entirely to the issue of repair versus reconstruction, and gave no attention to the different considerations that would come into play in the absence of a license from the patentee to the automobile manufacturer. The concurring opinion of MR. JUSTICE BLACK, for example, relied on the proposition that "One royalty to one patentee for one sale is enough under our patent law as written," 365 U. S., at 360, which would seem inapplicable to the situation presented by the Ford cars, where the patentee had not received any royalty on the sale of the patented structures. See also *id.*, at 354, 356, n. 9; and see the dissenting opinion of MR. JUSTICE HARLAN, 365 U. S., at 369, 373. The concurring opinion of MR. JUSTICE BRENNAN did refer to the presence in the case of the unlicensed Ford cars; it stated, 365 U. S., at 368, that "the judgment of the Court of Appeals must be reversed, except, however, as to the relief granted respondent [CTR] in respect of the replacements made on Ford cars . . . ." That the author of that opinion did not understand the Court as having ruled differently on the Ford car question, or as having ruled on it at all, is shown by the fact that he concurred generally in the result, rather than concurring in part and dissenting in part. The Court said nothing to indicate disagreement with this interpretation of its opinion and decision.

[2] We also granted Aro's motion for leave to use the record that was before us in *Aro I.* 372 U. S. 958.

CTR has made a Motion to Settle the Record, asking us to declare that certain items designated for printing by Aro do not comprise a portion of the record before this Court. We postponed further

I.[3]

CTR contends, and the Court of Appeals held, that since Ford infringed the patent by making and selling the top-structures without authority from the patentee,[4] persons who purchased the automobiles from Ford likewise infringed by using and repairing the structures; and hence Aro, by supplying replacement fabrics specially designed to be utilized in such infringing repair, was guilty of contributory infringement under 35 U. S. C. § 271 (c). In *Aro I*, 365 U. S., at 341–342, the Court said:

> "It is admitted that petitioners [Aro] know that the purchasers intend to use the fabric for replacement purposes on automobile convertible tops which are covered by the claims of respondent's combination

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consideration of the motion until the hearing of the case on the merits. 375 U. S. 804. The items in question, which were not included in the record in *Aro I*, consist of certain requests for admissions and answers thereto, and of materials involved in an accounting proceeding begun after the original affirmance by the Court of Appeals but subsequently stayed and never completed. A motion to strike the same materials from the record was made by CTR in the course of the second appeal to the Court of Appeals, and was denied by that court "without prejudice to renewal in its brief, at the oral argument, or upon taxation of costs." CTR did not renew the motion upon brief or oral argument in the Court of Appeals, but says that it still intends to do so upon taxation of costs if costs should ever be taxed against it by the Court of Appeals. Because of these events in the Court of Appeals, the motion in this Court is also denied, without prejudice to its renewal upon taxation of costs in the Court of Appeals.

[3] This Part of the opinion—with the exception of the point discussed at p. 488 and note 8, *infra*—expresses the views of JUSTICES HARLAN, BRENNAN, STEWART, WHITE, and GOLDBERG.

[4] The case will be considered in this Part of the opinion without reference to the agreement made on July 21, 1955, between Ford and AB, and thus on the assumption that Ford never obtained any authority under the patent. The effect of that agreement will be considered in succeeding Parts of the opinion.

> patent, and such manufacture and sale with that knowledge might well constitute contributory infringement under § 271 (c), if, but only if, such a replacement by the purchaser himself would in itself constitute a *direct* infringement under § 271 (a), for it is settled that if there is no *direct* infringement of a patent there can be no *contributory* infringement. . . . It is plain that § 271 (c)—a part of the Patent Code enacted in 1952—made no change in the fundamental precept that there can be no contributory infringement in the absence of a direct infringement. That section defines contributory infringement in terms of direct infringement—namely the sale of a component of a patented combination or machine for use 'in an infringement of such patent.' And § 271 (a) of the new Patent Code, which defines 'infringement,' left intact the entire body of case law on direct infringement. The determinative question, therefore, comes down to whether the car owner would infringe the combination patent by replacing the worn-out fabric element of the patented convertible top on his car . . . ."

Similarly here, to determine whether Aro committed contributory infringement, we must first determine whether the car owners, by replacing the worn-out fabric element of the patented top-structures, committed direct infringement. We think it clear, under § 271 (a) of the Patent Code and the "entire body of case law on direct infringement" which that section "left intact," that they did.

Section 271 (a) provides that "whoever without authority makes, uses or sells any patented invention . . . infringes the patent." It is not controverted—nor could it be—that Ford infringed by making and selling cars embodying the patented top-structures without any authority from the patentee. If Ford had had such authority, its purchasers would not have infringed

by using the automobiles, for it is fundamental that sale of a patented article by the patentee or under his authority carries with it an "implied license to use." *Adams* v. *Burke,* 17 Wall. 453, 456; *United States* v. *Univis Lens Co.,* 316 U. S. 241, 249, 250–251. But with Ford lacking authority to make and sell, it could by its sale of the cars confer on the purchasers no implied license to use, and their use of the patented structures was thus "without authority" and infringing under § 271 (a).[5] Not only does that provision explicitly regard an unauthorized user of a patented invention as an infringer, but it has often and clearly been held that unauthorized use, without more, constitutes infringement. *Birdsell* v. *Shaliol,* 112 U. S. 485; *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 114; see *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 32–33; *General Talking Pictures Corp.* v. *Western Electric Co.,* 305 U. S. 124, 127.

If the owner's *use* infringed, so also did his *repair* of the top-structure, as by replacing the worn-out fabric component. Where use infringes, repair does also, for it perpetuates the infringing use.

> "No doubt . . . a patented article may be repaired without making the repairer an infringer, . . . but not where it is done for one who is. It is only where the device in patented form has come lawfully into the hands of the person for or by whom it is repaired that this is the case. In other words, if one without right constructs or disposes of an infringing machine, it affords no protection to another to have merely repaired it; the repairer, by supplying an essential part of the patented combination, contributing by

[5] We have no need to consider whether the car owners, if sued for infringement by the patentee, would be entitled to indemnity from Ford on a breach of warranty theory. In fact they were not sued, and were released from liability by the agreement between Ford and AB. See *infra,* at 493–495.

> so much to the perpetuation of the infringement." *Union Special Mach. Co.* v. *Maimin,* 161 F. 748, 750 (C. C. E. D. Pa. 1908), aff'd, 165 F. 440 (C. A. 3d Cir. 1908).

Accord, *Remington Rand Business Serv., Inc.,* v. *Acme Card System Co.,* 71 F. 2d 628, 630 (C. A. 4th Cir. 1934), cert. denied, 293 U. S. 622; 2 Walker, Patents (Deller ed. 1937), at 1487. Consequently replacement of worn-out fabric components with fabrics sold by Aro, held in *Aro I* to constitute "repair" rather than "reconstruction" and thus to be permissible in the case of licensed General Motors cars, was not permissible here in the case of unlicensed Ford cars. Here, as was not the case in *Aro I,* the direct infringement by the car owners that is prerequisite to contributory infringement by Aro was unquestionably established.

We turn next to the question whether Aro, as supplier of replacement fabrics for use in the infringing repair by the Ford car owners, was a contributory infringer under § 271 (c) of the Patent Code. That section provides:

> "Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

We think Aro was indeed liable under this provision.

Such a result would plainly have obtained under the contributory-infringement case law that § 271 (c) was intended to codify.[6] Indeed, most of the law was estab-

[6] The section was designed to "codify in statutory form principles of contributory infringement" which had been "part of our law for

lished in cases where, as here, suit was brought to hold liable for contributory infringement a supplier of replacement parts specially designed for use in the repair of infringing articles. In *Union Tool Co.* v. *Wilson, supra,* 259 U. S., at 113–114, the Court held that where use of the patented machines themselves was not authorized,

> "There was, consequently, no implied license to use the spare parts in these machines. As such use, unless licensed, clearly constituted an infringement, the sale of the spare parts to be so used violated the injunction [enjoining infringement]."

As early as 1897, Circuit Judge Taft, as he then was, thought it "well settled" that

> "where one makes and sells one element of a combination covered by a patent with the intention and

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about 80 years." H. R. Rep. No. 1923 on H. R. 7794, 82d Cong., 2d Sess., at 9; see also Congressman Rogers' statement, Hearings before Subcommittee No. 3 of House Judiciary Committee on H. R. 3760, 82d Cong., 1st Sess., at 159:

"Then in effect this recodification, particularly as to section 231 [which became § 271 in the Patent Code of 1952], would point out to the court, at least that it was the sense of Congress that we remove this question of confusion as to whether contributory infringement existed at all, and state in positive law that there is such a thing as contributory infringement, or at least it be the sense of Congress by the enactment of this law that if you have in the Mercoid case [320 U. S. 661, 680] done away with contributory infringement, then we reinstate it as a matter of substantive law of the United States and that you shall hereafter in a proper case recognize or hold liable one who has contributed to the infringement of a patent.

"That is the substantive law that we would write if we adopted this section 231 as it now exists. Is that not about right?"

Mr. Giles S. Rich, now judge of the Court of Customs and Patent Appeals, then spokesman for proponents of § 271 (c), answered that the statement of the bill's purpose was "very excellent." *Ibid.* See also 98 Cong. Rec. 9323, 82d Cong., 2d Sess., July 4, 1952 (colloquy of Senators Saltonstall and McCarran).

> for the purpose of bringing about its use in such a combination he is guilty of contributory infringement and is equally liable to the patentee with him who in fact organizes the complete combination." *Thomson-Houston Elec. Co.* v. *Ohio Brass Co.*, 80 F. 712, 721 (C. A. 6th Cir. 1897).

While conceding that in the case of a machine purchased from the patentee, one "may knowingly assist in assembling, repairing, and renewing a patented combination by furnishing some of the needed parts," Judge Taft added: "but, when he does so, he must ascertain, if he would escape liability for infringement, that the one buying and using them for this purpose has a license, express or implied, to do so." *Id.*, at 723. See also *National Brake & Elec. Co.* v. *Christensen*, 38 F. 2d 721, 723 (C. A. 7th Cir. 1930), cert. denied, 282 U. S. 864; *Reed Roller Bit Co.* v. *Hughes Tool Co.*, 12 F. 2d 207, 211 (C. A. 5th Cir. 1926); *Shickle, Harrison & Howard Iron Co.* v. *St. Louis Car-Coupler Co.*, 77 F. 739, 743 (C. A. 8th Cir. 1896), cert. denied, 166 U. S. 720. These cases are all authority for the proposition that "The right of one, other than the patentee, furnishing repair parts of a patented combination, can be no greater than that of the user, and he is bound to see that no other use of such parts is made than that authorized by the user's license." *National Malleable Casting Co.* v. *American Steel Foundries*, 182 F. 626, 641 (C. C. D. N. J. 1910).

In enacting § 271 (c), Congress clearly succeeded in its objective of codifying this case law. The language of the section fits perfectly Aro's activity of selling "a component of a patented . . . combination . . . , constituting a material part of the invention, . . . especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use." Indeed, this is the almost unique case in which the component was

hardly suitable for *any* noninfringing use.[7] On this basis both the District Court originally, 119 U. S. P. Q., at 124, and the Court of Appeals in the instant case, 312 F. 2d, at 57, held that Aro was a contributory infringer within the precise letter of § 271 (c). See also *Aro I*, 365 U. S., at 341.

However, the language of § 271 (c) presents a question, apparently not noticed by the parties or the courts below, concerning the element of knowledge that must be brought home to Aro before liability can be imposed. It is only sale of a component of a patented combination "*knowing* the same to be especially made or especially adapted for use in an infringement of such patent" that is contributory infringement under the statute. Was Aro "knowing" within the statutory meaning because—as it admits, and as the lower courts found—it knew that its replacement fabrics were especially designed for use in the 1952–1954 Ford convertible tops and were not suitable for other use? Or does the statute require a further showing that Aro knew that the tops were patented, and knew also that Ford was not licensed under the patent so that any fabric replacement by a Ford car owner constituted infringement?

On this question a majority of the Court is of the view that § 271 (c) does require a showing that the alleged contributory infringer knew that the combination for which his component was especially designed was both patented and infringing.[8] With respect to many of the

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[7] Aro's factory manager admitted that the fabric replacements in question not only were specially designed for the Ford convertibles but would not, to his knowledge, fit the top-structures of any other cars.

[8] This view is held by THE CHIEF JUSTICE and JUSTICES BLACK, DOUGLAS, CLARK and WHITE. See the opinion of MR. JUSTICE BLACK, *post*, pp. 524–528, and of MR. JUSTICE WHITE, *post*, p. 514.

JUSTICES HARLAN, BRENNAN, STEWART and GOLDBERG dissent from this interpretation of the statute. They are of the view that the

replacement-fabric sales involved in this case, Aro clearly had such knowledge. For by letter dated January 2, 1954, AB informed Aro that it held the Mackie-Duluk patent; that it had granted a license under the patent to General Motors but to no one else; and that "It is obvious,

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knowledge Congress meant to require was simply knowledge that the component was especially designed for use in a combination and was not a staple article suitable for substantial other use, and not knowledge that the combination was either patented or infringing. Their reasons may be summarized as follows:

(1) No other result would have been consistent with the congressional intention to codify the case law of contributory infringement as it existed prior to this Court's decision in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661—and to do this not only in general, see note 6, *supra*, and p. 492, *infra*, but with specific reference to the knowledge requirement. See Hearings, *supra*, note 6, at 159–160, 163–165. Under that case law, liability was established by a showing that the component was suitable for no substantial use other than in the patented combination, since it was "the duty of the defendant to see to it that such combinations which it is intentionally inducing and promoting shall be confined to those which may be lawfully organized." *Thomson-Houston Elec. Co.* v. *Ohio Brass Co., supra*, 80 F., at 720–723. Accord, *Mercoid Corp.* v. *Mid-Continent Investment Co., supra*, 320 U. S., at 664; 3 Walker, Patents (Deller ed. 1937), at 1764–1765, and cases cited. See *Freedman* v. *Friedman*, 242 F. 2d 364 (C. A. 4th Cir. 1957).

(2) The House Committee's change in the language of the bill concerning the knowledge requirement, see the opinion of MR. JUSTICE BLACK, *post*, pp. 524–528, was not intended to limit liability to cases where the alleged contributory infringer had knowledge of the patented or infringing nature of the combination; it was intended merely to assure that the statute would be construed to require knowledge that the article sold was a component of some combination and was especially designed for use therein, rather than simply knowledge that the article was being sold. See, *e. g.*, the statement of Congressman Crumpacker, Hearings, *supra*, at 175, objecting to the original language on the ground that "the way it is phrased the word 'knowingly' refers directly to the word 'sells.'" See also *id.*, at 175–176. While the representatives of a manufacturing concern and of the Justice Department did urge the Committee to adopt the position which the Court now holds it did adopt, none of the Congressmen

from the foregoing and from an inspection of the convertible automobile sold by the Ford Motor Company, that anyone selling ready-made replacement fabrics for these automobiles would be guilty of contributory infringement of said patents." Thus the Court's interpretation of the knowledge requirement affords Aro no defense with respect to replacement-fabric sales made after January 2, 1954. It would appear that the over-

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said anything to indicate agreement with these views or disagreement with the contrary view expressed by the spokesman for the sponsors of the bill. This view, as clearly stated on several occasions at the Hearings, was that

"[Y]ou know that the component is going into that machine. You don't have to know that it is patented. You don't have to know the number of the patent, and you don't have to know that the machine that it is going into constitutes an infringement." *Id.*, at 175; see also *id.*, at 160, 176.

(3) The suggestion that a person cannot be liable even for direct infringement when he has no knowledge of the patent or the infringement is clearly refuted by the words of § 271 (a), which provides that "whoever without authority makes, uses or sells any patented invention . . . infringes the patent," with no mention of any knowledge requirement. And the case law codified by § 271 has long recognized the fundamental proposition that "To constitute an infringement of a patent, it is not necessary that the infringer should have known of the existence of the patent at the time he infringed it or, knowing of its existence, it is not necessary that he should have known his doings to constitute an infringement." 3 Walker, Patents (Deller ed. 1937), § 453. See, *e. g.*, *United States* v. *Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 566; *Sontag Chain Stores Co.* v. *National Nut Co.*, 310 U. S. 281, 295; *Boyden* v. *Burke*, 14 How. 575, 582.

(4) Section 287 of 35 U. S. C., quoted in the opinion of MR. JUSTICE BLACK, *post*, p. 528, n. 14, does not require a different conclusion. That section prevents a patentee from recovering damages for infringement unless he has marked the patented article with notice of the patent. Since a patentee may hardly be expected to mark the article when it has not been manufactured or sold by him, but rather by an infringer, the section has been held not to apply to such a situation. *Wine Ry. Appliance Co.* v. *Enterprise Ry. Equip. Co.*, 297 U. S. 387. That of course is the situation here with respect to the Ford cars.

whelming majority of the sales were in fact made after that date, since the oldest of the cars were 1952 models and since the average life of a fabric top is said to be three years. With respect to any sales that were made before that date, however, Aro cannot be held liable in the absence of a showing that at that time it had already acquired the requisite knowledge that the Ford car tops were patented and infringing. When the case is remanded, a finding of fact must be made on this question by the District Court, and, unless Aro is found to have had such prior knowledge, the judgment imposing liability must be vacated as to any sales made before January 2, 1954. As to subsequent sales, however, we hold, in agreement with the lower courts, that Aro is liable for contributory infringement within the terms of § 271 (c).

In seeking to avoid such liability, Aro relies on the *Mercoid* cases. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680. Since those cases involved essentially an application of the doctrine of patent misuse, which is not an issue in this case,[9] they are not

[9] Aro does contend here that recovery by CTR is precluded by misuse of the patent, and also that such misuse entitles Aro to an award of treble damages for violation of the antitrust laws. Although the point was arguably raised by Aro's original answer and counterclaim, and was decided against Aro in the original opinion of the District Court, 119 U. S. P. Q., at 122, n. 1, it was substantially abandoned on the first appeal, and hence was not ruled on in the first opinion of the Court of Appeals. Accordingly, this Court's opinion in *Aro I* stated that patent misuse "is not an issue in this case." 365 U. S., at 344, n. 10; see also the dissenting opinion of Mr. Justice Harlan, 365 U. S., at 376–377 and n. 5. On remand, after the District Court had dismissed without prejudice the counterclaim alleging misuse, the Court of Appeals held that neither the defense based on misuse nor the counterclaim was in the case, the defense having been "clearly abandoned" and the counterclaim never having been adequately pleaded. 312 F. 2d, at 58. We do not find error in this ruling, and thus have no occasion to consider Aro's allegations of patent misuse.

squarely applicable to the contributory infringement question here. On the other hand, they are hardly irrelevant. The Court in *Mercoid* said, among other things, that the principle that "he who sells an unpatented part of a combination patent for use in the assembled machine may be guilty of contributory infringement" could no longer prevail "against the defense that a combination patent is being used to protect an unpatented part from competition." 320 U. S., at 668. As the Court recognized, its definition of misuse was such as "to limit substantially the doctrine of contributory infringement" and to raise a question as to "what residuum may be left." 320 U. S., at 669. See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), at 252. The answer to Aro's argument is that Congress enacted § 271 for the express purpose of reinstating the doctrine of contributory infringement as it had been developed by decisions prior to *Mercoid,* and of overruling any blanket invalidation of the doctrine that could be found in the *Mercoid* opinions. See, *e. g.,* 35 U. S. C. §§ 271 (c), (d); Hearings, *supra,* n. 6, at 159, 161–162; and the *Aro I* opinions of MR. JUSTICE BLACK, 365 U. S., at 348–349 and nn. 3–4; MR. JUSTICE HARLAN, *id.,* at 378, n. 6; and MR. JUSTICE BRENNAN, *id.,* at 365–367. Hence, where Aro's sale of replacement fabrics for unlicensed Ford cars falls squarely within § 271 (c), and where Aro has not properly invoked the misuse doctrine as to any other conduct by CTR or AB, *Mercoid* cannot successfully be employed to shield Aro from liability for contributory infringement.[10]

Thus we hold that, subject to the reservation expressed at pp. 488–491, *supra,* with respect to sales made before January 2, 1954, and subject to the further reser-

[10] We have no doubt that § 271 (c) as so construed and applied, within the limitations set forth in the succeeding portions of this opinion, is constitutional.

vations set forth in succeeding Parts of this opinion, Aro's sales of replacement fabrics for use in the Ford cars constituted contributory infringement under § 271 (c).

II.[11]

Although we thus agree with the Court of Appeals that Aro was liable for contributory infringement with respect to the Ford cars, we find merit in a defense asserted by Aro. In our view this defense negatives Aro's liability as to some of the replacement fabrics in question and, as to the others, reduces substantially—quite possibly to a mere nominal sum—the amount of recovery that CTR may be awarded. The defense is based on the agreement of July 21, 1955, between Ford and AB. See note 4, *supra*. This agreement affected Aro's liability differently, we think, depending upon whether the replacement-fabric sales were made before or after the agreement date. We shall first discuss its effect on liability for the subsequent sales.

The agreement was made at a time when, as CTR states in its brief, "Ford had already completed its manufacture of all the cars here involved." Under it, Ford agreed to pay AB $73,000 for certain rights under the patent, which were defined by paragraph 1 of the agreement as follows:

> "1. AB hereby releases Ford, its associated companies . . . [and] its and their dealers, customers and users of its and their products, of all claims that AB has or may have against it or them for infringement of said patents arising out of the manufacture, use or sale of devices disclosed therein and manufactured before December 31, 1955, other than the 'replacement top fabrics' licensed under paragraph 3."

[11] This Part of the opinion expresses the views of JUSTICES BRENNAN, STEWART, WHITE, and GOLDBERG. MR. JUSTICE HARLAN concurs in the result.

In paragraph 3, AB licensed Ford to make and sell "replacement top fabrics" for the Mackie-Duluk top-structures, receiving in return a royalty—separate from the $73,000 lump-sum payment—of 5% of the net sales. And in paragraph 5, AB expressly reserved the right

> "to license under . . . said Mackie-Duluk patent . . . the manufacture, use and sale of replacement top fabrics other than those supplied to, made by or sold by Ford . . . to the extent that AB is entitled to reserve such right under 35 United States Code, § 271 (1952)."

In a pretrial memorandum filed early in the lawsuit, the District Court construed the agreement in the following manner, which we think to be a correct interpretation of the parties' intention:

(1) With respect to all patented top-structures manufactured before July 21, 1955, and all replacement fabrics installed before that date, it was a "release" to the parties named—that is, Ford and its customers—of the claims for infringement by manufacture, sale, or use of the patented combination;

(2) With respect to any new structures manufactured between July 21 and December 31, 1955 (it appears that there were no such structures), the agreement was a "future license" to Ford and its customers to make, sell, and use the patented combination, but "excepting replacements" unless these were provided by Ford under the special license granted by paragraph 3;

(3) With respect to the post-July 21 status of structures manufactured before July 21, the agreement was also a "future license" to Ford and its customers of the rights to make, sell, and use, but again, "excepting replacements" not provided by Ford; and

(4) The agreement "demonstrated an intention not to release" or license any persons other than Ford or its customers; in particular, the parties did not intend

to release or license contributory infringers like Aro in respect of replacement fabrics sold either before or after July 21.

Considering the legal effect of the agreement as so construed, the District Court went on to rule that if the fabric replacement should be held to constitute repair rather than reconstruction (as this Court did subsequently hold in *Aro I*), then:

(a) Aro *would* be liable for contributory infringement as to replacements made before July 21, 1955, since "I do not construe the agreement to release contributory infringers for rights of action already accrued";

(b) however, despite the intention of the parties, Aro would *not* be liable as to replacements made after July 21, 1955, since "If replacement is legitimate repair, no average owner can do-it-yourself, and he must be free to go to persons in the position of defendants without apprehension on their part."

The distinction between pre-agreement and post-agreement sales subsequently became irrelevant to the District Court's view of the case, when it held after trial that replacement of the fabrics constituted reconstruction rather than repair; the Court's interlocutory judgment for CTR thus held Aro liable with respect to *all* the Ford cars in question. When this Court in *Aro I* reversed the ruling on the reconstruction-repair issue, the only reference in the opinions to the Ford cars took the view that Aro should be held liable only in respect of replacements made on those cars "before July 21, 1955," 365 U. S., at 368 (concurring opinion), and thus agreed with the distinction originally drawn by the District Court. The present opinion of the Court of Appeals, however, in reinstating the Ford car portion of the interlocutory judgment for CTR without consideration of this distinction, appears to have held Aro liable in respect of replacement fabrics sold for the 1952–1954 Ford cars not only before

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July 21, 1955, but also after that date and—so long as the cars remain on the road—up to the present and into the future.

CTR's argument in support of this result emphasizes that the agreement in terms ran in favor only of Ford and Ford's customers and not of third parties like Aro, and that it expressly excepted "replacement top fabrics" from the scope of the rights it granted. Reliance is also placed on testimony that the amount to be paid by Ford under the agreement was set as low as $73,000 only because of a clear understanding between the parties that such payment would not affect AB's rights to recover from persons in the position of Aro.[12] CTR thus argues:

> "If the Ford agreement had never been made at all, it is clear that it would have been proper to require that Aro pay royalties, insofar as infringing Ford cars are concerned, even up to the present time. This being the case, it is clear that it was proper for the agreement to expressly recognize and to expressly exclude Aro's liability from its terms. Since Ford refused to purchase any rights for Aro, either before or after July 21, 1955, Aro is liable for its Ford repair activities both before and after that date."

Insofar as replacement fabrics sold "after that date" are concerned, we do not agree. We think the agreement's attempt to reserve rights in connection with future sales of replacement fabrics was invalid. By the agree-

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[12] Counsel for AB testified on deposition as follows:

"I . . . definitely told them that there were these other replacement top manufacturers and that if we were left in a position to collect royalty from them, that obviously we could give Ford a lower rate, and that is what Ford said they wanted, that they weren't interested in buying any sort of a release or license or anything else that would help out these replacement top people . . . ."

ment AB authorized the Ford car owners, in return for a payment from Ford, to use the patented top-structures from and after July 21, 1955. Since they were authorized to use the structures, they were authorized to repair them so as "to preserve [their] fitness for use . . . ." *Aro I*, 365 U. S., at 345, quoting *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325, 336. The contrary provisions in the agreement, purporting to restrict the right of use and repair by prohibiting fabric replacement unless done with fabrics purchased from Ford or some other licensee, stand condemned by a long line of this Court's decisions delimiting the scope of the patent grant. When the patentee has sold the patented article or authorized its sale and has thus granted to the purchaser an "implied license to use," it is clear that he cannot thereafter restrict that use; "so far as the use of it was concerned, the patentee had received his consideration, and it was no longer within the monopoly of the patent." *Adams* v. *Burke*, 17 Wall. 453, 456. In particular, he cannot impose conditions concerning the unpatented supplies, ancillary materials, or components with which the use is to be effected. *E. g., Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *United States* v. *Loews, Inc.*, 371 U. S. 38, 46. It follows that here, where the patentee has by the Ford agreement *explicitly* authorized the purchasers to use the articles, the patentee cannot thereafter restrict that use by imposing a condition that replacement parts may be purchased only from a licensed supplier.

With the restriction thus eliminated from consideration, it is clear that Aro cannot be liable for contributory infringement in connection with sales of replacement fabrics made after July 21, 1955. After that date the Ford car owners had authority from the patentee—indeed, had

a "license" [13]—fully to use and repair the patented structures. Hence they did not commit direct infringement under § 271 (a) when they had the fabrics replaced; hence Aro, in selling replacement fabrics for this purpose, did not commit contributory infringement under § 271 (c). The case as to the post-agreement sales is thus squarely ruled by *Aro I*. It was held there, despite AB's attempt to reserve the right to license sales of replacement fabrics, that General Motors car owners, who were authorized to use the patented structures by virtue of the license granted General Motors by AB, performed nothing more than "permissible repair" when they replaced the worn-out fabrics, and hence that there was no direct infringement by the owners to which Aro, by selling the replacement fabrics, could contribute. In other words, since fabric replacement was "repair" rather than "reconstruction," it was merely an aspect of the use of the patented article, and was thus beyond the patentee's power to control after the use itself had been authorized. So here, the Ford car owners were authorized to use the patented structures after July 21, 1955, by virtue of the agreement between AB and Ford. Hence they were likewise entitled, despite AB's attempt to reserve this right, to perform the "permissible repair" of replacing the worn-out fabrics; hence, just as in *Aro I*, the car owners by replacing the fabrics committed no direct infringement to which Aro's sales could contribute. "[I]f the purchaser and user could not be amerced as an infringer certainly one

[13] The District Court termed the agreement a "future license" in this respect, and AB's counsel on more than one occasion referred to it as a "release or license." It is difficult to see why it should not be considered a license insofar as it related to future activity, see *De Forest Radio Tel. Co.* v. *United States*, 273 U. S. 236, 241, although of course its proper label is less important than its clear effect of authorizing Ford's purchasers to make full use of the patented structures.

who sold to him . . . cannot be amerced for contributing to a non-existent infringement." *Aro I,* 365 U. S., at 341.

CTR would have it that this result is inconsistent with *Birdsell* v. *Shaliol,* 112 U. S. 485, and *Union Tool Co.* v. *Wilson,* 259 U. S. 107. In our view it is not. *Birdsell* allowed the patentee to hold one infringer liable for use of the patented machines after obtaining a judgment against another infringer for the manufacture and sale of the same machines; *Union Tool* held infringement to exist where the defendant, after being held liable for the manufacture and sale of certain infringing machines, sold spare parts for use in the same machines. Both cases turned upon the fact that the patentee had not collected on the prior judgment and thus had not received any compensation for the infringing use—or, indeed, any compensation at all.[14] Here, in contrast, the amount paid by Ford under the agreement was expressly stated to include compensation for the use of the patented structures by Ford's purchasers; moreover, the agreement covered *future* use and in this respect operated precisely like a license, with the result that after the agreement date there was simply no infringing use for which the patentee was entitled to compensation. See *Birdsell* v. *Shaliol, supra,* 112 U. S., at 487. In sum, AB obtained its reward for the use of the patented structures under the terms of the agreement with Ford; CTR cannot obtain from Aro here another reward for the same use.

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[14] In *Birdsell* the Court relied on the fact that only nominal damages had been awarded in the prior suit. 112 U. S., at 489. In *Union Tool* the Court's statement that the patentee had not "received any compensation whatever for the infringement by use of these machines," 259 U. S., at 113, was apparently based on the fact that the damages and profits awarded by the prior judgment had not yet been calculated or paid. See Brief for Respondent, at 37, and the opinion of the Court of Appeals, 265 F. 669, 673 (C. A. 9th Cir. 1920). Compare *Buerk* v. *Imhaeuser,* 4 Fed. Cas. 597 (No. 2,108) (C. C. S. D. N. Y. 1876), 4 Fed. Cas. 594 (No. 2,107) (C. C. S. D. N. Y. 1876).

We therefore hold, in agreement with the District Court's original view, that Aro is not liable for replacement-fabric sales [15] made after July 21, 1955. Insofar as the judgment of the Court of Appeals imposes liability for such sales, it is reversed.[16]

III.[17]

Turning to the question of replacement-fabric sales made *before* July 21, 1955, we agree with the District Court that the agreement between AB and Ford did not negative Aro's liability for these sales. With respect to the post-agreement sales the agreement necessarily absolved Aro of liability, its intention to the contrary notwithstanding, because it had the effect of precluding any direct infringement to which Aro could contribute. With respect to the pre-agreement sales, however, Aro's contributory infringement had already taken place at the time of the agreement. Whatever the agreement's effect on the amount recoverable from Aro—a matter to be discussed in Part IV of this opinion—it cannot be held, in the teeth of its contrary language and intention, to have erased the extant infringement.

It is true that a contributory infringer is a species of joint-tortfeasor, who is held liable because he has contributed with another to the causing of a single harm to the plaintiff. See *Wallace* v. *Holmes*, 29 Fed. Cas. 74, 80 (No. 17,100) (C. C. D. Conn. 1871); *Thomson-Houston Elec. Co.* v. *Ohio Brass Co., supra*, 80 F., at 721; Rich,

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[15] The date of the sale by Aro rather than the date of the installation in the car by the purchaser from Aro should control, since it is the act of sale that is made contributory infringement by § 271 (c).

[16] Since Aro's infringement thus terminated in 1955, it would seem that the perpetual injunction included in the interlocutory judgment would no longer be a proper element of relief.

[17] This Part of the opinion, like Part I, expresses the views of JUSTICES HARLAN, BRENNAN, STEWART, WHITE and GOLDBERG.

21 Geo. Wash. L. Rev. 521, 525 (1953). It is also true that under the old common-law rule, a release given to one joint-tortfeasor necessarily released another, even though it expressly stated that it would have no such effect. See Prosser, Torts (2d ed. 1955), at 243–244. Under this rule Aro's argument on this point would prevail, since the agreement did release Ford's purchasers for their infringing use of the top-structures before the agreement date, and that was the use to which Aro contributed. See *Schiff* v. *Hammond Clock Co.*, 69 F. 2d 742, 746 (C. A. 7th Cir. 1934), reversed for dismissal as moot, 293 U. S. 529. But the rule is not applicable. Even in the area of nonpatent torts, it has been repudiated by statute or decision in many if not most States, see Prosser, *supra,* at 245, and by the overwhelming weight of scholarly authority. *E. g.,* American Law Institute, Restatement of Torts (1939), § 885 (1) and Comments *b–d.* And application of the rule to contributory infringement has been rejected by this Court. In *Birdsell* v. *Shaliol, supra,* 112 U. S., at 489, the Court applied to a patent case the proposition that "By our law, judgment against one joint trespasser, without full satisfaction, is no bar to a suit against another for the same trespass." What is true of a judgment is true of a release. See Prosser, *supra,* at 241–244. A release given a direct infringer in respect of past infringement, which clearly intends to save the releasor's rights against a past contributory infringer, does not automatically surrender those rights. Thus the District Court was correct in denying that "defendants are entitled to the fortuitous benefit of the old joint tort-feasor rule." The mere fact that the agreement released Ford and Ford's customers for their past infringement does not negate Aro's liability for *its* past infringement. Hence the judgment of the Court of Appeals, insofar as it relates to Ford car replacement-fabric sales made by Aro before July 21, 1955—and subject to

the reservation set forth at pp. 488–491, *supra,* with respect to sales made before January 2, 1954—is affirmed; accordingly, the case is remanded to the District Court for a determination of damages and for such other proceedings as that court deems appropriate.

IV.[18]

The case must now be remanded for a determination of the damages to be recovered from Aro in respect of the infringing pre-agreement sales. It is true that the lower courts have not yet expressly addressed themselves to the damages issue, and that the parties have not argued it here. Nevertheless, it appears that all concerned in this litigation have shared a specific assumption as to the measure of damages that would be available to CTR if it succeeded in establishing infringement. Because we sharply disagree with that assumption, and because expression of our views may obviate the need upon remand for lengthy proceedings before a master in this already over-long litigation, we deem it in the interest of efficient judicial administration to express those views at this time. In brief, it is our opinion that the Ford agreement, while it does not negate Aro's liability for the prior sales as it does for the subsequent ones, does have the effect of limiting the amount that CTR can recover for the pre-agreement infringement, and probably of precluding recovery of anything more than nominal damages.

If the sum paid by Ford for the release of it and its customers constituted full satisfaction to AB for the infringing use of the patented structures, we think it clear that CTR cannot now collect further payment from Aro

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[18] This Part of the opinion expresses the views of JUSTICES BRENNAN, STEWART, WHITE, and GOLDBERG. MR. JUSTICE HARLAN considers that the matters here dealt with are not ripe for decision and should be left for determination in the future course of this litigation.

for contributing to the same infringing use. The rule is that

> "Payments made by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment . . . ." Restatement of Torts, *supra,* § 885 (3).

It has been said that "all courts are agreed" upon such a rule. Prosser, *supra,* at 246. And its applicability to contributory-infringement cases has been clearly indicated by this Court. *Birdsell* v. *Shaliol, supra,* 112 U. S., at 488–489; see *Hazeltine Corp.* v. *Atwater Kent Mfg. Co.,* 34 F. 2d 50, 52 (D. C. E. D. Pa. 1929). Indeed, if "actual damages" or "full compensation" paid by a maker-and-seller can have the effect of releasing a user, as was indicated in *Birdsell,* such a result should follow *a fortiori* where, as here, the damages paid were expressly stated to be compensation for use of the device, and the person subsequently sued is a contributory infringer liable merely for contributing to the same infringing use. In such a case full payment by or on behalf of the direct infringer leaves nothing to be collected from the contributory infringer. We therefore find it necessary to consider whether the payment by Ford to AB constituted full payment for the infringing use committed directly by Ford's purchasers and contributorily by Aro.

This depends upon the measure and total amount of recovery to which CTR and AB are entitled. In particular, if they are entitled to recover a royalty from Aro on the infringing sales of replacement fabrics, it is clear that no such recovery was included in the payment from Ford, whose representatives "weren't interested in buying any sort of a release or license or anything else that

would help out these replacement top people." See note 12, *supra*. CTR does contend, and all involved in this litigation have apparently assumed, that a judgment holding Aro liable for contributory infringement will result in recovery of such a royalty on Aro's sales.[19] This is the assumption with which we disagree. It is our view that despite our affirmance of the judgment against Aro as to sales made before the agreement date, no such royalty will be available to CTR as part of its recovery. We are, indeed, doubtful that CTR can properly be allowed recovery of anything more than nominal damages from Aro.

The measure of recovery for patent infringement is governed by 35 U. S. C. § 284, which provides:

> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.
>
> "When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed."

It is presumably the language "in no event less than a reasonable royalty" that has led to the assumption noted

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[19] AB's counsel asserted on deposition: "I believe we would have the right to arrive at royalty and otherwise consider as patented the replacement top . . . ." When asked by the District Court at a hearing concerning a judgment bond how much he expected to recover, CTR's counsel replied: "I suppose a reasonable royalty would be 5 per cent." Considerable evidence was introduced before the Master as to Aro's income from infringing sales and as to royalty rates fixed in licenses granted by CTR or AB to other replacement-fabric suppliers. See also the statement of AB's counsel quoted in note 12, *supra*, and the statement in CTR's brief quoted *supra*, at 496.

above. But that assumption ignores the fact—clear from the language, the legislative history, and the prior law—that the statute allows the award of a reasonable royalty, or of any other recovery, only if such amount constitutes "damages" for the infringement. It also ignores the important distinction between "damages" and "profits," and the relevance of this distinction to the 1946 amendment of the statute.

"In patent nomenclature what the infringer makes is 'profits'; what the owner of the patent loses by such infringement is 'damages.'" *Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U. S. 448, 451. Profits and damages have traditionally been all-inclusive as the two basic elements of recovery. Prior to 1946, the statutory precursor of the present § 284 allowed recovery of both amounts, reading as follows:

> "[U]pon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby . . . ." R. S. § 4921, as amended, 42 Stat. 392.

By the 1946 amendment, Act of August 1, 1946, c. 726, § 1, 60 Stat. 778, 35 U. S. C. (1946 ed.), §§ 67, 70, the statute was changed to approximately its present form, whereby only "damages" are recoverable.[20] The purpose of the change was precisely to eliminate the recovery of profits as such and allow recovery of damages only.

> "The object of the bill is to make the basis of recovery in patent-infringement suits general damages, that is, any damages the complainant can

[20] In the 1952 codification, §§ 67 and 70 of the 1946 Code were consolidated in the present § 284. The stated purpose was merely "reorganization in language to clarify the statement of the statutes." H. R. Rep. No. 1923, 82d Cong., 2d Sess., at 10, 29.

> prove, not less than a reasonable royalty, together with interest from the time infringement occurred, rather than profits and damages." H. R. Rep. No. 1587, 79th Cong., 2d Sess. (1946), to accompany H. R. 5311, at 1–2; S. Rep. No. 1503, 79th Cong., 2d Sess. (1946), to accompany H. R. 5311, at 2.[21]

There can be no doubt that the amendment succeeded in effectuating this purpose; it is clear that under the present statute only damages are recoverable. See, *e. g.*, *Ric-Wil Co.* v. *E. B. Kaiser Co.*, 179 F. 2d 401, 407 (C. A. 7th Cir. 1950), cert. denied, 339 U. S. 958; *Livesay Window Co.* v. *Livesay Industries, Inc.*, 251 F. 2d 469, 471–472 (C. A. 5th Cir. 1958); *Laskowitz* v. *Marie Designer, Inc.*, 119 F. Supp. 541, 554–555 (D. C. S. D. Cal. 1954); Cullen, 28 J. Pat. Off. Soc. 838 (1946); Wolff, 28 J. Pat. Off. Soc. 877 (1946).

The 1946 amendment is of crucial significance to the total amount of CTR's recovery against Aro and hence to the amount, if any, that may still be recovered after receipt of the payment from Ford. When recovery of the infringer's profits as such was allowed, the rule was that "complainant's damages are no criterion of defendant's profits"; it was "immaterial that the profits made by the defendant would not have been made by the plaintiff." 3 Walker, Patents (Deller ed. 1937), § 845, at 2186. And in cases of joint infringement this Court was said to have declared the doctrine that, whereas "when the total damage sustained has been paid by one tort-feasor, the damages cannot be duplicated through a recovery against another," nevertheless, "every infringer of a patent right may be made to give up whatever profits he has derived from the infringement, and . . . one in-

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[21] See also Hearing before the House Committee on Patents, 79th Cong., 2d Sess., on H. R. 5231 (subsequently amended, reintroduced, and reported as H. R. 5311), Jan. 29, 1946, *e. g.*, pp. 2–3.

fringer is not relieved by payment by another infringer, but each is accountable for the profits which he has received." *Hazeltine Corp.* v. *Atwater Kent Mfg. Co., supra,* 34 F. 2d 50, 52. Under such a rule, CTR might well argue that the payment received from Ford could have no effect in preventing it from recovering the profits made by Aro—which might even exceed the amount of a royalty on Aro's sales.

But the present statutory rule is that only "damages" may be recovered. These have been defined by this Court as "compensation for the pecuniary loss he [the patentee] has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts." *Coupe* v. *Royer,* 155 U. S. 565, 582. They have been said to constitute "the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred." *Yale Lock Mfg. Co.* v. *Sargent,* 117 U. S. 536, 552. The question to be asked in determining damages is "how much had the Patent Holder and Licensee suffered by the infringement. And that question [is] primarily: had the Infringer not infringed, what would Patent Holder-Licensee have made?" *Livesay Window Co.* v. *Livesay Industries, Inc., supra,* 251 F. 2d, at 471.

Thus, to determine the damages that may be recovered from Aro here, we must ask how much CTR suffered by Aro's infringement—how much it would have made if Aro had not infringed. Asking that question, we may assume first that the agreement of July 21, 1955, did not exist and that AB had not collected a cent from Ford. Even on that assumption, we would find it difficult to see why CTR's damages should be measured by a royalty on Aro's sales. CTR and AB were not deprived of such a royalty by Aro's infringement, for they could not have licensed Aro's sales in any event; they

were denied the right to do so in *Aro I*, and would still be denied it even if they had received no royalties on the patented combinations themselves. For the right could not be granted without allowing the patentee to "derive its profit, not from the invention on which the law gives it a monopoly but from the unpatented supplies with which it is used . . . ." *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 517; *Mercoid Corp.* v. *Mid-Continent Investment Co., supra,* 320 U. S., at 666–667. It would be absurd to say that what CTR could not recover from Aro in *Aro I* after it had licensed General Motors, it could recover here if it had stood by and let Ford infringe—as it apparently did, see p. 511, *infra*—and had then brought suit against Aro *before* settling with Ford. The rules prohibiting extension of the patent monopoly to unpatented elements are not so readily circumvented. This does not mean, of course, that CTR would have no remedy for Aro's contributory infringement. It could in a proper case obtain an injunction; it could recover such damages as had actually been suffered from the contributory infringement by virtue of the prolongation of the use of the infringing automobiles; it could in a case of willful or bad-faith infringement recover punitive or "increased" damages under the statute's trebling provision; and it could perhaps—we express no view on the question—recover from Aro a royalty on Ford's sales of the patented top-structures, even though such damages were primarily caused not by Aro's infringement but by Ford's, in a case where they could not be recovered from Ford or Ford's customers. It is difficult to conceive of any instance, however, in which actual damages could properly be based on a royalty on sales of an unpatented article used merely to repair the patented structure.

If CTR thus could not collect a royalty on Aro's sales in the absence of any payment from Ford, it surely can-

not do so here after AB, in return for $73,000, has released Ford and Ford's customers from liability for the direct infringement to which Aro contributed. Are there indeed any actual damages that CTR can recover from Aro after receiving $73,000 from Ford? The answer depends on whether CTR and AB suffered any loss by Aro's infringement—which depends in turn on how much they would have made if Aro had not infringed. But in view of the merely contributory nature of Aro's infringement, *this* leads in turn to the question how much CTR and AB would have made if *Ford* had not infringed; for in that event—as was held in *Aro I* with respect to the General Motors cars, and as we have held in Part II, *supra,* with respect to the post-agreement Ford car sales—Aro could not have contributorily infringed. If Ford had not infringed, AB would have made a royalty on Ford's sales of the patented top-structures—as it made such a royalty under its license to General Motors in *Aro I.* The amount that would thus have been received must be compared, however, with the amount that AB in fact received from Ford. We shall assume for the present—although CTR will have an opportunity to disprove the assumption upon remand—that the amount received by AB under the agreement was the same amount it would have received had it licensed Ford in the first place to produce the same number of convertible tops.[22] On this assumption, AB is just as well off now as it would have been if Ford had never infringed the patent. And since if Ford

[22] No answer was given by AB's counsel to the question how the $73,000 figure had been arrived at, except to say that it would have been larger if it had been intended to release contributory infringers as well. But the fact that paragraph 3 of the agreement provides for a 5% royalty on replacement tops, as the General Motors license agreement also apparently did, suggests that the effective royalty received from Ford for the right to make and sell the patented top-structures was the same as that received from General Motors.

had not infringed, Aro could not have contributorily infringed, it follows that what CTR and AB would have made if Aro had not infringed was precisely what they did make by virtue of the Ford agreement. Their pecuniary position was not rendered one cent worse by the total infringement to which Aro contributed, and hence they are not entitled—on the assumption stated above as to the payment by Ford—to anything more than nominal damages from Aro.

To allow recovery of a royalty on Aro's sales after receipt of the equivalent of a royalty on Ford's sales, or to allow any recovery from Aro after receipt of full satisfaction from Ford, would not only disregard the statutory provision for recovery of "damages" only, but would be at war with virtually every policy consideration in this area of the law. It would enable the patentee to derive a profit not merely on unpatented *rather than* patented goods—an achievement proscribed by the *Motion Picture Patents* and *Mercoid* cases, *supra*—but on unpatented *and* patented goods. In thus doubling the number of rewards to which a patentee is entitled "under our patent law as written," see MR. JUSTICE BLACK concurring in *Aro I*, 365 U. S., at 360, it would seriously restrict the purchaser's long-established right to use and repair an article which he has legally purchased and for the use of which the patentee has been compensated. See *Adams* v. *Burke*, 17 Wall. 453. The patentee could achieve this result, moreover, by the simple tactic of not licensing or suing the manufacturer in the first place, but rather standing by while the direct infringement occurs, thus allowing contributory infringements to spring up around him, with the result of bringing within the reach of his monopoly unpatented items that would never have been there if the manufacturer had been licensed from the start. And little is sacrificed, for it is almost always possible to sue or settle with the manufacturer at a later date. This

in fact seems to have been the strategy that AB employed here. It first sent Ford a notice of infringement—according to the deposition testimony of AB's own counsel—in late 1953, "a day or so after we got the patent." Yet it did nothing to stop Ford's infringement, and did not settle with Ford until 18 months later, by which time all the automobiles in question had been manufactured. In view of the apparently deliberate delay and of the unquestionably solvent status of the infringer, it indeed seems unlikely that the amount paid for the release was less than would have been paid under a license. In any event, the notion is intolerable that by such delay CTR and AB could entitle themselves to collect from Aro what they could not have collected had Ford been licensed from the start as General Motors was.

To achieve such a result through use of the contributory infringement doctrine would be especially ironic, in view of the purpose of that doctrine as set forth in case law and commentary and as presented to the Congress in urging passage of § 271 (c). That purpose is essentially, as was stated in the earlier versions of the bill that became § 271 (c), "to provide for the protection of patent rights where enforcement against direct infringers is impracticable," H. R. 5988, 80th Cong., 2d Sess.; H. R. 3866, 81st Cong., 1st Sess. At the hearings on § 271 (c) itself, Mr. Rich, see n. 6, *supra,* explained to the subcommittee that "There may be twenty or thirty percent of all the patents that are granted that cannot practically be enforced against direct infringers . . . ." Hearings, *supra,* n. 6, at 160.[23] Such a purpose might have been applicable here if CTR and AB had been unable to en-

[23] See also *Thomson-Houston Elec. Co.* v. *Ohio Brass Co., supra,* 80 F. 712, 721; Rep. Atty. Gen. Nat. Comm. to Study the Antitrust laws, *supra,* at 252; Rich, 21 Geo. Wash. L. Rev. 521, 542 (1953); Eastman, 48 Mich. L. Rev. 183, 187 (1949); Note, 66 Yale L. J. 132 (1956).

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force the patent against Ford (a rather unlikely event), since it would indeed have been impractical to sue every one of the car owners. But where the patentee has in fact enforced the patent against so solvent and accessible a direct infringer as Ford, it is difficult to see why it should then be allowed to invoke the contributory infringement doctrine—designed for cases "where enforcement against direct infringers is impracticable"—so as to enforce the patent a second time and obtain a reward that it could not extract from a direct infringer alone. Whatever the result might have been under the old "damages and profits" provision, no such perversion of the congressional purpose is possible within the rule allowing recovery of "damages" only.

Hence we think that after a patentee has collected from or on behalf of a direct infringer damages sufficient to put him in the position he would have occupied had there been no infringement, he cannot thereafter collect actual damages from a person liable only for contributing to the same infringement. This principle is but an application of the rule that full satisfaction received from one tortfeasor prevents further recovery against another. It is consistent with the Court's opinion in *Birdsell* v. *Shaliol, supra,* 112 U. S., at 488–489. See also *George Haiss Mfg. Co.* v. *Link-Belt Co.,* 63 F. 2d 479, 481 (C. A. 3d Cir. 1932); *Buerk* v. *Imhaeuser,* note 14, *supra,* 4 Fed. Cas. 597. And it is squarely in accord with a recent decision of the Court of Appeals for the Second Circuit. *Farrand Optical Co., Inc.,* v. *United States,* 325 F. 2d 328, 335 (C. A. 2d Cir. 1963). Nor is there any authority, even in lower courts, directly to the contrary. Of the many cases cited by CTR for the correct proposition that use or repair of an infringing structure constitutes infringement, relatively few deal at all with the question of amount of recovery. Some of these, it is true, do allow recovery on sales of infringing machines and a further

recovery on sales of spare parts for those machines. But they are all distinguishable; either the parts themselves were patented,[24] or the infringing parts-supplier had sold the machines as well and thus had arguably taken the sales of both machines and parts away from the patentee,[25] or the overlapping recovery allowed from the direct and contributory infringers was one of profits rather than damages.[26]

In the *Farrand* case, *supra,* the payment by the direct infringer was made under judicial decree, and there could thus be no question but that it represented full compensation for the infringing use. Where a private release of past infringement which does not purport to release others is involved, the adequacy of the compensation must always be a question of fact. Hence here, while it seems unlikely that Ford's payment under the agreement was any less than would have been paid under a license—that is, anything less than full satisfaction to AB for the infringing use committed directly by Ford's purchasers and contributorily by Aro—we think the case must nevertheless be remanded for findings on the question. We would also allow the lower courts to consider whether Aro's conduct has been such as to warrant an award of punitive or increased damages, although we think that very unlikely.

V.

The result is that the judgment of the Court of Appeals is reversed insofar as it holds Aro liable for contributory infringement with respect to replacement-fabric sales

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[24] *Reed Roller Bit Co.* v. *Hughes Tool Co.,* 12 F. 2d 207, 209, 210 (C. A. 5th Cir. 1926).

[25] *National Brake & Elec. Co.* v. *Christensen,* 38 F. 2d 721 (C. A. 7th Cir. 1930); *Graham* v. *Mason,* 10 Fed. Cas. 930 (No. 5,672) (C. C. D. Mass. 1872).

[26] *E. g., Conmar Products Corp.* v. *Tibony,* 63 F. Supp. 372, 374 (D. C. E. D. N. Y. 1945).

made after July 21, 1955. The judgment is affirmed insofar as it holds Aro liable with respect to sales made before that date, but subject to the reservation based on the knowledge requirement with respect to sales made before January 2, 1954. The case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring.

I agree with my Brother BLACK that the plain language and legislative history of § 271 (c) require the alleged contributory infringer to have knowledge of the infringing nature of the combination to which he is contributing a part. Otherwise I share MR. JUSTICE BRENNAN'S view of this case.

Section 271 (a) imposes no comparable requirement of knowledge in the case of the direct infringer who makes or uses the patented combination and § 287 does not say that one who makes or uses without knowledge is not infringing. It specifies that the "infringer" is not liable for damages until notice of the "infringement." In any event, § 287, as my Brother BRENNAN says, is not applicable here under *Wine Ry. Appliance Co.* v. *Enterprise Ry. Equipment Co.*, 297 U. S. 387, because the patentee has not manufactured the article and has had no opportunity to mark it in accordance with § 287.

Here the patentee gave notice to Aro and I think it is liable on Ford tops sold by it after that date, but not before, unless it had knowledge from other sources. After the notice date, the knowledge requirement of § 271 (c) was satisfied and the use of Ford cars by the owners thereof was direct infringement providing the necessary predicate for contributory infringement under § 271 (c).

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

For a number of reasons I would reverse the judgment, and reinstate the order of dismissal of the District Court.

I.

With regret I find it necessary to disagree with the inferences the Court draws from the past history of this case. Respondent Convertible held exclusive rights for Massachusetts in a combination patent on a convertible automobile top, the combination consisting of wood or metal supports, a fabric cover, and a mechanism to seal the fabric against the side of the automobile in order to keep out weather. None of the elements of the combination was patented or patentable. During the years in question General Motors Corporation and the Ford Motor Company manufactured automobiles with tops like those described in the patent. General Motors had a license from Convertible authorizing it to do so. Ford did not. Petitioner Aro manufactured and sold fabric replacement covers which were purchased by owners of both General Motors and Ford cars when the covers originally installed on the cars wore out. Convertible settled a claim it made against Ford for direct infringement, and did not sue Ford dealers or Ford car owners. It maintained also that the individual General Motors and Ford car owners who replaced their worn-out covers with Aro replacement covers by doing so directly infringed the combination patent. Convertible did not sue the individual car owners who patched or replaced the worn-out fabric, but it did bring this suit against Aro, charging that Aro by selling the replacement fabric thereby helped the individual car owners infringe and so became liable as a con-

tributory infringer under 35 U. S. C. § 271 (c).[1] The District Court held that the patent was valid and that Aro had been guilty of contributory infringement; it enjoined Aro from further alleged infringements and ordered an accounting to determine the damages due Convertible from Aro's sales of replacement fabrics to owners both of General Motors and of Ford cars. 119 U. S. P. Q. 122. The Court of Appeals affirmed the judgment, 270 F. 2d 200, and we granted certiorari to review it. We reversed the judgment. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336. We denied a petition for rehearing or alternative motion for amendment or clarification in which Convertible argued that our reversal applied only to replacements of General Motors, and not Ford, cars. 365 U. S. 890.

When the District Court received the mandate of this Court, it entered judgment dismissing the complaint on the ground that this Court's decision and mandate had reversed the prior judgment in its entirety. But Convertible appealed the dismissal to the Court of Appeals. That court said:

> "The puzzling question is whether the Supreme Court in reversing this court intended to reverse *in toto* or only to reverse insofar as replacement tops for General Motors cars were concerned." 312 F. 2d 52, 56 (C. A. 1st Cir.).

Thereupon the Court of Appeals, reversing the District Court's action taken in obedience to this Court's man-

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[1] "Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer." 66 Stat. 811, 35 U. S. C. § 271 (c).

date, held that this Court when it said *"Reversed"* at the end of its opinion had meant to reverse, not the entire judgment, but only that part of the judgment enjoining Aro from selling replacement fabrics for General Motors cars, which were made under licenses, and ordering an accounting for such sales in the past; the Court of Appeals said that this Court had in effect affirmed the earlier judgment insofar as that judgment concerned replacements for Ford fabrics. This Court today, in affirming the Court of Appeals' judgment, says:

> "Our decision dealt, however, only with the General Motors and not with the Ford cars." *Ante,* p. 479.

The Court's statement of what we did is, I think, completely refuted by the record in this case.

The opinion of the Court was delivered by Mr. Justice Whittaker. That opinion was joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE CLARK. The grounds for the Court's opinion, as I shall point out, applied alike to the repair of Ford cars which had originally been sold by the manufacturer without a license from Convertible, and to General Motors cars that had been sold with such a license. MR. JUSTICE BRENNAN, however, dissented from the grounds of the Court's opinion although he concurred in the judgment of reversal "except, however, as to the relief granted respondent in respect of the replacements made on Ford cars before July 21, 1955." 365 U. S., at 368. MR. JUSTICE HARLAN, joined by Justices Frankfurter and STEWART, dissented from the Court's opinion and from its judgment in its entirety. 365 U. S., at 369. His grounds for dissenting from the Court's opinion were substantially the same as those of MR. JUSTICE BRENNAN.[2]

[2] MR. JUSTICE BRENNAN's opinion said:

"My Brother HARLAN's dissent cogently states the reasons why I also think that is too narrow a standard of what constitutes impermissible 'reconstruction.'" 365 U. S., at 362.

The difference between MR. JUSTICE HARLAN'S dissent and MR. JUSTICE BRENNAN'S opinion concurring in the Court's judgment "except . . . as to the relief granted . . . in respect of the replacements made on Ford cars" was a very minor one: both agreed, contrary to what the Court decided, that a person could be held liable for contributory infringement of a combination patent, even though he furnished a replacement for only a part of the combination, if the part replaced was important enough for the substitution to amount to "reconstruction" rather than merely "repair" of the device; MR. JUSTICE BRENNAN, however, believed that the question whether there had been a "reconstruction" was for this Court to decide as a matter of law and that there had not been a "reconstruction" here, while MR. JUSTICE HARLAN said that the trial court's findings that there had been a "reconstruction" were decisive.

The difference in the approach of JUSTICES HARLAN and BRENNAN from that of Mr. Justice Whittaker, writing for the Court, is responsible, as I read the record, for the fact that while the Court reversed the former judgment in its entirety, MR. JUSTICE BRENNAN was willing to reverse it only as to replacement fabrics sold for General Motors cars. MR. JUSTICE BRENNAN believed that since the licensed General Motors cars as built did not directly infringe the patent and Aro contributed to what did not amount to a "reconstruction" of them, Aro as to them was not a contributory infringer; the Ford cars, however, were built by the manufacturer without a license from Convertible, so Ford and the purchasers who used its cars were allegedly direct infringers, and since Aro helped Ford owners continue to use infringing tops it was a contributory infringer even though the replacement covers did not "reconstruct" the tops. The Court, however, in Mr. Justice Whittaker's opinion, rejected completely the notion that there could ever be within the meaning of

§ 271 (c) any contributory infringement—whether based on a finding of "reconstruction" or on some other theory—in a case like this one, where the patent was merely a combination patent and the party which was sued for infringement had sold replacements for only a part of the combination. The Court's opinion relied on the fact that the fabric Aro used was not itself patented, that Convertible had made no claim to invention based on the fabric or its shape, pattern or design, and that a combination patent gave its owner a monopoly on nothing but the combination as a whole, since, Mr. Justice Whittaker said, "if anything is settled in the patent law, it is that the combination patent covers only the totality of the elements in the claim and that no element, separately viewed, is within the grant." 365 U. S., at 344. The effect of the Court's holding was that since the top fabric was not itself patented, Convertible could not extend its monopoly privileges regarding the combination as a whole to the unpatented fabric cover part of the top. Obviously, this holding of the Court and the reasons Mr. Justice Whittaker gave for it did not depend on whether the fabric was used on a Ford or on a General Motors car.

Mr. Justice Whittaker and the four members of the Court who joined him were, of course, familiar with the alleged distinction which Convertible tried to draw between its rights with reference to the General Motors licensed cars on the one hand and the Ford unlicensed cars on the other. The district judge in his opinion drew the distinction,[3] Convertible's brief in this Court drew the distinction,[4] and MR. JUSTICE BRENNAN drew the

[3] 119 U. S. P. Q., at 124.

[4] One of Convertible's argument headings read, "The Proposed Rules of Law Propounded By Aro and the Government Cannot, Under the Facts of This Case, Extend to Ford Cars." Brief for Respondent, *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, No. 21, 1960 Term, p. 73. The argument extended over the next several pages. *Id.*, pp. 73–76.

distinction in his opinion by concurring in the Court's judgment with respect to replacement fabrics for General Motors cars but dissenting with respect to those for Ford cars. It is apparent, therefore, that to the majority who joined in Mr. Justice Whittaker's opinion the asserted distinction was simply irrelevant, since Convertible as the holder of a combination patent could under no circumstances prevent others from making and supplying unpatented and unpatentable replacement parts for any element of the combination. The Court's opinion by Mr. Justice Whittaker made it crystal-clear that the Court was holding that with respect to combination patents like the one here,

> "No element, not itself separately patented, that constitutes one of the elements of a combination patent is entitled to patent monopoly, however essential it may be to the patented combination and no matter how costly or difficult replacement may be." 365 U. S., at 345.

Finally, the Court did not conclude its opinion with the words "reversed in part and affirmed in part," as it would have done if like MR. JUSTICE BRENNAN it had accepted Convertible's asserted distinction. The order in the opinion by Mr. Justice Whittaker was simply, *"Reversed,"* which meant *"Reversed,"* not "reversed in part and affirmed in part."

If all this could have left any doubt that the Court reversed the judgment of the Court of Appeals in its entirety rather than in part only, that doubt would certainly have been removed by the action taken on Convertible's petition for rehearing or alternative motion for amendment or clarification of the Court's judgment. This motion specifically pointed out the alleged distinction between Convertible's rights with respect to Aro's replace-

ment fabrics for the two kinds of cars. The Court denied the motion and the petition for rehearing, 365 U. S. 890, and in so doing rejected precisely the same argument [5] which today's Court is now accepting. Since the motion and petition for rehearing were rejected, five Justices must have found Convertible's arguments without merit. At that time, April 17, 1961, Mr. Justice Whittaker was still a member of the Court. It can be assumed that there were four votes for rehearing—those of MR. JUSTICE BRENNAN, who had not joined the Court's judgment with reference to the fabric replacements for Ford cars, and of MR. JUSTICE HARLAN, Mr. Justice Frankfurter, and MR. JUSTICE STEWART, who had dissented from the Court's opinion in its entirety. Four votes could not grant the motion or the petition for rehearing, but five votes—those of MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG—now reverse the earlier rulings of this Court. This is, of course, permissible, but there is no reason why today's action in departing from the prior holding should also be pointed to as, in the words the Court of Appeals used to describe our previous opinion, a "puzzling question." Compare *Legal Tender Cases*, 12 Wall. 457, overruling *Hepburn* v. *Griswold*, 8 Wall. 603. As to the merits of today's departure from our prior holding, I think that the old majority was right and the new majority is wrong, for all of the reasons set out in Mr. Justice Whittaker's opinion for the Court and in my concurring opinion, 365 U. S., at 346.

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[5] Respondent's Petition for a Limited Rehearing: or, in the Alternative, Motion for Amendment or Clarification of the Court's Opinion, *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, No. 21, 1960 Term, pp. 1–13. That the replacements for Ford cars should be treated differently from those for General Motors cars was the only argument made in the petition and motion.

II.

The Court now holds that although the fabric used on these car tops was unpatented and clearly unpatentable, the combination-patentee nevertheless is free to expand its monopoly beyond the patent's boundaries through preventing the sales of that single element, the unpatented fabric. The new majority relies largely on 35 U. S. C. § 271 (c), as did MR. JUSTICE HARLAN, Mr. Justice Frankfurter, MR. JUSTICE STEWART and MR. JUSTICE BRENNAN the first time this case was here. As I said, I am satisfied with the answers given to the new majority's interpretation of § 271 (c) by what was said in Mr. Justice Whittaker's opinion for the Court and in my concurrence. But since the new majority is now giving Convertible a legal monopoly over the unpatented fabric cover, I find it necessary to reach the constitutional question urged by Aro.

Article I, § 8 of 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." The granting of patent monopolies under this constitutional authority represents a very minor exception to the Nation's traditional policy of a competitive business economy, such as is safeguarded by the antitrust laws. When articles are not patentable and therefore are in the public domain, as these fabric covers were, to grant them a legally protected monopoly offends the constitutional plan of a competitive economy free from patent monopolies except where there are patentable "Discoveries." And the grant of a patent monopoly to the fabrics can no more be justified constitutionally by calling their sale by competitors "contributory infringement" than by giving it any other label. Cf. *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234; *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225.

III.

The Court holds, quite properly I think, that a patentee can get only one recovery for one infringement, no matter how many different persons take part in the infringement. In this case Ford, allegedly a direct infringer of the Convertible patent, made a settlement with Convertible for all past infringements in making its cars and obtained a license to use the patent in the future. The Court holds that while there can be only one recovery for the alleged infringement which Ford turned loose on the trade, Convertible should nevertheless have an opportunity to try to prove, if it can, that it settled with Ford for less than the full amount of its damages. This, I think, brings about an unjust result which the patent law does not compel. Here Ford, the principal infringer, obtained a complete release from all damages for its infringement, and I would hold that innocent purchasers of Ford cars containing the infringing devices are entitled to be released just as Ford has been. There is considerable merit and fairness in the idea that completely releasing from liability one of several persons, all of whom are obligated to another, releases them all. This is particularly so in the area of patent law, where the doctrine of contributory infringement is rested on the belief that a direct infringer may sometimes be collection-proof, and that in such a situation the patentee should be given a chance to collect its damages from a more solvent company which knowingly aided the infringement. The original infringement, if there was infringement here,[6] was Ford's. Fairness would require that if recovery can be had from the chief wrongdoer, here Ford, the first obligation of the injured person is to try to hold Ford com-

[6] For discussion of the doubtful validity of this combination patent, see my concurring opinion in the former decision of this case, 365 U. S., at 350–352.

pletely responsible. This should be particularly true in instances like this, where one company infringes a patent and sells goods which enter into the channels of trade throughout the Nation, thereby subjecting an untold number of innocent dealers, future purchasers, and even repairmen to damages. The statutory right to sue for infringement—involving treble damages, punitive damages, attorney's fees, etc.—should not be construed in a way that permits unnecessary harassment of people who have bought their goods in the open market place. I can think of nothing much more unfair than to visit the infringement sins of a large manufacturer upon the thousands of ultimate purchasers who buy or use its goods.

IV.

For the foregoing reasons I believe that Aro should not be held liable for any damages at all and that the District Court should be ordered to dismiss the case. A majority of the Court, however, remands the case for determination of whether and to what extent Aro is liable for damages. Whether Aro is liable for any damages at all depends on whether it and the persons to whose infringement Aro is alleged to have contributed can be held liable for damages even though they may have had no knowledge that a patent covered the top or that their conduct infringed or helped to infringe that patent. I would hold that unless there was such knowledge, there can be no infringement or contributory infringement.

Section 271 (c), the section dealing with contributory infringers (which Aro is alleged to be), provides that whoever sells a component of a patented combination "constituting a material part of the invention, *knowing* the same to be especially made or especially adapted for use in an infringement of such patent . . . shall be liable as

a contributory infringer." [7] Usually the word "knowing" means "knowing," and I am unwilling to say that in § 271 (c) it means "unknowing." This statute to me means rather plainly that in order to violate it, one who sells an article must *know* that the article is to be used "in an infringement of such patent" and that it is "especially made or especially adapted" for that purpose. Furthermore, the legislative history of the statute confirms this interpretation.

As originally drafted § 271 (c) provided:

> "Whoever *knowingly* sells a component of a patented . . . combination . . . , especially made or especially adapted for use in an infringement of such patent . . . shall be liable as a contributory infringer." [8]

Several times the House Committee considering the bill was told that because of the position of the word "knowingly" in the section it was not clear exactly how much a person had to be shown to have known before he could be held liable as a contributory infringer.[9] Some witnesses expressed fear that the section might be construed to mean that a person could be held liable for selling an article even though he did not know that it was adapted for use in a patented device and that it would be used in an infringement.[10] On the other hand, advocates of a

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[7] (Emphasis supplied.)

[8] § 231 (c), H. R. 3760, 82d Cong., 1st Sess. (Emphasis supplied.)

[9] See, *e. g.*, Hearings before Subcommittee No. 3, Committee on the Judiciary, on H. R. 3760, 82d Cong., 1st Sess., Ser. No. 9, p. 215.

[10] The chief engineer and chairman of the board of a company which manufactures instruments to customers' specifications testified: "We make a large number of devices and people come to us in the industry from distant points. . . . When you realize that there are some 600,000 patents and millions of claims involved under the present status of this bill, . . . and we become liable as contributory

broad liability for contributory infringement said that there should be required only knowledge that an article was to be used in a particular device—that a person would be liable as a contributory infringer even if he did not know of the existence of any patent and of any likely infringement.[11] After hearing both sides the House Committee changed the language of the bill to read, as § 271 (c) now provides:

> "Whoever sells a component of a patented . . . combination . . . , *knowing* the same to be especially

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infringers, you can see it would be impossible for us to know in all cases whether we infringed or not. . . .

" 'Knowingly sells' will thus become highly controversial, and it will be construed by various patent lawyers to meet their particular situation." *Id.*, at 141–142.

When a witness from the Antitrust Division of the Justice Department raised the same objection, the following exchange took place:

"[Congressman] BRYSON. It seems to me that if he sells it at all he knows he sells it.

"Mr. FUGATE [of the Justice Department]. He knows he sells it; but, as in this case that I mentioned, the cutter of the metal plate according to a special pattern didn't know that that was to be used in an infringing manner, that it was to be used in a patented combination.

"[Congressman] ROGERS. Inasmuch as you recognize that the law still gives a cause of action against the contributor who helps infringe, would there be any objection on the part of the Justice Department to clarify that law in definite words so that there would not be the confusion that the gentlemen have testified to?" *Id.*, at 164–165.

[11] Mr. Giles S. Rich of the National Council of Patent Law Associations stated:

" '[K]nowingly sells a component of a patented machine' means to us that you know that the component is going into that machine. You don't have to know that it is patented. You don't have to know the number of the patent, and you don't have to know that the machine that it is going into constitutes an infringement. You just know its ultimate destination." *Id.*, at 175.

> made or especially adapted for use in an infringement of such patent . . . shall be liable as a contributory infringer." [12]

Both the House and Senate reports explained that

> "This latter paragraph is much more restricted than many proponents of contributory infringement believe should be the case. The sale of a component of a patented machine, etc., must constitute a material part of the invention and must be known to be especially made or especially adapted for use in the infringement before there can be contributory infringement . . . ." [13]

The House Committee thus attempted to make clear that innocent persons, who acted without any knowledge that the goods they sold were adapted for use in the infringement of a patent which they knew about, could not be held liable as contributory infringers. It is hard to believe that Congress intended to hold persons liable for acts which they had no reason to suspect were unlawful, and as I have pointed out the legislative history shows Congress did not. Therefore I am wholly unwilling to construe the section as meaning that one who sells an unpatented and unpatentable piece of fabric to be used to repair an automobile top can be held liable for treble damages as a contributory infringer even though he had absolutely no knowledge that there was a patent on the top and that the top had been sold without a license, and could not, because of this lack of knowledge, have sold the top "knowing the same to be especially made or especially adapted for use in an infringement of such patent."

Furthermore, to justify its result the Court today in defining "contributory infringement" expands the cover-

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[12] (Emphasis supplied.)

[13] H. R. Rep. No. 1923, 82d Cong., 2d Sess., p. 9; S. Rep. No. 1979, 82d Cong., 2d Sess., p. 8.

age of § 271 (a), which deals with "direct infringement," so as to make every consumer or repairman who innocently buys or repairs an unmarked article which infringes a patent liable for damages as a direct infringer. In order for there to be contributory infringement, the Court admits, there must be a direct infringement which the alleged contributory infringer has aided. Here Ford was a direct infringer, but Aro sold nothing to Ford. And so, in order to find a direct infringer who used Aro fabrics, and thereby justify its result, the Court says that any individual who buys a product such as an automobile from an infringing manufacturer and devotes it to his personal use is without more liable as a direct infringer of the patent under § 271 (a)—even though he did not know that the manufacturer of the product had infringed some patent, indeed, even though he perhaps did not know what a patent is.

The Court's interpretation of § 271 (a) concerning the lack of necessity for knowledge before a person can be mulcted in damages for direct infringement is strangely inconsistent with another provision of the patent code, 35 U. S. C. § 287,[14] which states in unequivocal, easily understood language that "no damages shall be recovered by the patentee in any action for infringement, except

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[14] "Patentees, and persons making or selling any patented article for or under them, may give notice to the public that the same is patented, either by fixing thereon the word 'patent' or the abbreviation 'pat.', together with the number of the patent, or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice." 66 Stat. 813, 35 U. S. C. § 287.

on proof that the infringer was notified of the infringement and continued to infringe thereafter." Yet the Court here is holding, with no support in any judicial precedent [15] and certainly none in common sense or justice, that innocent consumers of patented products and those who equally innocently do no more than repair worn-out parts can be subjected to punitive or treble damages even though they neither knew nor suspected that any patent forbade them to buy, use or repair those products. It would be one thing to require those who sell new inventions for profit to check the records of the Patent Office. It is quite another to hold, as the Court now does, that every housewife, plumber, and auto repairman must do so.

The tremendous burden that the Court's construction of the patent laws will put on innocent bona fide dealers in or purchasers of unpatented products (if Congress does not change the Court's ruling) cannot be accurately predicted. The number of patented appliances of various kinds in automobiles is certainly not small. Just a few of those that have appeared in litigation in the courts are

[15] The cases which the Court cites as contrary to this view neither considered nor decided the issue whether innocent persons entirely unaware that their conduct would either infringe or contribute to the infringement of a patent can be held liable as direct or contributory infringers. *Wine Ry. Appliance Co.* v. *Enterprise Ry. Equipment Co.*, 297 U. S. 387, held that a primary infringer, like Ford here, which ordered manufactured for itself and which sold for profit a patented door-latch could not escape liability for infringement simply because a statutory notice of the patent was not marked on the infringing latches. The Court pointed out that the patentee had never had an opportunity to attach a notice because the infringer was producing the latches without the patentee's knowledge. The situation in the case before us, involving an asserted liability of consumers of unmarked goods, rather than a seller of those goods for profit, does not even remotely resemble that in *Wine*. In none of the other cases relied on was § 287 interpreted or even considered by the Court.

windshield sun visors, wheel attachments, drive-shaft bushing assemblies, automobile heaters and windshield defrosters, steering stabilizers, shock absorbers, pistons, steering gear checks, steering wheels, radiator shields, clutch release thrust bearings, mountings for rear-view mirrors, vacuum-operated gear-shift mechanisms, spark plug and coil connectors, wire springs for upholstered seat structures, steering gear idler arms, windshield wiper blade assemblies, and others.[16] After the Court's opinion in this case it will certainly behoove purchasers of new or second-hand cars and repair shops which mend those cars to hire experts, if they can find them, in order to try to ascertain whether or not any car which they have bought (maybe on credit from a second-hand dealer) or are asked to repair is a booby trap waiting to subject them to suits for infringement by reason of some one of the car's patented appliances, the name or existence of which the owner of the car may not even suspect. And automobiles are of course not the only equipment in which ordinary purchasers use patented devices. Purchasers of homes equipped with modern appliances, as well as millions of buyers of consumer goods in general, may soon be made unhappily aware of the broad scope of patent monopolies as interpreted by this Court. Entrepreneurs in the new corporate business of suing for infringements (Aro claimed that Convertible was such a corporation, set up with no other function) may soon become as common as patents themselves.

Neither the language nor the purpose of the patent laws requires that they be construed to bring about such threats on so wide a scale to the free functioning of our business economy and to purchasers of patented appliances who are wholly innocent of any intention to infringe patents. I do not believe that in construing the patent

[16] See 35 U. S. C. A. § 271, n. 139.

laws we should attribute to Congress the purpose of bringing about such unreasonable, absurd and wholly unjust results. Cf. *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 542–544; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 459. I cannot believe that Congress intended to subject to damages thousands of ultimate consumers who do not know and have no reason to suspect that lawsuits are lurking in every patented contrivance concealed somewhere within the hidden recesses of their automobiles.

I would reverse the judgment of the Court of Appeals and send the case back to the District Court with instructions to dismiss it.

TACOMA ASSOCIATION OF CREDIT MEN *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 995. Decided June 8, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 62 Wash. 2d 534, 383 P. 2d 910.

Ofell H. Johnson for appellant.

John J. O'Connell, Attorney General of Washington, and *James A. Furber* and *Henry W. Wager,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

REYNOLDS, JUDGE, ET AL. *v.* SIMS ET AL.

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

No. 23. Argued November 13, 1963.—Decided June 15, 1964.*

Charging that malapportionment of the Alabama Legislature deprived them and others similarly situated of rights under the Equal Protection Clause of the Fourteenth Amendment and the Alabama Constitution, voters in several Alabama counties brought suit against various officials having state election duties. Complainants sought a declaration that the existing state legislative apportionment provisions were unconstitutional; an injunction against future elections pending reapportionment in accordance with the State Constitution; or, absent such reapportionment, a mandatory injunction requiring holding the 1962 election for legislators at large over the entire State. The complaint alleged serious discrimination against voters in counties whose populations had grown proportionately far more than others since the 1900 census which, despite Alabama's constitutional requirements for legislative representation based on population and for decennial reapportionment, formed the basis for the existing legislative apportionment. Pursuant to the 1901 constitution the legislature consisted of 106 representatives and 35 senators for the State's 67 counties and senatorial districts; each county was entitled to at least one representative; each senate district could have only one member; and no county could be divided between two senate districts. A three-judge Federal District Court declined ordering the May 1962 primary election to be held at large, stating that it should not act before the legislature had further opportunity to take corrective measures before the general election. Finding after a hearing that neither of two apportionment plans which the legislature thereafter adopted, to become effective in 1966, would cure the gross inequality and invidious discrimination of the existing representation, which all parties generally conceded violated the Equal Protection Clause, and that the complainants' votes were unconstitutionally debased under all of the three plans at issue, the District Court ordered temporary reapportionment for the 1962 general

*Together with No. 27, *Vann et al.* v. *Baggett, Secretary of State of Alabama, et al.*, and No. 41, *McConnell et al.* v. *Baggett, Secretary of State of Alabama, et al.*, also on appeal from the same court.

election by combining features of the two plans adopted by the legislature, and enjoined officials from holding future elections under any of the invalid plans. The officials appealed, claiming that the District Court erred in holding unconstitutional the existing and proposed reapportionment plans and that a federal court lacks power affirmatively to reapportion a legislature; two groups of complainants also appealed, one claiming error in the District Court's failure to reapportion the Senate according to population, the other claiming error in its failure to reapportion both houses on a population basis. *Held:*

1. The right of suffrage is denied by debasement or dilution of a citizen's vote in a state or federal election. Pp. 554–555.

2. Under the Equal Protection Clause a claim of debasement of the right to vote through malapportionment presents a justiciable controversy; and the Equal Protection Clause provides manageable standards for lower courts to determine the constitutionality of a state legislative apportionment scheme. *Baker* v. *Carr,* 369 U. S. 186, followed. Pp. 556–557.

3. The Equal Protection Clause requires substantially equal legislative representation for all citizens in a State regardless of where they reside. Pp. 561–568.

(a) Legislators represent people, not areas. P. 562.

(b) Weighting votes differently according to where citizens happen to reside is discriminatory. Pp. 563–568.

4. The seats in both houses of a bicameral legislature must under the Equal Protection Clause be apportioned substantially on a population basis. Pp. 568–576.

5. The District Court correctly held that the existing Alabama apportionment scheme and both of the proposed plans are constitutionally invalid since neither legislative house is or would thereunder be apportioned on a population basis. Pp. 568–571.

6. The superficial resemblance between one of the Alabama apportionment plans and the legislative representation scheme of the Federal Congress affords no proper basis for sustaining that plan since the historical circumstances which gave rise to the congressional system of representation, arising out of compromise among sovereign States, are unique and without relevance to the allocation of seats in state legislatures. Pp. 571–577.

7. The federal constitutional requirement that both houses of a state legislature must be apportioned on a population basis means that, as nearly as practicable, districts be of equal population, though mechanical exactness is not required. Somewhat more

flexibility may be constitutionally permissible for state legislative apportionment than for congressional districting. Pp. 577–581.

(a) A state legislative apportionment scheme may properly give representation to various political subdivisions and provide for compact districts of contiguous territory if substantial equality among districts is maintained. Pp. 578–579.

(b) Some deviations from a strict equal-population principle are constitutionally permissible in the two houses of a bicameral state legislature, where incident to the effectuation of a rational state policy, so long as the basic standard of equality of population among districts is not significantly departed from. P. 579.

(c) Considerations of history, economic or other group interests, or area alone do not justify deviations from the equal-population principle. Pp. 579–580.

(d) Insuring some voice to political subdivisions in at least one legislative body may, within reason, warrant some deviations from population-based representation in state legislatures. Pp. 580–581.

8. In admitting States into the Union, Congress does not purport to pass on all constitutional questions concerning the character of state governmental organization, such as whether a state legislature's apportionment departs from the equal-population principle; in any case, congressional approval could not validate an unconstitutional state legislative apportionment. P. 582.

9. States consistently with the Equal Protection Clause can properly provide for periodic revision of reapportionment schemes, though revision less frequent than decennial would be constitutionally suspect. Pp. 583–584.

10. Courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions as far as possible, provided that such provisions harmonize with the Equal Protection Clause. P. 584.

11. A court in awarding or withholding immediate relief should consider the proximity of a forthcoming election and the mechanics and complexities of election laws, and should rely on general equitable principles. P. 585.

12. The District Court properly exercised its judicial power in this case by ordering reapportionment of both houses of the Alabama Legislature for purposes of 1962 elections as a temporary measure by using the best parts of the two proposed plans, each of which it had found, as a whole, invalid, and in retaining jurisdiction while deferring a hearing on the issuance of a final injunc-

tion to give the reapportioned legislature an opportunity to act effectively. Pp. 586–587.

208 F. Supp. 431, affirmed and remanded for further proceedings.

W. McLean Pitts argued the cause for appellants in No. 23 and for appellees in Nos. 27 and 41. With him on the briefs were *Joseph E. Wilkinson, Jr.* and *Thomas G. Gayle.*

David J. Vann argued the cause for appellants in No. 27. With him on the brief were *Robert S. Vance* and *C. H. Erskine Smith.*

John W. McConnell, Jr. argued the cause and filed a brief for appellants in No. 41.

Appellee *Richmond M. Flowers,* Attorney General of Alabama, argued the cause *pro se.* With him on the brief was *Gordon Madison,* Assistant Attorney General.

Charles Morgan, Jr. argued the cause for appellees in No. 23. With him on the brief for appellees Sims et al. was *George Peach Taylor. Jerome A. Cooper* filed a brief for appellees Farr et al.

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging affirmance. With him on the brief were *Bruce J. Terris* and *Richard W. Schmude.*

Briefs of *amici curiae* were filed by *Leo Pfeffer, Melvin L. Wulf, Jack Greenberg* and *Robert B. McKay* for the American Jewish Congress et al., and by *W. Scott Miller, Jr.* and *George J. Long* for Schmied, President of the Board of Aldermen of Louisville, Kentucky.

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

Involved in these cases are an appeal and two cross-appeals from a decision of the Federal District Court for the Middle District of Alabama holding invalid, under

the Equal Protection Clause of the Federal Constitution, the existing and two legislatively proposed plans for the apportionment of seats in the two houses of the Alabama Legislature, and ordering into effect a temporary reapportionment plan comprised of parts of the proposed but judicially disapproved measures.[1]

I.

On August 26, 1961, the original plaintiffs (appellees in No. 23), residents, taxpayers and voters of Jefferson County, Alabama, filed a complaint in the United States District Court for the Middle District of Alabama, in their own behalf and on behalf of all similarly situated Alabama voters, challenging the apportionment of the Alabama Legislature. Defendants below (appellants in No. 23), sued in their representative capacities, were various state and political party officials charged with the performance of certain duties in connection with state elections.[2] The complaint alleged a deprivation of rights under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment, and asserted that the District Court had jurisdiction under provisions of the Civil Rights Act, 42 U. S. C. §§ 1983, 1988, as well as under 28 U. S. C. § 1343 (3).

The complaint stated that the Alabama Legislature was composed of a Senate of 35 members and a House of Representatives of 106 members. It set out relevant portions of the 1901 Alabama Constitution, which prescribe the number of members of the two bodies of the

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[1] *Sims* v. *Frink*, 208 F. Supp. 431 (D. C. M. D. Ala. 1962). All decisions of the District Court in this litigation are reported *sub nom. Sims* v. *Frink*.

[2] Included among the defendants were the Secretary of State and the Attorney General of Alabama, the Chairmen and Secretaries of the Alabama State Democratic Executive Committee and the State Republican Executive Committee, and three Judges of Probate of three counties, as representatives of all the probate judges of Alabama.

State Legislature and the method of apportioning the seats among the State's 67 counties, and provide as follows:

> Art. IV, Sec. 50. "The legislature shall consist of not more than thirty-five senators, and not more than one hundred and five members of the house of representatives, to be apportioned among the several districts and counties, as prescribed in this Constitution; provided that in addition to the above number of representatives, each new county hereafter created shall be entitled to one representative."
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> Art. IX, Sec. 197. "The whole number of senators shall be not less than one-fourth or more than one-third of the whole number of representatives."
>
> Art. IX, Sec. 198. "The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken."
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> Art. IX, Sec. 199. "It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively; provided, that

each county shall be entitled to at least one representative."

Art. IX, Sec. 200. "It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other."

Art. XVIII, Sec. 284. ". . . Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments."

The maximum size of the Alabama House was increased from 105 to 106 with the creation of a new county in 1903, pursuant to the constitutional provision which states that, in addition to the prescribed 105 House seats, each county thereafter created shall be entitled to one representative. Article IX, §§ 202 and 203, of the Alabama Constitution established precisely the boundaries of the State's senatorial and representative districts until the enactment of a new reapportionment plan by the legislature. These 1901 constitutional provisions, specifically describing the composition of the senatorial

districts and detailing the number of House seats allocated to each county, were periodically enacted as statutory measures by the Alabama Legislature, as modified only by the creation of an additional county in 1903, and provided the plan of legislative apportionment existing at the time this litigation was commenced.[3]

Plaintiffs below alleged that the last apportionment of the Alabama Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially. They asserted that, since the population growth in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination with respect to the allocation of legislative representation. As a result of the failure of the legislature to reapportion itself, plaintiffs asserted, they were denied "equal suffrage in free and equal elections . . . and the equal protection of the laws" in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution. The complaint asserted that plaintiffs had no other adequate remedy, and that they had exhausted all forms of relief other than that available through the federal courts. They alleged that the Alabama Legislature had established a pattern of prolonged inaction from 1911 to the present which "clearly demonstrates that no reapportionment . . . shall be effected"; that representation at any future constitutional convention would be established by the legislature, making it unlikely that the membership of any such convention would be fairly representative; and that, while the Alabama Supreme Court had found that the legislature had not complied with the State Constitution in failing to reapportion according

[3] Provisions virtually identical to those contained in Art. IX, §§ 202 and 203, were enacted into the Alabama Codes of 1907 and 1923, and were most recently reenacted as statutory provisions in §§ 1 and 2 of Tit. 32 of the 1940 Alabama Code (as recompiled in 1958).

to population decennially,[4] that court had nevertheless indicated that it would not interfere with matters of legislative reapportionment.[5]

Plaintiffs requested that a three-judge District Court be convened.[6] With respect to relief, they sought a declaration that the existing constitutional and statutory provisions, establishing the present apportionment of seats in the Alabama Legislature, were unconstitutional under the Alabama and Federal Constitutions, and an injunction against the holding of future elections for legislators until the legislature reapportioned itself in accordance with the State Constitution. They further requested the issuance of a mandatory injunction, effective until such time as the legislature properly reapportioned, requiring the conducting of the 1962 election for legislators at large over the entire State, and any other relief which "may seem just, equitable and proper."

A three-judge District Court was convened, and three groups of voters, taxpayers and residents of Jefferson, Mobile, and Etowah Counties were permitted to inter-

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[4] See *Opinion of the Justices,* 263 Ala. 158, 164, 81 So. 2d 881, 887 (1955), and *Opinion of the Justices,* 254 Ala. 185, 187, 47 So. 2d 714, 717 (1950), referred to by the District Court in its preliminary opinion. 205 F. Supp. 245, 247.

[5] See *Ex parte Rice,* 273 Ala. 712, 143 So. 2d 848 (1962), where the Alabama Supreme Court, on May 9, 1962, subsequent to the District Court's preliminary order in the instant litigation as well as our decision in *Baker* v. *Carr,* 369 U. S. 186, refused to review a denial of injunctive relief sought against the conducting of the 1962 primary election until after reapportionment of the Alabama Legislature, stating that "this matter is a legislative function, and . . . the Court has no jurisdiction. . . ." And in *Waid* v. *Pool,* 255 Ala. 441, 51 So. 2d 869 (1951), the Alabama Supreme Court, in a similar suit, had stated that the lower court had properly refused to grant injunctive relief because "appellants . . . are seeking interference by the judicial department of the state in respect to matters committed by the constitution to the legislative department." 255 Ala., at 442, 51 So. 2d, at 870.

[6] Under 28 U. S. C. §§ 2281 and 2284.

vene in the action as intervenor-plaintiffs. Two of the groups are cross-appellants in Nos. 27 and 41. With minor exceptions, all of the intervenors adopted the allegations of and sought the same relief as the original plaintiffs.

On March 29, 1962, just three days after this Court had decided *Baker* v. *Carr*, 369 U. S. 186, plaintiffs moved for a preliminary injunction requiring defendants to conduct at large the May 1962 Democratic primary election and the November 1962 general election for members of the Alabama Legislature. The District Court set the motion for hearing in an order stating its tentative views that an injunction was not required before the May 1962 primary election to protect plaintiffs' constitutional rights, and that the Court should take no action which was not "absolutely essential" for the protection of the asserted constitutional rights before the Alabama Legislature had had a "further reasonable but prompt opportunity to comply with its duty" under the Alabama Constitution.

On April 14, 1962, the District Court, after reiterating the views expressed in its earlier order, reset the case for hearing on July 16, noting that the importance of the case, together with the necessity for effective action within a limited period of time, required an early announcement of its views. 205 F. Supp. 245. Relying on our decision in *Baker* v. *Carr*, the Court found jurisdiction, justiciability and standing. It stated that it was taking judicial notice of the facts that there had been population changes in Alabama's counties since 1901, that the present representation in the State Legislature was not on a population basis, and that the legislature had never reapportioned its membership as required by the Alabama Constitution.[7] Continuing, the Court stated

[7] During the over 60 years since the last substantial reapportionment in Alabama, the State's population increased from 1,828,697 to

that if the legislature complied with the Alabama constitutional provision requiring legislative representation to be based on population there could be no objection on federal constitutional grounds to such an apportionment. The Court further indicated that, if the legislature failed to act, or if its actions did not meet constitutional standards, it would be under a "clear duty" to take some action on the matter prior to the November 1962 general election. The District Court stated that its "present thinking" was to follow an approach suggested by MR. JUSTICE CLARK in his concurring opinion in *Baker* v. *Carr* [8]—awarding seats released by the consolidation or revamping of existing districts to counties suffering "the most egregious discrimination," thereby releasing the strangle hold on the legislature sufficiently so as to permit the newly elected body to enact a constitutionally valid and permanent reapportionment plan, and allowing eventual dismissal of the case. Subsequently, plaintiffs were permitted to amend their complaint by adding a further prayer for relief, which asked the District Court to reapportion the Alabama Legislature provisionally so that the rural strangle hold would be relaxed enough to permit it to reapportion itself.

On July 12, 1962, an extraordinary session of the Alabama Legislature adopted two reapportionment plans to take effect for the 1966 elections. One was a proposed constitutional amendment, referred to as the "67-Senator Amendment." [9] It provided for a House of Representatives consisting of 106 members, apportioned by giving

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3,244,286. Virtually all of the population gain occurred in urban counties, and many of the rural counties incurred sizable losses in population.

[8] See 369 U. S., at 260 (CLARK, J., concurring).

[9] Proposed Constitutional Amendment No. 1 of 1962, Alabama Senate Bill No. 29, Act No. 93, Acts of Alabama, Special Session, 1962, p. 124. The text of the proposed amendment is set out as Appendix B to the lower court's opinion. 208 F. Supp., at 443–444.

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one seat to each of Alabama's 67 counties and distributing the others according to population by the "equal proportions" method.[10] Using this formula, the constitutional amendment specified the number of representatives allotted to each county until a new apportionment could be made on the basis of the 1970 census. The Senate was to be composed of 67 members, one from each county. The legislation provided that the proposed amendment should be submitted to the voters for ratification at the November 1962 general election.

The other reapportionment plan was embodied in a statutory measure adopted by the legislature and signed into law by the Alabama Governor, and was referred to as the "Crawford-Webb Act." [11] It was enacted as standby legislation to take effect in 1966 if the proposed constitutional amendment should fail of passage by a majority of the State's voters, or should the federal courts refuse to accept the proposed amendment (though not rejected by the voters) as effective action in compliance with the requirements of the Fourteenth Amendment. The act provided for a Senate consisting of 35 members, representing 35 senatorial districts established along county lines, and altered only a few of the former districts. In apportioning the 106 seats in the Alabama House of Representatives, the statutory measure gave each county one seat, and apportioned the remaining 39 on a rough population basis, under a formula requiring increasingly more population for a county to be accorded

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[10] For a discussion of this method of apportionment, used in distributing seats in the Federal House of Representatives among the States, and other commonly used apportionment methods, see Schmeckebier, The Method of Equal Proportions, 17 Law & Contemp. Prob. 302 (1952).

[11] Alabama Reapportionment Act of 1962, Alabama House Bill No. 59, Act No. 91, Acts of Alabama, Special Session, 1962, p. 121. The text of the act is reproduced as Appendix C to the lower court's opinion. 208 F. Supp., at 445–446.

additional seats. The Crawford-Webb Act also provided that it would be effective "until the legislature is reapportioned according to law," but provided no standards for such a reapportionment. Future apportionments would presumably be based on the existing provisions of the Alabama Constitution which the statute, unlike the proposed constitutional amendment, would not affect.

The evidence adduced at trial before the three-judge panel consisted primarily of figures showing the population of each Alabama county and senatorial district according to the 1960 census, and the number of representatives allocated to each county under each of the three plans at issue in the litigation—the existing apportionment (under the 1901 constitutional provisions and the current statutory measures substantially reenacting the same plan), the proposed 67-Senator constitutional amendment, and the Crawford-Webb Act. Under all three plans, each senatorial district would be represented by only one senator.

On July 21, 1962, the District Court held that the inequality of the existing representation in the Alabama Legislature violated the Equal Protection Clause of the Fourteenth Amendment, a finding which the Court noted had been "generally conceded" by the parties to the litigation, since population growth and shifts had converted the 1901 scheme, as perpetuated some 60 years later, into an invidiously discriminatory plan completely lacking in rationality. 208 F. Supp. 431. Under the existing provisions, applying 1960 census figures, only 25.1% of the State's total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives. Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House. Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two seats

in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had only seven representatives.[12] With respect to senatorial apportionment, since the pertinent Alabama constitutional provisions had been consistently construed as prohibiting the giving of more than one Senate seat to any one county,[13] Jefferson County, with over 600,000 people, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 people.[14]

The Court then considered both the proposed constitutional amendment and the Crawford-Webb Act to ascer-

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[12] A comprehensive chart showing the representation by counties in the Alabama House of Representatives under the existing apportionment provisions is set out as Appendix D to the lower court's opinion. 208 F. Supp., at 447–449. This chart includes the number of House seats given to each county, and the populations of the 67 Alabama counties under the 1900, 1950, and 1960 censuses.

[13] Although cross-appellants in No. 27 assert that the Alabama Constitution forbids the division of a county, in forming senatorial districts, only when one or both pieces will be joined with another county to form a multicounty district, this view appears to be contrary to the language of Art. IX, § 200, of the Alabama Constitution and the practice under it. Cross-appellants contend that counties entitled by population to two or more senators can be split into the appropriate number of districts, and argue that prior to the adoption of the 1901 provisions the Alabama Constitution so provided and there is no reason to believe that the language of the present provision was intended to effect any change. However, the only apportionments under the 1901 Alabama Constitution—the 1901 provisions and the Crawford-Webb Act—gave no more than one seat to a county even though by population several counties would have been entitled to additional senatorial representation.

[14] A chart showing the composition, by counties, of the 35 senatorial districts provided for under the existing apportionment, and the population of each according to the 1900, 1950, and 1960 censuses, is reproduced as Appendix E to the lower court's opinion. 208 F. Supp., at 450.

tain whether the legislature had taken effective action to remedy the unconstitutional aspects of the existing apportionment. In initially summarizing the result which it had reached, the Court stated:

> "This Court has reached the conclusion that neither the '67-Senator Amendment,' nor the 'Crawford-Webb Act' meets the necessary constitutional requirements. We find that each of the legislative acts, when considered as a whole, is so obviously discriminatory, arbitrary and irrational that it becomes unnecessary to pursue a detailed development of each of the relevant factors of the [federal constitutional] test." [15]

The Court stated that the apportionment of one senator to each county, under the proposed constitutional amendment, would "make the discrimination in the Senate even more invidious than at present." Under the 67-Senator Amendment, as pointed out by the court below, "[t]he present control of the Senate by members representing 25.1% of the people of Alabama would be reduced to control by members representing 19.4% of the people of the State," the 34 smallest counties, with a total population of less than that of Jefferson County, would have a majority of the senatorial seats, and senators elected by only about 14% of the State's population could prevent the submission to the electorate of any future proposals to amend the State Constitution (since a vote of two-fifths of the members of one house can defeat a proposal to amend the Alabama Constitution). Noting that the "only conceivable rationalization" of the senatorial apportionment scheme is that it was based on equal representation of political subdivisions within the State and is thus analogous to the Federal Senate, the District Court rejected the analogy on the ground that Alabama

[15] 208 F. Supp., at 437.

counties are merely involuntary political units of the State created by statute to aid in the administration of state government. In finding the so-called federal analogy irrelevant, the District Court stated:

> "The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties." [16]

The Court also noted that the senatorial apportionment proposal "may not have complied with the State Constitution," since not only is it explicitly provided that the population basis of legislative representation "shall not be changed by constitutional amendments," [17] but the Alabama Supreme Court had previously indicated that that requirement could probably be altered only by constitutional convention.[18] The Court concluded, however, that the apportionment of seats in the Alabama House, under the proposed constitutional amendment, was "based upon reason, with a rational regard for known and accepted

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[16] *Id.*, at 438.

[17] According to the District Court, in the interval between its preliminary order and its decision on the merits, the Alabama Legislature, despite adopting this constitutional amendment proposal, "refused to inquire of the Supreme Court of the State of Alabama whether this provision in the Constitution of the State of Alabama could be changed by constitutional amendment as the '67-Senator Amendment' proposes." 208 F. Supp., at 437.

[18] At least this is the reading of the District Court of two somewhat conflicting decisions by the Alabama Supreme Court, resulting in a "manifest uncertainty of the legality of the proposed constitutional amendment, as measured by State standards . . . ." 208 F. Supp., at 438. Compare *Opinion of the Justices,* 254 Ala. 183, 184, 47 So. 2d 713, 714 (1950), with *Opinion of the Justices,* 263 Ala. 158, 164, 81 So. 2d 881, 887 (1955).

standards of apportionment." [19] Under the proposed apportionment of representatives, each of the 67 counties was given one seat and the remaining 39 were allocated on a population basis. About 43% of the State's total population would live in counties which could elect a majority in that body. And, under the provisions of the 67-Senator Amendment, while the maximum population-variance ratio was increased to about 59-to-1 in the Senate, it was significantly reduced to about 4.7-to-1 in the House of Representatives. Jefferson County was given 17 House seats, an addition of 10, and Mobile County was allotted eight, an increase of five. The increased representation of the urban counties was achieved primarily by limiting the State's 55 least populous counties to one House seat each, and the net effect was to take 19 seats away from rural counties and allocate them to the more populous counties. Even so, serious disparities from a population-based standard remained. Montgomery County, with 169,210 people, was given only four seats, while Coosa County, with a population of only 10,726, and Cleburne County, with only 10,911, were each allocated one representative.

Turning next to the provisions of the Crawford-Webb Act, the District Court found that its apportionment of the 106 seats in the Alabama House of Representatives, by allocating one seat to each county and distributing the remaining 39 to the more populous counties in diminishing ratio to their populations, was "totally unacceptable." [20] Under this plan, about 37% of the State's total

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[19] See the later discussion, *infra,* at 568–569, and note 68, *infra,* where we reject the lower court's apparent conclusion that the apportionment of the Alabama House, under the 67-Senator Amendment, comported with the requirements of the Equal Protection Clause.

[20] While no formula for the statute's apportionment of representatives is expressly stated, one can be extrapolated. Counties with less than 45,000 people are given one seat; those with 45,000 to 90,000

population would reside in counties electing a majority of the members of the Alabama House, with a maximum population-variance ratio of about 5-to-1. Each representative from Jefferson and Mobile Counties would represent over 52,000 persons while representatives from eight rural counties would each represent less than 20,000 people. The Court regarded the senatorial apportionment provided in the Crawford-Webb Act as "a step in the right direction, but an extremely short step," and but a "slight improvement over the present system of representation." [21] The net effect of combining a few of the less populous counties into two-county districts and splitting up several of the larger districts into smaller ones would be merely to increase the minority which would be represented by a majority of the members of the Senate from 25.1% to only 27.6% of the State's population.[22] The Court pointed out that, under the Crawford-Webb Act, the vote of a person in the senatorial district consisting of Bibb and Perry Counties would be worth 20 times that of a citizen in Jefferson County, and that the vote of a citizen in the six smallest districts would be worth 15 or more times that of a Jefferson County voter. The Court concluded that the Crawford-

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receive two seats; counties with 90,000 to 150,000, three seats; those with 150,000 to 300,000, four seats; counties with 300,000 to 600,000, six seats; and counties with over 600,000 are given 12 seats.

[21] Appendix F to the lower court's opinion sets out a chart showing the populations of the 35 senatorial districts provided for under the Crawford-Webb Act and the composition, by counties, of the various districts. 208 F. Supp., at 451.

[22] Cross-appellants in No. 27 assert that the Crawford-Webb Act was a "minimum-change measure" which merely redrew new senatorial district lines around the nominees of the May 1962 Democratic primary so as to retain the seats of 34 of the 35 nominees, and resulted, in practical effect, in the shift of only one Senate seat from an overrepresented district to another underpopulated, newly created district.

Webb Act was "totally unacceptable" as a "piece of permanent legislation" which, under the Alabama Constitution, would have remained in effect without alteration at least until after the next decennial census.

Under the detailed requirements of the various constitutional provisions relating to the apportionment of seats in the Alabama Senate and House of Representatives, the Court found, the membership of neither house can be apportioned solely on a population basis, despite the provision in Art. XVIII, § 284, which states that "[r]epresentation in the legislature shall be based upon population." In dealing with the conflicting and somewhat paradoxical requirements (under which the number of seats in the House is limited to 106 but each of the 67 counties is required to be given at least one representative, and the size of the Senate is limited to 35 but it is required to have at least one-fourth of the members of the House, although no county can be given more than one senator), the District Court stated its view that "the controlling or dominant provision of the Alabama Constitution on the subject of representation in the Legislature" is the previously referred to language of § 284. The Court stated that the detailed requirements of Art. IX, §§ 197–200,

> "make it obvious that in *neither* the House nor the Senate can representation be based strictly and entirely upon population. . . . The result may well be that representation according to population *to some extent* must be required in *both* Houses if invidious discrimination in the legislative systems as a whole is to be avoided. Indeed, . . . it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions." [23]

[23] 208 F. Supp., at 439.

The District Court then directed its concern to the providing of an effective remedy. It indicated that it was adopting and ordering into effect for the November 1962 election a provisional and temporary reapportionment plan composed of the provisions relating to the House of Representatives contained in the 67-Senator Amendment and the provisions of the Crawford-Webb Act relating to the Senate. The Court noted, however, that "[t]he proposed reapportionment of the Senate in the 'Crawford-Webb Act,' unacceptable as a piece of permanent legislation, may not even break the strangle hold." Stating that it was retaining jurisdiction and deferring any hearing on plaintiffs' motion for a permanent injunction "until the Legislature, as provisionally reapportioned . . . , has an opportunity to provide for a true reapportionment of both Houses of the Alabama Legislature," the Court emphasized that its "moderate" action was designed to break the strangle hold by the smaller counties on the Alabama Legislature and would not suffice as a permanent reapportionment. On July 25, 1962, the Court entered its decree in accordance with its previously stated determinations, concluding that "plaintiffs . . . are denied . . . equal protection . . . by virtue of the debasement of their votes since the Legislature of the State of Alabama has failed and continues to fail to reapportion itself as required by law." It enjoined the defendant state officials from holding any future elections under any of the apportionment plans that it had found invalid, and stated that the 1962 election of Alabama legislators could validly be conducted only under the apportionment scheme specified in the Court's order.

After the District Court's decision, new primary elections were held pursuant to legislation enacted in 1962 at the same special session as the proposed constitutional amendment and the Crawford-Webb Act, to be effective

in the event the Court itself ordered a particular reapportionment plan into immediate effect. The November 1962 general election was likewise conducted on the basis of the District Court's ordered apportionment of legislative seats, as MR. JUSTICE BLACK refused to stay the District Court's order. Consequently, the present Alabama Legislature is apportioned in accordance with the temporary plan prescribed by the District Court's decree. All members of both houses of the Alabama Legislature serve four-year terms, so that the next regularly scheduled election of legislators will not be held until 1966. The 1963 regular session of the Alabama Legislature produced no legislation relating to legislative apportionment,[24] and the legislature, which meets biennially, will not hold another regular session until 1965.

No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available.[25] No initiative procedure exists under Alabama law. Amendment of the State Constitution can be achieved only after a proposal is adopted by three-fifths of the members of both houses of the legislature and is approved by a majority of the people,[26] or as a result of a constitutional convention convened

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[24] Possibly this resulted from an understandable desire on the part of the Alabama Legislature to await a final determination by this Court in the instant litigation before proceeding to enact a permanent apportionment plan.

[25] However, a proposed constitutional amendment, which would have made the Alabama House of Representatives somewhat more representative of population but the Senate substantially less so, was rejected by the people in a 1956 referendum, with the more populous counties accounting for the defeat.

See the discussion in *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* pp. 736–737, decided also this date, with respect to the lack of federal constitutional significance of the presence or absence of an available political remedy.

[26] Ala. Const., Art. XVIII, § 284.

after approval by the people of a convention call initiated by a majority of both houses of the Alabama Legislature.[27]

Notices of appeal to this Court from the District Court's decision were timely filed by defendants below (appellants in No. 23) and by two groups of intervenor-plaintiffs (cross-appellants in Nos. 27 and 41). Appellants in No. 23 contend that the District Court erred in holding the existing and the two proposed plans for the apportionment of seats in the Alabama Legislature unconstitutional, and that a federal court lacks the power to affirmatively reapportion seats in a state legislature. Cross-appellants in No. 27 assert that the court below erred in failing to compel reapportionment of the Alabama Senate on a population basis as allegedly required by the Alabama Constitution and the Equal Protection Clause of the Federal Constitution. Cross-appellants in No. 41 contend that the District Court should have required and ordered into effect the apportionment of seats in both houses of the Alabama Legislature on a population basis. We noted probable jurisdiction on June 10, 1963. 374 U. S. 802.

II.

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *Ex parte Yarbrough,* 110 U. S. 651, and to have their votes counted, *United States* v. *Mosley,* 238 U. S. 383. In *Mosley* the Court stated that it is "as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box." 238 U. S.,

[27] Ala. Const., Art. XVIII, § 286.

at 386. The right to vote can neither be denied outright, *Guinn* v. *United States,* 238 U. S. 347, *Lane* v. *Wilson,* 307 U. S. 268, nor destroyed by alteration of ballots, see *United States* v. *Classic,* 313 U. S. 299, 315, nor diluted by ballot-box stuffing, *Ex parte Siebold,* 100 U. S. 371, *United States* v. *Saylor,* 322 U. S. 385. As the Court stated in *Classic,* "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." 313 U. S., at 315. Racially based gerrymandering, *Gomillion* v. *Lightfoot,* 364 U. S. 339, and the conducting of white primaries, *Nixon* v. *Herndon,* 273 U. S. 536, *Nixon* v. *Condon,* 286 U. S. 73, *Smith* v. *Allwright,* 321 U. S. 649, *Terry* v. *Adams,* 345 U. S. 461, both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country.[28] The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. 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.[29]

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[28] The Fifteenth, Seventeenth, Nineteenth, Twenty-third and Twenty-fourth Amendments to the Federal Constitution all involve expansions of the right of suffrage. Also relevant, in this regard, is the civil rights legislation enacted by Congress in 1957 and 1960.

[29] As stated by MR. JUSTICE DOUGLAS, dissenting, in *South* v. *Peters,* 339 U. S. 276, 279:

"There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group

In *Baker* v. *Carr,* 369 U. S. 186, we held that a claim asserted under the Equal Protection Clause challenging the constitutionality of a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy subject to adjudication by federal courts. The spate of similar cases filed and decided by lower courts since our decision in *Baker* amply shows that the problem of state legislative malapportionment is one that is perceived to exist in a large number of the States.[30] In *Baker,* a suit involving an attack on the apportionment of seats in the Tennessee Legislature, we remanded to the District Court, which had dismissed the action, for consideration on the merits. We intimated no view as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme. Nor did we give any consideration to the question of appropriate remedies. Rather, we simply stated:

> "Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial." [31]

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has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

[30] Litigation challenging the constitutionality of state legislative apportionment schemes had been instituted in at least 34 States prior to the end of 1962—within nine months of our decision in *Baker* v. *Carr.* See McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 Mich. L. Rev. 645, 706–710 (1963), which contains an appendix summarizing reapportionment litigation through the end of 1962. See also David and Eisenberg, Devaluation of the Urban and Suburban Vote (1961); Goldberg, The Statistics of Malapportionment, 72 Yale L. J. 90 (1962).

[31] 369 U. S., at 198.

We indicated in *Baker,* however, that the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative apportionment scheme, and we stated:

> "Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." [32]

Subsequent to *Baker,* we remanded several cases to the courts below for reconsideration in light of that decision.[33]

In *Gray* v. *Sanders,* 372 U. S. 368, we held that the Georgia county unit system, applicable in statewide primary elections, was unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where they resided. After indicating that the Fifteenth and Nineteenth Amendments prohibit a State from overweighting or diluting votes on the basis of race or sex, we stated:

> "How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occu-

[32] *Id.,* at 226.

[33] *Scholle* v. *Hare,* 369 U. S. 429 (Michigan); *WMCA, Inc.,* v. *Simon,* 370 U. S. 190 (New York).

> pation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." [34]

Continuing, we stated that "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State." And, finally, we concluded: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." [35]

We stated in *Gray,* however, that that case,

> "unlike *Baker* v. *Carr*, . . . does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. . . . Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population." [36]

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[34] 372 U. S., at 379–380.

[35] *Id.*, at 381.

[36] *Id.*, at 376. Later in the opinion we again stated:

"Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate no opinion on the constitutional phases of that problem beyond what we said in *Baker* v. *Carr* . . . ." *Id.*, at 378.

Of course, in these cases we are faced with the problem not presented in *Gray*—that of determining the basic standards and stating the applicable guidelines for implementing our decision in *Baker* v. *Carr*.

In *Wesberry* v. *Sanders*, 376 U. S. 1, decided earlier this Term, we held that attacks on the constitutionality of congressional districting plans enacted by state legislatures do not present nonjusticiable questions and should not be dismissed generally for "want of equity." We determined that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives.

In that case we decided that an apportionment of congressional seats which "contracts the value of some votes and expands that of others" is unconstitutional, since "the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote . . . ." We concluded that the constitutional prescription for election of members of the House of Representatives "by the People," construed in its historical context, "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." We further stated:

> "It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others." [37]

We found further, in *Wesberry*, that "our Constitution's plain objective" was that "of making equal repre-

[37] 376 U. S., at 14.

sentation for equal numbers of people the fundamental goal . . . ." We concluded by stating:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." [38]

Gray and *Wesberry* are of course not dispositive of or directly controlling on our decision in these cases involving state legislative apportionment controversies. Admittedly, those decisions, in which we held that, in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State, were based on different constitutional considerations and were addressed to rather distinct problems. But neither are they wholly inapposite. *Gray,* though not determinative here since involving the weighting of votes in statewide elections, established the basic principle of equality among voters within a State, and held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections. And our decision in *Wesberry* was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen "by the People," while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal

[38] *Id.,* at 17–18.

representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures.

III.

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in *United States* v. *Bathgate,* 246 U. S. 220, 227, "[t]he right to vote is personal . . . ." [39] While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like *Skinner* v. *Oklahoma,* 316 U. S. 535, such a case "touches a sensitive and important area of human rights," and "involves one of the basic civil rights of man," presenting questions of alleged "invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." 316 U. S., at 536, 541. Undoubtedly, the right of suffrage is a fundamental mat-

[39] As stated by MR. JUSTICE DOUGLAS, the rights sought to be vindicated in a suit challenging an apportionment scheme are "personal and individual," *South* v. *Peters,* 339 U. S., at 280, and are "important political rights of the people," *MacDougall* v. *Green,* 335 U. S. 281, 288. (DOUGLAS, J., dissenting.)

ter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo* v. *Hopkins,* 118 U. S. 356, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights." 118 U. S., at 370.

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of

state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.[40] Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U. S. 268, 275; *Gomillion* v. *Lightfoot,* 364 U. S. 339, 342. As we stated in *Wesberry* v. *Sanders, supra:*

> "We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth

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[40] As stated by MR. JUSTICE BLACK, dissenting, in *Colegrove* v. *Green,* 328 U. S. 549, 569–571:

"No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote. . . . [T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast. . . . [A] state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name."

more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . ." [41]

State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of the Federal

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[41] 376 U. S., at 8. See also *id.*, at 17, quoting from James Wilson, a delegate to the Constitutional Convention and later an Associate Justice of this Court, who stated:

"[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same." 2 The Works of James Wilson (Andrews ed. 1896) 15.

And, as stated by MR. JUSTICE DOUGLAS, dissenting, in *MacDougall v. Green*, 335 U. S., at 288, 290:

"[A] regulation . . . [which] discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

"Free and honest elections are the very foundation of our republican form of government. . . . Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. . . .

"None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government."

Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citi-

zens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown* v. *Board of Education,* 347 U. S. 483, or economic status, *Griffin* v. *Illinois,* 351 U. S. 12, *Douglas* v. *California,* 372 U. S. 353. Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. As stated in *Gomillion* v. *Lightfoot, supra:*

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." [42]

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[42] 364 U. S., at 347.

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban.[43] Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.[44]

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[43] Although legislative apportionment controversies are generally viewed as involving urban-rural conflicts, much evidence indicates that presently it is the fast-growing suburban areas which are probably the most seriously underrepresented in many of our state legislatures. And, while currently the thrust of state legislative malapportionment results, in most States, in underrepresentation of urban and suburban areas, in earlier times cities were in fact overrepresented in a number of States. In the early 19th century, certain of the seaboard cities in some of the Eastern and Southern States possessed and struggled to retain legislative representation disproportionate to population, and bitterly opposed according additional representation to the growing inland areas. Conceivably, in some future time, urban areas might again be in a situation of attempting to acquire or retain legislative representation in excess of that to which, on a population basis, they are entitled. Malapportionment can, and has historically, run in various directions. However and whenever it does, it is constitutionally impermissible under the Equal Protection Clause.

[44] The British experience in eradicating "rotten boroughs" is interesting and enlightening. Parliamentary representation is now based on districts of substantially equal population, and periodic reapportionment is accomplished through independent Boundary Commissions. For a discussion of the experience and difficulties in Great Britain in achieving fair legislative representation, see Edwards, Theoretical and Comparative Aspects of Reapportionment and Re-

A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

IV.

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State. Since, under neither the existing apportionment provisions nor either of the proposed plans was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that all three of these schemes were constitutionally invalid. Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone.[45] Al-

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districting: With Reference to Baker v. Carr, 15 Vand. L. Rev. 1265, 1275 (1962). See also the discussion in *Baker* v. *Carr*, 369 U. S., at 302–307. (Frankfurter, J., dissenting.)

[45] Under the existing scheme, Marshall County, with a 1960 population of 48,018, Baldwin County, with 49,088, and Houston County, with 50,718, are each given only one seat in the Alabama House, while Bullock County, with only 13,462, Henry County, with 15,286, and

though the District Court presumably found the apportionment of the Alabama House of Representatives under the 67-Senator Amendment to be acceptable, we conclude that the deviations from a strict population basis are too egregious to permit us to find that that body, under this proposed plan, was apportioned sufficiently on a population basis so as to permit the arrangement to be constitutionally sustained. Although about 43% of the State's total population would be required to comprise districts which could elect a majority in that body, only 39 of the 106 House seats were actually to be distributed on a population basis, as each of Alabama's 67 counties was given at least one representative, and population-variance ratios of close to 5-to-1 would have existed. While mathematical nicety is not a constitutional requisite, one could hardly conclude that the Alabama House, under the proposed constitutional amendment, had been apportioned sufficiently on a population basis to be sustainable under the requirements of the Equal Protection Clause. And none of the other apportionments of seats in either of the bodies of the Alabama Legislature, under the three plans considered by the District Court, came nearly as close to approaching the required constitutional standard as did that of the House of Representatives under the 67-Senator Amendment.

Legislative apportionment in Alabama is signally illustrative and symptomatic of the seriousness of this problem in a number of the States. At the time this litigation was commenced, there had been no reappor-

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Lowndes County, with 15,417, are allotted two representatives each. And in the Alabama Senate, under the existing apportionment, a district comprising Lauderdale and Limestone Counties had a 1960 population of 98,135, and another composed of Lee and Russell Counties had 96,105. Conversely, Lowndes County, with only 15,417, and Wilcox County, with 18,739, are nevertheless single-county senatorial districts given one Senate seat each.

tionment of seats in the Alabama Legislature for over 60 years.[46] Legislative inaction, coupled with the unavailability of any political or judicial remedy,[47] had resulted, with the passage of years, in the perpetuated scheme becoming little more than an irrational anachronism. Consistent failure by the Alabama Legislature to comply with state constitutional requirements as to the frequency of reapportionment and the bases of legislative representation resulted in a minority strangle hold on the State Legislature. Inequality of representation in one house added to the inequality in the other. With the crazy-quilt existing apportionment virtually conceded to be invalid, the Alabama Legislature offered two proposed plans for consideration by the District Court, neither of which was to be effective until 1966 and neither of which provided for the apportionment of even one of the two houses on a population basis. We find that the court below did not err in holding that neither of these proposed reapportionment schemes, considered as a whole, "meets the necessary constitutional requirements." And we conclude that the District Court acted properly in considering these two proposed plans, although neither was to become effective until the 1966 election and the proposed constitutional amendment was scheduled to be submitted to the State's voters in November 1962.[48]

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[46] An interesting pre-*Baker* discussion of the problem of legislative malapportionment in Alabama is provided in Comment, Alabama's Unrepresentative Legislature, 14 Ala. L. Rev. 403 (1962).

[47] See the cases cited and discussed in notes 4–5, *supra*, where the Alabama Supreme Court refused even to consider the granting of relief in suits challenging the validity of the apportionment of seats in the Alabama Legislature, although it stated that the legislature had failed to comply with the requirements of the State Constitution with respect to legislative reapportionment.

[48] However, since the District Court found the proposed constitutional amendment prospectively invalid, it was never in fact voted upon by the State's electorate.

Consideration by the court below of the two proposed plans was clearly necessary in determining whether the Alabama Legislature had acted effectively to correct the admittedly existing malapportionment, and in ascertaining what sort of judicial relief, if any, should be afforded.

V.

Since neither of the houses of the Alabama Legislature, under any of the three plans considered by the District Court, was apportioned on a population basis, we would be justified in proceeding no further. However, one of the proposed plans, that contained in the so-called 67-Senator Amendment, at least superficially resembles the scheme of legislative representation followed in the Federal Congress. Under this plan, each of Alabama's 67 counties is allotted one senator, and no counties are given more than one Senate seat. Arguably, this is analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population. Seats in the Alabama House, under the proposed constitutional amendment, are distributed by giving each of the 67 counties at least one, with the remaining 39 seats being allotted among the more populous counties on a population basis. This scheme, at least at first glance, appears to resemble that prescribed for the Federal House of Representatives, where the 435 seats are distributed among the States on a population basis, although each State, regardless of its population, is given at least one Congressman. Thus, although there are substantial differences in underlying rationale and result,[49]

[49] Resemblances between the system of representation in the Federal Congress and the apportionment scheme embodied in the 67-Senator Amendment appear to be more superficial than actual. Representation in the Federal House of Representatives is apportioned by the Constitution among the States in conformity with population. While each State is guaranteed at least one seat in the House, as a

the 67-Senator Amendment, as proposed by the Alabama Legislature, at least arguably presents for consideration a scheme analogous to that used for apportioning seats in Congress.

Much has been written since our decision in *Baker* v. *Carr* about the applicability of the so-called federal analogy to state legislative apportionment arrangements.[50] After considering the matter, the court below concluded that no conceivable analogy could be drawn between the federal scheme and the apportionment of seats in the Alabama Legislature under the proposed con-

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feature of our unique federal system, only four States have less than 1/435 of the country's total population, under the 1960 census. Thus, only four seats in the Federal House are distributed on a basis other than strict population. In Alabama, on the other hand, 40 of the 67 counties have less than 1/106 of the State's total population. Thus, under the proposed amendment, over ⅓ of the total number of seats in the Alabama House would be distributed on a basis other than strict population. States with almost 50% of the Nation's total population are required in order to elect a majority of the members of the Federal House, though unfair districting within some of the States presently reduces to about 42% the percentage of the country's population which reside in districts electing individuals comprising a majority in the Federal House. Cf. *Wesberry* v. *Sanders*, *supra*, holding such congressional districting unconstitutional. Only about 43% of the population of Alabama would live in districts which could elect a majority in the Alabama House, under the proposed constitutional amendment. Thus, it could hardly be argued that the proposed apportionment of the Alabama House was based on population in a way comparable to the apportionment of seats in the Federal House among the States.

[50] For a thorough statement of the arguments against holding the so-called federal analogy applicable to state legislative apportionment matters, see, *e. g.*, McKay, Reapportionment and the Federal Analogy (National Municipal League pamphlet 1962); McKay, The Federal Analogy and State Apportionment Standards, 38 Notre Dame Law. 487 (1963). See also Merrill, Blazes for a Trail Through the Thicket of Reapportionment, 16 Okla. L. Rev. 59, 67–70 (1963).

stitutional amendment.[51] We agree with the District Court, and find the federal analogy inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population.[52] And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted.[53] Demonstrative of this is the fact that the Northwest Ordinance, adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population.[54]

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[51] 208 F. Supp., at 438. See the discussion of the District Court's holding as to the applicability of the federal analogy earlier in this opinion, *supra,* at 547–548.

[52] Report of Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures 10–11, 35, 69 (1962).

[53] Thomas Jefferson repeatedly denounced the inequality of representation provided for under the 1776 Virginia Constitution and frequently proposed changing the State Constitution to provide that both houses be apportioned on the basis of population. In 1816 he wrote that "a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns . . . by representatives chosen by himself . . . ." Letter to Samuel Kercheval, 10 Writings of Thomas Jefferson (Ford ed. 1899) 38. And a few years later, in 1819, he stated: "Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified." Letter to William King, Jefferson Papers, Library of Congress, Vol. 216, p. 38616.

[54] Article II, § 14, of the Northwest Ordinance of 1787 stated quite specifically: "The inhabitants of the said territory shall always be entitled to the benefits . . . of a proportionate representation of the people in the Legislature."

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic.[55] Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together "to form a more perfect Union." But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation. In rejecting an asserted analogy to the federal electoral college in *Gray* v. *Sanders, supra,* we stated:

> "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of

[55] See the discussion in *Wesberry* v. *Sanders,* 376 U. S., at 9–14.

> an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued." [56]

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburgh,* 207 U. S. 161, 178, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and the "number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State." The relationship of the States to the Federal Government could hardly be less analogous.

Thus, we conclude that the plan contained in the 67-Senator Amendment for apportioning seats in the Alabama Legislature cannot be sustained by recourse to the so-called federal analogy. Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis. This does not necessarily mean that such a plan is irrational or involves something other than a "republican form of government." We conclude simply that such a plan is impermissible for the States under the Equal Protection Clause, since perforce resulting, in virtually every case, in submergence of the equal-population principle in at least one house of a state legislature.

Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state

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[56] 372 U. S., at 378.

legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis. The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. If such a scheme were permissible, an individual citizen's ability to exercise an effective voice in the only instrument of state government directly representative of the people might be almost as effectively thwarted as if neither house were apportioned on a population basis. Deadlock between the two bodies might result in compromise and concession on some issues. But in all too many cases the more probable result would be frustration of the majority will through minority veto in the house not apportioned on a population basis, stemming directly from the failure to accord adequate overall legislative representation to all of the State's citizens on a nondiscriminatory basis. In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature.

We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different

constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis.

VI.

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.[57]

In *Wesberry* v. *Sanders, supra,* the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in *Wesberry*—equality of popu-

[57] As stated by the Court in *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 501, "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."

lation among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Cf. *Slaughter-House Cases,* 16 Wall. 36, 78–79. Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant.

A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or

natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember [58] or floterial districts.[59] Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures.[60] So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone,[61] nor economic or other sorts of

[58] But cf. the discussion of some of the practical problems inherent in the use of multimember districts in *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* pp. 731–732, decided also this date.

[59] See the discussion of the concept of floterial districts in *Davis* v. *Mann, post,* pp. 686–687, n. 2, decided also this date.

[60] For a discussion of the formal apportionment formulae prescribed for the allocation of seats in state legislatures, see Dixon, Apportionment Standards and Judicial Power, 38 Notre Dame Law. 367, 398–400 (1963). See also The Book of the States 1962–1963, 58–62.

[61] In rejecting a suggestion that the representation of the newer Western States in Congress should be limited so that it would never exceed that of the original States, the Constitutional Convention plainly indicated its view that history alone provided an unsatisfactory basis for differentiations relating to legislative representation. See *Wesberry* v. *Sanders,* 376 U. S., at 14. Instead, the Northwest

group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local

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Ordinance of 1787, in explicitly providing for population-based representation of those living in the Northwest Territory in their territorial legislatures, clearly implied that, as early as the year of the birth of our federal system, the proper basis of legislative representation was regarded as being population.

legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body.[62] This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties.[63] Such a result, we conclude, would be constitutionally impermissible. And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

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[62] See McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 Mich. L. Rev. 645, 698–699 (1963).

[63] Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies.

VII.

One of the arguments frequently offered as a basis for upholding a State's legislative apportionment arrangement, despite substantial disparities from a population basis in either or both houses, is grounded on congressional approval, incident to admitting States into the Union, of state apportionment plans containing deviations from the equal-population principle. Proponents of this argument contend that congressional approval of such schemes, despite their disparities from population-based representation, indicates that such arrangements are plainly sufficient as establishing a "republican form of government." As we stated in *Baker* v. *Carr,* some questions raised under the Guaranty Clause are nonjusticiable, where "political" in nature and where there is a clear absence of judicially manageable standards.[64] Nevertheless, it is not inconsistent with this view to hold that, despite congressional approval of state legislative apportionment plans at the time of admission into the Union, even though deviating from the equal-population principle here enunciated, the Equal Protection Clause can and does require more. And an apportionment scheme in which both houses are based on population can hardly be considered as failing to satisfy the Guaranty Clause requirement. Congress presumably does not assume, in admitting States into the Union, to pass on all constitutional questions relating to the character of state governmental organization. In any event, congressional approval, however well-considered, could hardly validate an unconstitutional state legislative apportionment. Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

[64] See 369 U. S., at 217–232, discussing the nonjusticiability of malapportionment claims asserted under the Guaranty Clause.

VIII.

That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States,[65] often honored more in the breach than the observance, however. Illustratively, the Alabama Constitution requires decennial reapportionment, yet the last reapportionment of the Alabama Legislature, when this suit was brought, was in 1901. Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal

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[65] Report of Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures 56 (1962). Additionally, the constitutions of seven other States either require or permit reapportionment of legislative representation more frequently than every 10 years. See also The Book of the States 1962–1963, 58–62.

requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.

IX.

Although general provisions of the Alabama Constitution provide that the apportionment of seats in both houses of the Alabama Legislature should be on a population basis, other more detailed provisions clearly make compliance with both sets of requirements impossible. With respect to the operation of the Equal Protection Clause, it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions. In those States where the alleged malapportionment has resulted from noncompliance with state constitutional provisions which, if complied with, would result in an apportionment valid under the Equal Protection Clause, the judicial task of providing effective relief would appear to be rather simple. We agree with the view of the District Court that state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible. But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.

X.

We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases.[66] Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by MR. JUSTICE DOUGLAS, concurring in *Baker* v. *Carr*, "any relief accorded can be fashioned in the light of well-known principles of equity." [67]

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[66] Cf. *Baker* v. *Carr*, 369 U. S. 186, 198. See also 369 U. S., at 250–251 (DOUGLAS, J., concurring), and passages from *Baker* quoted in this opinion, *supra*, at 556, 557, and *infra*.

[67] 369 U. S., at 250.

We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Additionally, the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect, at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty, and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the legislature.

We find, therefore, that the action taken by the District Court in this case, in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid,[68] was an appropriate and

[68] Although the District Court indicated that the apportionment of the Alabama House under the 67-Senator Amendment was valid and acceptable, we of course reject that determination, which we regard as merely precatory and advisory since the court below found the

well-considered exercise of judicial power. Admittedly, the lower court's ordered plan was intended only as a temporary and provisional measure and the District Court correctly indicated that the plan was invalid as a permanent apportionment. In retaining jurisdiction while deferring a hearing on the issuance of a final injunction in order to give the provisionally reapportioned legislature an opportunity to act effectively, the court below proceeded in a proper fashion. Since the District Court evinced its realization that its ordered reapportionment could not be sustained as the basis for conducting the 1966 election of Alabama legislators, and avowedly intends to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim, we affirm the judgment below and remand the cases for further proceedings consistent with the views stated in this opinion.

It is so ordered.

MR. JUSTICE CLARK, concurring in the affirmance.

The Court goes much beyond the necessities of this case in laying down a new "equal population" principle for state legislative apportionment. This principle seems to be an offshoot of *Gray* v. *Sanders*, 372 U. S. 368, 381 (1963), *i. e.*, "one person, one vote," modified by the "nearly as is practicable" admonition of *Wesberry* v. *Sanders*, 376 U. S. 1, 8 (1964).* Whether "nearly as is

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overall plan, under the proposed constitutional amendment, to be unconstitutional. See 208 F. Supp., at 440–441. See the discussion earlier in this opinion, *supra*, at 568–569.

*Incidentally, neither of these cases, upon which the Court bases its opinion, is apposite. *Gray* involved the use of Georgia's county unit rule in the election of United States Senators and *Wesberry* was a congressional apportionment case.

practicable" means "one person, one vote" qualified by "approximately equal" or "some deviations" or by the impossibility of "mathematical nicety" is not clear from the majority's use of these vague and meaningless phrases. But whatever the standard, the Court applies it to each house of the State Legislature.

It seems to me that all that the Court need say in this case is that each plan considered by the trial court is "a crazy quilt," clearly revealing invidious discrimination in each house of the Legislature and therefore violative of the Equal Protection Clause. See my concurring opinion in *Baker* v. *Carr,* 369 U. S. 186, 253–258 (1962).

I, therefore, do not reach the question of the so-called "federal analogy." But in my view, if one house of the State Legislature meets the population standard, representation in the other house might include some departure from it so as to take into account, on a rational basis, other factors in order to afford some representation to the various elements of the State. See my dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* p. 741, decided this date.

MR. JUSTICE STEWART.

All of the parties have agreed with the District Court's finding that legislative inaction for some 60 years in the face of growth and shifts in population has converted Alabama's legislative apportionment plan enacted in 1901 into one completely lacking in rationality. Accordingly, for the reasons stated in my dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* p. 744, I would affirm the judgment of the District Court holding that this apportionment violated the Equal Protection Clause.

I also agree with the Court that it was proper for the District Court, in framing a remedy, to adhere as closely

as practicable to the apportionments approved by the representatives of the people of Alabama, and to afford the State of Alabama full opportunity, consistent with the requirements of the Federal Constitution, to devise its own system of legislative apportionment.

MR. JUSTICE HARLAN, dissenting.*

In these cases the Court holds that seats in the legislatures of six States [1] are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate.[2] These decisions, with *Wesberry* v. *Sanders,* 376 U. S. 1, involving congressional districting by the States, and *Gray* v. *Sanders,* 372 U. S. 368, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. Once again,[3] I must register my protest.

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*[This opinion applies also to No. 20, *WMCA, Inc., et al.* v. *Lomenzo, Secretary of State of New York, et al., post,* p. 633; No. 29, *Maryland Committee for Fair Representation et al.* v. *Tawes, Governor, et al., post,* p. 656; No. 69, *Davis, Secretary, State Board of Elections, et al.* v. *Mann et al., post,* p. 678; No. 307, *Roman, Clerk, et al.* v. *Sincock et al., post,* p. 695; and No. 508, *Lucas et al.* v. *Forty-Fourth General Assembly of Colorado et al., post,* p. 713.]

[1] Alabama, Colorado, Delaware, Maryland, New York, Virginia.

[2] In the Virginia case, *Davis* v. *Mann, post,* p. 678, the defendants introduced an exhibit prepared by the staff of the Bureau of Public Administration of the University of Virginia in which the Virginia Legislature, now held to be unconstitutionally apportioned, was ranked eighth among the 50 States in "representativeness," with population taken as the basis of representation. The Court notes that before the end of 1962, litigation attacking the apportionment of state legislatures had been instituted in at least 34 States. *Ante,* p. 556, note 30. See *infra,* pp. 610–611.

[3] See *Baker* v. *Carr,* 369 U. S. 186, 330, and the dissenting opinion of Frankfurter, J., in which I joined, *id.,* at 266; *Gray* v. *Sanders,* 372 U. S. 368, 382; *Wesberry* v. *Sanders,* 376 U. S. 1, 20.

PRELIMINARY STATEMENT.

Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people; other factors may be given play only to the extent that they do not significantly encroach on this basic "population" principle. Whatever may be thought of this holding as a piece of political ideology—and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate (see the dissenting opinion of Frankfurter, J., in *Baker* v. *Carr*, 369 U. S. 186, 266, 301–323)—I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.

The Court's constitutional discussion, found in its opinion in the Alabama cases (Nos. 23, 27, 41, *ante*, p. 533) and more particularly at pages 561–568 thereof, is remarkable (as, indeed, is that found in the separate opinions of my Brothers STEWART and CLARK, *ante*, pp. 588, 587) for its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand. Stripped of aphorisms, the Court's argument boils down to the assertion that appellees' right to vote has been invidiously "debased" or "diluted" by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that "equal" means "equal."

Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection Clause was never intended to inhibit the States in choos-

ing any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted. It is confirmed by numerous state and congressional actions since the adoption of the Fourteenth Amendment, and by the common understanding of the Amendment as evidenced by subsequent constitutional amendments and decisions of this Court before *Baker* v. *Carr, supra,* made an abrupt break with the past in 1962.

The failure of the Court to consider any of these matters cannot be excused or explained by any concept of "developing" constitutionalism. It is meaningless to speak of constitutional "development" when both the language and history of the controlling provisions of the Constitution are wholly ignored. Since it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, § 4),[4] the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.

So far as the Federal Constitution is concerned, the complaints in these cases should all have been dismissed below for failure to state a cause of action, because what

[4] That clause, which manifestly has no bearing on the claims made in these cases, see V Elliot's Debates on the Adoption of the Federal Constitution (1845), 332–333, could not in any event be the foundation for judicial relief. *Luther* v. *Borden,* 7 How. 1, 42–44; *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74, 79–80; *Highland Farms Dairy, Inc.,* v. *Agnew,* 300 U. S. 608, 612. In *Baker* v. *Carr, supra,* at 227, the Court stated that reliance on the Republican Form of Government Clause "would be futile."

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has been alleged or proved shows no violation of any constitutional right.

Before proceeding to my argument it should be observed that nothing done in *Baker* v. *Carr, supra,* or in the two cases that followed in its wake, *Gray* v. *Sanders* and *Wesberry* v. *Sanders, supra,* from which the Court quotes at some length, forecloses the conclusion which I reach.

Baker decided only that claims such as those made here are within the competence of the federal courts to adjudicate. Although the Court stated as its conclusion that the allegations of a denial of equal protection presented "a justiciable constitutional cause of action," 369 U. S., at 237, it is evident from the Court's opinion that it was concerned all but exclusively with *justiciability* and gave no serious attention to the question whether the Equal Protection Clause touches state legislative apportionments.[5] Neither the opinion of the Court nor any of the concurring opinions considered the relevant text of the Fourteenth Amendment or any of the historical materials bearing on that question. None of the materials was briefed or otherwise brought to the Court's attention.[6]

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[5] It is fair to say that, beyond discussion of a large number of cases having no relevance to this question, the Court's views on this subject were fully stated in the compass of a single sentence: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." 369 U. S., at 226.

Except perhaps for the "crazy quilt" doctrine of my Brother CLARK, 369 U. S., at 251, nothing is added to this by any of the concurring opinions, *id.,* at 241, 265.

[6] The cryptic remands in *Scholle* v. *Hare,* 369 U. S. 429, and *WMCA, Inc.,* v. *Simon,* 370 U. S. 190, on the authority of *Baker,* had nothing to say on the question now before the Court.

In the *Gray* case the Court expressly laid aside the applicability to state legislative apportionments of the "one person, one vote" theory there found to require the striking down of the Georgia county unit system. See 372 U. S., at 376, and the concurring opinion of STEWART, J., joined by CLARK, J., *id.*, at 381–382.

In *Wesberry,* involving congressional districting, the decision rested on Art. I, § 2, of the Constitution. The Court expressly did not reach the arguments put forward concerning the Equal Protection Clause. See 376 U. S., at 8, note 10.

Thus it seems abundantly clear that the Court is entirely free to deal with the cases presently before it in light of materials now called to its attention for the first time. To these I now turn.

I.

A. *The Language of the Fourteenth Amendment.*

The Court relies exclusively on that portion of § 1 of the Fourteenth Amendment which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and disregards entirely the significance of § 2, which reads:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. *But when the right to vote at any election for* the choice of electors for President and Vice President of the United States, Representatives in Congress, *the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied* to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, *or in any way abridged,* except for participation in rebellion, or

other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Emphasis added.)

The Amendment is a single text. It was introduced and discussed as such in the Reconstruction Committee,[7] which reported it to the Congress. It was discussed as a unit in Congress and proposed as a unit to the States,[8] which ratified it as a unit. A proposal to split up the Amendment and submit each section to the States as a separate amendment was rejected by the Senate.[9] Whatever one might take to be the application to these cases of the Equal Protection Clause if it stood alone, I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny "or in any way" abridge the right of their inhabitants to vote for "the members of the [State] Legislature," and its express provision of a remedy for such denial or abridgment. The comprehensive scope of the second section and its particular reference to the state legislatures preclude the suggestion that the first section was intended to have the result reached by the Court today. If indeed the words of the Fourteenth Amendment speak for themselves, as the majority's disregard of history seems to imply, they speak as clearly as may be against the construction which the majority puts on them. But we are not limited to the language of the Amendment itself.

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[7] See the Journal of the Committee, reprinted in Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction (1914), 83–117.

[8] See the debates in Congress, Cong. Globe, 39th Cong., 1st Sess., 2459–3149, *passim* (1866) (hereafter Globe).

[9] Globe 3040.

B. *Proposal and Ratification of the Amendment.*

The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment.

(i) *Proposal of the amendment in Congress.*—A resolution proposing what became the Fourteenth Amendment was reported to both houses of Congress by the Reconstruction Committee of Fifteen on April 30, 1866,[10] The first two sections of the proposed amendment read:

> "SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "SEC. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citi-

[10] Globe 2265, 2286.

> zens shall bear to the whole number of male citizens not less than twenty-one years of age." [11]

In the House, Thaddeus Stevens introduced debate on the resolution on May 8. In his opening remarks, Stevens explained why he supported the resolution although it fell "far short" of his wishes:

> "I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this." [12]

In explanation of this belief, he asked the House to remember "that three months since, and more, the committee reported and the House adopted a proposed amendment fixing the basis of representation in such way as would surely have secured the enfranchisement of every citizen at no distant period," but that proposal had been rejected by the Senate. [13]

He then explained the impact of the first section of the proposed Amendment, particularly the Equal Protection Clause.

> "This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the

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[11] As reported in the House. Globe 2286. For prior versions of the Amendment in the Reconstruction Committee, see Kendrick, *op. cit., supra,* note 7, 83–117. The work of the Reconstruction Committee is discussed in Kendrick, *supra,* and Flack, The Adoption of the Fourteenth Amendment (1908), 55–139, *passim.*

[12] Globe 2459.

[13] *Ibid.* Stevens was referring to a proposed amendment to the Constitution which provided that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation." Globe 535. It passed the House, *id.,* at 538, but did not muster the necessary two-thirds vote in the Senate, *id.,* at 1289.

> law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen." [14]

He turned next to the second section, which he said he considered "the most important in the article." [15] Its effect, he said, was to fix "the basis of representation in Congress." [16] In unmistakable terms, he recognized the power of a State to withhold the right to vote:

> "If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive." [17]

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[14] Globe 2459.

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

Closing his discussion of the second section, he noted his dislike for the fact that it allowed "the States to discriminate [with respect to the right to vote] among the same class, and receive proportionate credit in representation." [18]

Toward the end of the debate three days later, Mr. Bingham, the author of the first section in the Reconstruction Committee and its leading proponent,[19] concluded his discussion of it with the following:

> "Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. *The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.*" [20] (Emphasis added.)

He immediately continued:

> *"The second section excludes the conclusion that by the first section suffrage is subjected to congressional law;* save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a

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[18] Globe 2460.

[19] Kendrick, *op. cit., supra,* note 7, 87, 106; Flack, *op. cit., supra,* note 11, 60–68, 71.

[20] Globe 2542.

> despotic government, and thereby deny suffrage to the people." [21] (Emphasis added.)

He stated at another point in his remarks:

> "To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that *the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.*" [22] (Emphasis added.)

In the three days of debate which separate the opening and closing remarks, both made by members of the Reconstruction Committee, every speaker on the resolution, with a single doubtful exception,[23] assumed without question that, as Mr. Bingham said, *supra*, "the second section excludes the conclusion that by the first section suffrage is subjected to congressional law." The assumption was neither inadvertent nor silent. Much of the debate concerned the change in the basis of representation effected by the second section, and the speakers stated repeatedly, in express terms or by unmistakable implication, that the States retained the power to regulate suffrage within their borders. Attached as Appendix A hereto are some of those statements. The resolution was adopted by the House without change on May 10.[24]

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[21] *Ibid.* It is evident from the context of the reference to a republican government that Bingham did not regard limitations on the right to vote or the denial of the vote to specified categories of individuals as violating the guarantee of a republican form of government.

[22] *Ibid.*

[23] Representative Rogers, who voted against the resolution, Globe 2545, suggested that the right to vote might be covered by the Privileges and Immunities Clause. Globe 2538. But immediately thereafter he discussed the possibility that the Southern States might "refuse to allow the negroes to vote." *Ibid.*

[24] Globe 2545.

Debate in the Senate began on May 23, and followed the same pattern. Speaking for the Senate Chairman of the Reconstruction Committee, who was ill, Senator Howard, also a member of the Committee, explained the meaning of the Equal Protection Clause as follows:

> "The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? . . .
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> "*But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting.* The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [*sic*]." [25] (Emphasis added.)

Discussing the second section, he expressed his regret that it did "not recognize the authority of the United States over the question of suffrage in the several States

[25] Globe 2766.

at all . . . ." [26] He justified the limited purpose of the Amendment in this regard as follows:

> "But, sir, it is not the question here what will we do; it is not the question what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage; it is not entirely the question what measure we can pass through the two Houses; but the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions?
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> . . . . . .
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> "The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race. . . .
>
> "*The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.*" [27] (Emphasis added.)

There was not in the Senate, as there had been in the House, a closing speech in explanation of the Amendment. But because the Senate considered, and finally adopted, several changes in the first and second sections, even more attention was given to the problem of voting rights there than had been given in the House. In the

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[26] *Ibid.*

[27] *Ibid.*

Senate, it was fully understood by everyone that neither the first nor the second section interfered with the right of the States to regulate the elective franchise. Attached as Appendix B hereto are representative statements from the debates to that effect. After having changed the proposed amendment to the form in which it was adopted, the Senate passed the resolution on June 8, 1866.[28] As changed, it passed in the House on June 13.[29]

(ii) *Ratification by the "loyal" States.*—Reports of the debates in the state legislatures on the ratification of the Fourteenth Amendment are not generally available.[30] There is, however, compelling indirect evidence. Of the 23 loyal States which ratified the Amendment before 1870, five had constitutional provisions for apportionment of at least one house of their respective legislatures which wholly disregarded the spread of population.[31]

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[28] Globe 3042.

[29] Globe 3149.

[30] Such evidence as there is, mostly committee reports and messages to the legislatures from Governors of the States, is to the same effect as the evidence from the debates in the Congress. See Ark. House J. 288 (1866–1867); Fla. Sen. J. 8–10 (1866); Ind. House J. 47–48, 50–51 (1867); Mass. Legis. Doc., House Doc. No. 149, 4–14, 16–17, 23, 24, 25–26 (1867); Mo. Sen. J. 14 (1867); N. J. Sen. J. 7 (Extra Sess. 1866); N. C. Sen. J. 96–97, 98–99 (1866–1867); Tenn. House J. 12–15 (1865–1866); Tenn. Sen. J. 8 (Extra Sess. 1866); Va. House J. & Doc., Doc. No. 1, 35 (1866–1867); Wis. Sen. J. 33, 101–103 (1867). Contra: S. C. House J. 34 (1866); Tex. Sen. J. 422 (1866 App.).

For an account of the proceedings in the state legislatures and citations to the proceedings, see Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5, 81–126 (1949).

[31] Conn. Const., 1818, Art. Third, § 3 (towns); N. H. Const., 1792, Part Second, § XXVI (direct taxes paid); N. J. Const., 1844, Art. IV, § II, cl. 1 (counties); R. I. Const., 1842, Art. VI, § 1 (towns and cities); Vt. Const., 1793, c. II, § 7 (towns).

In none of these States was the other House apportioned strictly according to population. Conn. Const., 1818, Amend. II; N. H. Const., 1792, Part Second, §§ IX–XI; N. J. Const., 1844, Art. IV,

Ten more had constitutional provisions which gave primary emphasis to population, but which applied also other principles, such as partial ratios and recognition of political subdivisions, which were intended to favor sparsely settled areas.[32] Can it be seriously contended that the legislatures of these States, almost two-thirds of those concerned, would have ratified an amendment which might render their own States' constitutions unconstitutional?

Nor were these state constitutional provisions merely theoretical. In New Jersey, for example, Cape May County, with a population of 8,349, and Ocean County, with a population of 13,628, each elected one State Senator, as did Essex and Hudson Counties, with populations of 143,839 and 129,067, respectively.[33] In the House, each county was entitled to one representative, which left 39 seats to be apportioned according to population.[34] Since there were 12 counties besides the two already mentioned which had populations over 30,000,[35] it is evident that there were serious disproportions in the House also. In

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§ III, cl. 1; R. I. Const., 1842, Art. V, § 1; Vt. Const., 1793, Amend. 23.

[32] Iowa Const., 1857, Art. III, § 35; Kan. Const., 1859, Art. 2, § 2, Art. 10, § 1; Me. Const., 1819, Art. IV–Part First, § 3; Mich. Const., 1850, Art. IV, § 3; Mo. Const., 1865, Art. IV, § 2; N. Y. Const., 1846, Art. III, § 5; Ohio Const., 1851, Art. XI, §§ 2–5; Pa. Const., 1838, Art. I, §§ 4, 6, 7, as amended; Tenn. Const., 1834, Art. II, § 5; W. Va. Const., 1861–1863, Art. IV, § 9.

[33] Ninth Census of the United States, Statistics of Population (1872) (hereafter Census), 49. The population figures, here and hereafter, are for the year 1870, which presumably best reflect the figures for the years 1866–1870. Only the figures for 1860 were available at that time, of course, and they would have been used by anyone interested in population statistics. See, *e. g.*, Globe 3028 (remarks of Senator Johnson).

The method of apportionment is contained in N. J. Const., 1844, Art. IV, § II, cl. 1.

[34] N. J. Const., 1844, Art. IV. § III, cl. 1. Census 49.

[35] *Ibid.*

New York, each of the 60 counties except Hamilton County was entitled to one of the 128 seats in the Assembly.[36] This left 69 seats to be distributed among counties the populations of which ranged from 15,420 to 942,292.[37] With seven more counties having populations over 100,000 and 13 others having populations over 50,000,[38] the disproportion in the Assembly was necessarily large. In Vermont, after each county had been allocated one Senator, there were 16 seats remaining to be distributed among the larger counties.[39] The smallest county had a population of 4,082; the largest had a population of 40,651 and there were 10 other counties with populations over 20,000.[40]

(iii) *Ratification by the "reconstructed" States.*— Each of the 10 "reconstructed" States was required to ratify the Fourteenth Amendment before it was readmitted to the Union.[41] The Constitution of each was scrutinized in Congress.[42] Debates over readmission

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[36] N. Y. Const., 1846, Art. III, §§ 2, 5. Census 50–51.

[37] *Ibid.*

[38] *Ibid.*

[39] There were 14 counties, Census 67, each of which was entitled to at least one out of a total of 30 seats. Vt. Const., 1793, Amend. 23.

[40] Census 67.

[41] Act of Mar. 2, 1867, § 5, 14 Stat. 429. See also Act of June 25, 1868, 15 Stat. 73, declaring that the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, would be admitted to representation in Congress when their legislatures had ratified the Fourteenth Amendment. Other conditions were also imposed, including a requirement that Georgia nullify certain provisions of its Constitution. *Ibid.* Arkansas, which had already ratified the Fourteenth Amendment, was readmitted by Act of June 22, 1868, 15 Stat. 72. Virginia was readmitted by Act of Jan. 26, 1870, 16 Stat. 62; Mississippi by Act of Feb. 23, 1870, 16 Stat. 67; and Texas by Act of Mar. 30, 1870, 16 Stat. 80. Georgia was not finally readmitted until later, by Act of July 15, 1870, 16 Stat. 363.

[42] Discussing the bill which eventuated in the Act of June 25, 1868, see note 41, *supra*, Thaddeus Stevens said:

"Now, sir, what is the particular question we are considering? Five or six States have had submitted to them the question of forming

were extensive.[43] In at least one instance, the problem of state legislative apportionment was expressly called to the attention of Congress. Objecting to the inclusion of Florida in the Act of June 25, 1868, Mr. Farnsworth stated on the floor of the House:

> "I might refer to the apportionment of representatives. By this constitution representatives in the Legislature of Florida are apportioned in such a manner as to give to the sparsely-populated portions of the State the control of the Legislature. The sparsely-populated parts of the State are those where there are very few negroes, the parts inhabited by the white rebels, the men who, coming in from Georgia, Alabama, and other States, control the fortunes of their several counties. By this constitution every county in that State is entitled to a representative. There are in that State counties that have not thirty registered voters; yet, under this constitution, every one of those counties is entitled

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constitutions for their own government. They have voluntarily formed such constitutions, under the direction of the Government of the United States. . . . They have sent us their constitutions. Those constitutions have been printed and laid before us. We have looked at them; we have pronounced them republican in form; and all we propose to require is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the Union." Cong. Globe, 40th Cong., 2d Sess., 2465 (1868). See also the remarks of Mr. Butler, *infra*, p. 606.

The close attention given the various Constitutions is attested by the Act of June 25, 1868, which conditioned Georgia's readmission on the deletion of "the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision . . . ." 15 Stat. 73. The sections involved are printed in Sen. Ex. Doc. No. 57, 40th Cong., 2d Sess., 14–15.

Compare *United States* v. *Florida*, 363 U. S. 121, 124–127.

[43] See, *e. g.*, Cong. Globe, 40th Cong., 2d Sess., 2412–2413, 2858–2860, 2861–2871, 2895–2900, 2901–2904, 2927–2935, 2963–2970, 2998–3022, 3023–3029 (1868).

> to a representative in the Legislature; while the populous counties are entitled to only one representative each, with an additional representative for every thousand inhabitants." [44]

The response of Mr. Butler is particularly illuminating:

> "All these arguments, all these statements, all the provisions of this constitution have been submitted to the Judiciary Committee of the Senate, and they have found the constitution republican and proper. This constitution has been submitted to the Senate, and they have found it republican and proper. It has been submitted to your own Committee on Reconstruction, and they have found it republican and proper, and have reported it to this House." [45]

The Constitutions of six of the 10 States contained provisions departing substantially from the method of apportionment now held to be required by the Amendment.[46] And, as in the North, the departures were as real in fact as in theory. In North Carolina, 90 of the 120 representatives were apportioned among the counties without regard to population, leaving 30 seats to be distributed by numbers.[47] Since there were seven counties with populations under 5,000 and 26 counties with populations over 15,000, the disproportions must have been widespread and substantial.[48] In South Carolina, Charleston, with a population of 88,863, elected two Senators; each of the other counties, with populations ranging from 10,269 to

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[44] Cong. Globe, 40th Cong., 2d Sess., 3090–3091 (1868).

[45] *Id.*, at 3092.

[46] Ala. Const., 1867, Art. VIII, § 1; Fla. Const., 1868, Art. XIV; Ga. Const., 1868, Art. III, § 3, ¶ 1; La. Const., 1868, Tit. II, Art. 20; N. C. Const., 1868, Art. II, § 6; S. C. Const., 1868, Art. II, §§ 6, 8.

[47] N. C. Const., 1868, Art. II, § 6. There were 90 counties. Census 52–53.

[48] *Ibid.*

42,486, elected one Senator.[49] In Florida, each of the 39 counties was entitled to elect one Representative; no county was entitled to more than four.[50] These principles applied to Dade County, with a population of 85, and to Alachua County and Leon County, with populations of 17,328 and 15,236, respectively.[51]

It is incredible that Congress would have exacted ratification of the Fourteenth Amendment as the price of readmission, would have studied the State Constitutions for compliance with the Amendment, and would then have disregarded violations of it.

The facts recited above show beyond any possible doubt:

(1) that Congress, with full awareness of and attention to the possibility that the States would not afford full equality in voting rights to all their citizens, nevertheless deliberately chose not to interfere with the States' plenary power in this regard when it proposed the Fourteenth Amendment;

(2) that Congress did not include in the Fourteenth Amendment restrictions on the States' power to control voting rights because it believed that if such restrictions were included, the Amendment would not be adopted; and

(3) that at least a substantial majority, if not all, of the States which ratified the Fourteenth Amendment did not consider that in so doing, they were accepting limitations on their freedom, never before questioned, to regulate voting rights as they chose.

Even if one were to accept the majority's belief that it is proper entirely to disregard the unmistakable implica-

[49] S. C. Const., 1868, Art. II, § 8; Census 60.

[50] Fla. Const., 1868, Art. XIV.

[51] Census 18–19.

tions of the second section of the Amendment in construing the first section, one is confounded by its disregard of all this history. There is here none of the difficulty which may attend the application of basic principles to situations not contemplated or understood when the principles were framed. The problems which concern the Court now were problems when the Amendment was adopted. By the deliberate choice of those responsible for the Amendment, it left those problems untouched.

C. *After 1868.*

The years following 1868, far from indicating a developing awareness of the applicability of the Fourteenth Amendment to problems of apportionment, demonstrate precisely the reverse: that the States retained and exercised the power independently to apportion their legislatures. In its Constitutions of 1875 and 1901, Alabama carried forward earlier provisions guaranteeing each county at least one representative and fixing an upper limit to the number of seats in the House.[52] Florida's Constitution of 1885 continued the guarantee of one representative for each county and reduced the maximum number of representatives per county from four to three.[53] Georgia, in 1877, continued to favor the smaller counties.[54] Louisiana, in 1879, guaranteed each parish at least one representative in the House.[55] In 1890, Mississippi guaranteed each county one representative, established a maximum number of representatives, and provided that specified groups of counties should each have approximately one-third of the seats in the House, what-

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[52] Ala. Const., 1875, Art. IX, §§ 2, 3; Ala. Const., 1901, Art. IX, §§ 198, 199.

[53] Fla. Const., 1885, Art. VII, § 3.

[54] Ga. Const., 1877, Art. III, § III.

[55] La. Const., 1879, Art. 16.

ever the spread of population.[56] Missouri's Constitution of 1875 gave each county one representative and otherwise favored less populous areas.[57] Montana's original Constitution of 1889 apportioned the State Senate by counties.[58] In 1877, New Hampshire amended its Constitution's provisions for apportionment, but continued to favor sparsely settled areas in the House and to apportion seats in the Senate according to direct taxes paid; [59] the same was true of New Hampshire's Constitution of 1902.[60]

In 1894, New York adopted a Constitution the peculiar apportionment provisions of which were obviously intended to prevent representation according to population: no county was allowed to have more than one-third of all the Senators, no two counties which were adjoining or "separated only by public waters" could have more than one-half of all the Senators, and whenever any county became entitled to more than three Senators, the total number of Senators was increased, thus preserving to the small counties their original number of seats.[61] In addition, each county except Hamilton was guaranteed a seat in the Assembly.[62] The North Carolina Constitution of 1876 gave each county at least one representative and fixed a maximum number of representatives for the whole House.[63] Oklahoma's Constitution at the time of its admission to the Union (1907) favored small counties by the use of partial ratios and a maximum number of seats in the House; in addition, no county was permitted to "take part" in the election of more than seven

[56] Miss. Const., 1890, Art. 13, § 256.
[57] Mo. Const., 1875, Art. IV, § 2.
[58] Mont. Const., 1889, Art. V, § 4, Art. VI, § 4.
[59] N. H. Const., 1792, Part Second, §§ IX–XI, XXVI, as amended.
[60] N. H. Const., 1902, Part Second, Arts. 9, 10, 25.
[61] N. Y. Const., 1894, Art. III, § 4.
[62] N. Y. Const., 1894, Art. III, § 5.
[63] N. C. Const., 1876, Art. II, § 5.

representatives.[64] Pennsylvania, in 1873, continued to guarantee each county one representative in the House.[65] The same was true of South Carolina's Constitution of 1895, which provided also that each county should elect one and only one Senator.[66] Utah's original Constitution of 1895 assured each county of one representative in the House.[67] Wyoming, when it entered the Union in 1889, guaranteed each county at least one Senator and one representative.[68]

D. *Today.*

Since the Court now invalidates the legislative apportionments in six States, and has so far upheld the apportionment in none, it is scarcely necessary to comment on the situation in the States today, which is, of course, as fully contrary to the Court's decision as is the record of every prior period in this Nation's history. As of 1961, the Constitutions of all but 11 States, roughly 20% of the total, recognized bases of apportionment other than geographic spread of population, and to some extent favored sparsely populated areas by a variety of devices, ranging from straight area representation or guaranteed minimum area representation to complicated schemes of the kind exemplified by the provisions of New York's Constitution of 1894, still in effect until struck down by the Court today in No. 20, *post*, p. 633.[69] Since

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[64] Okla. Const., 1907, Art. V, § 10.

[65] Pa. Const., 1873, Art. II, § 17.

[66] S. C. Const., 1895, Art. III, §§ 4, 6.

[67] Utah Const., 1895, Art. IX, § 4.

[68] Wyo. Const., 1889, Art. III, § 3.

[69] A tabular presentation of constitutional provisions for apportionment as of Nov. 1, 1961, appears in The Book of the States 1962–1963, 58–62. Using this table, but disregarding some deviations from a pure population base, the Advisory Commission on Intergovernmental Relations states that there are 15 States in which the legislatures are apportioned solely according to population. Apportionment of State Legislatures (1962), 12.

Tennessee, which was the subject of *Baker* v. *Carr,* and Virginia, scrutinized and disapproved today in No. 69, *post,* p. 678, are among the 11 States whose own Constitutions are sound from the standpoint of the Federal Constitution as construed today, it is evident that the actual practice of the States is even more uniformly than their theory opposed to the Court's view of what is constitutionally permissible.

E. *Other Factors.*

In this summary of what the majority ignores, note should be taken of the Fifteenth and Nineteenth Amendments. The former prohibited the States from denying or abridging the right to vote "on account of race, color, or previous condition of servitude." The latter, certified as part of the Constitution in 1920, added sex to the prohibited classifications. In *Minor* v. *Happersett,* 21 Wall. 162, this Court considered the claim that the right of women to vote was protected by the Privileges and Immunities Clause of the Fourteenth Amendment. The Court's discussion there of the significance of the Fifteenth Amendment is fully applicable here with respect to the Nineteenth Amendment as well.

> "And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must

include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?" *Id.*, at 175.

In the present case, we can go still further. If constitutional amendment was the only means by which all men and, later, women, could be guaranteed the right to vote at all, even for *federal* officers, how can it be that the far less obvious right to a particular kind of apportionment of *state* legislatures—a right to which is opposed a far more plausible conflicting interest of the State than the interest which opposes the general right to vote—can be conferred by judicial construction of the Fourteenth Amendment? [70] Yet, unless one takes the highly implausible view that the Fourteenth Amendment controls methods of apportionment but leaves the right to vote itself unprotected, the conclusion is inescapable that the Court has, for purposes of these cases, relegated the Fifteenth and Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned.

Mention should be made finally of the decisions of this Court which are disregarded or, more accurately, silently overruled today. *Minor* v. *Happersett, supra,* in which the Court held that the Fourteenth Amendment did *not*

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[70] Compare the Court's statement in *Guinn* v. *United States,* 238 U. S. 347, 362:

"... Beyond doubt the [Fifteenth] Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

confer the right to vote on anyone, has already been noted. Other cases are more directly in point. In *Colegrove* v. *Barrett,* 330 U. S. 804, this Court dismissed "for want of a substantial federal question" an appeal from the dismissal of a complaint alleging that the Illinois legislative apportionment resulted in "gross inequality in voting power" and "gross and arbitrary and atrocious discrimination in voting" which denied the plaintiffs equal protection of the laws.[71] In *Remmey* v. *Smith,* 102 F. Supp. 708 (D. C. E. D. Pa.), a three-judge District Court dismissed a complaint alleging that the apportionment of the Pennsylvania Legislature deprived the plaintiffs of "constitutional rights guaranteed to them by the Fourteenth Amendment." *Id.,* at 709. The District Court stated that it was aware that the plaintiffs' allegations were "notoriously true" and that "the practical disenfranchisement of qualified electors in certain of the election districts in Philadelphia County is a matter of common knowledge." *Id.,* at 710. This Court dismissed the appeal "for the want of a substantial federal question." 342 U. S. 916.

In *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S. W. 2d 40, the Supreme Court of Tennessee dismissed an action for a declaratory judgment that the Tennessee Apportionment Act of 1901 was unconstitutional. The complaint alleged that "a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives." *Id.,* at 276, 292 S. W. 2d, at 42. Without dissent, this Court granted the motion to dismiss the appeal. 352 U. S. 920. In *Radford* v. *Gary,* 145 F. Supp. 541 (D. C. W. D. Okla.), a three-judge District Court was

[71] The quoted phrases are taken from the Jurisdictional Statement, pp. 13, 19.

convened to consider "the complaint of the plaintiff to the effect that the existing apportionment statutes of the State of Oklahoma violate the plain mandate of the Oklahoma Constitution and operate to deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States." *Id.*, at 542. The plaintiff alleged that he was a resident and voter in the most populous county of the State, which had about 15% of the total population of the State but only about 2% of the seats in the State Senate and less than 4% of the seats in the House. The complaint recited the unwillingness or inability of the branches of the state government to provide relief and alleged that there was no state remedy available. The District Court granted a motion to dismiss. This Court affirmed without dissent. 352 U. S. 991.

Each of these recent cases is distinguished on some ground or other in *Baker* v. *Carr*. See 369 U. S., at 235–236. Their summary dispositions prevent consideration whether these after-the-fact distinctions are real or imaginary. The fact remains, however, that between 1947 and 1957, four cases raising issues precisely the same as those decided today were presented to the Court. Three were dismissed because the issues presented were thought insubstantial and in the fourth the lower court's dismissal was affirmed.[72]

I have tried to make the catalogue complete, yet to keep it within the manageable limits of a judicial opinion. In my judgment, today's decisions are refuted by

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[72] In two early cases dealing with party primaries in Texas, the Court indicated that the Equal Protection Clause did afford some protection of the right to vote. *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73. Before and after these cases, two cases dealing with the qualifications for electors in Oklahoma had gone off on the Fifteenth Amendment, *Guinn* v. *United States*, 238

the language of the Amendment which they construe and by the inference fairly to be drawn from subsequently enacted Amendments. They are unequivocally refuted by history and by consistent theory and practice from the time of the adoption of the Fourteenth Amendment until today.

II.

The Court's elaboration of its new "constitutional" doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States.

In the Alabama cases (Nos. 23, 27, 41), the District Court held invalid not only existing provisions of the State Constitution—which this Court lightly dismisses with a wave of the Supremacy Clause and the remark

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U. S. 347; *Lane* v. *Wilson,* 307 U. S. 268. The rationale of the Texas cases is almost certainly to be explained by the Court's reluctance to decide that party primaries were a part of the electoral process for purposes of the Fifteenth Amendment. See *Newberry* v. *United States,* 256 U. S. 232. Once that question was laid to rest in *United States* v. *Classic,* 313 U. S. 299, the Court decided subsequent cases involving Texas party primaries on the basis of the Fifteenth Amendment. *Smith* v. *Allwright,* 321 U. S. 649; *Terry* v. *Adams,* 345 U. S. 461.

The recent decision in *Gomillion* v. *Lightfoot,* 364 U. S. 339, that a constitutional claim was stated by allegations that municipal lines had been redrawn with the intention of depriving Negroes of the right to vote in municipal elections was based on the Fifteenth Amendment. Only one Justice, in a concurring opinion, relied on the Equal Protection Clause of the Fourteenth Amendment. *Id.,* at 349.

that "it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions," *ante*, p. 584—but also a proposed amendment to the Alabama Constitution which had never been submitted to the voters of Alabama for ratification, and "standby" legislation which was not to become effective unless the amendment was rejected (or declared unconstitutional) and in no event before 1966. *Sims* v. *Frink*, 208 F. Supp. 431. See *ante*, pp. 543–551. Both of these measures had been adopted only nine days before,[73] at an Extraordinary Session of the Alabama Legislature, convened pursuant to what was very nearly a directive of the District Court, see *Sims* v. *Frink*, 205 F. Supp. 245, 248. The District Court formulated its own plan for the apportionment of the Alabama Legislature, by picking and choosing among the provisions of the legislative measures. 208 F. Supp., at 441–442. See *ante*, p. 552. Beyond that, the court warned the legislature that there would be still further judicial reapportionment unless the legislature, like it or not, undertook the task for itself. 208 F. Supp., at 442. This Court now states that the District Court acted in "a most proper and commendable manner," *ante*, p. 586, and approves the District Court's avowed intention of taking "some further action" unless the State Legislature acts by 1966, *ante*, p. 587.

In the Maryland case (No. 29, *post*, p. 656), the State Legislature was called into Special Session and enacted a temporary reapportionment of the House of Delegates, under pressure from the state courts.[74] Thereafter, the

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[73] The measures were adopted on July 12, 1962. The District Court handed down its opinion on July 21, 1962.

[74] In reversing an initial order of the Circuit Court for Anne Arundel County dismissing the plaintiffs' complaint, the Maryland Court of Appeals directed the lower court to hear evidence on and determine the plaintiffs' constitutional claims, and, if it found provi-

Maryland Court of Appeals held that the Maryland Senate was constitutionally apportioned. *Maryland Committee for Fair Representation* v. *Tawes,* 229 Md. 406, 184 A. 2d 715. This Court now holds that neither branch of the State Legislature meets constitutional requirements. *Post,* p. 674. The Court *presumes* that since "the Maryland constitutional provisions relating to legislative apportionment [are] hereby held unconstitutional, the Maryland Legislature . . . has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions" which satisfy the Federal Constitution, *id.,* at 675. On this premise, the Court concludes that the Maryland courts need not "feel obliged to take further affirmative action" now, but that "under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan." *Id.,* at 676.

In the Virginia case (No. 69, *post,* p. 678), the State Legislature in 1962 complied with the state constitutional requirement of regular reapportionment.[75] Two days later, a complaint was filed in the District Court.[76] Eight months later, the legislative reapportionment was

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sions of the Maryland Constitution to be invalid, to "declare that the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its membership for purposes of the November, 1962, election." *Maryland Committee for Fair Representation* v. *Tawes,* 228 Md. 412, 438–439, 180 A. 2d 656, 670. On remand, the opinion of the Circuit Court included such a declaration. The opinion was filed on May 24, 1962. The Maryland Legislature, in Special Session, adopted the "emergency" measures now declared unconstitutional seven days later, on May 31, 1962.

[75] The Virginia Constitution, Art. IV, § 43, requires that a reapportionment be made every 10 years.

[76] The 1962 reapportionment acts were approved on Apr. 7, 1962. The complaint was filed on Apr. 9, 1962.

declared unconstitutional. *Mann* v. *Davis,* 213 F. Supp. 577. The District Court gave the State Legislature two months within which to reapportion itself in special session, under penalty of being reapportioned by the court.[77] Only a stay granted by a member of this Court slowed the process;[78] it is plain that no stay will be forthcoming in the future. The Virginia Legislature is to be given "an adequate opportunity to enact a valid plan"; but if it fails "to act promptly in remedying the constitutional defects in the State's legislative apportionment plan," the District Court is to "take further action." *Post,* p. 693.

In Delaware (No. 307, *post,* p. 695), the District Court entered an order on July 25, 1962, which stayed proceedings until August 7, 1962, "in the hope and expectation" that the General Assembly would take "some appropriate action" in the intervening 13 days. *Sincock* v. *Terry,* 207 F. Supp. 205, 207. By way of prodding, presumably, the court noted that if no legislative action were taken and the court sustained the plaintiffs' claim, "the present General Assembly and any subsequent General Assembly, the members of which were elected pursuant to Section 2 of Article 2 [the challenged provisions of the Delaware Constitution], might be held not to be a *de jure* legislature and its legislative acts might be held invalid and unconstitutional." *Id.,* at 205–206. Five days later, on July 30, 1962, the General Assembly approved a proposed amendment to the State Constitution. On August 7, 1962, the District Court entered an order denying the

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[77] The District Court handed down its opinion on Nov. 28, 1962, and gave the Virginia General Assembly until Jan. 31, 1963, "to enact appropriate reapportionment laws." 213 F. Supp., at 585–586. The court stated that failing such action or an appeal to this Court, the plaintiffs might apply to it "for such further orders as may be required." *Id.,* at 586.

[78] On Dec. 15, 1962, THE CHIEF JUSTICE granted a stay pending final disposition of the case in this Court.

defendants' motion to dismiss. The court said that it did not wish to substitute its judgment "for the collective wisdom of the General Assembly of Delaware," but that "in the light of all the circumstances," it had to proceed promptly. 210 F. Supp. 395, 396. On October 16, 1962, the court declined to enjoin the conduct of elections in November. 210 F. Supp. 396. The court went on to express its regret that the General Assembly had not adopted the court's suggestion, see 207 F. Supp., at 206–207, that the Delaware Constitution be amended to make apportionment a statutory rather than a constitutional matter, so as to facilitate further changes in apportionment which might be required. 210 F. Supp., at 401. In January 1963, the General Assembly again approved the proposed amendment of the apportionment provisions of the Delaware Constitution, which thereby became effective on January 17, 1963.[79] Three months later, on April 17, 1963, the District Court reached "the reluctant conclusion" that Art. II, § 2, of the Delaware Constitution was unconstitutional, with or without the 1963 amendment. *Sincock* v. *Duffy,* 215 F. Supp. 169, 189. Observing that "the State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time," *id.,* at 191, the court gave the General Assembly until October 1, 1963, to adopt acceptable provisons for apportionment. On May 20, 1963, the District Court enjoined the defendants from conducting any elections, including the general election scheduled for November 1964, pursuant to the old or the new constitutional provisions.[80] This Court now approves all these

[79] The Delaware Constitution, Art. XVI, § 1, requires that amendments be approved by the necessary two-thirds vote in two successive General Assemblies.

[80] The District Court thus nailed the lid on the "box of time" in which everyone seemed to it "to be trapped." The lid was temporarily opened a crack on June 27, 1963, when MR. JUSTICE BRENNAN

proceedings, noting particularly that in allowing the 1962 elections to go forward, "the District Court acted in a wise and temperate manner." *Post,* p. 710.[81]

Records such as these in the cases decided today are sure to be duplicated in most of the other States if they have not been already. They present a jarring picture of courts threatening to take action in an area which they have no business entering, inevitably on the basis of political judgments which they are incompetent to make. They show legislatures of the States meeting in haste and deliberating and deciding in haste to avoid the threat of judicial interference. So far as I can tell, the Court's only response to this unseemly state of affairs is ponderous insistence that "a denial of constitutionally protected rights demands judicial protection," *ante,* p. 566. By thus refusing to recognize the bearing which a potential for

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granted a stay of the injunction until disposition of the case by this Court. Since the Court states that "the delay inherent in following the state constitutional prescription for approval of constitutional amendments by two successive General Assemblies cannot be allowed to result in an impermissible deprivation of appellees' right to an adequate voice in the election of legislators to represent them," *post,* p. 711, the lid has presumably been slammed shut again.

[81] In New York and Colorado, this pattern of conduct has thus far been avoided. In the New York case (No. 20, *post,* p. 633), the District Court twice dismissed the complaint, once without reaching the merits, *WMCA, Inc.,* v. *Simon,* 202 F. Supp. 741, and once, after this Court's remand following *Baker* v. *Carr, supra,* 370 U. S. 190, on the merits, 208 F. Supp. 368. In the Colorado case (No. 508, *post,* p. 713), the District Court first declined to interfere with a forthcoming election at which reapportionment measures were to be submitted to the voters, *Lisco* v. *McNichols,* 208 F. Supp. 471, and, after the election, upheld the apportionment provisions which had been adopted, 219 F. Supp. 922.

In view of the action which this Court now takes in both of these cases, there is little doubt that the legislatures of these two States will now be subjected to the same kind of pressures from the federal judiciary as have the other States.

conflict of this kind may have on the question whether the claimed rights are in fact constitutionally entitled to judicial protection, the Court assumes, rather than supports, its conclusion.

It should by now be obvious that these cases do not mark the end of reapportionment problems in the courts. Predictions once made that the courts would never have to face the problem of actually working out an apportionment have proved false. This Court, however, continues to avoid the consequences of its decisions, simply assuring us that the lower courts "can and . . . will work out more concrete and specific standards," *ante,* p. 578. Deeming it "expedient" not to spell out "precise constitutional tests," the Court contents itself with stating "only a few rather general considerations." *Ibid.*

Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever. Quite obviously, there are limitless possibilities for districting consistent with such a principle. Nor can these problems be avoided by judicial reliance on legislative judgments so far as possible. Reshaping or combining one or two districts, or modifying just a few district lines, is no less a matter of choosing among many possible

solutions, with varying political consequences, than reapportionment broadside.[82]

The Court ignores all this, saying only that "what is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case," *ante,* p. 578. It is well to remember that the product of today's decisions will not be readjustment of a few districts in a few States which most glaringly depart from the principle of equally populated districts. It will be a redetermination, extensive in many cases, of legislative districts in all but a few States.

Although the Court—necessarily, as I believe—provides only generalities in elaboration of its main thesis, its opinion nevertheless fully demonstrates how far removed these problems are from fields of judicial competence. Recognizing that "indiscriminate districting" is an invitation to "partisan gerrymandering," *ante,* pp. 578–579, the Court nevertheless excludes virtually every basis for the formation of electoral districts other than "indiscriminate districting." In one or another of today's opinions, the Court declares it unconstitutional for a State to give effective consideration to any of the following in establishing legislative districts:

(1) history; [83]

(2) "economic or other sorts of group interests"; [84]

(3) area; [85]

(4) geographical considerations; [86]

(5) a desire "to insure effective representation for sparsely settled areas"; [87]

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[82] It is not mere fancy to suppose that in order to avoid problems of this sort, the Court may one day be tempted to hold that all state legislators must be elected in statewide elections.

[83] *Ante,* p. 579.

[84] *Ante,* pp. 579–580.

[85] *Ante,* p. 580.

[86] *Ibid.*

[87] *Ibid.*

(6) "availability of access of citizens to their representatives"; [88]

(7) theories of bicameralism (except those approved by the Court); [89]

(8) occupation; [90]

(9) "an attempt to balance urban and rural power." [91]

(10) the preference of a majority of voters in the State.[92]

So far as presently appears, the *only* factor which a State may consider, apart from numbers, is political subdivisions. But even "a clearly rational state policy" recognizing this factor is unconstitutional if "population is submerged as the controlling consideration . . . ." [93]

I know of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes all or any of these exclusions. Certain it is that the Court's opinion does not establish them. So far as the Court says anything at all on this score, it says only that "legislators represent people, not trees or acres," *ante,* p. 562; that "citizens, not history or economic interests, cast votes," *ante,* p. 580; that "people, not land or trees or pastures, vote," *ibid.*[94] All this may be conceded. But it is surely equally obvious, and, in the context of elections, more meaningful to note that people are not ciphers and that legislators can represent their electors only by speak-

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[88] *Ibid.*

[89] *Ante,* pp. 576–577.

[90] *Davis* v. *Mann, post,* p. 691.

[91] *Id.,* at 692.

[92] *Lucas* v. *Forty-Fourth General Assembly, post,* p. 736.

[93] *Ante,* p. 581.

[94] The Court does note that, in view of modern developments in transportation and communication, it finds "unconvincing" arguments based on a desire to insure representation of sparsely settled areas or to avoid districts so large that voters' access to their representatives is impaired. *Ante,* p. 580.

ing for their interests—economic, social, political—many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation.

CONCLUSION.

With these cases the Court approaches the end of the third round set in motion by the complaint filed in *Baker* v. *Carr*. What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible. As I have said before, *Wesberry* v. *Sanders, supra,* at 48, I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result.

These decisions also cut deeply into the fabric of our federalism. What must follow from them may eventually appear to be the product of state legislatures. Nevertheless, no thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable.

Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is

not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

I dissent in each of these cases, believing that in none of them have the plaintiffs stated a cause of action. To the extent that *Baker* v. *Carr,* expressly or by implication, went beyond a discussion of jurisdictional doctrines independent of the substantive issues involved here, it should be limited to what it in fact was: an experiment in venturesome constitutionalism. I would reverse the judgments of the District Courts in Nos. 23, 27, and 41 (Alabama), No. 69 (Virginia), and No. 307 (Delaware), and remand with directions to dismiss the complaints. I would affirm the judgments of the District Courts in No. 20 (New York), and No. 508 (Colorado), and of the Court of Appeals of Maryland in No. 29.

APPENDIX A TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

Statements made in the House of Representatives during the debate on the resolution proposing the Fourteenth Amendment.*

*All page references are to Cong. Globe, 39th Cong., 1st Sess. (1866).

"As the nearest approach to justice which we are likely to be able to make, I approve of the second section that bases representation upon voters." 2463 (Mr. Garfield).

"Would it not be a most unprecedented thing that when this [former slave] population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here; that when they will not count them in apportioning their own legislative districts, we are to count them as five fifths (no longer as three fifths, for that is out of the question) as soon as you make a new apportionment?" 2464–2465 (Mr. Thayer).

"The second section of the amendment is ostensibly intended to remedy a supposed inequality in the basis of representation. The real object is to reduce the number of southern representatives in Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage." 2467 (Mr. Boyer).

"Shall the pardoned rebels of the South include in the basis of representation four million people to whom they deny political rights, and to no one of whom is allowed a vote in the selection of a Representative?" 2468 (Mr. Kelley).

"I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country." 2469 (Mr. Kelley).

"But I will ask, why should not the representation of the States be limited as the States themselves limit suffrage? . . . If the negroes of the South are

not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union?" 2498 (Mr. Broomall).

"It is now proposed to base representation upon suffrage, upon the number of voters, instead of upon the aggregate population in every State of the Union." 2502 (Mr. Raymond).

"We admit equality of representation based upon the exercise of the elective franchise by the people. The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country—and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people—I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation." 2508 (Mr. Boutwell).

"Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation for male citizens not less than twenty-one years of age, whether white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age." 2510 (Mr. Miller).

"Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, ultimately recognized and admitted." 2511 (Mr. Eliot).

"I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have no doubt that the Government of the United States has authority to do this under the Constitution; but I do not think they have the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion. The situa-

tion of opinion in these States compels us to look to other means to protect the Government against the enemy." 2532 (Mr. Banks).

"If you deny to any portion of the loyal citizens of your State the right to vote for Representatives you shall not assume to represent them, and, as you have done for so long a time, misrepresent and oppress them. This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best." 2539–2540 (Mr. Farnsworth).

APPENDIX B TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

Statements made in the Senate during the debate on the resolution proposing the Fourteenth Amendment.*

"The second section of the constitutional amendment proposed by the committee can be justified upon no other theory than that the negroes ought to vote; and negro suffrage must be vindicated before the people in sustaining that section, for it does not exclude the non-voting population of the North, because it is admitted that there is no wrong in excluding from suffrage aliens, females, and minors. But we say, if the negro is excluded from suffrage he shall also be excluded from the basis of representation. Why this inequality? Why this injustice? For injustice it would be unless there be some good reason for this discrimination against the South in excluding her non-voting population from the basis

*All page references are to Cong. Globe, 39th Cong., 1st Sess. (1866).

of representation. The only defense that we can make to this apparent injustice is that the South commits an outrage upon human rights when she denies the ballot to the blacks, and we will not allow her to take advantage of her own wrong, or profit by this outrage. Does any one suppose it possible to avoid this plain issue before the people? For if they will sustain you in reducing the representation of the South because she does not allow the negro to vote, they will do so because they think it is wrong to disfranchise him." 2800 (Senator Stewart).

"It [the second section of the proposed amendment] relieves him [the Negro] from misrepresentation in Congress by denying him any representation whatever." 2801 (Senator Stewart).

"But I will again venture the opinion that it [the second section] means as if it read thus: no State shall be allowed a representation on a colored population unless the right of voting is given to the negroes—presenting to the States the alternative of loss of representation or the enfranchisement of the negroes, and their political equality." 2939 (Senator Hendricks).

"I should be much better satisfied if the right of suffrage had been given at once to the more intelligent of them [the Negroes] and such as had served in our Army. But it is believed by wiser ones than myself that this amendment will very soon produce some grant of suffrage to them, and that the craving for political power will ere long give them universal suffrage. . . . Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in

the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further." 2963–2964 (Senator Poland).

"What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania, and you say to her that she must either allow her negroes to vote or have one member of Congress less." 2987 (Senator Cowan).

"Now, sir, in all the States—certainly in mine, and no doubt in all—there are local as contradistinguished from State elections. There are city elections, county elections, and district or borough elections; and those city and county and district elections are held under some law of the State in which the city or county or district or borough may be; and in those elections, according to the laws of the States, certain qualifications are prescribed, residence within the limits of the locality and a property qualification in some. Now, is it proposed to say that if every man in a State is not at liberty to vote at a city or a country or a borough election that is to affect the basis of representation?" 2991 (Senator Johnson).

"Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States . . . not only the right, but the exclusive right, to regulate the franchise. . . . It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Govern-

ment of the United States will be impotent to redress." 3027 (Senator Johnson).

"The amendment fixes representation upon numbers, precisely as the Constitution now does, but when a State denies or abridges the elective franchise to any of its male inhabitants who are citizens of the United States and not less than twenty-one years of age, except for participation in rebellion or other crime, then such State will lose its representation in Congress in the proportion which the male citizen so excluded bears to the whole number of male citizens not less than twenty-one years of age in the State." 3033 (Senator Henderson).

Syllabus.

WMCA, INC., ET AL. *v.* LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL.

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

No. 20. Argued November 12–13, 1963.—Decided June 15, 1964.

Appellants, including voters in several of New York State's most populous counties, filed suit on their own behalf and for others similarly situated, against various state and local election officials, attacking the legislative apportionment system as a violation of the Fourteenth Amendment. The 1894 New York Constitution provides for a complex "ratio" system of senatorial apportionment, with the county as the basic unit, yielding separate and diverse ratios for "populous" and "less populous" counties, and resulting in comparatively less representation for the populous counties. Under the existing apportionment senators representing 40.9% of the State's citizens comprised a majority in the Senate, and the most populous senatorial district had 2.4 times as many citizens as the least populous one. Gross disparities would remain under the forthcoming apportionment. Similarly, the provisions for apportioning Assembly seats resulted in establishing three separate categories of counties with distinctly different population ratios, and also favored the less populous counties. Under the existing apportionment, assemblymen representing 37.1% of the State's citizens constituted a majority in the Assembly and the most populous assembly district had 11.9 times as many citizens as the least populous one. Gross disparities would remain under the forthcoming apportionment. No initiative procedure exists under New York law and no adequate political remedy for malapportionment is available. The District Court initially denied relief, holding the issues nonjusticiable. This Court, in 370 U. S. 190, vacated that judgment and remanded for further consideration in the light of *Baker* v. *Carr*, 369 U. S. 186. Thereafter, the District Court dismissed the complaint on the merits, concluding that the constitutional provisions were not arbitrary or irrational in giving weight to "area, accessibility and character of interest" in addition to population. *Held:*

1. The Equal Protection Clause requires that both houses of a bicameral state legislature be apportioned substantially on an equal population basis. *Reynolds* v. *Sims, ante,* p. 533, followed. P. 653.

2. Neither house of the New York Legislature is now, or will be when reapportioned on 1960 census figures, apportioned sufficiently on a population basis to be constitutionally sustainable. Pp. 653–654.

(a) No matter how sophisticated or complex an apportionment plan may be, it cannot significantly undervalue the votes of citizens merely because of where they reside. P. 653.

(b) A formula with a built-in bias against voters residing in the more populous counties cannot be constitutionally condoned. Pp. 653–654.

3. Using equitable principles, the District Court must determine whether, in view of the imminence of the 1964 election, that election may be held under the existing apportionment provisions, or whether effectuation of appellants' rights should not be further delayed. P. 655.

208 F. Supp. 368, reversed and remanded.

Leonard B. Sand argued the cause for appellants. With him on the brief was *Max Gross.*

Irving Galt, Assistant Solicitor General of New York, argued the cause for appellees. With him on the brief for the Secretary of State and Attorney General of New York were *Louis J. Lefkowitz,* Attorney General of New York, *Sheldon Raab,* Assistant Attorney General, and *Barry Mahoney,* Deputy Assistant Attorney General. *Francis J. Morgan* and *Irving Libenson* filed a brief for appellee Berman. *Stanley S. Corwin* filed a brief for appellee Griffing.

Bertram Harnett and *Jack B. Weinstein* filed a brief for appellee Nickerson in support of appellants. *Leo A. Larkin, George H. P. Dwight* and *Benjamin Offner* filed a brief for appellees Screvane et al., in support of appellants.

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

reversal. With him on the brief were *Bruce J. Terris* and *Richard W. Schmude.*

Briefs of *amici curiae* were filed by *Leo Pfeffer, Melvin L. Wulf, Jack Greenberg* and *Robert B. McKay* for the American Jewish Congress et al., and by *W. Scott Miller, Jr.* and *George J. Long* for Schmied, President of the Board of Aldermen of Louisville, Kentucky.

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

At issue in this litigation is the constitutional validity, under the Fourteenth Amendment to the Federal Constitution, of the apportionment of seats in the New York Legislature.

I.

Appellants initially brought this action on May 1, 1961, in the Federal District Court for the Southern District of New York. Plaintiffs below included individual citizens and voters residing in five of the six most populous New York counties (Bronx, Kings, Nassau, New York and Queens), suing in their own behalf and on behalf of all New York citizens similarly situated. Appellees, sued in their representative capacities, are various state and local officials charged with duties in connection with reapportionment and the conducting of state elections. The complaint claimed rights under the Civil Rights Act, 42 U. S. C. §§ 1983, 1988, and asserted jurisdiction under 28 U. S. C. § 1343 (3).

Plaintiffs below sought a declaration that those provisions of the State Constitution which establish the formulas for apportioning seats in the two houses of the New York Legislature, and the statutes implementing them, are unconstitutional since violative of the Fourteenth Amendment to the Federal Constitution. The complaint further asked the District Court to enjoin defendants

from performing any acts or duties in compliance with the allegedly unconstitutional legislative apportionment provisions. Plaintiffs asserted that they had no adequate remedy other than the judicial relief sought, and requested the court to retain jurisdiction until the New York Legislature, "freed from the fetters imposed by the Constitutional provisions invalidated by this Court, provides for such apportionment of the State legislature as will insure to the urban voters of New York State the rights guaranteed them by the Constitution of the United States."

In attacking the existing apportionment of seats in the New York Legislature, plaintiffs below stated, more particularly, that:

> "The provisions of the New York State Constitution, Article III, §§ 2–5, violate the XIV Amendment of the Constitution of the United States because the apportionment formula contained therein results, and must necessarily result, when applied to the population figures of the State in a grossly unfair weighting of both houses in the State legislature in favor of the lesser populated rural areas of the state to the great disadvantage of the densely populated urban centers of the state. . . .
>
> "As a result of the constitutional provisions challenged herein, the Plaintiffs' votes are not as effective in either house of the legislature as the votes of other citizens residing in rural areas of the state. Plaintiffs and all others similarly situated suffer a debasement of their votes by virtue of the arbitrary, obsolete and unconstitutional apportionment of the legislature and they and all others similarly situated are denied the equal protection of the laws required by the Constitution of the United States."

The complaint asserted that the legislative apportionment provisions of the 1894 New York Constitution, as

amended, are not only presently unconstitutional, but also were invalid and violative of the Fourteenth Amendment at the time of their adoption, and that "[t]he population growth in the State of New York and the shifts of population to urban areas have aggravated the violation of Plaintiffs' rights under the XIV Amendment."

As requested by plaintiffs, a three-judge District Court was convened.[1] The New York City defendants admitted the allegations of the complaint and requested the Court to grant plaintiffs the relief they were seeking. The remaining defendants moved to dismiss. On January 11, 1962, the District Court announced its initial decision. It held that it had jurisdiction but dismissed the complaint, without reaching the merits, on the ground that it failed to state a claim upon which relief could be granted, since the issues raised were nonjusticiable. 202 F. Supp. 741. In discussing the allegations made by plaintiffs, the Court stated:

> "The complaint specifically cites as the cause of this allegedly unconstitutional distribution of state legislative representation the New York Constitutional provisions requiring that:
>
> "(a) '. . . the total of fifty Senators established by the Constitution of 1894 shall be increased by those Senators to which any of the larger counties become entitled in addition to their allotment as of 1894, but without effect for decreases in other large counties . . .'
>
> "(b) no county may have 'four or more Senators unless it has a full ratio for each Senator . . .' and

[1] See 196 F. Supp. 758, where the District Court concluded that the suit presented issues warranting the convening of a three-judge court, over defendants' motions to dismiss the complaint for lack of jurisdiction and for failure to state a claim on which relief could be granted.

> "(c) '. . . every county except Hamilton shall always be entitled [in the Assembly] to one member coupled with the limitation of the entire membership to 150 members . . . .'" [2]

Noting that the 1894 Constitution, containing the present apportionment provisions, was approved by a majority of the State's electorate before becoming effective, and that subsequently the voters had twice disapproved proposals for a constitutional convention to amend the constitutional provisions relating to legislative apportionment, the District Court concluded that, in any event, there was a "want of equity in the relief sought, or, to view it slightly differently, want of justiciability, [which] clearly demands dismissal."

Plaintiffs appealed to this Court from the District Court's dismissal of their complaint. On June 11, 1962, we vacated the judgment below and remanded for further consideration in the light of *Baker* v. *Carr*, 369 U. S. 186, which had been decided subsequent to the District Court's dismissal of the suit below. 370 U. S. 190. In vacating and remanding, we stated:

> "Our well-established practice of a remand for consideration in the light of a subsequent decision therefore applies. . . . [W]e believe that the court below should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination." [3]

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[2] 202 F. Supp., at 743. All decisions of the District Court, and also this Court's initial decision in this litigation, are reported *sub nom. WMCA, Inc.*, v. *Simon.*

[3] 370 U. S., at 191. Shortly after we remanded the case, the District Court ordered defendants to answer or otherwise move in respect to the complaint. Another of the defendants, a Nassau County official, joined the New York City defendants in admitting most of the allegations, and requested the Court to grant plaintiffs the relief

On August 16, 1962, the District Court, after conducting a hearing,[4] dismissed the complaint on the merits, concluding that plaintiffs had not shown by a preponderance of the evidence that there was any invidious discrimination, that the apportionment provisions of the New York Constitution were rational and not arbitrary, that they were of historical origin and contained no improper geographical discrimination, that they could be amended by an electoral majority of the citizens of New York, and that therefore the apportionment of seats in the New York Senate and Assembly was not unconstitutional. 208 F. Supp. 368. Finding no failure by the New York Legislature to comply with the state constitutional pro-

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which they were seeking. The remaining defendants, presently appellees, denied the material allegations of the complaint and asserted varied defenses.

[4] At the hearing on the merits a large amount of statistical evidence was introduced showing the population and citizen population of New York under various censuses, including the populations of the State's 62 counties and the Senate and Assembly districts established under the various apportionments. The 1953 apportionment of Senate and Assembly seats under the 1950 census was shown, and other statistical computations showing the apportionment to be made by the legislature under the 1960 census figures, as a result of applying the pertinent constitutional provisions, were also introduced into evidence.

The District Court refused to receive evidence showing the effect of the alleged malapportionment on citizens of several of the most populous counties with respect to financial matters such as the collection of state taxes and the disbursement of state assistance. The Court also excluded evidence offered to show that the State Constitution's apportionment formulas were devised for the express purpose of creating a class of citizens whose representation was inferior to that of a more preferred class, and that there had been intentional discrimination against the citizens of New York City in the designing of the legislative apportionment provisions of the 1894 Constitution. Since we hold that the court below erred in finding the New York legislative apportionment scheme here challenged to be constitutionally valid, we express no view on the correctness of the District Court's exclusion of this evidence.

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visions requiring and establishing the formulas for periodic reapportionment of Senate and Assembly seats, the court below relied on the presumption of constitutionality attaching to a state constitutional provision and the necessity for a clear violation "before a federal court of equity will lend its power to the disruption of the state election processes . . . ." After postulating a number of "tests" for invidious discrimination, including the "[r]ationality of state policy and whether or not the system is arbitrary," "[w]hether or not the present complexion of the legislature has a historical basis," whether the electorate has an available political remedy, and "[g]eography, including accessibility of legislative representatives to their electors," the Court concluded that none of the relevant New York constitutional provisions were arbitrary or irrational in giving weight to, in addition to population, "the ingredient of area, accessibility and character of interest." Stating that in New York "the county is a classic unit of governmental organization and administration," the District Court found that the allocation of one Assembly seat to each county was grounded on a historical basis. The Court noted that the 1957 vote on whether to call a constitutional convention was "heralded as an issue of apportionment" by the then Governor, but that nevertheless a majority of the State's voters chose not to have a constitutional convention convened. The Court also noted that "if strict population standards were adopted certain undesirable results might follow such as an increase in the size of the legislature to such an extent that effective debate may be hampered or an increase in the size of districts to such an extent that contacts between the individual legislator and his constituents may become impracticable." [5] As a result of the District

[5] A concurring opinion stated that, while the six counties where plaintiffs reside contain 56.2% of the State's population, they comprise only 3.1% of its area, and, if legislative apportionment were

Court's dismissal of the complaint, the November 1962 election of New York legislators was conducted pursuant to the existing apportionment scheme. A timely appeal to this Court was filed, and we noted probable jurisdiction on June 10, 1963. 374 U. S. 802.

II.

Apportionment of seats in the two houses of the New York Legislature is prescribed by certain formulas contained in the 1894 State Constitution, as amended. Reapportionment is effected periodically by statutory provisions,[6] enacted in compliance with the constitutionally established formulas. The county is the basic unit of area for apportionment purposes, except that two sparsely populated counties, Fulton and Hamilton, are treated as one. New York uses citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment. The number of assemblymen is fixed at 150, while the size of the Senate is prescribed as not less than 50 and may vary with each apportionment.[7] All members of both houses of the New York Legislature are elected for two-year terms only, in even-numbered years.

With respect to the Senate, after providing that that body should initially have 50 seats and creating 50 senatorial districts, the New York Constitution, in Art. III, § 4, as amended, provides for decennial readjustment of the size of the Senate and reapportionment of senatorial

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"based solely on population, . . . 3% of the state's area would dominate the rest of New York."

[6] The existing plan of apportionment of Senate and Assembly seats is provided for in McKinney's N. Y. Laws, 1952 (Supp. 1963), State Law, §§ 120–124, enacted by the New York Legislature in 1953.

[7] Article III, § 2, of the 1894 New York Constitution provided for a 50-member Senate and a 150-member Assembly. Article III, § 3, of the 1894 Constitution prescribed a detailed plan for the apportionment of the 50 Senate seats, subject to periodic alteration by the legislature under the formula provided for in Art. III, § 4.

seats, beginning in 1932 and every decade thereafter, in the following manner:

> "Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. . . .
>
> "No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.
>
> "The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent." [8]

As interpreted by practice and judicial decision, reapportionment and readjustment of senatorial representation is accomplished in several stages. First, the total population of the State, excluding aliens, as determined by the last federal census, is divided by 50 (the minimum

[8] N. Y. Const., Art. III, § 4.

number of Senate seats) in order to obtain a so-called "ratio" figure. The counties on account of which the size of the Senate might have to be increased are then ascertained—counties having three or more ratios, *i. e.*, more than 6% of the State's total citizen population each. Under the existing apportionment, only five counties are in the 6%-or-more class, four of New York City's five counties and upstate Erie County (Buffalo and environs). Nassau County (suburban New York City) will be added to this class in the pending reapportionment based on the 1960 census. After those counties that come within the "populous" category, so defined, have been ascertained, they are then allocated one senatorial seat for each full ratio. Fractions of a ratio are disregarded, and each populous county is thereafter divided into the appropriate number of Senate districts. In ascertaining the size of the Senate, the total number of additional seats resulting from the growth of the populous counties since 1894 is added to the 50 original seats. And, while the total number of seats which any of the populous counties has gained since 1894 is added to the 50 original seats, the number of seats which any of them has lost since 1894 is not deducted from the total number of seats to be added. Currently the New York Senate, as reapportioned in 1953, has 58 seats. From that total, the number allocated to the populous counties is subtracted—27 under the 1953 apportionment—and the remaining seats—31 under the 1953 scheme—are then apportioned among the less populous counties. When reapportioned on the basis of 1960 census figures, the Senate will have 57 seats, with 26 allotted to the populous counties, as a result of applying the constitutionally prescribed ratio and the requirement of a full ratio in order for a populous county to be given more than three Senate seats.

The second stage of applying the senatorial apportionment formula involves the allocation of seats to the less

populous counties, *i. e.*, those having less than 6% of the State's total citizen population (less than three full ratios). After the number of Senate seats allocated to the populous counties (and thus the size of the Senate) has been determined, a second population ratio figure is obtained by dividing the number of seats available for distribution to the less populous counties, 31 under both the 1950 and 1960 censuses, into the total citizen population of the less populous counties. Less populous counties which are entitled to two or three seats, as determined by comparing a county's population with the second ratio figure thus ascertained, are then divided into senatorial districts. A less populous county is entitled to three seats if it has less than three full first ratios, but has more than three, or has two and a large fraction, second ratios. Since the first ratio is significantly larger than the second, a county can have less than three first ratios but more than three second ratios. Finally, counties with substantially less than one second ratio are combined into multicounty districts.

The result of applying this complicated apportionment formula is to give the populous counties markedly less senatorial representation, when compared with respective population figures, than the less populous counties. Under the 1953 apportionment, based on the 1950 census, a senator from one of the less populous counties represented, on the average, 195,859 citizens, while a senator from a populous county represented an average of 301,178. The constitutionally prescribed first ratio figure was 284,069, while the second ratio was, of course, only 195,859. Under the pending apportionment based on the 1960 census, the first ratio figure is 324,816, and the average population of the senatorial districts in the populous counties will be 366,128. On the other hand, the second ratio, and the average population of the senatorial districts in the less populous counties, is only 216,822.

Thus, a citizen in a less populous county had, under the 1953 apportionment, over 1.5 times the representation, on the average, of a citizen in a populous county, and, under the apportionment based on the 1960 census, this ratio will be about 1.7-to-1.[9]

The 1894 New York Constitution also provided for an Assembly composed of 150 members, in Art. III, § 2. Under the formula prescribed by Art. III, § 5, of the New York Constitution, each of the State's 62 counties, except Hamilton County which is combined with Fulton County for purposes of Assembly representation, is initially given one Assembly seat. The remaining 89 seats are then allocated among the various counties in accordance with a "ratio" figure obtained by dividing the total number of seats, 150, into the State's total citizen population. Applying the constitutional formula, a county whose population is at least 1½ times this ratio (1% of the total citizen population) is given one additional assemblyman. The remaining Assembly seats are then apportioned among those counties whose citizen populations total two or more whole ratios, with any remaining seats being allocated among the counties on the basis of "highest remainders." Finally, those counties receiving more than one seat are divided into the appropriate number of Assembly districts. In allocating 61 of the 150 Assembly seats on a basis wholly unrelated to population, and in establishing three separate categories of counties for the apportionment of Assembly representation, the constitutional provisions relating to the apportionment of Assembly seats plainly result in a favoring of the less populous counties. Under the new reapportionment based on

[9] For an extended discussion of the apportionment of seats in the New York Senate under the pertinent state constitutional provisions, see Silva, Apportionment of the New York Senate, 30 Ford. L. Rev. 595 (1962). See also Silva, Legislative Representation—With Special Reference to New York, 27 Law & Contemp. Prob. 408 (1962).

1960 census figures, the smallest 44 counties will each be given one seat for an average of 62,765 citizen inhabitants per seat, three counties will receive two seats each, with a total of six assemblymen representing an average of 93,478 citizen inhabitants, and the 14 most populous counties will be given the remaining 100 seats, resulting in an average representation figure of 129,183 citizen inhabitants each.[10]

Although the New York Legislature has not yet reapportioned on the basis of 1960 census figures,[11] the outlines of the forthcoming apportionment can be predicted with assurance. Since the rules prescribed in the New York Constitution for apportioning the Senate are so explicit and detailed, the New York Legislature has little discretion, in decennially enacting implementing statutory reapportionment provisions, except in determining which of the less populous counties are to be joined together in multicounty districts and in districting within counties having more than one senator. Similarly, the legislature has little discretion in reapportioning Assembly seats.[12]

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[10] For a thorough discussion of the apportionment of seats in the New York Assembly pursuant to the relevant state constitutional provisions, see Silva, Apportionment of the New York Assembly, 31 Ford. L. Rev. 1 (1962).

[11] Article III, § 4, of the New York Constitution requires the legislature to reapportion and redistrict Senate seats no later than 1966, and Art. III, § 5, provides that "[t]he members of the Assembly shall be chosen by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens."

[12] While the legislature has the sole power to apportion Assembly seats among the State's counties, in accordance with the constitutional formula, the New York Constitution gives local governmental authorities the exclusive power to divide their respective counties into Assembly districts. A county having only one assemblyman constitutes one Assembly district by itself, of course, and therefore

A number of other rather detailed rules, some mandatory and some only directive, are included in the constitutional provisions prescribing the system for apportioning seats in the two houses of the New York Legislature, and are set out in Art. III, §§ 2–5, of the New York Constitution.[13]

When the New York Legislature was reapportioned in 1953, on the basis of 1950 census figures, assemblymen representing 37.1% of the State's citizens constituted a majority in that body, and senators representing 40.9% of the citizens comprised a majority in the Senate. Under the still effective 1953 apportionment, applying 1960 census figures, assemblymen representing 34.7% of the citizens constitute a majority in the Assembly, and senators representing 41.8% of the citizens constitute a majority in that body. If reapportionment were carried out under the existing constitutional formulas, applying 1960 census figures, 37.5% of the State's citizens would

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cannot be divided into Assembly districts. But, with respect to counties given more than one Assembly seat, the New York Constitution, Art. III, § 5, provides: "In any county entitled to more than one member [of the Assembly], the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall . . . divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be . . . ."

[13] Under these specific provisions, while more than one Senate or Assembly district can be contained within the whole of a single county, and while a Senate district may consist of more than one county, no county border line can be broken in the formation of either type of district. Both Senate and Assembly districts are required to consist of contiguous territory, and each Assembly district is required to be wholly within the same senatorial district. Each Assembly district in the same county shall contain, as nearly as may be, an equal number of citizen inhabitants, and shall consist of "convenient" territory and be as compact as practicable. Further detailed provisions relate to the division of towns between adjoining districts, and the equalization of population among Senate districts in the same county and Assembly districts in the same Senate district.

reside in districts electing a majority in the Assembly, and 38.1% would live in areas electing a majority of the members of the Senate. When the State was reapportioned in 1953 on the basis of the 1950 census, the most populous Assembly district had 11.9 times as many citizens as the least populous one, and a similar ratio in the Senate was about 2.4-to-1. Under the current apportionment, applying 1960 census figures, the citizen population-variance ratio between the most populous and least populous Assembly districts is about 21-to-1, and a similar ratio in the Senate is about 3.9-to-1. If the Assembly were reapportioned under the existing constitutional formulas, the most populous Assembly district would have about 12.7 times as many citizens as the least populous one, and a similar ratio in the Senate would be about 2.6-to-1.

According to 1960 census figures, the six counties where the six individual appellants reside had a citizen population of 9,129,780, or 56.2% of the State's total citizen population of 16,240,786. They are currently represented by 72 assemblymen and 28 senators—48% of the Assembly and 48.3% of the Senate. When the legislature reapportions on the basis of the 1960 census figures, these six counties will have 26 Senate seats and 69 Assembly seats, or 45.6% and 46%, respectively, of the seats in the two houses. The 10 most heavily populated counties in New York, with about 73.5% of the total citizen population, are given, under the current apportionment, 38 Senate seats, 65.5% of the membership of that body, and 93 Assembly seats, 62% of the seats in that house. When the legislature reapportions on the basis of the 1960 census figures, these same 10 counties will be given 37 Senate seats and 92 Assembly seats, 64.9% and 61.3%, respectively, of the membership of the two houses. The five counties comprising New York City have 45.7% of the State's total citizen popu-

lation, and are given, under the current apportionment, 43.1% of the Senate seats and 43.3% of the seats in the Assembly. When the legislature reapportions on the basis of the 1960 census figures, these same counties will be given 36.8% and 37.3%, respectively, of the membership of the two houses.

Under the existing senatorial apportionment, applying 1960 census figures, Suffolk County's one senator represents a citizen population of 650,112, and Nassau County's three senators represent an average of 425,267 citizens each. The least populous senatorial district, on the other hand, comprising Saratoga, Warren, and Essex Counties, has a total population of only 166,715.[14] Under the forthcoming reapportionment based on the 1960 census, Nassau County will again be allocated only three Senate seats, with an average population of 425,267, while the least populous senatorial district, which will probably comprise Putnam and Rockland Counties, will have a citizen population of only 162,840.[15] Onondaga County, with a total citizen population of 414,770, less than the average population of *each* Nassau County district, will nevertheless be given *two* Senate seats. Because of the effect of the full-ratio requirement applicable only to the populous counties, Nassau County, despite the fact that its citizen population increased from 655,690 to 1,275,801,

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[14] Included as Appendix D to the District Court's opinion on the merits is a map of the State of New York showing the 58 senatorial districts under the existing apportionment. 208 F. Supp., at 383. Appendix E contains a chart which includes census figures showing the 1960 population of each of New York's 62 counties. *Id.*, at 384.

[15] Appendix A to the District Court's opinion on the merits is a chart showing the apportionment of senatorial seats which would result if the Senate were reapportioned on the basis of the present constitutional formula, using 1960 census figures, including the citizen populations of the 13 most populous counties, the number of senators to be allocated to each, and the average citizen population per senator in each of the projected senatorial districts. 208 F. Supp., at 380.

will not obtain a single additional senatorial seat as a result of the reapportionment based on 1960 census figures. And Monroe County, with a citizen population of 571,029, since not having more than 6% of the State's total citizen population, will have the same number of senators under the new apportionment, three, as Nassau County, although it has less than half that county's population. New York City's 20 senators will represent an average citizen population of 360,193, while the 15 multi-county senatorial districts to be created upstate will have an average of only 207,528 citizens per district. Because of the operation of the full-ratio rule with respect to counties having more than 6% of the State's total citizen population each, the unrepresented remainders (above a full first ratio but short of another full first ratio which is required for an additional Senate seat) in three of the urban counties will be as follows: Nassau, 301,353; New York, 284,805; and Kings, 244,798. Thus, over 800,000 citizens will not be counted in the apportionment of Senate seats, even though the unrepresented remainders in two of these three counties equal or exceed the statewide average population of 284,926 citizens per district. Furthermore, the effect of the rule requiring an increase in the number of Senate seats because of the entitlement of populous counties to added senatorial representation, coupled with the failure to reduce the size of the Senate because of reductions in the number of seats to which a populous county is entitled (as compared with its senatorial representation in 1894), is that the comparative voting power of the populous counties in the Senate decreases as their share of the State's total population increases.

With respect to the Assembly, the six assemblymen currently elected from Nassau County represent an average citizen population of 212,634, and one of that county's current Assembly districts has a citizen population of

314,721. Suffolk County's three assemblymen presently represent an average of 216,704 citizens. On the other hand, the least populous Assembly district, Schuyler County, has a citizen population, according to the 1960 census, of only 14,974, and yet, in accordance with the constitutional formula, is allocated one Assembly seat.[16] Under the new apportionment, Schuyler County will again be given one Assembly seat, while one projected Monroe County district will have a citizen population of 190,343 and an Assembly district in Suffolk County will have over 170,000 citizens.[17] Additionally, the average population of the 54 Assembly districts in New York City's four populous counties will be in excess of 132,000 citizens each.

Under the 1953 apportionment, based on 1950 census figures, the most populous Assembly district, in Onondaga County, had a citizen population of 167,226, while the least populous district was that comprising Schuyler County, with only 14,066 citizens. In the Senate, the most populous districts were the four in Bronx County, averaging 344,545 citizens each, while the least populous district had a citizen population of only 146,666.

No adequate political remedy to obtain relief against alleged legislative malapportionment appears to exist in

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[16] Included as Appendix C to the District Court's opinion on the merits is a map of the State of New York showing the number of Assembly seats apportioned to each county under the existing apportionment. 208 F. Supp., at 383. Appendix E contains a chart which includes census figures showing the 1960 population of each of New York's 62 counties. *Id.*, at 384.

[17] Appendix B to the District Court's opinion on the merits is a chart showing the apportionment of Assembly seats which would result if the Assembly were reapportioned under the present constitutional formula, using 1960 census figures, including the number of Assembly seats to be given to each county and the approximate citizen population in each projected Assembly district. 208 F. Supp., at 381–382.

New York.[18] No initiative procedure exists under New York law. A proposal to amend the State Constitution can be submitted to a vote by the State's electorate only after approval by a majority of both houses of two successive sessions of the New York Legislature.[19] A majority vote of both houses of the legislature is also required before the electorate can vote on the calling of a constitutional convention.[20] Additionally, under New York law the question of whether a constitutional convention should be called must be submitted to the electorate every 20 years, commencing in 1957.[21] But even if a constitutional convention were convened, the same alleged discrimination which currently exists in the apportionment of Senate seats against each of the counties having 6% or more of a State's citizen population would be perpetuated in the election of convention delegates.[22] And, since the New York Legislature has rather consistently complied with the state constitutional requirement for decennial legislative reapportionment in accordance with the rather explicit constitutional rules, enact-

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[18] For a discussion of the lack of federal constitutional significance of the presence or absence of an available political remedy, see *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* pp. 736–737, decided also this date.

[19] Under Art. XIX, § 1, of the New York Constitution.

[20] According to Art. XIX, § 2, of the New York Constitution, which provides that the question of whether a constitutional convention should be called can be submitted to the electorate "at such times as the legislature may by law provide . . . ."

[21] Pursuant to Art. XIX, § 2, of the New York Constitution. In 1957 the State's electorate, by a close vote, disapproved the calling of a constitutional convention, and the question is not required to be submitted to the people again until 1977.

[22] Under Art. XIX, § 2, of the New York Constitution, delegates to a constitutional convention are elected three per senatorial district, plus 15 delegates elected at large.

ing effective apportionment statutes in 1907, 1917, 1943, and 1953, judicial relief in the state courts to remedy the alleged malapportionment was presumably unavailable.[23]

III.

In *Reynolds* v. *Sims, ante,* p. 533, decided also this date, we held that the Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis. Neither house of the New York Legislature, under the state constitutional formulas and the implementing statutory provisions here attacked, is presently or, when reapportioned on the basis of 1960 census figures, will be apportioned sufficiently on a population basis to be constitutionally sustainable. Accordingly, we hold that the District Court erred in upholding the constitutionality of New York's scheme of legislative apportionment.

We have examined the state constitutional formulas governing legislative apportionment in New York in a detailed fashion in order to point out that, as a result of following these provisions, the weight of the votes of those living in populous areas is of necessity substantially diluted in effect. However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside. New York's constitutional formulas relating to

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[23] Decisions by the New York Court of Appeals indicate that state courts will do no more than determine whether the New York Legislature has properly complied with the state constitutional provisions relating to legislative apportionment in enacting implementing statutory provisions. See, *e. g., In re Sherrill,* 188 N. Y. 185, 81 N. E. 124 (1907); *In re Dowling,* 219 N. Y. 44, 113 N. E. 545 (1916); and *In re Fay,* 291 N. Y. 198, 52 N. E. 2d 97 (1943).

legislative apportionment demonstrably include a built-in bias against voters living in the State's more populous counties. And the legislative representation accorded to the urban and suburban areas becomes proportionately less as the population of those areas increases. With the size of the Assembly fixed at 150, with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population, and with an additional seat given to counties having 1½ population ratios, the population-variance ratios between the more populous and the less populous counties will continually increase so long as population growth proceeds at a disparate rate in various areas of the State. With respect to the Senate, significantly different population ratio figures are used in determining the number of Senate seats to be given to the more populous and the less populous counties, and the more populous counties are required to have full first ratios in order to be entitled to additional senatorial representation. Also, in ascertaining the size of the Senate, the number of seats by which the senatorial representation of the more populous counties has increased since 1894 is added to 50, but the number of Senate seats that some of the more populous counties have lost since 1894 is not subtracted from that figure. Thus, an increasingly smaller percentage of the State's population will, in all probability, reside in senatorial districts electing a majority of the members of that body. Despite the opaque intricacies of New York's constitutional formulas relating to legislative apportionment, when the effect of these provisions, and the statutes implementing them, on the right to vote of those individuals living in the disfavored areas of the State is considered, we conclude that neither the existing scheme nor the forthcoming one can be constitutionally condoned.

We find it inappropriate to discuss questions relating to remedies at the present time, beyond what we said in

our opinion in *Reynolds*.[24] Since all members of both houses of the New York Legislature will be elected in November 1964, the court below, acting under equitable principles, must now determine whether, because of the imminence of that election and in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, it would be desirable to permit the 1964 election of legislators to be conducted pursuant to the existing provisions, or whether under the circumstances the effectuation of appellants' right to a properly weighted voice in the election of state legislators should not be delayed beyond the 1964 election. We therefore reverse the decision below and remand the case to the District Court for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims*.

It is so ordered.

[For dissenting opinion of MR. JUSTICE HARLAN, see *ante*, p. 589.]

[For dissenting opinion of MR. JUSTICE STEWART, see *post*, p. 744.]

[24] See *Reynolds* v. *Sims*, *ante*, p. 585.

MARYLAND COMMITTEE FOR FAIR REPRESENTATION ET AL. *v.* TAWES, GOVERNOR OF MARYLAND, ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 29. Argued November 13–14, 1963.—Decided June 15, 1964.

The Maryland Senate under the 1867 Constitution has 29 seats, one for each of 23 counties and six for the City of Baltimore's legislative districts. The State's five most populous political subdivisions with over three-fourths of the 1960 population are represented by only slightly over one-third of the Senate's membership, and, prior to 1962 temporary legislation, were represented by less than one-half of the House of Delegates' membership. Appellants, including voters in those subdivisions, sued appellee officials in a state court seeking a declaration that the legislative apportionment deprived them and others similarly situated of rights protected under the Equal Protection Clause, and sought a declaration that the legislature's failure to convene a constitutional convention approved by a majority of the voters in 1950 violated the State Constitution. The circuit court, after reversal of its order dismissing the complaint, held that as to certain counties there was invidious discrimination in the apportionment of the House but refrained from passing on the validity of the senatorial apportionment. The legislature thereafter enacted legislation whose effect was to give those five most populous subdivisions 55.6% of the members of the House, but failed to pass a constitutional amendment reapportioning the House. On another remand the circuit court held that the Senate apportionment, although established on a nonpopulation, geographical basis, was constitutional, and the Maryland Court of Appeals affirmed, holding that the appeal did not question the House apportionment and upholding the Senate apportionment, in part in reliance on an analogy to the Federal Senate. Opposition of legislators from the less populous counties accounted for failure of many reapportionment bills, and Maryland law makes no provision for reapportionment or the initiation of legislation or constitutional amendments by the people. *Held:*

1. This Court cannot decide on the validity of the apportionment of one house of a bicameral legislature without also evaluating the actual apportionment of the other. P. 673.

2. Whether or not the House is apportioned on a population basis, Maryland's legislative representation scheme cannot be sustained under the Equal Protection Clause because of the gross disparities from population-based representation in the apportionment of Senate seats. P. 673.

3. Seats in both houses of a bicameral state legislature must, under the Equal Protection Clause, be apportioned substantially on a population basis. *Reynolds* v. *Sims, ante,* p. 533, followed. P. 674.

4. Neither house of the Maryland Legislature, even after the temporary legislation, is apportioned sufficiently on a population basis to be constitutionally sustainable. P. 674.

5. The same constitutional standards apply whether an apportionment scheme is evaluated in the state or federal courts. P. 674.

6. Reliance on the "federal analogy" to sustain the Maryland apportionment scheme is misplaced. *Reynolds* v. *Sims, supra,* followed. P. 675.

7. The Maryland Legislature has sufficient time before the 1966 elections to reapportion the General Assembly, but under no circumstances should those elections be conducted under the existing or other unconstitutional plan. Pp. 675–676.

229 Md. 406, 184 A. 2d 715, reversed and remanded.

Alfred L. Scanlan argued the cause for appellants. With him on the brief were *John B. Wright* and *Johnson Bowie.*

Robert S. Bourbon, Assistant Attorney General of Maryland, argued the cause for appellees. With him on the brief was *Thomas B. Finan,* Attorney General of Maryland.

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Bruce J. Terris* and *Richard W. Schmude.*

Theodore I. Botter, First Assistant Attorney General of New Jersey, argued the cause for the State of New Jersey et al., as *amici curiae,* urging affirmance. With him

on the brief were the Attorneys General of their respective States as follows: *Arthur J. Sills* of New Jersey, *Robert W. Pickrell* of Arizona, *Duke W. Dunbar* of Colorado, *Bert T. Kobayashi* of Hawaii, *Allan G. Shepard* of Idaho, *Edwin K. Steers* of Indiana, *William M. Ferguson* of Kansas, *Jack P. F. Gremillion* of Louisiana, *T. Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *Walter E. Alessandroni* of Pennsylvania, *J. Joseph Nugent* of Rhode Island, *Frank L. Farrar* of South Dakota and *Charles Gibson* of Vermont.

Briefs of *amici curiae* were filed by *Robert G. Tobin, Jr., Douglas H. Moore, Jr.* and *Richard J. Sincoff* for Montgomery County, Maryland, urging reversal; by *Leo Pfeffer, Melvin L. Wulf, Jack Greenberg* and *Robert B. McKay* for the American Jewish Congress et al., and by *W. Scott Miller, Jr.* and *George J. Long* for Schmied, President of the Board of Aldermen of Louisville, Kentucky.

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

This case involves an appeal from a decision of the Maryland Court of Appeals upholding the validity, under the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, of the apportionment of seats in the Maryland Senate.

I.

Appellants, residents, taxpayers and voters in four populous Maryland counties (Anne Arundel, Baltimore, Montgomery and Prince George's) and the City of Baltimore, and an unincorporated association, originally brought an action in the Circuit Court of Anne Arundel County, in August 1960, challenging the apportionment of the Maryland Legislature. Defendants below, sued in their representative capacities, were various officials

charged with duties in connection with state elections. Plaintiffs below alleged that the apportionment of both houses of the Maryland Legislature, pursuant to Art. III, §§ 2 and 5, of the 1867 Maryland Constitution, as amended, discriminated against inhabitants of the more populous counties and the City of Baltimore by according these persons substantially less representation than that given to persons residing in other areas of the State. They contended that the alleged legislative malapportionment violated the Equal Protection Clause of the Fourteenth Amendment since that provision prohibits any State from "denying, diluting or restricting the equality of voting rights or privileges among classes of otherwise eligible voters similarly situated," and asserted that there was no political remedy practicably available under Maryland law to obtain the relief sought.

Plaintiffs below sought a declaratory judgment that Art. III, §§ 2 and 5, of the Maryland Constitution deny them and those similarly situated rights protected under the Equal Protection Clause, and that the failure of the Maryland Legislature to reapportion its membership in accordance with a formula which would reasonably reflect present population figures deprived them of their constitutional rights. Plaintiffs also requested a declaration that the failure of the Maryland General Assembly to convene a constitutional convention as approved by a majority of the State's voters in the general election of 1950 violated various provisions of the State Constitution.

Plaintiffs requested that, unless the November 1962 election and elections thereafter were conducted on an at-large basis, the court enjoin defendants from performing various election duties until such time as the General Assembly should submit for a referendum vote by eligible state voters an amendment to Art. III, §§ 2 and 5, which would reapportion the membership of the Maryland Legislature on a population basis in conformity with the

requirements of the Fourteenth Amendment. Plaintiffs also asked the court to retain jurisdiction of the case until the General Assembly submitted such a constitutional amendment to the State's voters.

On February 21, 1961, the Circuit Court sustained defendants' demurrers to plaintiffs' complaint and dismissed the complaint without leave to amend. On appeal, the Maryland Court of Appeals, on April 25, 1962, splitting 5-to-2, reversed the order of the Circuit Court and remanded the case for a hearing on the merits. 228 Md. 412, 180 A. 2d 656. Finding that the federal questions raised were not nonjusticiable in a Maryland state court, the Maryland Court of Appeals, after discussing this Court's decision in *Baker* v. *Carr,* 369 U. S. 186, stated that

> "if any action needs to be taken in order to bring the State's system of legislative apportionment into conformity with the requirements of the Fourteenth Amendment . . . , it is preferable from the point of view of responsible self-government that the State's own duly constituted officials and the people themselves undertake the task, rather than leave to the Federal judiciary the delicate and perhaps unwelcome task of doing so." [1]

While recognizing that "[t]here was no need in *Baker* v. *Carr* . . . for the Supreme Court to pass upon the power of a State court to deal with questions of State legislative apportionment," the Maryland Court of Appeals found "implicit in the vacation of the judgment and remand by the Supreme Court of the United States to the Supreme Court of Michigan of the case of *Scholle* v. *Hare*" this Court's view that cases challenging the constitutionality of state legislative apportionments are "appropriate for consideration by a State court . . . ." [2] Finding "a

[1] 228 Md., at 419, 180 A. 2d, at 659.

[2] *Id.*, at 428, 180 A. 2d, at 664.

strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination," the Maryland court nevertheless stated that it was not "possible (or advisable if it were possible) to state a precise, inflexible and intractable formula for constitutional representation in the General Assembly." [3] In remanding to the lower state court to "receive evidence to determine whether or not an invidious discrimination does exist with respect to representation in either or both houses" of the Maryland Legislature, the Court of Appeals stated that, if the Maryland constitutional provisions relating to legislative apportionment were held invalid as to the November 1962 election, the Circuit Court should "also declare that the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its membership for purposes" of that election.

On May 24, 1962, the Circuit Court, after receiving various exhibits and hearing argument, held that the apportionment of the Maryland House of Delegates invidiously discriminated against the people of Baltimore, Montgomery and Prince George's Counties, but not against the people of Baltimore City or Anne Arundel County, and that therefore Art. III, § 5, of the Maryland Constitution, which apportions seats in the House of Delegates, violates the Equal Protection Clause of the Fourteenth Amendment. Although stating that the apportionment of the Maryland Senate might be "constitutionally based upon area and geographical location regardless of population or eligible voters," the Circuit Court refrained from formally passing on the validity of the senatorial apportionment. The lower court also stated

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[3] *Id.*, at 433–434, 180 A. 2d, at 667–668.

that the Maryland Legislature had the power to enact a statute providing for the reapportionment of the House of Delegates as well as to propose a constitutional amendment providing for such a reapportionment. It withheld the granting of injunctive relief but retained jurisdiction to do so before the November 1962 election if such became appropriate.

On May 31, 1962, the Maryland Legislature, called into special session by the Governor, enacted temporary "stop-gap" legislation reapportioning seats in the House of Delegates, by allocating 19 added seats to the more populous areas of the State.[4] However, the legislature failed to pass a proposed constitutional amendment reapportioning the Maryland House. The newly enacted apportionment statute expires automatically on January 1, 1966, except that, if a constitutional amendment superseding the statutory provisions is submitted to the voters at the 1964 general election and is rejected, the statute will continue in force until January 1, 1970. The statute further provides that upon its expiration the House of Delegates shall again be apportioned according to Art. III, § 5, which the Circuit Court had previously held unconstitutional. No appeal was taken from the Circuit Court's decision holding invalid the existing apportionment of the Maryland House of Delegates.

Following the Circuit Court's failure to rule upon the validity of the senatorial apportionment, plaintiffs appealed this question to the Maryland Court of Appeals. On June 8, 1962, the Court of Appeals ordered the case remanded to the Circuit Court for a prompt decision on whether Art. III, § 2, of the Maryland Constitution, apportioning seats in the Senate, was valid or invalid under the Equal Protection Clause. On June 28, 1962, the Circuit Court held that the apportionment of the Maryland Senate did not violate the Federal Constitu-

[4] Md. Ann. Code (1962 Supp.), Art. 40, § 42.

tion because it felt that an apportionment based upon area and geographical location, without regard to population, served to protect minorities, preserve legislative checks and balances, and prevent hasty, though temporarily popular, legislation, and accorded with history, tradition and reason, placing considerable reliance on a comparison of that body of the Maryland Legislature with the Federal Senate.

On July 23, 1962, the Maryland Court of Appeals, splitting 5-to-3, in a *per curiam* order affirmed the Circuit Court's decision holding valid the apportionment of the Maryland Senate, noting that its reasons would be stated in an opinion to be filed at a later date. Plaintiffs' motion for reargument, calling attention to recent decisions and developments relating to legislative apportionment, was denied by the Maryland Court of Appeals on September 11, 1962. On September 25, 1962, the Court of Appeals filed its opinion. 229 Md. 406, 184 A. 2d 715. It stated initially that the appeal did not question the apportionment of the Maryland House. Continuing, the Maryland court indicated that it was affirming the decision below and upholding the constitutionality of the senatorial apportionment, on the grounds that: (1) Each Maryland county has since 1837 had the same number of Senate seats, except that Baltimore City had periodically been given additional representation, and Maryland counties "have always been an integral part of the state government" and have consistently possessed and maintained "distinct individualities"; (2) since the idea of a bicameral legislature assumes two different methods of apportionment in the two Houses to check "hasty and ill-conceived legislation," one house can be constitutionally apportioned on a nonpopulation, geographical basis; and (3) geographical representation in the Maryland Senate, based on political subdivisions, is closely analogous to the representation of the States in the Federal Senate. The dissenting judges pointed out that the House of Dele-

gates, even as reapportioned, was still not apportioned on a population basis, and that gross disparities from population-based representation existed in the senatorial apportionment. The dissenters found that neither history nor reliance on the so-called federal analogy provided a rational basis for such gross disparities from population-based representation as were found in the apportionment of the Maryland Legislature, before and after the 1962 reapportionment. Since the Maryland Court of Appeals upheld the senatorial apportionment plan, the November 1962 election of senators was conducted pursuant thereto, and delegates were elected under the scheme provided by the 1962 legislation. Notice of appeal to this Court from the Maryland Court of Appeals' decision was timely filed, and we noted probable jurisdiction on June 10, 1963. 374 U. S. 804.

II.

The Maryland Constitution of 1867 vests legislative power in a bicameral General Assembly consisting of a Senate and a House of Delegates. According to official census figures, Maryland had a 1960 population of 3,100,689, and the combined population of the five most populous political subdivisions of Maryland—the counties of Anne Arundel, Baltimore, Montgomery and Prince George's, and the City of Baltimore—was 2,336,409. Thus, about 75.3% of the State's total population lived in these five most populous subdivisions, as of 1960, while about 24.7% lived in the remaining 19 counties of the State. Under Art. III, § 2, of the Maryland Constitution, each of the State's 23 counties is allocated one seat in the Maryland Senate, and each of the six legislative districts of the City of Baltimore is also entitled to one Senate seat—resulting in a total of 29 seats in the Maryland Senate. Thus, the five most populous political subdivisions, with over three-fourths of the State's total 1960 population, are represented by only 10 senators, or slightly

over one-third of the membership of that body. On the other hand, the remaining 19 counties, with an aggregate population of less than one-fourth of the State's population, are nevertheless represented by 19 senators, almost two-thirds of the members of that body.[5] And the 15 least populous counties, with only 14.1% of the total state population, can elect a controlling majority of the members of the Maryland Senate. A maximum population-variance ratio of almost 32-to-1 exists between the most populous and least populous counties. Kent County, with a 1960 population of 15,481, and Calvert County, where only 15,826 resided, are each entitled to one Senate seat, while Baltimore County, with a 1960 population of 492,428, is likewise entitled to only one senator.

As to the apportionment of the Maryland House of Delegates, Art. III, § 5, of the Maryland Constitution, in force when this litigation was commenced but subsequently held unconstitutional by the Maryland courts and superseded by the temporary legislation enacted in 1962, prescribed the representation accorded to each of the State's political subdivisions in the Maryland House. The membership of the House was numerically fixed at 123 by this constitutional provision, with each county being given at least two House seats. Seven counties were given two seats each, five counties were allocated three seats, and four counties were given four House members. The remaining seven counties, including all of those four populous counties where appellants reside, were each allotted six House seats, and the six legislative districts of the City of Baltimore were given six delegates

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[5] Included as Appendix B to the dissenting opinion of the Maryland Court of Appeals is a chart comparing the senatorial representation of the City of Baltimore and the four most populous counties with that of the other counties in the State. 229 Md., at 430, 184 A. 2d, at 730.

each.[6] Under the then-existing House apportionment, the five most populous political subdivisions, with 75.3% of the State's 1960 population, elected only 60 delegates, or less than one-half of the members of the House of Delegates, while the other 19 counties, with only 24.7% of the population, were represented by 63 delegates, or 51.3% of the total membership. A maximum population-variance ratio of over 12-to-1 existed between the most populous and least populous counties. Baltimore County, with a 1960 population of 492,428, had only the same number of House seats, six, as did Garrett and Somerset Counties, whose combined 1960 population was 40,043.

Under the 1962 temporary legislation reapportioning the Maryland House of Delegates, the only practical effect is to add 19 House seats, increasing the membership of that body from 123 to 142, for the four-year terms of delegates elected in November 1962. Seven seats were added for Baltimore County, four delegates each were added for Montgomery and Prince George's Counties, two of Baltimore City's legislative districts were given two and one additional seats, respectively, and one seat was

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[6] Article III, § 4, of the 1867 Maryland Constitution provided for a minimum of two delegates per county, with increases proportional to population up to a total of six when a county's population reached 55,000, but made no provision for additional delegates after a county's population reached and exceeded 55,000. In 1950, Art. III, § 5, was adopted as a constitutional amendment freezing the representation in the House of Delegates on the basis of the allocation of House seats under the 1940 federal census. The purpose of this amendment was to prevent the smaller counties from continuing to receive increased House representation at the expense of the larger political subdivisions which, under the 1867 formula, were not entitled to any more than six delegates after their population had reached 55,000, regardless of how much it might increase thereafter. Additionally, Art. III, § 4, of the Maryland Constitution, as amended, provides for altering the boundaries of the legislative districts of the City of Baltimore to provide for approximately equal population among the six districts.

added for Anne Arundel County. The basic scheme embodied in the temporary legislation is to allocate two House seats to each county and to each of the six Baltimore City legislative districts, and then to distribute the remaining seats, out of a fixed number of 123, among the counties on a population basis. The new law provided, however, that during the initial four-year period of its operation, "and for any additional period during which . . . [it] may be extended," each county and legislative district would be entitled, as a minimum, to the number of House seats that it had on January 1, 1962. Thus, this means that in actuality there will be more than 123 delegates and that the counties and legislative districts which were allegedly overrepresented under the old constitutional provisions will retain much of their former relative power. Under the new legislation, the five most populous subdivisions, with 75.3% of the State's 1960 population, elect 79 delegates, or 55.6% of the members in the Maryland House. The remaining 19 counties, with less than one-fourth of the State's population, elect 44.4% of the members of the House of Delegates. Counties with only 35.6% of the State's total population elect a majority of the members of the House under the 1962 legislation. A maximum population-variance ratio of almost 6-to-1 still exists between the most populous and least populous House districts. A delegate from Somerset County represents an average of 6,541 persons, whereas a delegate from Baltimore County represents an average of 37,879. Under both the previous and present apportionment provisions, members of both the Senate and the House of Delegates in Maryland are all elected to serve four-year terms.[7] None of the Maryland counties, under either the old or revised House apportionment schemes, were divided into districts for the purpose

[7] According to the provisions of Art. III, §§ 2, 6, and 7, of the Maryland Constitution.

of electing delegates. Rather, all House members are elected at large within each county (and legislative district), regardless of the number of seats allocated thereto.[8]

Maryland law makes no provision for the initiation of legislation or constitutional amendments by the people.[9] Certain constitutional provisions provide, however, for the taking, at a general election each 20 years, of "the sense of the People in regard to calling a Convention for altering this Constitution." [10] Pursuant to these provisions, a statewide referendum on whether a constitutional convention, which would have the power to propose amendments to the Maryland Constitution, including amendments relating to the reapportionment of representation in the General Assembly, should be called was submitted to the State's voters at the general election in 1950. An overwhelming majority of the voters (by a vote of 200,439 to 56,998) indicated their approval of the calling of a constitutional convention. Nevertheless, even though numerous bills providing for the convening of a constitutional convention were introduced into the

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[8] Appendix A to the dissenting opinion of the Maryland Court of Appeals contains a chart showing the populations, according to 1960 census figures, and representation of Maryland's 23 counties and the City of Baltimore in the two houses of the Maryland General Assembly, including figures relating to the apportionment of seats in the House of Delegates both before and after the 1962 reapportionment legislation. Also included in this chart are figures showing the number of persons represented by each delegate, and computations of the relative values of votes for delegates and senators in each of the State's political subdivisions. 229 Md., at 429, 184 A. 2d, at 728–729.

[9] Article XVI, §§ 2–5, of the Maryland Constitution provides a procedure for the conducting of a referendum vote by the people on certain types of legislative enactments, however, upon the filing of a petition signed by at least 3% of the State's qualified voters.

For a discussion of the lack of federal constitutional significance of the presence or absence of an available political remedy, see *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* pp. 736–737, decided also this date.

[10] Md. Const., Art. XIV, § 2.

General Assembly between 1951 and 1962, the General Assembly repeatedly refused to enact the necessary enabling legislation.[11] Thus, despite the favorable vote of the State's electorate, no constitutional convention has ever been convened. The next such vote will not be taken until 1970, and, even if the people again approve the calling of a constitutional convention, it cannot be actually convened without the enactment of enabling legislation by the Maryland General Assembly.

Although over 10 reapportionment bills were introduced into the General Assembly between 1951 and 1960, all failed to pass because of opposition by legislators from the less populous counties. Both houses of the General Assembly, during its 1960 regular session, declined to pass bills incorporating the limited reapportionment recommendations of a special commission created by the Governor in 1959 to investigate and report on the matter of legislative reapportionment. Numerous proposed reapportionment amendments and reapportionment bills were introduced at the regular session of the Maryland Legislature in 1961 and 1962, but all failed of passage. Relief from the allegedly discriminatory apportionment through constitutional amendment was also apparently unavailable, as a practical matter, to appellants. Article XIV, § 1, of the Maryland Constitution requires a three-fifths affirmative vote of the membership of both houses of the General Assembly in order to have proposed constitutional amendments submitted to the State's voters at a referendum. Admittedly, legislators from the less

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[11] Despite the clear mandate of Art. XIV, § 2, of the State Constitution, which states that "if a majority of voters at such election or elections shall vote for a Convention, the General Assembly, at its next session, shall provide by Law for the assembling of such convention, and for the election of Delegates thereto."

Compare the situation existing in Colorado, with respect to the availability of a political remedy, as discussed in our opinion in *Lucas, post,* pp. 732–733.

populous counties controlled each house of the Maryland Legislature. And even if a constitutional convention were convened, representation at the convention would be based on the allocation of seats in the allegedly malapportioned General Assembly.[12] Significantly, the Maryland Court of Appeals, in its initial opinion in this litigation, stated that "the chances of the appellants' obtaining relief from the infringement upon their alleged constitutional rights, other than from the courts, is so remote as to be practically nil." [13]

Neither in the Maryland Constitution nor in the state statutes is there any provision relating to the reapportionment of representation in the General Assembly. Apart from the limited and temporary reapportionment of the House enacted at the 1962 special session of the Maryland Legislature, following the holding of the Circuit Court that the House apportionment provisions of the Maryland Constitution were invalid, all efforts since 1867 to achieve a substantial reapportionment of seats in the General Assembly, with two rather minor exceptions, have been futile.[14] In 1900, the City of Baltimore, because of its expanding population, was given an additional Senate seat and an additional legislative district, bringing its total to four senators and legislative districts.

[12] Pursuant to Art. XIV, § 2, of the Maryland Constitution, which provides: "Each County, and Legislative District of the City of Baltimore, shall have in such Convention a number of Delegates equal to its representation in both Houses at the time at which the Convention is called."

[13] 228 Md., at 432–433, 180 A. 2d, at 667.

[14] In fact, there has been no substantial change in the scheme of legislative representation in Maryland since 1837, when the system of indirect election of senators was abolished. In 1864 the City of Baltimore was given additional representation in the form of three legislative districts, with one senator for each of the three districts. A constitutional convention in 1867, which adopted the existing Maryland Constitution, confirmed the increased representation accorded the City of Baltimore, but otherwise based the legislative apportionment provisions which it adopted on the 1837 scheme.

Two additional senators and two more legislative districts were added to Baltimore City's representation in 1922. Apart from these increases in the legislative representation of the City of Baltimore, membership in the Maryland Senate remains as provided for in the 1867 Constitution. And, until 19 additional House seats were created and distributed among the five most populous political subdivisions in 1962, representation in the House of Delegates had been based, for a period of 95 years, on the limited-population formula embodied in the 1867 Maryland Constitution.[15]

III.

In its unreported opinion holding the Maryland senatorial apportionment valid, the Circuit Court, after referring to the reapportionment of seats in the House of Delegates by the Maryland Legislature, stated: "It appears, therefore, and the Petitioners have conceded, that the Lower House has been legally reapportioned according to population." And the Maryland Court of Appeals, in its opinion upholding the Circuit Court's decision that the senatorial apportionment was constitutionally valid, pointed out that the instant appeal was from the lower court's decision on remand of the previously undecided question as to the validity of the senatorial apportionment, and stated: "No question is presented as to the validity of the 'stop-gap' legislation or the reapportionment of the House of Delegates." [16] Questioning the validity of the majority's assumption in this regard, the dissenters stated:

> "The majority of this Court in the present case seems to accept tacitly, if not expressly, the view

[15] For a discussion of various aspects of the Maryland legislative apportionment situation, including the instant litigation, see Note, Senate Reapportionment—The Maryland Experience, 31 Geo. Wash. L. Rev. 812 (1963).

[16] 229 Md., at 410, 184 A. 2d, at 716.

> that if one house of the Maryland General Assembly (the Senate) may be apportioned on a basis which ignores disparities of population, the other house (the House of Delegates) must be apportioned with due regard to population, and assumes that the House of Delegates now is so apportioned. It is true that the apportionment of the House is not under attack on this appeal and no question with regard thereto is now before us. It is also true, however, that even as reapportioned by the May 1962 Special Session of the General Assembly, considerable disparities still exist in a number of instances, though previous disparities have been materially reduced. . . . There is no such close relationship between population and representation as in the case of the Michigan House . . . . Surely, the present Maryland apportionment is not so closely related to population as is that of the House of Representatives of the Congress of the United States. In that respect the Federal analogy is far from perfect." [17]

Appellants have continually asserted that not only is the constitutional validity of the apportionment of the Maryland Senate at issue in this appeal, but that also presented for decision is the sufficiency, under the Fourteenth Amendment to the Federal Constitution, of "the combined total representation provided for in both Houses of the Maryland General Assembly." Appellees, on the other hand, have repeatedly contended that the sole question presented in this appeal is whether one house of a bicameral state legislature, *i. e.*, the Maryland Senate, can be apportioned on a basis other than population, where the other house is presumably apportioned on a strict population basis. Appellees have argued that,

[17] *Id.*, at 421–422, 184 A. 2d, at 723–724.

since the courts below assumed and appellants allegedly conceded that the Maryland House of Delegates, as reapportioned in 1962, is apportioned on a population basis, and since the decisions of the state courts below here appealed from considered only the validity of the apportionment of the Maryland Senate, this Court is precluded from considering the validity of the apportionment of the Maryland House and is required to assume that that body is now apportioned on a population basis.

Regardless of possible concessions made by the parties and the scope of the consideration of the courts below, in reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature. We therefore reject appellees' contention that the Court is precluded from considering the validity of the apportionment of the Maryland House of Delegates. We cannot be compelled to assume that the Maryland House is presently apportioned on a population basis, when that is in fact plainly not so. Furthermore, whether or not the House is apportioned on a population basis, the scheme of legislative representation in Maryland cannot be sustained under the Equal Protection Clause of the Federal Constitution, because of the gross disparities from population-based representation in the apportionment of seats in the Maryland Senate.

IV.

In *Reynolds* v. *Sims, ante,* p. 533, decided also this date, we held that seats in both houses of a bicameral state legislature are required, under the Equal Protection Clause, to be apportioned substantially on a population basis. Neither house of the Maryland Legislature, even after the 1962 legislation reapportioning the House of Delegates, is apportioned sufficiently on a population basis to be constitutionally sustainable. Thus, we conclude that the Maryland Court of Appeals erred in holding the Maryland legislative apportionment valid, and that the decision below must be reversed.

We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes.[18] However, in determining the validity of a State's apportionment plan, the same federal constitutional standards are applicable whether the matter is litigated in a federal or a state court. Maryland's plan is plainly insufficient under the requirements of the Equal Protection Clause as spelled out in our opinion in *Reynolds*.[19]

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[18] A commendable example of an exercise of judicial responsibility by a state court in a case involving state legislative apportionment is provided by the action of the Kansas Supreme Court in *Harris* v. *Shanahan,* 192 Kan. 183, 387 P. 2d 771 (1963). In that case the Kansas Supreme Court held that the statutory provisions apportioning seats in both houses of the Kansas Legislature were constitutionally invalid, but afforded the legislature a further opportunity to enact a constitutionally valid plan prior to the 1964 primary and general elections. Of course, this decision by the Kansas Supreme Court is not presently before us, and we indicate no view as to the merits in that case.

[19] The pattern of prolonged legislative inaction with respect to legislative apportionment matters and the existence of a rural strangle hold on the legislature in Maryland closely parallels the situation existing in Alabama, although Maryland, unlike Alabama,

For the reasons stated in *Reynolds*,[20] appellees' reliance on the so-called federal analogy as a sustaining principle for the Maryland apportionment scheme, despite significant deviations from population-based representation in both houses of the General Assembly, is clearly misplaced.[21] And considerations of history and tradition, relied upon by appellees, do not, and could not, provide a sufficient justification for the substantial deviations from population-based representation in both houses of the Maryland Legislature.

In view of the circumstances of this case, we feel it inappropriate to discuss remedial questions at the present time.[22] Since all members of both houses of the Maryland General Assembly were elected in 1962, and since all Maryland legislators are elected to serve four-year terms, the next election of legislators in Maryland will not be conducted until 1966. Thus, sufficient time exists for the Maryland Legislature to enact legislation reapportioning seats in the General Assembly prior to the 1966 primary and general elections. With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to

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has no state constitutional provision requiring decennial legislative reapportionment.

[20] See *Reynolds* v. *Sims*, *ante*, pp. 571–576.

[21] Additionally, the Maryland legislative apportionment scheme here attacked fails to resemble the plan of representation in the Federal Congress in at least two important respects: the Maryland House, even as reapportioned in 1962, is clearly not apportioned on a population basis, and political subdivisions are not accorded the same number of senatorial seats, since, although each of Maryland's 23 counties is given only one Senate seat, six senators are allotted to the City of Baltimore.

[22] See *Reynolds* v. *Sims*, *ante*, p. 585.

legislative apportionment which comport with federal constitutional requirements.[23]

Since primary responsibility for legislative apportionment rests with the legislature itself, and since adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so. However, under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan. We therefore reverse the judgment of the Maryland Court of Appeals, and remand the case to that Court for further proceedings not inconsistent with the views stated here and in our opinion in *Reynolds* v. *Sims*.

It is so ordered.

MR. JUSTICE CLARK concurs in the reversal for the reasons stated in his concurring opinion in *Reynolds* v. *Sims*, *ante*, p. 587, decided this date.

[For dissenting opinion of MR. JUSTICE HARLAN, see *ante*, p. 589.]

MR. JUSTICE STEWART.

In this case there is no finding by this Court or by the Maryland Court of Appeals that Maryland's apportion-

[23] See 228 Md., at 438–440, 180 A. 2d, at 670–671, where the Maryland Court of Appeals stated that, if the Maryland constitutional provisions relating to legislative apportionment were found invalid by the lower court, the Maryland Legislature would have the power to enact reapportionment legislation, "because the powers of the General Assembly of Maryland are plenary, except as limited by constitutional provisions." See also the reference to this matter earlier in this opinion, *ante*, at 661.

ment plan reflects "no policy, but simply arbitrary and capricious action or inaction." Nor do I think such a finding on the record before us would be warranted. Consequently, on the basis of the constitutional views expressed in my dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* p. 744. I would affirm the judgment of the Maryland Court of Appeals unless the Maryland apportionment "could be shown systematically to prevent ultimate effective majority rule." The Maryland court did not address itself to this question. Accordingly, I would vacate the judgment and remand this case to the state court for full consideration of this issue.

DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL. *v.* MANN ET AL.

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

No. 69. Argued November 14, 18, 1963.—Decided June 15, 1964.

Complainants, certain Virginia voters, brought this action against appellants, various officials having state election duties, challenging the statutory provisions apportioning seats in the Virginia Legislature as violative of the Equal Protection Clause. While the Virginia Constitution provides for decennial reapportionment the establishment of districts rests in the discretion of the legislature, which has been guided chiefly by population but which has also considered factors such as compactness and contiguity of territory, geographic features, and community of interests. Under the existing apportionment, the State is divided into 36 senatorial districts, with 40 senators, and 70 House districts with 100 delegates. The maximum population-variance ratios between the most populous and least populous senatorial and House districts are, respectively, 2.65-to-1 and 4.36-to-1; and under the 1962 apportionment about 41.1% of the State's total population reside in districts electing a majority of the Senate, and about 40.5% in districts electing a majority of the House. No adequate political remedy for legislative reapportionment exists in Virginia and no initiative procedure is provided for. Appellants before the three-judge court which was convened to decide the case showed the number of military or military-related personnel in the areas where complainants resided, disparities from population-based representation among the various States in the Federal Electoral College, and results of a comparative study showing Virginia as eighth among the States in population-based legislative representativeness. The District Court entered an interlocutory order holding Virginia's legislative apportionment unconstitutional and refused to abstain pending the obtaining of the state courts' views on the validity of the apportionment. The Court refused to defer deciding the case until after the January 1964 regular session of the legislature and retained jurisdiction for the entry of necessary orders. *Held:*

1. Neither of the houses of the Virginia General Assembly is apportioned sufficiently on a population basis to be constitutionally sustainable. P. 690.

2. Where a federal court's jurisdiction is properly invoked and the relevant state constitutional and statutory provisions are plain and unambiguous, abstention is not necessary. P. 690.

3. The Equal Protection Clause applies to failure to meet federal constitutional requirements whether the legislature periodically reapportions or fails to act. P. 691.

4. The fact that large numbers of military or military-related personnel reside in the same areas as appellees cannot justify underrepresentation of those areas because the nature of their employment alone provides no proper basis for discrimination; there was no showing that the legislature took this factor into account in making the apportionment; and even if it had the maximum population-variance ratios would have remained impermissible. Pp. 691–692.

5. The apportionment was not sustainable, either factually or legally, as involving an attempt to balance urban and rural power in the legislature. P. 692.

6. Analogy to deviations from population in the Federal Electoral College provides no constitutional basis for sustaining a state apportionment scheme under the Equal Protection Clause. P. 692.

7. It would be inappropriate for this Court to consider the remedies for malapportionment of the legislature since the next election of Virginia legislators does not occur until 1965; the legislature has ample time to effect a valid reapportionment; and the District Court has retained jurisdiction to grant relief under equitable principles if necessary to ensure that no further elections are held under an unconstitutional scheme. Pp. 692–693.

213 F. Supp. 577, affirmed and remanded.

David J. Mays and *R. D. McIlwaine III,* Assistant Attorney General of Virginia, argued the cause for appellants. With them on the briefs were *Robert Y. Button,* Attorney General of Virginia, and *Henry T. Wickham.*

Edmund D. Campbell and *Henry E. Howell, Jr.* argued the cause for appellees. With *Mr. Campbell* on the brief for appellees Mann et al. was *E. A. Prichard.* With *Mr. Howell* on the brief for appellees, the citizens and

voters of Norfolk, Virginia, were *Leonard B. Sachs* and *Sidney H. Kelsey.*

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging affirmance. With him on the brief were *Bruce J. Terris* and *Richard W. Schmude.*

Briefs of *amici curiae* were filed by *Leo Pfeffer, Melvin L. Wulf, Jack Greenberg* and *Robert B. McKay* for the American Jewish Congress et al., and by *W. Scott Miller, Jr.* and *George J. Long* for Schmied, President of the Board of Aldermen of Louisville, Kentucky.

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

Presented for decision in this case is the validity, under the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, of the apportionment of seats in the legislature of the Commonwealth of Virginia.

I.

Plaintiffs below, residents, taxpayers and qualified voters of Arlington and Fairfax Counties, filed a complaint on April 9, 1962, in the United States District Court for the Eastern District of Virginia, in their own behalf and on behalf of all voters in Virginia similarly situated, challenging the apportionment of the Virginia General Assembly. Defendants, sued in their representative capacities, were various officials charged with duties in connection with state elections. Plaintiffs claimed rights under provisions of the Civil Rights Act, 42 U. S. C. §§ 1983, 1988, and asserted jurisdiction under 28 U. S. C. § 1343 (3).

The complaint alleged that the present statutory provisions apportioning seats in the Virginia Legislature, as amended in 1962, result in invidious discrimination

against plaintiffs and "all other voters of the State Senatorial and House districts" in which they reside, since voters in Arlington and Fairfax Counties are given substantially less representation than voters living in other parts of the State. Plaintiffs asserted that the discrimination was violative of the Fourteenth Amendment as well as the Virginia Constitution, and contended that the requirements of the Equal Protection Clause of the Federal Constitution, and of the Virginia Constitution, could be met only by a redistribution of legislative representation among the counties and independent cities of the State "substantially in proportion to their respective populations." Plaintiffs asserted that they "possess an inherent right to vote for members of the General Assembly . . . and to cast votes that are equally effective with the votes of every other citizen" of Virginia, and that this right was being diluted and effectively denied by the discriminatory apportionment of seats in both houses of the Virginia Legislature under the statutory provisions attacked as being unconstitutional. Plaintiffs contended that the alleged inequalities and distortions in the allocation of legislative seats prevented the Virginia Legislature from "being a body representative of the people of the Commonwealth," and resulted in a minority of the people of Virginia controlling the General Assembly.

The complaint requested the convening of a three-judge District Court. With respect to relief, plaintiffs sought a declaratory judgment that the statutory scheme of legislative apportionment in Virginia, prior as well as subsequent to the 1962 amendments, contravenes the Equal Protection Clause of the Fourteenth Amendment and is thus unconstitutional and void. Plaintiffs also requested the issuance of a prohibitory injunction restraining defendants from performing their official duties relating to the election of members of the General Assembly pursuant to the present statutory provisions. Plain-

tiffs further sought a mandatory injunction requiring defendants to conduct the next primary and general elections for legislators on an at-large basis throughout the State.

A three-judge District Court was promptly convened. Residents and voters of the City of Norfolk were permitted to intervene as plaintiffs against the original defendants and against certain additional defendants, election officials in Norfolk. On June 20, 1962, all of the plaintiffs obtained leave to amend the complaint by adding an additional prayer for relief which requested that, unless the General Assembly "promptly and fairly" reapportioned the legislative districts, the Court should reapportion the districts by its own order so as to accord the parties and others similarly situated "fair and proportionate" representation in the Virginia Legislature.

Evidence presented to the District Court by plaintiffs included basic figures showing the populations of the various districts from which senators and delegates are elected and the number of seats assigned to each. From that data various statistical comparisons were derived. Since the 1962 reapportionment measures were enacted only two days before the complaint was filed and made only small changes in the statutory provisions relating to legislative apportionment, which had been last amended in 1958, the evidence submitted covered both the present and the last previous apportionments. Defendants introduced various exhibits showing the numbers of military and military-related personnel in the City of Norfolk and in Arlington and Fairfax Counties, disparities from population-based representation among the various States in the Federal Electoral College, and results of a comparative study of state legislative apportionment which show Virginia as ranking eighth among the States in population-based legislative representativeness, as reapportioned in 1962.

On November 28, 1962, the District Court, with one judge dissenting, sustained plaintiffs' claim and entered an interlocutory order holding the apportionment of the Virginia Legislature violative of the Federal Constitution. 213 F. Supp. 577. The Court refused to dismiss the case or stay its action on the ground, asserted by defendants, that plaintiffs should be required first to procure the views of the state courts on the validity of the apportionment scheme. Instead, it held that, since neither the 1962 legislation nor the relevant state constitutional provisions were ambiguous, no question of state law necessitating abstention by the Federal District Court was presented. In applying the Equal Protection Clause to the Virginia apportionment scheme, the Court stated that, although population is the predominant consideration, other factors may be of some relevance "in assaying the justness of the apportionment." Stating that the Federal Constitution requires a state legislative apportionment to "accord the citizens of the State substantially equal representation," the Court held that the inequalities found in the statistical information relating to the population of the State's various legislative districts, if unexplained, sufficiently showed an "invidious discrimination" against plaintiffs and those similarly situated. The Court rejected any possibility of different bases of representation being applicable in the two houses of the Virginia Legislature, stating that, in Virginia, each house has "a direct, indeed the same, relation to the people," and that the principal present-day justification for bicameralism in state legislatures is to insure against precipitate action by imposing greater deliberation upon proposed legislation. Because of the gross inequalities in representation among various districts in both houses of the Virginia Legislature, the Court put the burden of explanation on defendants, and found that they had failed to meet it. Consequently, the Court concluded that the discrimina-

tion against Arlington and Fairfax Counties and the City of Norfolk was a grave and "constitutionally impermissible" deprivation, violative of the Equal Protection Clause of the Fourteenth Amendment.

With respect to relief, the Court stated that, while it would have preferred that the General Assembly itself correct the unconstitutionality of the 1962 apportionment legislation, it would not defer deciding the case until after the next regular session of the Virginia Legislature in January 1964, because senators elected in November 1963 would hold office until 1968 and delegates elected in 1963 would serve until 1966. Deferring action would thus result in unreasonable delay in correcting the injustices in the apportionment of the Senate and the House of Delegates, concluded the Court.

The District Court's interlocutory order declared that the 1962 apportionment violated the Equal Protection Clause and accordingly was void and of no effect. It also restrained and enjoined defendants from proceeding with the conducting of elections under the 1962 legislation, but stayed the operation of the injunction until January 31, 1963, so that either the General Assembly could act or an appeal could be taken to this Court, provided that, if neither of these steps was taken, plaintiffs might apply to the District Court for further relief. Finally, the court below retained jurisdiction of the case for the entry of such orders as might be required.

An appeal to this Court was timely noted by defendants. On application by appellants, THE CHIEF JUSTICE, on December 15, 1962, granted a stay of the District Court's injunction pending final disposition of the case by this Court. Because of this stay, the November 1963 election of members of the Virginia Legislature was conducted under the existing statutory provisions. We noted probable jurisdiction on June 10, 1963. 374 U. S. 803.

II.

The Virginia Constitution provides for a Senate of not more than 40 nor less than 33 members, in Art. IV, § 41, and for a House of Delegates of not more than 100 nor less than 90 seats, in Art. IV, § 42. Senators are elected quadrennially and delegates biennially. At all relevant times, state statutes have fixed the number of senators at 40 and the number of delegates at 100. Pursuant to the state constitutional requirement of legislative reapportionment at least decenially, contained in Art. IV, § 43, the General Assembly has reapportioned senatorial and House seats in 1932, 1942, and 1952, as well as in 1962, and in 1958 the apportionment statutes were amended.[1] The Virginia Constitution contains no ex-

[1] Reapportionment in 1952 was accomplished only after the Governor convened a special session of the Virginia Legislature for that purpose, since the legislature had adjourned without enacting any statutes reallocating representation. In anticipation of the constitutional mandate to reapportion in 1962, the Virginia Governor, in January 1961, appointed a commission on redistricting. In doing its work, this commission employed the assistance of the Bureau of Public Administration of the University of Virginia. Suggesting that Senate and House districts should be, as nearly as practicable, equal in population, the Bureau submitted two alternative plans for the apportionment of the House and three alternative plans for the apportionment of Senate seats. These plans all followed the various criteria traditionally considered in previous apportionments, and complied with the constitutionally prescribed size limitations on both of the houses. In late 1961, the commission filed its report recommending a redistricting plan different from any of the plans submitted by the Bureau. Its plan, based more on political compromise than any of the Bureau's suggested plans, deviated further from population-based representation than any of the Bureau's proposals. At its 1962 regular session, the Virginia General Assembly completely disregarded both the commission report and the plans prepared by the Bureau, and adopted apportionment schemes of its own for each house, in practical effect making only minimal changes in the existing statutory provisions. These enactments, of course, are the ones principally complained of by appellees in this litigation.

press standards, however, for the apportionment of legislative representation, and leaves the task of establishing districts solely up to the discretion of the legislature.

With respect to political subdivisions, Virginia has 98 counties and 32 independent cities. Despite the absence of any specific provisions in the State Constitution, population has generally been traditionally regarded as the most important factor for legislative consideration in reapportioning and redistricting. Because cities and counties have consistently not been split or divided for purposes of legislative representation, multimember districts have been utilized for cities and counties whose populations entitle them to more than a single representative, resulting in there always being less than 100 delegate districts and less than 40 senatorial districts. And, because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them. This has resulted in the periodic utilization of floterial districts [2]

[2] The term "floterial district" is used to refer to a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned. See *Baker* v. *Carr*, 369 U. S. 186, 256 (CLARK, J., concurring). As an example, the City of Lynchburg, with a 1960 population of 54,790, is itself allocated one seat in the Virginia House of Delegates under the 1962 apportionment plan. Amherst County, with a population of only 22,953, is not given any independent representation in the Virginia House. But the City of Lynchburg and Amherst County are combined in a floterial district with a total population of 77,743. Presumably, it was felt that Lynchburg was entitled to some additional representation in the Virginia House, since its population significantly exceeded the ideal House district size of 36,669. However, since Lynchburg's population did not approach twice that figure, it was apparently decided that Lynchburg was not entitled, by itself, to an added seat. Adjacent Amherst County, with a population substantially smaller

where contiguous cities or counties cannot be combined to yield population totals reasonably close to a population ratio figure determined by dividing the State's total population by the number of seats in the particular legislative body. Various other factors, in addition to population, which have historically been considered by Virginia Legislatures in enacting apportionment statutes include compactness and contiguity of territory in forming districts, geographic and topographic features, and community of interests among people in various districts.

Section 24–14 of the Virginia Code, as amended in 1962, provides for the apportionment of the Virginia Senate, and divides the State into 36 senatorial districts for the allocation of the 40 seats in that body. With a total state population of 3,966,949, according to the 1960 census, and 40 Senate seats, the ideal ratio would be one senator for each 99,174 persons. Under the 1962 statute, however, Arlington County is given but one senator for its 163,401 persons, only .61 of the representation to which it would be entitled on a strict population basis. The City of Norfolk has only .65 of its ideal share of senatorial representation, with two senators for a population of 305,872. And Fairfax County (including the cities of Fairfax and Falls Church), with two senators for 285,194 people, has but .70 of its ideal representation in the Virginia Senate. In comparison, the smallest senatorial district, with respect to population, has only 61,730, and the next smallest 63,703.[3] Thus, the maximum popula-

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than the ideal district size, was presumably felt not to be entitled to a separate House seat. The solution was the creation of a floterial district comprising the two political subdivisions, thereby according Lynchburg additional representation and giving Amherst County a voice in the Virginia House, without having to create separate additional districts for each of the two political subdivisions.

[3] In illustrating the disparities from population-based representation in the apportionment of Senate seats, the District Court included

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tion-variance ratio between the most populous and least populous senatorial districts is 2.65-to-1. Under the 1962 senatorial apportionment, applying 1960 population figures, approximately 41.1% of the State's total population reside in districts electing a majority of the members of that body.[4]

Apportionment of seats in the Virginia House of Delegates is provided for in § 24–12 of the Virginia Code, as amended in 1962, which creates 70 House districts and distributes the 100 House seats among them. Dividing the State's total 1960 population by 100 results in an ideal ratio of one delegate for each 39,669 persons. Fairfax County, with a population of 285,194, is allocated only three House seats under the 1962 apportionment provisions, however, thus being given only .42 of its ideal representation. While the average population per delegate in Fairfax County is 95,064, Wythe County, with only 21,975 persons, and Shenandoah County, with a population of only 21,825, are each given one seat in the Virginia House.[5] The maximum population-variance

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in its opinion a chart showing the composition (by counties and cities) and populations of, and the number of senators allotted to, various senatorial districts, and comparing these figures with the senatorial representation given Arlington, Fairfax and Norfolk. 213 F. Supp., at 581–582.

[4] Appellees have pointed out, however, that, since seats in the Virginia Legislature are reapportioned decennially, and since the allegedly underrepresented districts are those whose populations are increasing more rapidly than the allegedly overrepresented ones, the disparities from population-based representation, in both houses of the Virginia Legislature, will continually increase throughout the 10-year period until the next reapportionment.

[5] In discussing deviations from population-based representation in the allocation of seats in the House of Delegates, the District Court included, as part of its opinion, a chart showing the populations of and the number of seats given to certain House districts, and comparing these figures with the House representation accorded Arlington, Fairfax and Norfolk. 213 F. Supp., at 582–584.

ratio, between the most populous and least populous House districts, is thus 4.36-to-1. The City of Norfolk, with 305,872 people, is given only six House seats, and Arlington County, with a population of 163,401, is allocated only three. Under the 1962 reapportionment of the House of Delegates, 40.5% of the State's population live in districts electing a majority of the House members. Twenty-seven House districts have more than three times the representation of the people of Fairfax County, 12 districts have twice the representation of Arlington County, and six, twice that of Norfolk.

No adequate political remedy to obtain legislative reapportionment appears to exist in Virginia.[6] No initiative procedure is provided for under Virginia law. Amendment of the State Constitution or the calling of a constitutional convention initially requires the vote of a majority of both houses of the Virginia General Assembly.[7] Only after such legislative approval is obtained is such a measure submitted to the people for a referendum vote. Legislative apportionment questions do not appear to have been traditionally regarded as nonjusticiable by Virginia state courts, however,[8] and appellees could

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[6] For a discussion of the lack of federal constitutional significance of the presence or absence of an available political remedy, see *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* pp. 736–737, decided also this date.

[7] Va. Const., Art. XV, §§ 196, 197.

[8] In *Brown* v. *Saunders,* 159 Va. 28, 166 S. E. 105 (1932), the Supreme Court of Appeals of Virginia held that a congressional districting statute enacted by the Virginia Legislature was invalid since it conflicted with Art. IV, § 55, of the State Constitution, which requires congressional districts to have "as nearly as practicable, an equal number of inhabitants." Of course, involved in that case was a specific state constitutional requirement relating to congressional districting, whereas no such detailed state requirements exist with respect to apportionment of seats in the Virginia Legislature. Appellants have argued, however, that this decision indicates that Virginia

possibly have sought and obtained relief in a state court as well as in a Federal District Court.[9]

III.

In *Reynolds* v. *Sims, ante,* p. 533, decided also this date, we held that the Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis. Neither of the houses of the Virginia General Assembly, under the 1962 statutory provisions here attacked, is apportioned sufficiently on a population basis to be constitutionally sustainable. Accordingly, we hold that the District Court properly found the Virginia legislative apportionment invalid.

Appellants' contention that the court below should have abstained so as to permit a state court to decide the questions of state law involved in this litigation is without merit. Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. *McNeese* v. *Board of Education,* 373 U. S. 668. This is especially so where, as here, no state proceeding had been

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courts will also adjudicate questions relating to the validity of the State's legislative apportionment scheme under the provisions of the Federal Constitution.

[9] However, in *Tyler* v. *Davis,* a case involving a suit instituted on March 26, 1963, almost four months after the District Court's decision in the instant case, the Circuit Court of the City of Richmond dismissed, on the merits, an action challenging the apportionment of seats in the Virginia Legislature. Although the state court found that it had jurisdiction and that the questions raised were justiciable in nature, it dismissed the complaint on the ground that plaintiffs had failed to show that the scheme for apportioning seats in the Virginia Legislature was an invidiously discriminatory one violative of the Equal Protection Clause.

instituted or was pending when the District Court's jurisdiction was invoked. We conclude that the court below did not err in refusing to dismiss the proceeding or stay its action pending recourse to the state courts.

Undoubtedly, the situation existing in Virginia, with respect to legislative apportionment, differs not insignificantly from that in Alabama. In contrast to Alabama, in Virginia the legislature has consistently reapportioned itself decennially as required by the State Constitution. Nevertheless, state legislative malapportionment, whether resulting from prolonged legislative inaction or from failure to comply sufficiently with federal constitutional requisites, although reapportionment is accomplished periodically, falls equally within the proscription of the Equal Protection Clause.

We reject appellants' argument that the underrepresentation of Arlington, Fairfax and Norfolk is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible. Additionally, no showing was made that the Virginia Legislature in fact took such a factor into account in allocating legislative representation.[10] And state policy, as evidenced by Virginia's election laws, actually favors and fosters voting by military and military-related personnel.[11] Furthermore, even if

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[10] See 213 F. Supp., at 584.

[11] Virginia's election laws enable persons in the armed forces to vote without registration or payment of poll tax. Va. Code Ann., 1950 (Repl. Vol. 1964) § 24–23.1. While the literal language of this provision grants the privilege to those "in active service . . . in time of war," the Virginia State Board of Electors is applying it currently. Although the mere stationing of military personnel in the State does not give them residence, Virginia election officials interpret the appli-

such persons were to be excluded in determining the populations of the various legislative districts, the discrimination against the disfavored areas would hardly be satisfactorily explained, because, after deducting military and military-related personnel, the maximum population-variance ratios would still be 2.22-to-1 in the Senate and 3.53-to-1 in the House.

We also reject appellants' claim that the Virginia apportionment is sustainable as involving an attempt to balance urban and rural power in the legislature. Not only does this explanation lack legal merit, but it also fails to conform to the facts. Some Virginia urban areas, such as Richmond, by comparison with Arlington, Fairfax and Norfolk, appear to be quite adequately represented in the General Assembly. And, for the reasons stated in *Reynolds,*[12] in rejecting the so-called federal analogy, and in *Gray* v. *Sanders,* 372 U. S. 368, 378, appellants' reliance on an asserted analogy to the deviations from population in the Federal Electoral College is misplaced. The fact that the maximum variances in the populations of various state legislative districts are less than the extreme deviations from a population basis in the composition of the Federal Electoral College fails to provide a constitutionally cognizable basis for sustaining a state apportionment scheme under the Equal Protection Clause.

We find it unnecessary and inappropriate to discuss questions relating to remedies at the present time.[13]

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cable statutory provisions to mean that residence for military personnel is determined in the same manner as for all other citizens. Military personnel and members of their families who have been residents of Virginia for a year, residents of a county, city or town for six months, and residents of a precinct for 30 days are entitled to vote. Military personnel are not included in the categories of persons disabled from voting. Va. Code Ann., 1950 (Repl. Vol. 1964) § 24–18.

[12] See *Reynolds* v. *Sims, ante,* pp. 571–576.

[13] See *id.,* at 585.

Since the next election of Virginia legislators will not occur until 1965, ample time remains for the Virginia Legislature to enact a constitutionally valid reapportionment scheme for purposes of that election. After the District Court has provided the Virginia Legislature with an adequate opportunity to enact a valid plan, it can then proceed, should it become necessary, to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme. Since the District Court stated that it was retaining jurisdiction and that plaintiffs could seek further appropriate relief, the court below presumably intends to take further action should the Virginia Legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan. We therefore affirm the judgment of the District Court on the merits of this litigation, and remand the case for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims*.

It is so ordered.

MR. JUSTICE CLARK concurs in the affirmance for the reasons stated in his concurring opinion in *Reynolds* v. *Sims, ante,* p. 587, decided this date.

[For dissenting opinion of MR. JUSTICE HARLAN, see *ante,* p. 589.]

MR. JUSTICE STEWART.

In this case, the District Court recognized that "population is not . . . the sole or definitive measure of districts when taken by the Equal Protection Clause." 213 F. Supp., at 584. In reaching its decision the court made clear that it did not "intend to say that there cannot be wide differences of population in districts if a sound reason can be advanced for the discrepancies." *Id.*, at

585. The District Court, however, could find "no rational basis for the disfavoring of Arlington, Fairfax and Norfolk." *Ibid.* In my opinion the appellants have failed to show that the trial court erred in reaching this conclusion. Accordingly, in keeping with the view expressed in my dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* p. 744, I would affirm the District Court's judgment holding that to the extent a state legislative apportionment plan is conclusively shown to have no rational basis, such a plan violates the Equal Protection Clause.

Syllabus.

ROMAN, CLERK OF THE PEACE, ET AL. *v.* SINCOCK ET AL.

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

No. 307. Argued December 9, 1963.—Decided June 15, 1964.

Appellees, voters in Delaware's most populous county, on behalf of themselves and others similarly situated, brought suit in the Federal District Court against officials having duties in connection with state elections, contending that the apportionment of the Delaware Legislature violated the Equal Protection Clause. Under the legislative apportionment provisions of the 1897 Delaware Constitution, in force when this litigation began, the State was divided into 17 Senate and 35 House single-member districts for electing state legislators. Both senatorial and representative districts had varied greatly in population, resulting in a maximum population-variance ratio of about 15-to-1 for the Senate and 35-to-1 for the House. Districts electing a majority in the Senate and the House comprised only 22% and 18.5%, respectively, of the State's total 1960 population. A 1963 constitutional amendment, adopted by the legislature while this litigation was pending, increased the size of both houses, but left the maximum population-variance ratio for the Senate about the same while reducing the ratio for the House to about 12-to-1. Under the amendment about two-thirds of the Senate would be elected from districts containing only about 31% of the State's population and a majority of the House would represent districts where only 28% reside. Although repeated attempts were made through the years to reapportion the legislature or call a constitutional convention for that purpose, the Delaware Legislature failed to take any action until the 1963 amendment. No initiative or referendum procedure exists in the State. After the 1963 amendment, the District Court held that gross and invidious discrimination in violation of the Equal Protection Clause existed against appellees and others similarly situated, both before and after the amendment, but, while retaining jurisdiction, gave the legislature further time to adopt a valid apportionment plan. However, it later enjoined the holding of any elections under the existing scheme or amendment after the

Governor proclaimed a plan for House redistricting under the 1963 amendment. Appeals to this Court followed. *Held:*

1. The seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis. *Reynolds* v. *Sims, ante,* p. 533, followed. P. 708.

2. Neither of the houses in the Delaware General Assembly was so apportioned either before or after the 1963 amendment. P. 708.

3. Reliance upon the so-called "federal analogy" to justify deviations from a population basis in apportionment of seats in the Delaware Legislature is misplaced. *Reynolds* v. *Sims, supra,* followed. Pp. 708–709.

4. The Delaware apportionment scheme cannot be upheld on the basis that Congress had admitted various States into the Union although the apportionment of seats in their legislatures was based on factors other than population. P. 709.

5. Rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause are neither practicable nor desirable. P. 710.

6. Applying general equitable principles, the District Court must determine whether it would be advisable to allow the 1964 election of the Delaware legislators to be conducted under the provisions of the 1963 amendment in the interest of avoiding possible disruption of state election processes and permitting the Delaware Legislature to adopt a constitutionally valid apportionment scheme, or whether further delay in effecting appellees' constitutional rights is unjustified. Pp. 711–712.

215 F. Supp. 169, affirmed and remanded.

Frederick Bernays Wiener argued the cause for appellants. With him on the briefs were *David P. Buckson,* Attorney General of Delaware, *E. Norman Veasey,* Chief Deputy Attorney General, *Januar D. Bove, Jr., Frank O'Donnell* and *N. Maxson Terry.*

Vincent A. Theisen argued the cause and filed a brief for appellees.

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

affirmance. With him on the brief were *Bruce J. Terris* and *Richard W. Schmude.*

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

Presented for decision in this case is the constitutional validity, under the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, of the apportionment of seats in the Delaware General Assembly.

I.

Shortly after this Court's decision in *Baker* v. *Carr,* 369 U. S. 186, plaintiffs below, residents, taxpayers and qualified voters of New Castle County, Delaware, filed a complaint in the United States District Court for the District of Delaware, in their own behalf and on behalf of all persons similarly situated, challenging the apportionment of the Delaware Legislature. Defendants, sued in their representative capacities, were various officials charged with the performance of certain duties in connection with state elections. The complaint alleged deprivation of rights under the Equal Protection Clause of the Fourteenth Amendment, and asserted that the District Court had jurisdiction under the Fourteenth Amendment, 42 U. S. C. §§ 1983 and 1988, and 28 U. S. C. §§ 1343 and 2201.

Plaintiffs below alleged that the apportionment of seats in the Delaware Legislature resulted in an "invidious discrimination as to the inhabitants of New Castle County and the City of Wilmington," operated to deny them the right to cast votes for Delaware legislators "that are of equal effect with that of every other citizen of the State of Delaware," and was arbitrary and capricious in failing to provide a reasonable classification of those voting for

members of the Delaware General Assembly.[1] Plaintiffs also asserted that they were without any other adequate remedy since the existing legislative apportionment was frozen into the 1897 Delaware Constitution; that the present legislature was dominated by legislators representing the two less populous counties; that it was, as a practical matter, impossible to amend the State Constitution or convene a constitutional convention for the purpose of reapportioning the General Assembly; and that the Delaware Legislature had consistently failed to take appropriate action with respect to reapportionment.

Plaintiffs below sought a declaration that Art. II, § 2, of the Delaware Constitution, which established the apportionment of seats in both houses of the Delaware Legislature, is unconstitutional, and an injunction against defendants to prevent the holding of any further elections under the existing apportionment scheme. Plaintiffs also requested that the District Court either reapportion the Delaware Legislature on a population basis or, alternatively, direct that the November 1962 general election be conducted on an at-large basis. A three-judge District Court was asked for by plaintiffs, and was promptly convened.

On July 25, 1962, the District Court entered an order staying the proceedings until August 7, 1962, in order to permit the Delaware Legislature to take "some appropriate action." 207 F. Supp. 205. The court noted that, since publication of any proposed constitutional amendment at least three months prior to the next general election was required under Delaware law,[2] it would serve no useful purpose to grant a stay beyond August 7, 1962.

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[1] Interestingly, Art. I, § 3, of the Delaware Constitution provides: "All elections shall be free and equal."

[2] See 207 F. Supp., at 207. The decisions of the court below are reported *sub nom. Sincock* v. *Terry* and *Sincock* v. *Duffy*.

On July 30, 1962, the General Assembly approved a proposed amendment to the legislative apportionment provisions of the Delaware Constitution,[3] based upon recommendations of a bipartisan reapportionment committee appointed by the Delaware Governor. Under Delaware law this amendment could not, however, become effective unless again approved during the next succeeding session of the General Assembly.[4]

On August 7, 1962, the District Court entered an order refusing to dismiss the suit, and stated that, while it had no desire to substitute its judgment for the collective wisdom of the Delaware General Assembly in matters of legislative apportionment, it had no alternative but to proceed promptly in deciding the case. 210 F. Supp. 395. Some of the defendants applied for a further stay of proceedings so that the General Assembly coming into office in January 1963 would have an opportunity to approve the proposed constitutional amendment. On August 8, 1962, plaintiffs applied for a preliminary injunction against the conducting of the November 1962 general election under the existing apportionment provisions. Plaintiffs were thereafter permitted to amend their complaint to request that the proposed constitutional amendment also be declared unconstitutional and that the court order a provisional reapportionment of the Delaware Legislature.

On October 16, 1962, the District Court denied both the applications for a preliminary injunction and for a further stay. 210 F. Supp. 396. Denial of a preliminary

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[3] By the requisite two-thirds vote in both houses of the General Assembly, pursuant to Art. XVI, § 1, of the Delaware Constitution.

[4] Under Art. XVI, § 1, of the Delaware Constitution, a constitutional amendment must be passed by a two-thirds vote of both houses of successive General Assemblies before becoming part of the State Constitution.

injunction effectively permitted the holding of the November 1962 general election pursuant to the legislative apportionment provisions of the 1897 Delaware Constitution. After extended pretrial proceedings, the court, on November 27, 1962, entered a pretrial order in which the parties agreed to the accuracy of a series of exhibits, statistics and various statistical computations. In early January 1963, the Delaware General Assembly, elected in November 1962, approved the proposed constitutional amendment by the requisite two-thirds vote. As a result, the amendment to the legislative apportionment provisions of Art. II, § 2, became effective on January 17, 1963, having been passed by two successive General Assemblies.[5] Trial before the District Court ensued, with the expert testimony of various political scientists being presented.

On April 17, 1963, the District Court, in an opinion by Circuit Judge Biggs, held that Art. II, § 2, of the Delaware Constitution, both before and after the 1963 amendment, resulted in gross and invidious discrimination against the plaintiffs and others similarly situated, in violation of the Equal Protection Clause of the Fourteenth Amendment. 215 F. Supp. 169. Stating that "the fundamental issue presented for . . . adjudication is whether or not the apportioning of members of the General Assembly of the State of Delaware offends the electors of the State because of an alleged debasement of their voting rights," the court indicated that it would pass upon the constitutional validity of both the provisions of the 1897 Constitution and the provisions of the 1963 constitutional amendment. After considering in detail the apportionment of legislative seats under the provisions of the 1897 Delaware Constitution, the court below concluded that "[t]he uneven growth of the different areas of the State created a condition because of which

[5] 53 Del. Laws, c. 425 (1962); 54 Del. Laws, c. 1 (1963).

the numbers of inhabitants in representative and senatorial districts differed not only on an intercounty basis but also on an intracounty basis." After discussing the effect of the 1963 reapportionment amendment, the District Court turned to a consideration of plaintiffs' claim under the Federal Constitution. Stating that the rights asserted by plaintiffs are "personal civil rights" of great importance, the court below continued:

> ". . . Section 2 of Article II of the Constitution of Delaware as it existed prior to the 1963 Amendment and as it exists today creates such an inequality in voting power, resulting in invidious discrimination, as to bring it within the proscription of the Fourteenth Amendment of the Constitution of the United States. . . . This is true as to the apportionment of the Senate as well as to the apportionment of the House of Representatives of the General Assembly of Delaware. While mathematical exactitude in apportionment cannot be expected, and indeed is not possible in an absolute sense, disparities created by Section 2 of Article II, as it was prior to the 1963 Amendment and as it is now, are of such a startling nature as to demonstrate a debasement of franchise of individual electors of this State which the Equal Protection Clause of the Federal Constitution cannot tolerate." [6]

After holding that the apportionment of at least one house of a bicameral state legislature must be based substantially on population, the District Court rejected the relevancy of the so-called federal analogy as a justification for departures from a population-based apportionment scheme in the other house of a state legislature. Although finding no rational or reasonable basis for the Delaware apportionment, either as it previously existed

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[6] 215 F. Supp., at 184.

or as amended, the court nevertheless concluded that reapportionment was basically a legislative function, and that a further opportunity should be given to the General Assembly to reapportion itself properly in accordance with the requirements of the Fourteenth Amendment. After attempting to delineate some guidelines for the Delaware Legislature to follow in reapportioning, the court below, with an eye toward the impending 1964 elections, gave the General Assembly until October 1, 1963, to adopt a constitutionally valid plan.[7] The District Court entered a decree declaring Art. II, § 2, of the Delaware Constitution to be unconstitutional, and retained jurisdiction to order injunctive or other relief if it became necessary to do so.

On May 6, 1963, the Supreme Court of Delaware advised the Delaware Governor that, notwithstanding the holding of the District Court, he should proceed according to the provisions of the invalidated 1963 constitu-

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[7] The other two judges both wrote short opinions. Chief District Judge Wright indicated that he concurred in the view that Art. II, § 2, of the Delaware Constitution, before and after amendment, was unconstitutional, since at least one house of a state legislature must be apportioned strictly on a population basis. He indicated that he also agreed with the "precatory observation" of Judge Biggs that the other house must also be apportioned substantially on a population basis.

District Judge Layton concurred in the result reached, finding that Art. II, § 2, of the Delaware Constitution, prior to as well as after the 1963 amendment, was unconstitutional with respect to the House of Representatives. He stated that, since the 1963 amendment contained no severability clause, the whole amendment was unconstitutional because of the provisions relating to the House, and that therefore there was no need to consider whether the senatorial provisions were valid. He indicated, however, that he thought that it was permissible to apportion one house on a nonpopulation, area basis where the other house was apportioned strictly on population, since such a system would be patterned on the scheme of representation in the Federal Congress.

tional amendment to proclaim a redistricting plan for House of Representatives seats. The Delaware Supreme Court's opinion was predicated on the view that the District Court's decision was not a final one, since it was appealable and since no injunctive relief had been granted. Acting on this advice, while making reference to the District Court's decision, the Governor, on May 17, 1963, proclaimed a plan providing for the redistricting of certain House districts in accordance with the provisions of the 1963 reapportionment amendment. Under these circumstances, on May 20, 1963, the District Court entered an injunction against the holding of any elections for General Assembly seats under Art. II, § 2, of the Delaware Constitution, either as it had previously existed or as amended, and again reserved jurisdiction to make such further orders as it might deem necessary. The District Court denied a motion to stay its injunction pending appeal, but, on application by defendants below, MR. JUSTICE BRENNAN, on June 27, 1963, stayed the operation of the District Court's injunction pending final disposition of the case by this Court. Notices of appeal from the District Court's final decree, and from its injunction and denial of the motion for a stay, were timely filed by defendants. Pursuant to this Court's Rule 15 (3), both appeals have been treated as a single case. When appellees filed a motion to affirm, appellants countered with a motion to advance. On October 21, 1963, we noted probable jurisdiction and granted appellants' motion to advance. 375 U. S. 877.

II.

Under the provisions of the 1897 Delaware Constitution relating to legislative apportionment, in force when this litigation was commenced, the State was geographically divided into 17 Senate and 35 House districts for the purpose of electing members of the Delaware Legis-

lature. Delaware senators serve four-year terms, with approximately half of the senators elected every two years, and all representatives are elected for two-year terms. Qualified voters in each Senate and House district elect one senator and one representative, under the 1897 Constitution's apportionment plan. Delaware is comprised of only three counties, and only one sizable metropolitan area—Wilmington. Under the 1897 apportionment, five senatorial districts and 10 representative districts were allocated to Kent County, to Sussex County, and to "rural" New Castle County (that part of the county outside of the City of Wilmington), and Wilmington was given two senatorial and five representative districts. The number and boundaries of both the senatorial and representative districts were specifically fixed and described in the constitutional provisions, and no provision was made for their alteration. When the constitutional provisions were adopted, the population of the State of Delaware was approximately 180,000, with about 32,000 living in Kent County, 38,000 residing in Sussex County, and 105,000 living in New Castle County (of whom about 70,000 lived in the City of Wilmington). By 1960, the total population of Delaware had increased to 446,292, of which 307,446 resided in New Castle County, 95,827 in Wilmington and 211,619 in "rural" New Castle County. And, under the 1960 census figures, 65,651 lived in Kent County and 73,195 resided in Sussex County.

Under the 1897 apportionment scheme, as perpetuated over 65 years later, Senate districts ranged in population from 4,177 to 64,820, resulting in a maximum population-variance ratio, between the most populous and least populous Senate districts, of about 15-to-1. Senatorial districts in Kent and Sussex Counties were consistently much smaller in population than those in New Castle County, with the exception of one New Castle County district

which, with a population of only 4,177, was the smallest senatorial district in the State.[8] Only 22% of the State's total population resided in districts electing a majority of the members of the 17-member Senate, applying 1960 census figures to the senatorial apportionment scheme existing when this litigation was commenced.

Representative districts ranged in population, as of 1960, from 1,643 to 58,228, under Art. II, § 2, of the 1897 Delaware Constitution, resulting in a maximum population-variance ratio, in the Delaware House, of about 35-to-1. Again, the average population of House districts in Kent and Sussex Counties was significantly smaller than that of those in New Castle County, although several of the "rural" New Castle County districts were among the smallest in the State. Applying 1960 census figures to the 1897 apportionment scheme, with respect to the Delaware House, the 18 most sparsely populated representative districts, containing only about 18.5% of the State's total 1960 population, elected a majority of the members of the House of Representatives.[9] Persons living in the six most populous representative districts, 233,718, more than one-half of the total state population, had only the same voting power, under the 1897 Constitution's scheme, as those 16,552 persons living in the six least populous districts, with respect to electing members of the Delaware House.[10] Serious disparities in the population of dis-

[8] Included in the District Court's opinion is a chart showing the population of the 17 senatorial districts established by Art. II, § 2, of the 1897 Delaware Constitution, and tracing the population changes in each during the period 1930–1960. 215 F. Supp., at 176.

[9] A chart showing the population of the 35 representative districts established by Art. II, § 2, of the 1897 Delaware Constitution, and tracing the population changes in each during the period 1890–1960, is included in the District Court's opinion. 215 F. Supp., at 174–175.

[10] And, as pointed out by the court below, under the apportionment of House seats contained in Art. II, § 2, of the Delaware Constitution, "The inhabitants of the 18 least populated representative districts

tricts, both House and Senate, *within* each county were also presented in the district population figures considered by the District Court.[11]

Evidence before the District Court showed that, despite repeated attempts to reapportion the legislature or to call a constitutional convention for that purpose, the Delaware Legislature had consistently failed to take any action to change the existing apportionment of legislative seats. No initiative and referendum procedure exists in Delaware.[12] Legislative apportionment has been traditionally provided for wholly by constitutional provisions in Delaware, and a concurrence of two-thirds of both houses of two consecutive state legislatures is required in order to amend the State Constitution.[13] The Delaware General Assembly may also, by a two-thirds vote, submit to the State's voters the question of whether to hold a constitutional convention.[14]

Under the 1963 amendment to Art. II, § 2, of the Delaware Constitution, the size of the Senate is increased from 17 to 21 members, and the four added seats are

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are less in number than those of the two districts having the heaviest concentration of population; nonetheless, the former elect 18 representatives in the House of Representatives, while the latter elect 2 representatives in the House of Representatives of the Delaware General Assembly." 215 F. Supp., at 176.

[11] The 35 representative districts tended to follow generally the boundaries of a "hundred," a geographical subdivision of counties in Delaware since its founding, and the 17 senatorial districts, which were also described in a detailed fashion in Art. II, § 2, of the 1897 Delaware Constitution, were composed either of two representative districts each or two or more hundreds or portions of hundreds.

[12] For a discussion of the lack of federal constitutional significance of the presence or absence of an available political remedy, see *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* pp. 736–737, decided also this date.

[13] Under Art. XVI, § 1, of the Delaware Constitution.

[14] Under Art. XVI, § 2, of the Delaware Constitution.

allotted equally to Kent and Sussex Counties, giving each of the State's three counties seven senators.[15] The added senators are to be elected at large from districts comprising about one-half of the House districts in each of the two counties. As a result of this change, each voter in Kent and Sussex Counties is entitled to vote for two senators and one representative. With respect to the House of Representatives, the amendment provides that each existing representative district with a population in excess of 15,000 persons is to be allotted an additional representative for each additional 15,000 persons or major fraction thereof. The boundaries of the original 35 representative districts are not affected, and districts receiving additional representatives are to be divided, by a redistricting commission headed by the Governor, so that each of the new districts elects one representative.[16] The net effect of the 1963 amendment, as regards immediate changes in House representation, is to allot 10 additional representatives to various districts in New Castle County, increasing the size of the House to 45 members. Representation of Kent and Sussex Counties is to be unaffected. Under the revised apportionment, the maximum population-variance ratio is reduced to about 12-to-1 with respect to the House, but remains about 15-to-1 in the Senate. A majority of the members of the House would be elected, under the 1963 amendment, from districts with only about 28% of the State's total population. And, since

[15] A chart showing the composition of the Senate and the population of each of the 21 senatorial districts under the 1963 amendment is included in the District Court's opinion. 215 F. Supp., at 181.

[16] Included in the District Court's opinion are charts indicating the effect of the 1963 amendment on the representation of New Castle County in the House of Representatives and showing the composition of the Delaware House, as reapportioned, including the population of each of its 45 districts under 1960 census figures. 215 F. Supp., at 179–180.

the 1963 amendment added two Senate seats each for the two smaller counties, the change in senatorial apportionment would result in two-thirds of the Senate being elected from districts where only about 31% of the State's population reside. About 21% of the State's population would be represented by a majority of the members of the Delaware Senate, under the 1963 reapportionment.

The 1963 amendment also provided that, if a constitutional convention were to be called, the number of delegates and the method of their election were not to be affected by the amended apportionment provisions, and, for the purpose of any future constitutional convention, the representative districts were to elect delegates on the basis of the apportionment provided by Art. II, § 2, as it existed prior to the amendment. Thus, the number of constitutional convention delegates would continue to be 41, one from each of the 35 representative districts provided for under the 1897 scheme, with two elected at large from each of the three counties.[17]

III.

In *Reynolds* v. *Sims, ante,* p. 533, decided also this date, we held that the Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis. Neither of the houses of the Delaware General Assembly, either before or after the 1963 constitutional amendment, was so apportioned. Thus, we hold that the District Court correctly found the Delaware legislative apportionment constitutionally invalid, and affirm the decisions below.

For the reasons stated in our opinion in *Reynolds,*[18] appellants' reliance upon the so-called federal analogy to

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[17] Under Art. XVI, § 2, of the Delaware Constitution.

[18] See *Reynolds* v. *Sims, ante,* pp. 571–576.

justify the deviations from a population basis in the apportionment of seats in the Delaware Legislature is misplaced.[19] And appellants' argument that the Delaware apportionment scheme should be upheld since Congress has admitted various States into the Union although the apportionment of seats in their legislatures was based on factors other than population is also unconvincing.[20] In giving the Delaware Legislature an opportunity to adopt a constitutionally valid plan of legislative apportionment, and in deferring decision until after the November 1962 general election, because of the imminence of

[19] That the three Delaware counties may have possessed some attributes of limited sovereignty prior to the inception of Delaware as a State provides no basis for applying the federal analogy to legislative apportionment in Delaware while holding it inapplicable in other States. Whatever the role of counties in Delaware during the colonial period, they never have had those aspects of sovereignty which the States possessed when our federal system of government was adopted. And it could hardly be contended that Delaware's counties retained any elements of sovereign power, when the State was formed, that at all compare with those retained by the States under our Federal Constitution. See 215 F. Supp., at 186, where the District Court stated that "there never was much and there is now no sovereignty in the Counties of Delaware . . . ."

Additionally, the Delaware legislative apportionment scheme here challenged, even after the 1963 constitutional amendment, fails to resemble the plan of representation in the Federal Congress in several significant respects: the Delaware House of Representatives is plainly not apportioned in accordance with population, and senators in Delaware are not chosen as representatives of counties. Although, under the 1963 amendment, each county is given an equal number of senators, the 21 senators are chosen one each from the 21 senatorial districts, seven per county, established solely for the purpose of their election. Each Delaware senator represents his district and not the county in which the district is located. Members of the Federal Senate are of course elected from a State at large, and represent the entire State.

[20] See the discussion of and the reasons for rejecting this argument in *Reynolds* v. *Sims*, *ante*, p. 582.

that election and the disruptive effect which its decision might have had, the District Court acted in a wise and temperate manner. And the court below did not err in granting injunctive relief after it had become apparent that, despite its decree holding that the 1963 constitutional amendment reapportioning seats in the Delaware Legislature failed to comply with federal constitutional requirements, no further reapportionment by the Delaware General Assembly was probable.

Our affirmance of the decision below is not meant to indicate approval of the District Court's attempt to state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population.[21] In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Apart from what we said in *Reynolds*, we express no view on questions relating to remedies at the present time.[22] Regardless of the requirements of the Delaware

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[21] The court below suggested that population-variance ratios smaller than 1½-to-1 would presumably comport with minimal constitutional requisites, while ratios in excess thereof would necessarily involve deviations from population-based apportionment too extreme to be constitutionally sustainable. See 215 F. Supp., at 190.

[22] See *Reynolds* v. *Sims*, *ante*, p. 585.

Constitution [23] and the fact that legislative apportionment has traditionally been considered a constitutional matter in Delaware, the delay inherent in following the state constitutional prescription for approval of constitutional amendments by two successive General Assemblies cannot be allowed to result in an impermissible deprivation of appellees' right to an adequate voice in the election of legislators to represent them. Acting under general equitable principles, the court below must now determine whether it would be advisable, so as to avoid a possible disruption of state election processes and permit additional time for the Delaware Legislature to adopt a

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[23] Particularly Art. XVI, § 1, which requires the approval by successive state legislatures before a proposed constitutional amendment can be adopted.

In its initial opinion, incident to its order granting a limited stay, the District Court suggested that the Delaware Legislature might desire to amend the State Constitution so as to make legislative apportionment a statutory instead of a constitutional matter, in order to obviate the delay inherently involved in complying with the requirement of the Delaware Constitution that constitutional amendments must be approved by two successive General Assemblies before becoming effective. 207 F. Supp., at 206–207. In this manner, the District Court suggested, if the Delaware Legislature's attempt at reapportionment should be found deficient under the Federal Constitution, the General Assembly elected in November 1962 would be free, under state law, to proceed expeditiously with the enactment of a revised statutory reapportionment plan consonant with the requirements of the Equal Protection Clause. Unfortunately, the Delaware Legislature failed to act on the Court's suggestion, and instead proposed the constitutional amendment hereinbefore discussed, which was approved by two consecutive state legislatures in late 1962 and in early 1963. However, in its opinion on the merits, the District Court intimated that, with the Delaware constitutional provisions relating to legislative apportionment declared invalid, the Delaware Legislature could "then proceed to pass an apportionment statute meeting the requirements of the Fourteenth Amendment . . . ." 215 F. Supp., at 191.

constitutionally valid apportionment scheme, to allow the 1964 election of Delaware legislators to be conducted pursuant to the provisions of the 1963 constitutional amendment, or whether those factors are insufficient to justify any further delay in the effectuation of appellees' constitutional rights. We therefore affirm the decisions of the District Court here appealed from, and remand the case for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims*.

It is so ordered.

MR. JUSTICE CLARK concurs in the affirmance for the reasons stated in his concurring opinion in *Reynolds* v. *Sims, ante,* p. 587, decided this date.

[For dissenting opinion of MR. JUSTICE HARLAN, see *ante,* p. 589.]

MR. JUSTICE STEWART.

In this case the appellees showed that the apportionment of seats among the districts represented in the Delaware House of Representatives and within the counties represented in the Delaware Senate, apparently reflects "no policy, but simply arbitrary and capricious action." The appellants have failed to dispel this showing by suggesting any possible rational explanation for these aspects of Delaware's system of legislative apportionment. Accordingly, for the reasons stated in my dissenting opinion in *Lucas* v. *Forty-Fourth General Assembly of Colorado, post,* p. 744, I would affirm the judgment of the District Court insofar as it holds that Delaware's system of apportionment violates the Equal Protection Clause.

Syllabus.

LUCAS ET AL. *v.* FORTY-FOURTH GENERAL ASSEMBLY OF COLORADO ET AL.

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

No. 508. Argued March 31–April 1, 1964.—
Decided June 15, 1964.

Appellants, voters in the Denver metropolitan area, seeking declaratory and injunctive relief, sued various officials having duties in connection with state elections challenging the apportionment of seats in both houses of the Colorado General Assembly. A three-judge Federal District Court deferred a hearing until after the 1962 general election, at which two proposals for amending the state constitutional provisions relating to legislative apportionment were to be voted on by the Colorado electorate. Under the plan which was adopted the House of Representatives was presumably to be apportioned on the basis of population but the existing apportionment of the Senate, based on a combination of population and other factors (geography, compactness and contiguity, accessibility, natural boundaries, and conformity to historical divisions) was substantially maintained. The rejected proposal would have based apportionment of both houses largely on the basis of population. Under the adopted plan, counties with only about one-third of the State's total population would elect a majority of the Senate; the maximum population-variance ratio would be about 3.6-to-1; and the chief metropolitan areas, with over two-thirds of the State's population, could elect only a bare majority of the Senate. Following the general election the parties amended their pleadings so that a challenge to the newly adopted apportionment scheme was solely involved. The District Court, stressing approval by the electorate, held that the recently adopted plan met the requirements of the Equal Protection Clause of the Fourteenth Amendment and dismissed the suit. *Held:*

1. Both houses of a bicameral state legislature must be apportioned substantially on a population basis. *Reynolds* v. *Sims, ante,* p. 533, followed. P. 734.

2. Though this Court need not pass upon the apportionment of the House, which is not challenged here, the apportionment of

the Senate under the newly adopted scheme, which is not severable from the apportionment of the House, departs from population-based representation too substantially to be permissible under the Equal Protection Clause. P. 735.

3. A political remedy, such as the initiative and referendum, may justify an equity court in deferring action temporarily on an apportionment plan to allow recourse to such procedure; but such a remedy has no constitutional significance if the plan does not meet equal protection requirements. Pp. 736–737.

4. The disparities from population-based representation in the allocation of Senate seats to populous areas cannot be justified as rational on the ground that geographical, historical, and other factors were taken into account. P. 738.

5. The "federal analogy" relied upon with regard to the Senate apportionment plan is without factual or legal merit. P. 738.

6. It is not appropriate for this Court to express a view on the question of remedies, since the District Court, acting under equitable principles, must now determine whether the imminence of 1964 elections requires utilization of the newly adopted apportionment plan for purposes of those elections or whether appellants' right to cast adequately weighted votes for state legislators in those elections can practicably be effectuated. P. 739.

219 F. Supp. 922, reversed and remanded.

George Louis Creamer and *Charles Ginsberg* argued the cause and filed a brief for appellants.

Anthony F. Zarlengo, Special Assistant Attorney General of Colorado, argued the cause for the Forty-Fourth General Assembly of Colorado et al., appellees. With him on the brief was *Duke W. Dunbar,* Attorney General of Colorado. *Stephen H. Hart* argued the cause for Johnson et al., appellees. With him on the brief were *James Lawrence White, William E. Murane, Charles S. Vigil* and *Richard S. Kitchen, Sr.*

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

General Marshall, Bruce J. Terris, Harold H. Greene and *David Rubin.*

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

Involved in this case is an appeal from a decision of the Federal District Court for the District of Colorado upholding the validity, under the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, of the apportionment of seats in the Colorado Legislature pursuant to the provisions of a constitutional amendment approved by the Colorado electorate in 1962.

I.

Appellants, voters, taxpayers and residents of counties in the Denver metropolitan area, filed two separate actions, consolidated for trial and disposition, on behalf of themselves and all others similarly situated, in March and July 1962, challenging the constitutionality of the apportionment of seats in both houses of the Colorado General Assembly. Defendants below, sued in their representative capacities, included various officials charged with duties in connection with state elections. Plaintiffs below asserted that Art. V, §§ 45, 46, and 47, of the Colorado Constitution, and the statutes [1] implementing those constitutional provisions, result in gross inequalities and disparities with respect to their voting rights. They alleged that "one of the inalienable rights of citizenship . . . is equality of franchise and vote, and that the concept of equal protection of the laws requires that every citizen be equally represented in the legislature of his State." Plaintiffs sought declaratory and injunctive relief, and also requested the Court to order a constitution-

[1] Colo. Rev. Stat. 1953, c. 63, §§ 63–1–1—63–1–6.

ally valid apportionment plan into effect for purposes of the 1962 election of Colorado legislators. Proponents of the current apportionment scheme, which was then to be voted upon in a November 1962 referendum as proposed Amendment No. 7 to the Colorado Constitution, were permitted to intervene. A three-judge court was promptly convened.

On August 10, 1962, the District Court announced its initial decision.[2] *Lisco* v. *McNichols,* 208 F. Supp. 471. After holding that it had jurisdiction, that the issues presented were justiciable, and that grounds for abstention were lacking,[3] the court below stated that the population

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[2] The District Court wisely refrained from acting at all until a case pending in the Colorado Supreme Court was decided without that court's passing on the federal constitutional questions relating to Colorado's scheme of legislative apportionment which were raised in that suit. *In re Legislative Reapportionment,* 150 Colo. 380, 374 P. 2d 66 (1962). After accepting jurisdiction, the Colorado Supreme Court, over a vigorous dissent, ignored the federal constitutional issues and instead discussed only the matter of when the Colorado Legislature was required, pursuant to the State Constitution, to reapportion seats in the General Assembly. The Court concluded that a reapportionment measure enacted during the 1963 session of the Colorado Legislature, on the basis of 1960 census figures, would, if neither of the proposed constitutional amendments relating to legislative apportionment was approved by the voters in November 1962, be in sufficient compliance with the constitutional requirement of periodic legislative reapportionment. See also 208 F. Supp., at 474, discussing the Colorado Supreme Court's decision in that case.

[3] In its initial opinion, the District Court properly concluded that the argument that "the Colorado Supreme Court has preempted jurisdiction by first hearing the controversy, is without merit in view of the fact that the Supreme Court of Colorado has refrained from even considering the issue of infringement of the plaintiffs' federally-guaranteed constitutional rights." 208 F. Supp., at 475. Continuing, the court below correctly held that, under the circumstances, it was not required to abstain, and stated:

"The considerations which demand abstinence are not present in the instant case. Here, the General Assembly of the State of Colorado

disparities among various legislative districts under the existing apportionment "are of sufficient magnitude to make out a *prima facie* case of invidious discrimination . . . ." However, because of the imminence of the primary and general elections, and since two constitutional amendments, proposed through the initiative procedure and prescribing rather different schemes for legislative apportionment, would be voted upon in the impending election, the District Court continued the cases without further action until after the November 1962 election. Colorado legislators were thus elected in 1962 pursuant to the provisions of the existing apportionment scheme.

At the November 1962 general election, the Colorado electorate adopted proposed Amendment No. 7 by a vote of 305,700 to 172,725, and defeated proposed Amendment No. 8 by a vote of 311,749 to 149,822. Amendment No. 8, rejected by a majority of the voters, prescribed an apportionment plan pursuant to which seats in both houses of the Colorado Legislature would purportedly be apportioned on a population basis.[4] Amend-

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has repeatedly refused to perform the mandate imposed by the Colorado Constitution to apportion the legislature. The likelihood that the unapportioned General Assembly will ever apportion itself now appears remote. The Supreme Court of Colorado, while retaining jurisdiction of the subject matter of the controversy presented to it, has postponed further consideration of the cause until June, 1963. Under these circumstances, we must conclude that the parties do not, at least at present, have an adequate, speedy and complete remedy apart from that asserted in the case at bar and thus grounds for abstention are at this time lacking." 208 F. Supp., at 476. See also *Davis* v. *Mann, ante,* pp. 690–691, decided also this date, where we discussed the question of abstention by a federal court in a state legislative apportionment controversy.

[4] As stated succinctly by the District Court, in its opinion on the merits,

"The defeated Amendment No. 8 proposed a three-man commission to apportion the legislature periodically. The commission was to have

ment No. 7, on the other hand, provided for the apportionment of the House of Representatives on the basis of population, but essentially maintained the existing apportionment in the Senate, which was based on a combination of population and various other factors.

After the 1962 election the parties amended their pleadings so that the cases involved solely a challenge to the apportionment scheme established in the newly adopted Amendment No. 7. Plaintiffs below requested a declaration that Amendment No. 7 was unconstitu-

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the duty of delineating, revising and adjusting senatorial and representative districts. Its actions were to be reviewed by the Colorado Supreme Court. The districting was to be on a strict population ratio for both the Senate and the House with limited permissible variations therefrom." 219 F. Supp., at 925.

Additionally, under proposed Amendment No. 8, the commission would determine a strict population ratio for both the Senate and the House by dividing the State's total population, as ascertained in each decennial federal census, by the number of seats assigned to the Senate and the House, respectively. No legislative district should contain a population per senator or representative of 33⅓% more or less than the strict population ratio, except certain mountainous senatorial districts of more than 5,500 square miles in area, but no senatorial district was to contain a population of less than 50% of the strict population ratio. Senatorial districts should consist of one county or two or more contiguous counties, but no county should be divided in the formation of a senatorial district. Representative districts should consist of one county or two or more contiguous counties. Any county apportioned two or more representatives could be divided into representative subdistricts, but only after a majority of the voters in the county had approved, in a general election, the exact method of subdivision and the specific apportionment of representatives among the subdistricts and the county at large. A proposal to divide a county into subdistricts could be placed on the ballot only by initiative petition in accordance with state law, and only at the general elections in 1966 and 1974, and at the general elections held each 10 years thereafter. Amendment No. 8, like Amendment No. 7, would have required implementing legislation and would not have become effective, if adopted, until the 1964 elections.

tional under the Fourteenth Amendment since resulting in substantial disparities from population-based representation in the Senate, and asked for a decree reapportioning both houses of the Colorado Legislature on a population basis. After an extended trial, at which a variety of statistical and testimonial evidence regarding legislative apportionment in Colorado, past and present, was introduced, the District Court, on July 16, 1963, announced its decision on the merits. *Lisco* v. *Love,* 219 F. Supp. 922. Splitting 2-to-1, the court below concluded that the apportionment scheme prescribed by Amendment No. 7 comported with the requirements of the Equal Protection Clause, and thus dismissed the consolidated actions. In sustaining the validity of the senatorial apportionment provided for in Amendment No. 7, despite deviations from population-based representation, the District Court stated that the Fourteenth Amendment does not require "equality of population within representation districts for each house of a bicameral state legislature." Finding that the disparities from a population basis in the apportionment of Senate seats were based upon rational considerations, the court below stated that the senatorial apportionment under Amendment No. 7 "recognizes population as a prime, but not controlling, factor and gives effect to such important considerations as geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, [and] conformity to historical divisions such as county lines and prior representation districts . . . ." [5] Stressing also that the apportionment plan had been recently adopted by popular vote in a statewide referendum, the Court stated:

> "[Plaintiffs'] argument that the apportionment of the Senate by Amendment No. 7 is arbitrary, in-

[5] 219 F. Supp., at 932.

> vidiously discriminatory, and without any rationality [has been answered by the] voters of Colorado . . . . By adopting Amendment No. 7 and by rejecting Amendment No. 8, which proposed to apportion the legislature on a per capita basis, the electorate has made its choice between the conflicting principles." [6]

Concluding, the District Court stated:

> "We believe that no constitutional question arises as to the actual, substantive nature of apportionment if the popular will has expressed itself. . . . In Colorado the liberal provisions for initiation of con-

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[6] *Ibid.* Continuing, the court below stated:

"The initiative gives the people of a state no power to adopt a constitutional amendment which violates the Federal Constitution. Amendment No. 7 is not valid just because the people voted for it. . . . [But] the traditional and recognized criteria of equal protection . . . are arbitrariness, discrimination, and lack of rationality. The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary.

"The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. At the most they present a political issue which they lost. On the questions before us we shall not substitute any views which we may have for the decision of the electorate. . . . [W]e decline to act as a superelectorate to weigh the rationality of a method of legislative apportionment adopted by a decisive vote of the people." *Id.*, at 932–933.

And, earlier in its opinion on the merits, the District Court stated: "With full operation of the one-man, one-vote principle, the Colorado electorate by an overwhelming majority approved a constitutional

> stitutional amendments permit the people to act—and they have done so. If they become dissatisfied with what they have done, a workable method of change is available. The people are free, within the framework of the Federal Constitution, to establish the governmental forms which they desire and when they have acted the courts should not enter the political wars to determine the rationality of such action." [7]

In dissenting, District Judge Doyle stated that he regarded the senatorial apportionment under Amendment No. 7 as irrational and invidiously discriminatory, and that the constitutional amendment had not sufficiently remedied the gross disparities previously found by the District Court to exist in Colorado's prior apportionment scheme. Instead, he stated, the adopted plan freezes senatorial apportionment and merely retains the former system with certain minor changes. Equality of voting power in both houses is constitutionally required, the dissent stated, since there is no logical basis for distinguishing between the two bodies of the Colorado Legislature. In rejecting the applicability of the so-called federal analogy, Judge Doyle relied on this Court's decision in *Gray* v. *Sanders,* 372 U. S. 368. He concluded that, although absolute equality is a practical impossibility, legislative districting based substantially on population is constitutionally required, and that the disparities in the

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amendment creating a Senate, the membership of which is not apportioned on a strict population basis. By majority process the voters have said that minority process in the Senate is what they want. A rejection of their choice is a denial of the will of the majority. If the majority becomes dissatisfied with that which it has created, it can make a change at an election in which each vote counts the same as every other vote." *Id.*, at 926–927.

[7] *Id.*, at 933.

apportionment of Senate seats under Amendment No. 7's provisions cannot be rationalized.[8]

Notices of appeal from the District Court's decision were timely filed, and we noted probable jurisdiction on December 9, 1963. 375 U. S. 938.

II.

When this litigation was commenced, apportionment of seats in the Colorado General Assembly was based on certain provisions of the State Constitution and statutory provisions enacted to implement them. Article V, § 45, of the Colorado Constitution provided that the legislature

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[8] Additionally, Judge Doyle correctly stated that "a properly apportioned state legislative body must at least approximate by bona fide attempt the creation of districts substantially related to population." 219 F. Supp., at 941. With respect to the relatively easy availability of the initiative procedure in Colorado, the dissent perceptively pointed out that "it is of little consolation to an individual voter who is being deprived of his rights that he can start a popular movement to change the Constitution. This possible remedy is not merely questionable, it is for practical purposes impossible." *Id.*, at 942. Judge Doyle referred to Amendment No. 7's provisions relating to senatorial apportionment as "the product of a mechanical and arbitrary freezing accomplished by adoption, with slight modification, of the unlawful alignments which had existed in the previous statute." *Id.*, at 943. Discussing the majority's view that geographic and economic considerations were relevant in explaining the disparities from population-based senatorial representation, he discerningly stated that geographic and area factors carry "little weight when considered in the light of modern methods of electronic communication, modern highways, automobiles and airplanes," and, with regard to economic considerations, that "[e]conomic interests are remarkably well represented without special representation," that "[i]t is dangerous to build into a political system a favored position for a segment of the population of the state," that "[t]here exists no practical method of ridding ourselves of them," and that, "long after the institutions pass, the built-in advantage remains even though it is at last only a vestige of the dead past." *Ibid.*

"shall revise and adjust the apportionment for senators and representatives . . . according to ratios to be fixed by law," at the sessions following the state enumeration of inhabitants in 1885 and every 10 years thereafter, and following each decennial federal census. Article V, § 46, as amended in 1950, stated that "[t]he senate shall consist of not more than thirty-five and the house of not more than sixty-five members." Article V, § 47, provided that:

> "Senatorial and representative districts may be altered from time to time, as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the district as compact as may be. No county shall be divided in the formation of a senatorial or representative district."

Article V, § 3, provides that senators shall be elected for four-year terms, staggered so that approximately one-half of the members of the Senate are elected every two years, and that all representatives shall be elected for two-year terms.

Pursuant to these general constitutional provisions, the Colorado General Assembly has periodically enacted detailed statutory provisions establishing legislative districts and prescribing the apportionment to such districts of seats in both houses of the Colorado Legislature. Since the adoption of the Colorado Constitution in 1876, the General Assembly has been reapportioned or redistricted in the following years: 1881, 1891, 1901, 1909, 1913, 1932, 1953, and, with the adoption of Amendment No. 7, in 1962.[9] The 1932 reapportionment was an initiated

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[9] Admittedly, the Colorado Legislature has never complied with the state constitutional provision requiring the conducting of a decennial state census in 1885 and every 10 years thereafter, and of course has never reapportioned seats in the legislature based upon such a

measure, adopted because the General Assembly had neglected to perform its duty under the State Constitution. In 1933 the legislature attempted to thwart the initiated measure by enacting its own legislative reapportionment statute, but the latter measure was held unconstitutional by the Colorado Supreme Court.[10]

The 1953 apportionment scheme, implementing the existing state constitutional provisions and in effect immediately prior to the adoption of Amendment No. 7, was contained in several statutory provisions which provided for a 35-member Senate and a 65-member House of Representatives. Section 63–1–2 of the Colorado Revised Statutes established certain population "ratio" figures for the apportionment of Senate and House seats among the State's 63 counties. One Senate seat was to be allocated to each senatorial district for the first 19,000 population, with one additional senator for each senatorial district for each additional 50,000 persons or fraction over 48,000. One House seat was to be given to each representative district for the first 8,000 population, with one

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census. Under Amendment No. 7, sole reliance is placed on the federal census, and there is no longer any requirement for the conducting of a decennial state census.

In its initial opinion, the District Court stated that there had been only a "modicum of apportionment, either real or purported," as well as "several abortive attempts," since Colorado first achieved statehood. However, in its later opinion on the merits, the court below viewed the situation rather differently, and stated that "[a]pportionment of the Colorado legislature has not remained static." As indicated by the District Court, in addition to the reapportionments which were effected, "[i]n 1954 the voters rejected a referred apportionment measure and in 1956 rejected an initiated constitutional amendment proposing the reapportionment of both chambers of the legislature on a straight population basis." 219 F. Supp., at 930.

[10] *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757 (1934). See note 24, *infra*.

additional representative for each House district for each additional 25,000 persons or fraction over 22,400. Sections 63–1–3 and 63–1–6 established 25 senatorial districts and 35 representative districts, respectively, and allocated the 35 Senate seats and 65 House seats among them according to the prescribed population ratios. No counties were divided in the formation of senatorial or representative districts, in compliance with the constitutional proscription. Thus, senators and representatives in those counties entitled to more than one seat in one or both bodies were elected at large by all of the county's voters. The City and County of Denver was given eight Senate seats and 17 House seats, and Pueblo County was allocated two Senate seats and four House seats. Other populous counties were also given more than one Senate and House seat each. Certain counties were entitled to separate representation in either or both of the houses, and were given one seat each. Sparsely populated counties were combined in multicounty districts.

Under the 1953 apportionment scheme, applying 1960 census figures, 29.8% of the State's total population lived in districts electing a majority of the members of the Senate, and 32.1% resided in districts electing a majority of the House members. Maximum population-variance ratios of approximately 8-to-1 existed between the most populous and least populous districts in both the Senate and the House. One senator represented a district containing 127,520 persons, while another senator had only 17,481 people in his district. The smallest representative district had a population of only 7,867, while another district was given only two House seats for a population of 127,520. In discussing the 1953 legislative apportionment scheme, the District Court, in its initial opinion, stated that "[f]actual data presented at the trial reveals the existence of gross and glaring disparity in voting strength as between the several representative and

senatorial districts," and that "[t]he inevitable effect . . . [of the existing apportionment provisions] has been to develop severe disparities in voting strength with the growth and shift of population." [11]

Amendment No. 7 provides for the establishment of a General Assembly composed of 39 senators and 65 representatives, with the State divided geographically into 39 senatorial and 65 representative districts, so that all seats in both houses are apportioned among single-member districts.[12] Responsibility for creating House districts "as nearly equal in population as may be" is given to the legislature. Allocation of senators among the counties follows the existing scheme of districting and apportionment, except that one sparsely populated county is detached from populous Arapahoe County and joined with four others in forming a senatorial district, and one additional senator is apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson. Within counties given more than one Senate seat, senatorial districts are to be established by the legislature "as nearly equal in population as may be." [13] Amendment No. 7 also pro-

[11] 208 F. Supp., at 474, 475.

[12] Amendment No. 7 is set out as Appendix A to the District Court's opinion on the merits, 219 F. Supp., at 933–934, and provides for the repeal of the existing Art. V, §§ 45, 46 and 47, and the adoption of "new Sections 45, 46, 47 and 48 of Article V," which are set out verbatim in the Appendix to this opinion.

Additionally, the provisions of proposed Amendment No. 8, rejected by the Colorado electorate, are set out as Appendix B to the District Court's opinion on the merits. 219 F. Supp., at 934–935. See the discussion of Amendment No. 8's provisions in note 4, *supra*.

[13] In addition to establishing House districts, the legislation enacted by the Colorado General Assembly in early 1963, in implementation of Amendment No. 7's provisions, also divided counties apportioned more than one Senate seat into single-member districts. Amendment No. 7, in contrast to Amendment No. 8, explicitly provided for districting, with respect to both Senate and House seats, in multimem-

vides for a revision of representative districts, and of senatorial districts within counties given more than one Senate seat, after each federal census, in order to maintain conformity with the prescribed requirements.[14] Pursuant to this constitutional mandate, the Colorado Legislature, in early 1963, enacted a statute establishing 65 representative districts and creating senatorial districts in counties given more than one Senate seat.[15] Under the newly adopted House apportionment plan, districts in which about 45.1% of the State's total population reside are represented by a majority of the members of that body. The maximum population-variance ratio, between the most populous and least populous House districts, is approximately 1.7-to-1. The court below concluded that the House was apportioned as nearly on a population basis as was practicable, consistent with Amendment No. 7's requirement that "[n]o part of one county shall be added to another county or part of another county" in the formation of a legislative district, and directed its concern solely to the question of whether the

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ber counties. The rejected amendment, on the other hand, made no provision at all for districting within counties given more than one Senate seat, and allowed subdistricting of House seats only upon specific approval of such a plan by a county's voters. Thus, Amendment No. 8 would at least in part have perpetuated the extremely objectionable feature of the existing apportionment scheme, under which legislators in multimember counties were elected at large from the county as a whole.

[14] As stated by the District Court, "Mandatory provisions [of Amendment No. 7] require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census." 219 F. Supp., at 925. Under the provisions of Amendment No. 7, eight counties are given more than one Senate seat, and 14 of the 39 senatorial districts are comprised of more than one county.

[15] Colo. Laws 1963, c. 143, pp. 520–532, referred to as House Bill No. 65.

deviations from a population basis in the apportionment of Senate seats were rationally justifiable.[16]

Senatorial apportionment, under Amendment No. 7, involves little more than adding four new Senate seats and distributing them to four populous counties in the Denver area, and in substance perpetuates the existing senatorial apportionment scheme.[17] Counties containing only 33.2% of the State's total population elect a majority of the 39-member Senate under the provisions of Amendment No. 7. Las Animas County, with a 1960 population of only 19,983, is given one Senate seat, while El Paso County, with 143,742 persons, is allotted only two Senate seats. Thus, the maximum population-variance ratio, under the revised senatorial apportionment, is about 3.6-to-1.[18] Denver and the three adjacent subur-

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[16] As stated by the court below, "The Colorado legislature met in January, 1963, and passed a statute, H. B. No. 65, implementing Amendment No. 7. No question is raised concerning the implementing legislation." 219 F. Supp., at 924–925. Again the District Court stated: "The cases now before the court do not present the issues as they existed prior to the apportionment made by Amendment No. 7. . . . [T]he then-existing disparities in each chamber were severe, the defendants presented no evidence to sustain the rationality of the apportionment, and witnesses for the intervenors, while defending the apportionment of the Senate, recognized the malapportionment of the House. The change by Amendment No. 7 was such as to require a trial de novo and we are concerned with the facts as finally presented." *Id.*, at 928.

[17] Appendix C to the District Court's opinion on the merits contains a chart of the senatorial districts created under Amendment No. 7's provisions, showing the population of and the counties included in each. 219 F. Supp., at 935–938.

[18] Included as Appendix D to the District Court's opinion on the merits is a chart showing the ratios of population per senator in each district to the population of the least populous senatorial district, as established by Amendment No. 7 and the implementing statutory provisions dividing counties given more than one Senate seat into separate senatorial districts. 219 F. Supp., at 939.

ban counties contain about one-half of the State's total 1960 population of 1,753,947, but are given only 14 out of 39 senators. The Denver, Pueblo, and Colorado Springs metropolitan areas, containing 1,191,832 persons, about 68%, or over two-thirds of Colorado's population, elect only 20 of the State's 39 senators, barely a majority. The average population of Denver's eight senatorial districts, under Amendment No. 7, is 61,736, while the five least populous districts contain less than 22,000 persons each. Divergences from population-based representation in the Senate are growing continually wider, since the underrepresented districts in the Denver, Pueblo, and Colorado Springs metropolitan areas are rapidly gaining in population, while many of the overrepresented rural districts have tended to decline in population continuously in recent years.[19]

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[19] Appellants have repeatedly asserted that equality of population among districts has been the traditional basis of legislative apportionment in both houses of the Colorado General Assembly. They pointed out that both houses of the territorial legislature established by Congress in the organic act creating the territory of Colorado in 1861 were expressly required to be apportioned on a population basis. And, they contended, the legislative districts established for the apportionment of the 26 Senate and 49 House seats in the first General Assembly after Colorado became a State were virtually all substantially equal in population. Referring to the language of the Colorado Supreme Court in *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757 (1934), they urged that no basis other than population has ever been recognized for apportioning representation in either house of the Colorado Legislature. Appellees, on the other hand, have consistently contended that population "ratio" figures have been used in apportioning seats in both houses since 1881, requiring proportionately more population to obtain additional legislative representation. Since the Colorado Supreme Court's statements in *Armstrong* regarding population as the basis of legislative representation plainly assumed the existence of an underlying population ratio scheme, its language can hardly be read out of context to support the proposition that absolute equality of population among districts has been the

III.

Several aspects of this case serve to distinguish it from the other cases involving state legislative apportionment also decided this date. Initially, one house of the Colorado Legislature is at least arguably apportioned substantially on a population basis under Amendment No. 7 and the implementing statutory provisions. Under the apportionment schemes challenged in the other cases, on the other hand, clearly neither of the houses in any of the state legislatures is apportioned sufficiently on a population basis so as to be constitutionally sustainable. Additionally, the Colorado scheme of legislative apportionment here attacked is one adopted by a majority vote of the Colorado electorate almost contemporaneously with the District Court's decision on the merits in this litigation. Thus, the plan at issue did not result from prolonged legislative inaction. However, the Colorado General Assembly, in spite of the state constitutional mandate for periodic reapportionment, has enacted only one effective legislative apportionment measure in the past 50 years.[20]

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historical basis of legislative apportionment in Colorado. For a short discussion of legislative apportionment in Colorado, including the adoption of Amendment No. 7 and the instant litigation, see Note, 35 U. of Colo. L. Rev. 431 (1963).

[20] In 1953 the Colorado General Assembly enacted the legislative apportionment scheme in effect when this litigation was commenced. Prior to 1953, the last effective apportionment of legislative representation by the General Assembly itself was accomplished in 1913. The 1932 measure was an initiated act, adopted by a vote of the Colorado electorate. Although the legislature enacted a statutory plan in 1933, in an attempt to nullify the effect of the 1932 initiated act, that measure was held invalid and unconstitutional, as a matter of state law, by the Colorado Supreme Court. See note 24, *infra*. And the 1962 adoption of the apportionment scheme contained in proposed constitutional Amendment No. 7 resulted, of course, not from legislative action, but from a vote of the Colorado electorate

As appellees have correctly pointed out, a majority of the voters in every county of the State voted in favor of the apportionment scheme embodied in Amendment No. 7's provisions, in preference to that contained in proposed Amendment No. 8, which, subject to minor deviations, would have based the apportionment of seats in both houses on a population basis. However, the choice presented to the Colorado electorate, in voting on these two proposed constitutional amendments, was hardly as clear-cut as the court below regarded it. One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies *within* the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multimember county represented the county as a whole.[21] Amendment No. 8, as distinguished from Amendment No. 7, while purportedly basing the apportionment of

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approving the initiated measure. The 1963 statutory provisions were enacted by the General Assembly simply in order to comply with Amendment No. 7's mandate for legislative implementation.

[21] We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties.

seats in both houses on a population basis, would have perpetuated, for all practical purposes, this debatable feature of the existing scheme. Under Amendment No. 8, senators were to be elected at large in those counties given more than one Senate seat, and no provision was made for subdistricting within such counties for the purpose of electing senators. Representatives were also to be elected at large in multimember counties pursuant to the provisions of Amendment No. 8, at least initially, although subdistricting for the purpose of electing House members was permitted if the voters of a multimember county specifically approved a representative subdistricting plan for that county. Thus, neither of the proposed plans was, in all probability, wholly acceptable to the voters in the populous counties, and the assumption of the court below that the Colorado voters made a definitive choice between two contrasting alternatives and indicated that "minority process in the Senate is what they want" does not appear to be factually justifiable.

Finally, this case differs from the others decided this date in that the initiative device provides a practicable political remedy to obtain relief against alleged legislative malapportionment in Colorado.[22] An initiated

[22] Article V, § 1, of the Colorado Constitution provides that "the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly . . . ," and further establishes the specific procedures for initiating proposed constitutional amendments or legislation.

Twenty-one States make some provision for popular initiative. Fourteen States provide for the amendment of state constitutional provisions through the process of initiative and referendum. See The Book of the States 1962–1963, 14. Seven States allow the use of popular initiative for the passage of legislation but not constitutional amendments. Both types of initiative and referendum may, of course, be relevant to legislative reapportionment. See Report of Advisory Commission on Intergovernmental Relations, Apportionment of State

measure proposing a constitutional amendment or a statutory enactment is entitled to be placed on the ballot if the signatures of 8% of those voting for the Secretary of State in the last election are obtained. No geographical distribution of petition signers is required. Initiative and referendum has been frequently utilized throughout Colorado's history.[23] Additionally, Colorado courts have traditionally not been hesitant about adjudicating controversies relating to legislative apportionment.[24] How-

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Legislatures 57 (1962). In some States the initiative process is ineffective and cumbersome, while in others, such as Colorado, it is a practicable and frequently utilized device.

In addition to the initiative device, Art. V, § 1, of the Colorado Constitution provides that, upon the timely filing of a petition signed by 5% of the State's voters or at the instance of the legislature, the Colorado electorate reserves the power of voting upon legislative enactments in a statewide referendum at the next general election.

[23] Amendment of the Colorado Constitution can be accomplished, in addition to resort to the initiative and referendum device, through a majority vote of the electorate on an amendment proposed by the General Assembly following a favorable vote thereon "by two-thirds of all the members elected to each house" of the Colorado Legislature, pursuant to Art. XIX, § 2, of the Colorado Constitution. Additionally, a constitutional convention can be convened, upon the favorable recommendation of two-thirds of the members elected to each house of the General Assembly, if the electorate approves of the calling of such a convention to "revise, alter and amend" the State Constitution, under Art. XIX, § 1, of the Colorado Constitution. Pursuant to Art. XIX, § 1, "[t]he number of members of the convention shall be twice that of the senate and they shall be elected in the same manner, at the same places, and in the same districts."

[24] See *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757 (1934), where the Colorado Supreme Court held that a 1933 statute, enacted by the legislature to effectively nullify the 1932 initiated act reapportioning legislative representation, was void under the state constitutional provisions. In finding the legislative measure invalid, the Colorado court stated that "redistricting must be done with due regard to the requirement that representation in the general assembly shall be based upon population," and that "[t]he legislative act in

ever, the Colorado Supreme Court, in its 1962 decision discussed previously in this opinion,[25] refused to consider or pass upon the federal constitutional questions, but instead held only that the Colorado General Assembly was not required to enact a reapportionment statute until the following legislative session.[26]

IV.

In *Reynolds* v. *Sims, ante,* p. 533, decided also this date, we held that the Equal Protection Clause requires that both houses of a bicameral state legislature must be apportioned substantially on a population basis. Of course, the court below assumed, and the parties apparently conceded, that the Colorado House of Representatives, under the statutory provisions enacted by the Colorado Legislature in early 1963 pursuant to Amendment No. 7's dictate that the legislature should create 65 House districts "as nearly equal in population as may be," is now apportioned sufficiently on a population basis to comport with federal constitutional requisites. We need not pass on this question, since the apportionment of Senate seats, under Amendment No. 7, clearly involves departures from population-based representation too

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question is void because it violates section 45 of article 5 of the Constitution, which requires the reapportionment to be made on the basis of population, as disclosed by the census, and according to ratios to be fixed by law." Stating that "[i]t is clear that ratios, after having been fixed under section 45, . . . cannot be changed until after the next census," the Colorado Supreme Court concluded that "[t]he legislative act attempts to confer upon some districts a representation that is greater, and upon others a representation that is less, than they are entitled to under the Constitution." *Id.*, at 428, 37 P. 2d, at 758.

[25] See note 2, *supra.*

[26] *In re Legislative Reapportionment,* 150 Colo. 380, 374 P. 2d 66 (1962). Even so, the Colorado court stated that "it is abundantly clear that this court has jurisdiction . . . ." *Id.*, at 385, 374 P. 2d, at 69. See note 2, *supra.*

extreme to be constitutionally permissible, and there is no indication that the apportionment of the two houses of the Colorado General Assembly, pursuant to the 1962 constitutional amendment, is severable.[27] We therefore conclude that the District Court erred in holding the legislative apportionment plan embodied in Amendment No. 7 to be constitutionally valid. Under neither Amendment No. 7's plan, nor, of course, the previous statutory scheme, is the overall legislative representation in the two houses of the Colorado Legislature sufficiently grounded on population to be constitutionally sustainable under the Equal Protection Clause.[28]

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[27] See *Maryland Committee for Fair Representation* v. *Tawes*, *ante*, p. 673, decided also this date, where we discussed the need for considering the apportionment of seats in both houses of a bicameral state legislature in evaluating the constitutionality of a state legislative apportionment scheme, regardless of what matters were raised by the parties and decided by the court below. Consistent with this approach, in determining whether a good faith effort to establish districts substantially equal in population has been made, a court must necessarily consider a State's legislative apportionment scheme as a whole. Only after an evaluation of an apportionment plan in its totality can a court determine whether there has been sufficient compliance with the requisites of the Equal Protection Clause. Deviations from a strict population basis, so long as rationally justifiable, may be utilized to balance a slight overrepresentation of a particular area in one house with a minor underrepresentation of that area in the other house. But, on the other hand, disparities from population-based representation, though minor, may be cumulative instead of offsetting where the same areas are disadvantaged in both houses of a state legislature, and may therefore render the apportionment scheme at least constitutionally suspect. Of course, the court below can properly take into consideration the present apportionment of seats in the House in determining what steps must be taken in order to achieve a plan of legislative apportionment in Colorado that sufficiently comports with federal constitutional requirements.

[28] See *Reynolds* v. *Sims*, *ante*, p. 576, where we discussed some of the underlying reasons for our conclusion that the Equal Pro-

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Except as an interim remedial procedure justifying a court in staying its hand temporarily, we find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature. Courts sit to adjudicate controversies involving alleged denials of constitutional rights. While a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy, such as initiative and referendum, individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief against the alleged malapportionment, which the individual voters seek, might be achieved. An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U. S. 624, 638, "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." [29] A citizen's constitutional rights can hardly be infringed simply because a majority

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tection Clause requires that seats in both houses of a state legislature must be apportioned substantially on a population basis in order to comport with federal constitutional requisites.

[29] And, as stated by the court in *Hall* v. *St. Helena Parish School Bd.,* 197 F. Supp. 649, 659 (D. C. E. D. La. 1961), aff'd, 368 U. S. 515, "No plebiscite can legalize an unjust discrimination."

of the people choose that it be.[30] We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in *Reynolds* v. *Sims*. And we conclude that the fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportionment are pending and will be submitted to the State's voters at the next election.

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[30] In refuting the majority's reliance on the fact that Amendment No. 7 had been adopted by a vote of the Colorado electorate, Judge Doyle, in dissenting below, stated:

"The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint we can not, true to our oath, uphold such legislation in the face of palpable infringement of rights. Thus, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet no one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority. The rights which are here asserted are the rights of the individual plaintiffs to have their votes counted equally with those of other voters. . . . [T]o say that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve. It is no answer to say that the approval of the polling place necessarily evidences a rational plan. The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice." 219 F. Supp., at 944.

Because of the imminence of the November 1962 election, and the fact that two initiated proposals relating to legislative apportionment would be voted on by the State's electorate at that election, the District Court properly stayed its hand and permitted the 1962 election of legislators to be conducted pursuant to the existing statutory scheme. But appellees' argument, accepted by the court below, that the apportionment of the Colorado Senate, under Amendment No. 7, is rational because it takes into account a variety of geographical, historical, topographic and economic considerations fails to provide an adequate justification for the substantial disparities from population-based representation in the allocation of Senate seats to the disfavored populous areas.[31] And any attempted reliance on the so-called federal analogy is factually as well as constitutionally without merit.[32]

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[31] In its opinion on the merits, the District Court stated: "By the admission of states into the Union with constitutions creating bicameral legislatures, membership to which is not apportioned on a population basis, Congress has rejected the principle of equal representation as a constitutional requirement." 219 F. Supp., at 927–928. For the reasons stated in our opinion in *Reynolds* v. *Sims, ante,* p. 582, we find this argument unpersuasive as a justification for the deviations from population in the apportionment of seats in the Colorado Senate under the provisions of Amendment No. 7. Also, the court below stated that the disparities from population-based senatorial representation were necessary in order to protect "insular minorities" and to accord recognition to "the state's heterogeneous characteristics." Such rationales are, of course, insufficient to justify the substantial deviations from population in the apportionment of seats in the Colorado Senate under Amendment No. 7, under the views stated in our opinion in *Reynolds.*

[32] See *Reynolds* v. *Sims, ante,* pp. 571–576, discussing and rejecting the applicability of the so-called federal analogy to state legislative apportionment matters. As stated in the dissent below, "It would appear that there is no logical basis for distinguishing between the lower and the upper house—that the equal protection clause applies to both since no valid analogy can be drawn between the United States Congress" and state legislatures. 219 F. Supp.,

Since the apportionment of seats in the Colorado Legislature, under the provisions of Amendment No. 7, fails to comport with the requirements of the Equal Protection Clause, the decision below must be reversed. Beyond what we said in our opinion in *Reynolds*,[33] we express no view on questions relating to remedies at the present time. On remand, the District Court must now determine whether the imminence of the 1964 primary and general elections requires that utilization of the apportionment scheme contained in the constitutional amendment be permitted, for purposes of those elections, or whether the circumstances in Colorado are such that appellants' right to cast adequately weighted votes for members of the State Legislature can practicably be effectuated in 1964. Accordingly, we reverse the decision of the court below and remand the case for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims*.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

Amendment No. 7, approved by a vote of the Colorado electorate in November 1962, appears in Colo. Laws 1963, c. 312, p. 1045 *et seq.*, and, in relevant part, provides as follows:

"Sections 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed

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at 940–941. Additionally, the apportionment scheme embodied in the provisions of Amendment No. 7 differs significantly from the plan for allocating congressional representation among the States. Although the Colorado House of Representatives is arguably apportioned on a population basis, and therefore resembles the Federal House, senatorial seats are not apportioned to counties or political subdivisions in a manner that at all compares with the allocation of two seats in the Federal Senate to each State.

[33] See *Reynolds* v. *Sims, ante,* p. 585.

and new Sections 45, 46, 47 and 48 of Article V are adopted, to read as follows:

"Section 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

"Section 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

"Section 47. SENATE. The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63–1–3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

"Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all

representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Sections 45, 46 and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be as provided by law."

[For dissenting opinion of MR. JUSTICE HARLAN, see *ante*, p. 589.]

MR. JUSTICE CLARK, dissenting.

While I join my Brother STEWART'S opinion, I have some additional observations with reference to this case.

The parties concede that the Colorado House of Representatives is now apportioned "as nearly equal in population as may be." The Court does not disturb this stipulation though it seems to accept it in niggardly fashion. The fact that 45.1% of the State's population resides in the area which selects a majority of the House indicates rather conclusively that the apportionment comes within the test laid down in *Reynolds* v. *Sims*, *ante*, p. 533, decided this date, *viz.*: " 'one person, one vote,' " that is, "approximately equal" or " 'as nearly as is practicable' " with only "some deviations . . . ." Indeed, the Colorado House is within 4.9% of being perfect.

Moreover, the fact that the apportionment follows political subdivision lines to some extent is also a teaching of *Reynolds* v. *Sims, supra.* But the Court strikes down Colorado's apportionment, which was adopted by the majority vote of every political subdivision in the State, because the Senate's majority is elected by 33.2% of the population, a much higher percentage than that which elects a majority of the Senate of the United States.

I would refuse to interfere with this apportionment for several reasons. First, Colorado enjoys the initiative and referendum system which it often utilizes and which, indeed, produced the present apportionment. As a result of the action of the Legislature and the use of initiative and referendum, the State Assembly has been reapportioned eight times since 1881. This indicates the complete awareness of the people of Colorado to apportionment problems and their continuing efforts to solve them. The courts should not interfere in such a situation. See my concurring opinion in *Baker* v. *Carr,* 369 U. S. 186, 258–259 (1962). Next, as my Brother STEWART has pointed out, there are rational and most persuasive reasons for some deviations in the representation in the Colorado Assembly. The State has mountainous areas which divide it into four regions, some parts of which are almost impenetrable. There are also some depressed areas, diversified industry and varied climate, as well as enormous recreational regions and difficulties in transportation. These factors give rise to problems indigenous to Colorado, which only its people can intelligently solve. This they have done in the present apportionment.

Finally, I cannot agree to the arbitrary application of the "one man, one vote" principle for both houses of a State Legislature. In my view, if one house is fairly apportioned by population (as is admitted here) then the people should have some latitude in providing, on a rational basis, for representation in the other house. The

Court seems to approve the federal arrangement of two Senators from each State on the ground that it was a compromise reached by the framers of our Constitution and is a part of the fabric of our national charter. But what the Court overlooks is that Colorado, by an overwhelming vote, has likewise written the organization of its legislative body into its Constitution,* and our dual federalism requires that we give it recognition. After all, the Equal Protection Clause is not an algebraic formula. Equal protection does not rest on whether the practice assailed "results in some inequality" but rather on whether "any state of facts reasonably can be conceived that would sustain it"; and one who attacks it must show "that it does not rest upon any reasonable basis, but is essentially arbitrary." Mr. Justice Van Devanter in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79 (1911). Certainly Colorado's arrangement is not arbitrary. On the contrary, it rests on reasonable grounds which, as I have pointed out, are peculiar to that State. It is argued that the Colorado apportionment would lead only to a legislative stalemate between the two houses, but the experience of the Congress completely refutes this argument. Now in its 176th year, the federal plan has worked well. It is further said that in any event Colorado's apportionment would substitute compromise for the legislative process. But most legislation is the product of compromise between the various forces acting for and against its enactment.

In striking down Colorado's plan of apportionment, the Court, I believe, is exceeding its powers under the Equal Protection Clause; it is invading the valid functioning of

*The Court says that the choice presented to the electorate was hardly "clear-cut." The short answer to this is that if the voters had desired other choices, they could have accomplished this easily by filing initiative petitions, since in Colorado 8% of the voters can force an election.

the procedures of the States, and thereby is committing a grievous error which will do irreparable damage to our federal-state relationship. I dissent.

MR. JUSTICE STEWART, whom MR. JUSTICE CLARK joins, dissenting.*

It is important to make clear at the outset what these cases are not about. They have nothing to do with the denial or impairment of any person's right to vote. Nobody's right to vote has been denied. Nobody's right to vote has been restricted. Nobody has been deprived of the right to have his vote counted. The voting right cases which the Court cites are, therefore, completely wide of the mark.[1] Secondly, these cases have nothing to do with the "weighting" or "diluting" of votes cast within any electoral unit. The rule of *Gray* v. *Sanders*, 372 U. S. 368, is, therefore, completely without relevance here.[2] Thirdly, these cases are not concerned with the election of members of the Congress of the United States, governed by Article I of the Constitution. Consequently,

*[This opinion applies also to No. 20, *WMCA, Inc., et al.* v. *Lomenzo, Secretary of State of New York, et al*, *ante*, p. 633.]

[1] See *Reynolds* v. *Sims*, *ante*, pp. 554–555, citing: *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Mosley*, 238 U. S. 383; *Guinn* v. *United States*, 238 U. S. 347; *Lane* v. *Wilson*, 307 U. S. 268; *United States* v. *Classic*, 313 U. S. 299; *Ex parte Siebold*, 100 U. S. 371; *United States* v. *Saylor*, 322 U. S. 385; *Gomillion* v. *Lightfoot*, 364 U. S. 339; *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 345 U. S. 461.

[2] "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . ." *Gray* v. *Sanders*, 372 U. S., at 379. The Court carefully emphasized in *Gray* that the case did *not* "involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen . . . for the State Legislature . . . ." 372 U. S., at 376.

the Court's decision in *Wesberry* v. *Sanders,* 376 U. S. 1, throws no light at all on the basic issue now before us.[3]

The question involved in these cases is quite a different one. Simply stated, the question is to what degree, if at all, the Equal Protection Clause of the Fourteenth Amendment limits each sovereign State's freedom to establish appropriate electoral constituencies from which representatives to the State's bicameral legislative assembly are to be chosen. The Court's answer is a blunt one, and, I think, woefully wrong. The Equal Protection Clause, says the Court, "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." [4]

After searching carefully through the Court's opinions in these and their companion cases, I have been able to find but two reasons offered in support of this rule. First, says the Court, it is "established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people . . . ." [5] With all respect, I think that this is not correct, simply as a matter of fact. It has been unanswerably demonstrated before now that this "was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the

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[3] In *Wesberry* v. *Sanders* the Court held that Article I of the Constitution (which ordained that members of the United States Senate shall represent grossly disparate constituencies in terms of numbers, U. S. Const., Art. I, § 3, cl. 1; see U. S. Const., Amend. XVII) ordained that members of the United States House of Representatives shall represent constituencies as nearly as practicable of equal size in terms of numbers. U. S. Const., Art. I, § 2.

[4] See *Reynolds* v. *Sims, ante,* p. 568.

[5] *Id.,* at 560–561.

States today." [6] Secondly, says the Court, unless legislative districts are equal in population, voters in the more populous districts will suffer a "debasement" amounting to a constitutional injury. As the Court explains it, "To the extent that a citizen's right to vote is debased, he is that much less a citizen." [7] We are not told how or why the vote of a person in a more populated legislative district is "debased," or how or why he is less a citizen, nor is the proposition self-evident. I find it impossible to understand how or why a voter in California, for instance, either feels or is less a citizen than a voter in Nevada, simply because, despite their population disparities, each of those States is represented by two United States Senators.[8]

To put the matter plainly, there is nothing in all the history of this Court's decisions which supports this constitutional rule. The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union.[9] With

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[6] *Baker* v. *Carr*, 369 U. S. 186, 266, 301 (Frankfurter, J., dissenting).

See also the excellent analysis of the relevant historical materials contained in MR. JUSTICE HARLAN'S dissenting opinion filed this day in these and their companion cases, *ante*, p. 589.

[7] *Reynolds* v. *Sims*, *ante*, p. 567.

[8] On the basis of the 1960 Census, each Senator from Nevada represents fewer than 150,000 constituents, while each Senator from California represents almost 8,000,000. As will become clear later in this opinion, I do not mean to imply that a state legislative apportionment system modeled precisely upon the Federal Congress would necessarily be constitutionally valid in every State.

[9] It has been the broad consensus of the state and federal courts which, since *Baker* v. *Carr*, 369 U. S. 186, have been faced with the basic question involved in these cases, that the rule which the Court announces today has no basis in the Constitution and no root in

all respect, I am convinced these decisions mark a long step backward into that unhappy era when a majority of the members of this Court were thought by many to have convinced themselves and each other that the demands of the Constitution were to be measured not by what it says,

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reason. See, *e. g., Sobel* v. *Adams,* 208 F. Supp. 316, 214 F. Supp. 811; *Thigpen* v. *Meyers,* 211 F. Supp. 826; *Sims* v. *Frink,* 205 F. Supp. 245, 208 F. Supp. 431; *W. M. C. A., Inc.,* v. *Simon,* 208 F. Supp. 368; *Baker* v. *Carr,* 206 F. Supp. 341; *Mann* v. *Davis,* 213 F. Supp. 577; *Toombs* v. *Fortson,* 205 F. Supp. 248; *Davis* v. *Synhorst,* 217 F. Supp. 492; *Nolan* v. *Rhodes,* 218 F. Supp. 953; *Moss* v. *Burkhart,* 207 F. Supp. 885; *Lisco* v. *Love,* 219 F. Supp. 922; *Wisconsin* v. *Zimmerman,* 209 F. Supp. 183; *Marshall* v. *Hare,* 227 F. Supp. 989; *Hearne* v. *Smylie,* 225 F. Supp. 645; *Lund* v. *Mathas,* 145 So. 2d 871 (Fla.); *Caesar* v. *Williams,* 84 Idaho 254, 371 P. 2d 241; *Maryland Committee for Fair Representation* v. *Tawes,* 228 Md. 412, 180 A. 2d 656, 182 A. 2d 877, 229 Md. 406, 184 A. 2d 715; *Levitt* v. *Maynard,* 104 N. H. 243, 182 A. 2d 897; *Jackman* v. *Bodine,* 78 N. J. Super. 414, 188 A. 2d 642; *Sweeney* v. *Notte,* — R. I. —, 183 A. 2d 296; *Mikell* v. *Rousseau,* 123 Vt. 139, 183 A. 2d 817.

The writings of scholars and commentators have reflected the same view. See, *e. g.,* De Grazia, Apportionment and Representative Government; Neal, Baker v. Carr: Politics in Search of Law, 1962 Supreme Court Review 252; Dixon, Legislative Apportionment and the Federal Constitution, 27 Law & Contemp. Prob. 329; Dixon, Apportionment Standards and Judicial Power, 38 Notre Dame Law. 367; Israel, On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr, 61 Mich. L. Rev. 107; Israel, Nonpopulation Factors Relevant to an Acceptable Standard of Apportionment, 38 Notre Dame Law. 499; Lucas, Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr, 61 Mich. L. Rev. 711; Friedelbaum, Baker v. Carr: The New Doctrine of Judicial Intervention and its Implications for American Federalism, 29 U. of Chi. L. Rev. 673; Bickel, The Durability of Colegrove v. Green, 72 Yale L. J. 39; McCloskey, The Reapportionment Case, 76 Harv. L. Rev. 54; Freund, New Vistas in Constitutional Law, 112 U. Pa. L. Rev. 631, 639; Comment, Baker v. Carr and Legislative Apportionments: A Problem of Standards, 72 Yale L. J. 968.

but by their own notions of wise political theory. The rule announced today is at odds with long-established principles of constitutional adjudication under the Equal Protection Clause, and it stifles values of local individuality and initiative vital to the character of the Federal Union which it was the genius of our Constitution to create.

I.

What the Court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas, without regard and without respect for the many individualized and differentiated characteristics of each State, characteristics stemming from each State's distinct history, distinct geography, distinct distribution of population, and distinct political heritage. My own understanding of the various theories of representative government is that no one theory has ever commanded unanimous assent among political scientists, historians, or others who have considered the problem.[10] But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the make-up of the representative assembly of a typical State, I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system

[10] See, *e. g.*, De Grazia, Apportionment and Representative Government, pp. 19–63; Ross, Elections and Electors, pp. 21–127; Lakeman and Lambert, Voting in Democracies, pp. 19–37, 149–156; Hogan, Election and Representation; Dahl, A Preface to Democratic Theory, pp. 63–84, 124–151.

of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.

Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate. In practice, of course, this ideal is approximated in the particular apportionment system of any State by a realistic accommodation of the diverse and often conflicting political forces operating within the State.

I do not pretend to any specialized knowledge of the myriad of individual characteristics of the several States, beyond the records in the cases before us today. But I do know enough to be aware that a system of legislative apportionment which might be best for South Dakota, might be unwise for Hawaii with its many islands, or Michigan with its Northern Peninsula. I do know enough to realize that Montana with its vast distances is not Rhode Island with its heavy concentrations of people. I do know enough to be aware of the great variations among the several States in their historic manner of distributing legislative power—of the Governors' Councils in New England, of the broad powers of initiative and referendum retained in some States by the people, of the legislative power which some States give to their Governors, by the right of veto or otherwise, of the widely autonomous home rule which many States give to their

cities.[11] The Court today declines to give any recognition to these considerations and countless others, tangible and intangible, in holding unconstitutional the particular systems of legislative apportionment which these States have chosen. Instead, the Court says that the requirements of the Equal Protection Clause can be met in any State only by the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic.

But legislators do not represent faceless numbers. They represent people, or, more accurately, a majority of the voters in their districts—people with identifiable needs and interests which require legislative representation, and which can often be related to the geographical areas in which these people live. The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests. Yet if geographical residence is irrelevant, as the Court suggests, and the goal is solely that of equally "weighted" votes, I do not understand why the Court's constitutional rule does not require the abolition of districts and the holding of all elections at large.[12]

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[11] See, *e. g.*, Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643; Klemme, The Powers of Home Rule Cities in Colorado, 36 U. Colo. L. Rev. 321.

[12] Even with legislative districts of exactly equal voter population, 26% of the electorate (a bare majority of the voters in a bare majority of the districts) can, as a matter of the kind of theoretical mathematics embraced by the Court, elect a majority of the legislature under our simple majority electoral system. Thus, the Court's constitutional rule permits minority rule.

Students of the mechanics of voting systems tell us that if all that matters is that votes count equally, the best vote-counting electoral system is proportional representation in state-wide elections. See, *e. g.*, Lakeman and Lambert, *supra*, n. 10. It is just because electoral systems are intended to serve functions other than satisfying mathematical theories, however, that the system of proportional representation has not been widely adopted. *Ibid.*

The fact is, of course, that population factors must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important goal of ensuring a fair, effective, and balanced representation of the regional, social, and economic interests within a State. And the further fact is that throughout our history the apportionments of State Legislatures have reflected the strongly felt American tradition that the public interest is composed of many diverse interests, and that in the long run it can better be expressed by a medley of component voices than by the majority's monolithic command. What constitutes a rational plan reasonably designed to achieve this objective will vary from State to State, since each State is unique, in terms of topography, geography, demography, history, heterogeneity and concentration of population, variety of social and economic interests, and in the operation and interrelation of its political institutions. But so long as a State's apportionment plan reasonably achieves, in the light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational.

II.

This brings me to what I consider to be the proper constitutional standards to be applied in these cases. Quite simply, I think the cases should be decided by application of accepted principles of constitutional adjudication under the Equal Protection Clause. A recent expression by the Court of these principles will serve as a generalized compendium:

> "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the

> classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U. S. 420, 425–426.

These principles reflect an understanding respect for the unique values inherent in the Federal Union of States established by our Constitution. They reflect, too, a wise perception of this Court's role in that constitutional system. The point was never better made than by Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280. The final paragraph of that classic dissent is worth repeating here:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." 285 U. S., at 311.

That cases such as the ones now before us were to be decided under these accepted Equal Protection Clause

standards was the clear import of what was said on this score in *Baker* v. *Carr,* 369 U. S. 186, 226:

> "Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

It is to be remembered that the Court in *Baker* v. *Carr* did not question what had been said only a few years earlier in *MacDougall* v. *Green,* 335 U. S. 281, 284:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Moving from the general to the specific, I think that the Equal Protection Clause demands but two basic attributes of any plan of state legislative apportionment. First, it demands that, in the light of the State's own characteristics and needs, the plan must be a rational one. Secondly, it demands that the plan must be such as not to permit the systematic frustration of the will of a majority

of the electorate of the State.[13] I think it is apparent that any plan of legislative apportionment which could be shown to reflect no policy, but simply arbitrary and capricious action or inaction, and that any plan which could be shown systematically to prevent ultimate effective majority rule, would be invalid under accepted Equal Protection Clause standards. But, beyond this, I think there is nothing in the Federal Constitution to prevent a State from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people. In the light of these standards, I turn to the Colorado and New York plans of legislative apportionment.

III.

COLORADO.

The Colorado plan creates a General Assembly composed of a Senate of 39 members and a House of 65 members. The State is divided into 65 equal population representative districts, with one representative to be elected from each district, and 39 senatorial districts, 14 of which include more than one county. In the Colorado House, the majority unquestionably rules supreme, with the population factor untempered by other considerations. In

[13] In *Baker* v. *Carr*, 369 U. S. 186, it was alleged that a substantial numerical majority had an effective voice in neither legislative house of Tennessee. Failure to reapportion for 60 years in flagrant violation of the Tennessee Constitution and in the face of intervening population growth and movement had created enormous disparities among legislative districts—even among districts seemingly identical in composition—which, it was alleged, perpetuated minority rule and could not be justified on any rational basis. It was further alleged that all other means of modifying the apportionment had proven futile, and that the Tennessee legislators had such a vested interest in maintaining the *status quo* that reapportionment by the legislature was not a practical possibility. See generally, the concurring opinion of MR. JUSTICE CLARK, 369 U. S., at 251.

the Senate rural minorities do not have effective control, and therefore do not have even a veto power over the will of the urban majorities. It is true that, as a matter of theoretical arithmetic, a minority of 36% of the voters could elect a majority of the Senate, but this percentage has no real meaning in terms of the legislative process.[14] Under the Colorado plan, no possible combination of Colorado senators from rural districts, even assuming *arguendo* that they would vote as a bloc, could control the Senate. To arrive at the 36% figure, one must include with the rural districts a substantial number of urban districts, districts with substantially dissimilar interests. There is absolutely no reason to assume that this theoretical majority would ever vote together on any issue so as to thwart the wishes of the majority of the voters of Colorado. Indeed, when we eschew the world of numbers, and look to the real world of effective representation, the simple fact of the matter is that Colorado's three metropolitan areas, Denver, Pueblo, and Colorado Springs, elect a majority of the Senate.

The State of Colorado is not an economically or geographically homogeneous unit. The Continental Divide crosses the State in a meandering line from north to south, and Colorado's 104,247 square miles of area are almost

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[14] The theoretical figure is arrived at by placing the legislative districts for each house in rank order of population, and by counting down the smallest population end of the list a sufficient distance to accumulate the minimum population which could elect a majority of the house in question. It is a meaningless abstraction as applied to a multimembered body because the factors of political party alignment and interest representation make such theoretical bloc voting a practical impossibility. For example, 31,000,000 people in the 26 least populous States representing only 17% of United States population have 52% of the Senators in the United States Senate. But no one contends that this bloc controls the Senate's legislative process.

equally divided between high plains in the east and rugged mountains in the west. The State's population is highly concentrated in the urbanized eastern edge of the foothills, while farther to the east lies that agricultural area of Colorado which is a part of the Great Plains. The area lying to the west of the Continental Divide is largely mountainous, with two-thirds of the population living in communities of less than 2,500 inhabitants or on farms. Livestock raising, mining and tourism are the dominant occupations. This area is further subdivided by a series of mountain ranges containing some of the highest peaks in the United States, isolating communities and making transportation from point to point difficult, and in some places during the winter months almost impossible. The fourth distinct region of the State is the South Central region, in which is located the most economically depressed area in the State. A scarcity of water makes a state-wide water policy a necessity, with each region affected differently by the problem.

The District Court found that the people living in each of these four regions have interests unifying themselves and differentiating them from those in other regions. Given these underlying facts, certainly it was not irrational to conclude that effective representation of the interests of the residents of each of these regions was unlikely to be achieved if the rule of equal population districts were mechanically imposed; that planned departures from a strict per capita standard of representation were a desirable way of assuring some representation of distinct localities whose needs and problems might have passed unnoticed if districts had been drawn solely on a per capita basis; a desirable way of assuring that districts should be small enough in area, in a mountainous State like Colorado, where accessibility is affected by configuration as well as compactness of districts, to enable each

senator to have firsthand knowledge of his entire district and to maintain close contact with his constituents; and a desirable way of avoiding the drawing of district lines which would submerge the needs and wishes of a portion of the electorate by grouping them in districts with larger numbers of voters with wholly different interests.

It is clear from the record that if per capita representation were the rule in both houses of the Colorado Legislature, counties having small populations would have to be merged with larger counties having totally dissimilar interests. Their representatives would not only be unfamiliar with the problems of the smaller county, but the interests of the smaller counties might well be totally submerged by the interests of the larger counties with which they are joined. Since representatives representing conflicting interests might well pay greater attention to the views of the majority, the minority interest could be denied any effective representation at all. Its votes would not be merely "diluted," an injury which the Court considers of constitutional dimensions, but rendered totally nugatory.

The findings of the District Court speak for themselves:

> "The heterogeneous characteristics of Colorado justify geographic districting for the election of the members of one chamber of the legislature. In no other way may representation be afforded to insular minorities. Without such districting the metropolitan areas could theoretically, and no doubt practically, dominate both chambers of the legislature.
>
> ". . . The realities of topographic conditions with their resulting effect on population may not be ignored. For an example, if [the rule of equal population districts] was to be accepted, Colorado would have one senator for approximately every 45,000 persons. Two contiguous Western Region senatorial

districts, Nos. 29 and 37, have a combined population of 51,675 persons inhabiting an area of 20,514 square miles. The division of this area into two districts does not offend any constitutional provisions. Rather, it is a wise recognition of the practicalities of life. . . .

"We are convinced that the apportionment of the Senate by Amendment No. 7 recognizes population as a prime, but not controlling, factor and gives effect to such important considerations as geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, conformity to historical divisions such as county lines and prior representation districts, and 'a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses.'" 219 F. Supp., at 932.

From 1954 until the adoption of Amendment 7 in 1962, the issue of apportionment had been the subject of intense public debate. The present apportionment was proposed and supported by many of Colorado's leading citizens. The factual data underlying the apportionment were prepared by the wholly independent Denver Research Institute of the University of Denver. Finally, the apportionment was adopted by a popular referendum in which not only a 2–1 majority of all the voters in Colorado, but a majority in each county, including those urban counties allegedly discriminated against, voted for the present plan in preference to an alternative proposal providing for equal representation per capita in both legislative houses. As the District Court said:

"The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of

> the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary." *Ibid.*

The present apportionment, adopted overwhelmingly by the people in a 1962 popular referendum as a state constitutional amendment, is entirely rational, and the amendment by its terms provides for keeping the apportionment current.[15] Thus the majority has consciously chosen to protect the minority's interests, and under the liberal initiative provisions of the Colorado Constitution, it retains the power to reverse its decision to do so. Therefore, there can be no question of frustration of the basic principle of majority rule.

IV.

NEW YORK.

". . . Constitutional statecraft often involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality in voting rights would be achieved if an entire State legislature were elected at large but the danger is too great that the remote and less populated sections would be neglected or that, in the event of a conflict between two parts of the State, the more populous region would elect the entire legislature and in its councils the minority would never be heard.

"Due recognition of geographic and other minority interests is also a comprehensible reason for reducing the weight of votes in great cities. If seventy percent of a State's population lived in a single city and the re-

[15] Within the last 12 years, the people of Michigan, California, Washington, and Nebraska (unicameral legislature) have expressed their will in popular referenda in favor of apportionment plans departing from the Court's rule. See Dixon, 38 Notre Dame Law., *supra*, at 383–385.

mainder was scattered over wide country areas and small towns, it might be reasonable to give the city voters somewhat smaller representation than that to which they would be entitled by a strictly numerical apportionment in order to reduce the danger of total neglect of the needs and wishes of rural areas."

The above two paragraphs are from the brief which the United States filed in *Baker* v. *Carr*, 369 U. S. 186.[16] It would be difficult to find words more aptly to describe the State of New York, or more clearly to justify the system of legislative apportionment which that State has chosen.

Legislative apportionment in New York follows a formula which is written into the New York Constitution and which has been a part of its fundamental law since 1894. The apportionment is not a crazy quilt; it is rational, it is applied systematically, and it is kept reasonably current. The formula reflects a policy which accords major emphasis to population, some emphasis to region and community, and a reasonable limitation upon massive overcentralization of power. In order to effectuate this policy, the apportionment formula provides that each county shall have at least one representative in the Assembly, that the smaller counties shall have somewhat greater representation in the legislature than representation based solely on numbers would accord, and that some limits be placed on the representation of the largest

[16] Brief for the United States as *amicus curiae* on reargument, No. 6, 1961 Term, pp. 29–30.

The Solicitor General, appearing as *amicus* in the present cases, declined to urge this Court to adopt the rule of per capita equality in both houses, stating that "[s]uch an interpretation would press the Equal Protection Clause to an extreme, as applied to State legislative apportionment, would require radical changes in three-quarters of the State governments, and would eliminate the opportunities for local variation." Brief for the United States as *amicus curiae*, No. 508, 1963 Term, p. 32.

counties in order to prevent one megalopolis from completely dominating the legislature.

New York is not unique in considering factors other than population in its apportionment formula. Indeed, the inclusion of such other considerations is more the rule than the exception throughout the States. Two-thirds of the States have given effect to factors other than population in apportioning representation in both houses of their legislatures, and over four-fifths of the States give effect to nonpopulation factors in at least one house.[17] The typical restrictions are those like New York's affording minimal representation to certain political subdivisions, or prohibiting districts composed of parts of two or more counties, or requiring districts to be composed of contiguous and compact territory, or fixing the membership of the legislative body. All of these factors tend to place practical limitations on apportionment according to population, even if the basic underlying system is one of equal population districts for representation in one or both houses of the legislature.

That these are rational policy considerations can be seen from even a cursory examination of New York's political makeup. In New York many of the interests which a citizen may wish to assert through the legislative process are interests which touch on his relation to the government of his county as well as to that of the State, and consequently these interests are often peculiar to the citizens of one county. As the District Court found, counties have been an integral part of New York's governmental structure since early colonial times, and the many functions performed by the counties today reflect both the historic gravitation toward the county as the central unit of political activity and the realistic fact that

[17] See Dixon, 38 Notre Dame Law., *supra*, at 399.

the county is usually the most efficient and practical unit for carrying out many governmental programs.[18]

A policy guaranteeing minimum representation to each county is certainly rational, particularly in a State like New York. It prevents less densely populated counties from being merged into multicounty districts where they would receive no effective representation at all. Further, it may be only by individual county representation that the needs and interests of all the areas of the State can be brought to the attention of the legislative body. The rationality of individual county representation becomes

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[18] The following excerpts from the brief of the Attorney General of New York in this case are instructive:

"For example, state aid is administered by the counties in the following areas: educational extension work (N. Y. Education Law §§ 1104, 1113), community colleges (N. Y. Education Law §§ 6301, 6302, 6304), assistance to physically handicapped children (N. Y. Education Law § 4403), social welfare such as medical and other aid for the aged, the blind, dependent children, the disabled, and other needy persons (N. Y. Social Welfare Law §§ 153, 154, 257, 409), public health (N. Y. Public Health Law §§ 608, 620, 636, 650, 660), mental health (N. Y. Mental Hygiene Law, Art. 8–A, § 191–a), probation work (N. Y. Correction Law § 14–a), highway construction, improvement and maintenance (N. Y. Highway Law §§ 12, 112, 112–a, 279), conservation (N. Y. County Law §§ 219, 299–w, N. Y. Conservation Law §§ 205, 879), and civil defense preparations (State Defense Emergency Act §§ 23–b, 25–a).

"County governments, are, of course, far more than instrumentalities for the administration of state aid. They have extensive powers to adopt, amend or repeal local laws affecting the county (N. Y. County Law §§ 301–309), and also play a vital part in the enactment of state laws which affect only a particular county or counties (See N. Y. Constitution, Art. IX, §§ 1, 2). The enactment in 1959 of a new County Charter Law (N. Y. County Law, Art. 6–A), providing opportunity for the fundamental reorganization of county governments by county residents, has given the counties an even greater role to play in the social, economic and political life of modern New York." Brief for appellees Secretary of State and Attorney General, No. 20, 1963 Term, pp. 42–43.

particularly apparent in States where legislative action applicable only to one or more particular counties is the permissible tradition.

Despite the rationality of according at least one representative to each county, it is clear that such a system of representation, coupled with a provision fixing the maximum number of members in the legislative body—a necessity if the body is to remain small enough for manageably effective action—has the result of creating some population disparities among districts. But since the disparity flows from the effectuation of a rational state policy, the mere existence of the disparity itself can hardly be considered an invidious discrimination.

In addition to ensuring minimum representation to each county, the New York apportionment formula, by allocating somewhat greater representation to the smaller counties while placing limitations on the representation of the largest counties, is clearly designed to protect against overcentralization of power. To understand fully the practical importance of this consideration in New York, one must look to its unique characteristics. New York is one of the few States in which the central cities can elect a majority of representatives to the legislature. As the District Court found, the 10 most populous counties in the State control both houses of the legislature under the existing apportionment system. Each of these counties is heavily urban; each is in a metropolitan area. Together they contain 73.5% of the citizen population, and are represented by 65.5% of the seats in the Senate and 62% of the seats in the Assembly. Moreover, the nine counties comprising one metropolitan area—New York City, Nassau, Rockland, Suffolk and Westchester—contain 63.2% of the total citizen population and elect a clear majority of both houses of the legislature under the existing system which the Court today holds invalid. Obviously, therefore, the exist-

ing system of apportionment clearly guarantees effective majority representation and control in the State Legislature.

But this is not the whole story. New York City, with its seven million people and a budget larger than that of the State, has, by virtue of its concentration of population, homogeneity of interest, and political cohesiveness, acquired an institutional power and political influence of its own hardly measurable simply by counting the number of its representatives in the legislature. Elihu Root, a delegate to the New York Constitutional Convention of 1894, which formulated the basic structure of the present apportionment plan, made this very point at that time:

> "The question is whether thirty separate centers of 38,606 each scattered over the country are to be compared upon the basis of absolute numerical equality with one center of thirty times 38,606 in one city, with all the multiplications of power that comes from representing a single interest, standing together on all measures against a scattered and disunited representation from the thirty widely separated single centers of 38,606. Thirty men from one place owing their allegiance to one political organization, representing the interest of one community, voting together, acting together solidly; why, they are worth double the scattered elements of power coming from hundreds of miles apart." 3 Revised Record of the New York State Constitutional Convention of 1894, p. 1215.

Surely it is not irrational for the State of New York to be justifiably concerned about balancing such a concentration of political power, and certainly there is nothing in our Federal Constitution which prevents a State from reasonably translating such a concern into its apportionment formula. See *MacDougall* v. *Green,* 335 U. S. 281.

The State of New York is large in area and diverse in interests. The Hudson and Mohawk Valleys, the farm communities along the southern belt, the many suburban areas throughout the State, the upstate urban and industrial centers, the Thousand Islands, the Finger Lakes, the Berkshire Hills, the Adirondacks—the people of all these and many other areas, with their aspirations and their interests, just as surely belong to the State as does the giant metropolis which is New York City. What the State has done is to adopt a plan of legislative apportionment which is designed in a rational way to ensure that minority voices may be heard, but that the will of the majority shall prevail.

V.

In the allocation of representation in their State Legislatures, Colorado and New York have adopted completely rational plans which reflect an informed response to their particularized characteristics and needs. The plans are quite different, just as Colorado and New York are quite different. But each State, while clearly ensuring that in its legislative councils the will of the majority of the electorate shall rule, has sought to provide that no identifiable minority shall be completely silenced or engulfed. The Court today holds unconstitutional the considered governmental choices of these two sovereign States. By contrast, I believe that what each State has achieved fully comports with the letter and the spirit of our constitutional traditions.

I would affirm the judgments in both cases.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 765 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

729-256 O-65-53

ORDERS FROM APRIL 20 THROUGH JUNE 22, 1964.

APRIL 20, 1964.

Miscellaneous Orders.

No. 14, Original. LOUISIANA *v.* MISSISSIPPI ET AL. IT IS ORDERED that Honorable Marvin Jones, Chief Judge of the United States Court of Claims, be, and he is hereby, appointed Special Master in this case, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to submit such reports as he may deem appropriate.

The master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

The request of the State of Mississippi for admissions is referred to the Special Master for consideration and determination. [For earlier orders herein, see 375 U. S. 803, 950.]

No. 1314, Misc. IN RE DISBARMENT OF DOLNICK. IT IS ORDERED that Stanley Dolnick of Philadelphia, Pennsylvania, be suspended from the practice of the law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court.

No. 1148, Misc. HARPER *v.* SMITH, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 33. ANDERSON *v.* KENTUCKY. Certiorari, 371 U. S. 886, to the Court of Appeals of Kentucky. The motion of the petitioner to correct the order of this Court of March 9, 1964, 376 U. S. 940, is denied.

No. 1184, Misc. WILLIAMS *v.* PATE, WARDEN;

No. 1199, Misc. OHODNICKI *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT;

No. 1214, Misc. WILSON *v.* SOUTH CAROLINA ET AL.; and

No. 1215, Misc. OLIVE *v.* FLORIDA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1210, Misc. LOFTICE *v.* NASH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 865, Misc. RAUBINGER, COMMISSIONER OF EDUCATION OF NEW JERSEY, ET AL. *v.* AUGELLI, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition denied. MR. JUSTICE DOUGLAS is of the opinion that the motion for leave to file should be granted. *Arthur J. Sills,* Attorney General of New Jersey, *Theodore I. Botter,* First Assistant Attorney General, *Joseph A. Hoffman,* Deputy Attorney General, and *Richard Newman* for petitioners. *Milton T. Lasher* for Volpe et al., intervenors.

Probable Jurisdiction Noted.

No. 866. CITY OF EL PASO *v.* SIMMONS. Appeal from the United States Court of Appeals for the Fifth Circuit. Probable jurisdiction noted. *Thornton Hardie* for appellant. *Greenberry Simmons* for appellee. Reported below: 320 F. 2d 541.

Certiorari Granted. (*See also No. 856, Misc., ante, p. 125.*)

No. 801. BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES *v.* UNITED AIR LINES, INC. C. A. 6th Cir. Certiorari granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for petitioner. *H. Templeton Brown, Robert L. Stern* and *Stuart Bernstein* for respondent. Reported below: 325 F. 2d 576.

No. 846. TEXTILE WORKERS UNION OF AMERICA *v.* DARLINGTON MANUFACTURING CO. ET AL.; and

No. 874. NATIONAL LABOR RELATIONS BOARD *v.* DARLINGTON MANUFACTURING CO. ET AL. C. A. 4th Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG took no part in the consideration or decision of these petitions. *Patricia Eames* for petitioner in No. 846. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Nancy M. Sherman* for the National Labor Relations Board, respondent in No. 846 and petitioner in No. 874. *Thornton H. Brooks* for Darlington Manufacturing Co., and *Stuart N. Updike, John R. Schoemer, Jr., John Lord O'Brian* and *Hugh B. Cox* for Deering Milliken, Inc., respondents in both cases. Reported below: 325 F. 2d 682.

No. 898. SINGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Sidney Dorfman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 326 F. 2d 132.

No. 899. REPUBLIC STEEL CORP. *v.* MADDOX. Supreme Court of Alabama. Certiorari granted. *Andrew J. Thomas* for petitioner. *John D. Prince, Jr.* and *Richard L. Jones* for respondent. Reported below: 275 Ala. 685, 158 So. 2d 492.

Certiorari Denied. (*See also No. 1210, Misc., supra.*)

No. 104. JEFFERSON CITY CABINET CO. *v.* LOCAL UNION 748, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO. C. A. 6th Cir. Certiorari denied. *H. R. Silvers* and *G. Maynard Smith* for petitioner. *Benjamin C. Sigal* and *David S. Davidson* for respondent. Reported below: 314 F. 2d 192.

No. 784. BURIE ET AL. *v.* OVERSEAS NAVIGATION CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Edward B. Joachim* for petitioners. *Lawrence J. Mahoney* for respondents.

No. 797. TILLMAN, ADMINISTRATRIX, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Borris M. Komar* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, 320 F. 2d 396.

No. 823. HAMES *v.* UNITED STATES. Court of Claims. Certiorari denied. *O. John Rogge* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States.

No. 836. CATALANO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Julius Lucius Echeles* for petitioner. Reported below: 29 Ill. 2d 197, 193 N. E. 2d 797.

No. 842. DELTA ENGINEERING CORP. ET AL. *v.* SCOTT ET AL. C. A. 5th Cir. Certiorari denied. *Ernest A. Carrere, Jr.* for petitioners. Reported below: 322 F. 2d 11.

No. 858. BASS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Malcolm I. Frank* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 326 F. 2d 884.

No. 871. TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *L. N. D. Wells, Jr.* and *David Previant* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Alexander E. Wilson, Jr.* and *James P. Swann, Jr.* for Redwing Carriers, Inc., et al., respondents. Reported below: 117 U. S. App. D. C. 84, 325 F. 2d 1011.

No. 872. MOHAWK LIQUEUR CORP. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Dean Acheson* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. Reported below: 324 F. 2d 241.

No. 873. TENENBAUM ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 327 F. 2d 210.

No. 875. DURANT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 324 F. 2d 859.

No. 876. VAN DER SCHELLING *v.* U. S. NEWS & WORLD REPORT, INC. C. A. 3d Cir. Certiorari denied. *Harry Lore* and *Philip Dorfman* for petitioner. *James H. McGlothlin* and *David B. Isbell* for respondent. Reported below: 324 F. 2d 956.

No. 877. SERAP ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *George Stone* and *Max E. Klayman* for petitioners. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *James R. Ramsey,* Assistant Attorney General, for respondent.

No. 863. GRAYSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Charles B. Evins* for petitioner. Reported below: 29 Ill. 2d 229, 193 N. E. 2d 801.

No. 881. SITTNER, DOING BUSINESS AS SITTNER'S AUTO WRECKING, ET AL. *v.* CITY OF SEATTLE. Supreme Court of Washington. Certiorari denied. *Clarence J. Coleman* for petitioners. *A. L. Newbould* for respondent. Reported below: 62 Wash. 2d 834, 384 P. 2d 859.

No. 884. TRU-LINE METAL PRODUCTS CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Robert M. Myers* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Allison W. Brown, Jr.* for respondent. Reported below: 324 F. 2d 614.

No. 879. MAYER *v.* ILLINOIS NORTHERN RAILWAY. C. A. 7th Cir. Certiorari denied. *James A. Dooley* for petitioner. *Floyd Stuppi* for respondent. Reported below: 324 F. 2d 154.

No. 885. DROP DEAD CO., INC., DOING BUSINESS AS PARAMOUNT CHEMICAL CO., ET AL. *v.* S. C. JOHNSON & SON, INC. C. A. 9th Cir. Certiorari denied. *Almon S. Nelson* for petitioners. *Beverly W. Pattishall* for respondent. Reported below: 326 F. 2d 87.

No. 886. HUGHES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 325 F. 2d 789.

No. 888. KASLOW, DOING BUSINESS AS J. C. MARTIN CO. ET AL., *v.* DIXON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Miles Warner* and *Walter D. Hansen* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents.

No. 891. CONNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 322 F. 2d 647.

No. 892. PALMER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States.

No. 948. WINKLER *v.* PRINGLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 324 F. 2d 613.

No. 895. HINDES ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robt. H. Rice* for petitioners. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. Reported below: 326 F. 2d 150.

No. 464, Misc. STEWART *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se*. *Robert W. Pickrell,* Attorney General of Arizona, and *Edward I. Kennedy* and *Philip M. Haggerty,* Assistant Attorneys General, for respondent.

No. 903, Misc. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 114. GENERAL ELECTRIC CO. *v.* CAREY, PRESIDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *David L. Benetar* and *H. H. Nordlinger* for petitioner. *Benjamin C. Sigal, David S. Davidson* and *Isadore Katz* for respondent. Reported below: 315 F. 2d 499.

No. 838. DICKSON, WARDEN, *v.* PIKE. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Stanley Mosk,* Attorney General of California, and *Robert R. Granucci* and *Albert W. Harris, Jr.,* Deputy Attorneys General, for petitioner. *Henry A. Dietz* for respondent. Reported below: 323 F. 2d 856.

No. 878. General Tire & Rubber Co. *v.* Watkins, U. S. District Judge. Motion of Firestone Tire & Rubber Co. et al. for leave to file brief, as *amici curiae*, granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. *Norman P. Ramsey* and *Charles J. Merriam* for petitioner. *Solicitor General Cox* filed a memorandum for the United States. *Edward S. Irons, William Wade Beckett* and *Stanley M. Clark* for Firestone Tire & Rubber Co. et al., as *amici curiae*, in opposition. Reported below: 326 F. 2d 926.

No. 902. S. Stern & Co. *v.* United States. United States Court of Customs and Patent Appeals. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Leonard Feldman* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 51 C. C. P. A. (Cust.) 15, 331 F. 2d 310.

No. 912. Nello L. Teer Co. et al. *v.* Hollywood Golf Estates, Inc. C. A. 5th Cir. Certiorari denied. *Wesley G. Carey* and *Charles B. Nye* for petitioners. *Lewis Horwitz* and *L. J. Cushman* for respondent. Reported below: 324 F. 2d 669.

No. 896. Dean, Administrator, *v.* Cole. C. A. 4th Cir. Certiorari denied. *Henry Hammer* and *Henry H. Edens* for petitioner. *Irvine F. Belser* for respondent. Reported below: 326 F. 2d 907.

No. 811, Misc. Kyle *v.* United States. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 836, Misc. FRASIER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 874, Misc. HARRIS *v.* SETTLE, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 322 F. 2d 908.

No. 876, Misc. GUTIERREZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: 323 F. 2d 593.

No. 929, Misc. KOENIG *v.* BLACKWELL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents.

No. 993, Misc. KORMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1033, Misc. JOHNSON *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. *Edwin P. Rome* and *Charles Alvin Jones* for petitioner.

No. 1043, Misc. COLLINS *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 1055, Misc. CUMMINGS *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 324 F. 2d 1.

No. 1065, Misc. GARY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1069, Misc. PERRY *v.* RONAN ET AL. C. A. 9th Cir. Certiorari denied.

No. 1073, Misc. HICKS *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1084, Misc. CHANDLER *v.* PEYTON, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1085, Misc. NASTASIO, ALIAS NOLETTI, *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 30 Ill. 2d 51, 195 N. E. 2d 144.

No. 1090, Misc. JONES *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Fred Okrand* for petitioner. Reported below: 221 Cal. App. 2d 37, 34 Cal. Rptr. 267.

No. 1092, Misc. HARRISON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1094, Misc. KIMBALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ben S. Atkins* for petitioner. *Solicitor General Cox* for the United States. Reported below: 322 F. 2d 104.

No. 1095, Misc. LOMAX *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1100, Misc. FINLEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1102, Misc. MERRITT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 29 Ill. 2d 423, 194 N. E. 2d 292.

No. 1109, Misc. BEST *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1110, Misc. TURNER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1112, Misc. KING *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 117 U. S. App. D. C. 302, 329 F. 2d 257.

No. 1119, Misc. SAULSBURY *v.* GREEN, CORRECTIONAL SUPERINTENDENT. Supreme Court of Ohio. Certiorari denied. Reported below: 175 Ohio St. 433, 195 N. E. 2d 787.

No. 1126, Misc. CARTER ET AL. *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1123, Misc. BLEVINS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1131, Misc. DUTTON *v.* EYMAN, WARDEN, ET AL. Supreme Court of Arizona. Certiorari denied. Reported below: 95 Ariz. 96, 387 P. 2d 799.

Rehearing Denied.

No. 71. FEDERAL POWER COMMISSION *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL., 376 U. S. 205;

No. 73. CITY OF COLTON *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL., 376 U. S. 205;

No. 106. COMPCO CORPORATION *v.* DAY-BRITE LIGHTING, INC., 376 U. S. 234;

No. 468. GALANTE *v.* UNITED STATES, 375 U. S. 940;

No. 739. MIGUEL ET AL. *v.* JUSTICES OF THE SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, ET AL., 376 U. S. 937;

No. 742. KAISER ET AL. *v.* NEW JERSEY, 376 U. S. 950;

No. 968, Misc. DI SILVESTRO *v.* LUMBARD, U. S. CIRCUIT JUDGE, ET AL., 376 U. S. 948; and

No. 1106, Misc. POWERS *v.* UNITED STATES, 376 U. S. 947. Petitions for rehearing denied.

No. 669, Misc. ZUPICICH *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, 376 U. S. 933. Motion for leave to file petition for rehearing denied.

Nos. 671, Misc., and 843, Misc. CEPERO *v.* PRESIDENT OF THE UNITED STATES ET AL., 376 U. S. 512. Petition for rehearings denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

APRIL 24, 1964.

Certiorari Denied.

No. 1028. STASSEN FOR PRESIDENT CITIZENS COMMITTEE *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA. The motions of Janice C. Herrera and Thomas N. Burbridge, Jr. for leave to file briefs, as *amici curiae,* are granted. Petition for writ of certiorari to the Supreme Court of California denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG dissent. Opinions may be filed in due course. [See *post,* p. 927.] *John Lord O'Brian, Newell W. Ellison* and *Daniel M. Gribbon* for petitioner. *Richard G. Logan* on the motion for Herrera. *Allan Brotsky* on the motion for Burbridge.

APRIL 27, 1964.

Miscellaneous Orders.

No. 1014, Misc. KREPEL *v.* HEINZE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, and *Doris H. Maier,* Assistant Attorney General, for respondent.

No. 1250, Misc. TAYLOR *v.* WILSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Probable Jurisdiction Noted.

No. 585. MCLAUGHLIN ET AL. *v.* FLORIDA. Appeal from the Supreme Court of Florida. Probable jurisdiction noted. *Jack Greenberg, James M. Nabrit III, Louis H. Pollak* and *William T. Coleman, Jr.* for appel-

lants. *James W. Kynes,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for appellee. Reported below: 153 So. 2d 1.

Certiorari Granted. (*See also No. 669, ante, p. 126.*)

No. 909. AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Joseph Forer* and *David Rein* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney, George B. Searls* and *Lee B. Anderson* for respondent. Reported below: 117 U. S. App. D. C. 393, 331 F. 2d 53.

No. 1093, Misc. SWAIN *v.* ALABAMA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Alabama granted. Case transferred to the appellate docket. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Orzell Billingsley, Jr.* and *Peter A. Hall* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for respondent. Reported below: 275 Ala. 508, 156 So. 2d 368.

Certiorari Denied. (*See also No. 791, ante, p. 128, and Misc. Nos. 1014 and 1250, supra.*)

No. 903. OREGON SAW CHAIN CORP. *v.* MCCULLOCH MOTORS CORP. C. A. 9th Cir. Certiorari denied. *Lewis E. Lyon* for petitioner. *R. Welton Whann* for respondent. Reported below: 323 F. 2d 758.

No. 832. KTISTAKIS *v.* UNITED CROSS NAVIGATION CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *John R. Sheneman* for respondent United Cross Navigation Corp. Reported below: 324 F. 2d 728.

No. 840. BYRAM CONCRETANKS, INC., *v.* WARREN CONCRETE PRODUCTS CO. OF N. J. ET AL. C. A. 3d Cir. Certiorari denied. *Leopold Frankel* for petitioner. *William W. Evans, Jr.* for Warren Concrete Products Co. of N. J. et al., and *George A. Vaccaro* for Higgins et al., respondents. Reported below: 323 F. 2d 994.

No. 887. GENSTIL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *John L. Saltonstall, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 326 F. 2d 243.

No. 897. BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS *v.* UNITED STATES; and

No. 906. LACLEDE STEEL CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Sumter D. Marks, Jr.* for petitioner in No. 897. *Abe Garland, Leonard B. Levy, Murray F. Cleveland, Ralph L. Kaskell, Jr., Sumter D. Marks, Jr.* and *Walter J. Suthon, Jr.* for petitioners in No. 906. *Solicitor General Cox, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 322 F. 2d 698.

No. 907. ORLEANS PARISH SCHOOL BOARD *v.* RELIANCE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Samuel I. Rosenberg* for petitioner. *June L. Green* for Real Estate Board of New Orleans, Inc., as *amicus curiae,* in support of the petition. Reported below: 322 F. 2d 803.

No. 910. DADE BROTHERS, INC., ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *James A. Cuddihy* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: —— Ct. Cl. ——, 325 F. 2d 239.

No. 911. SILVA *v.* CARTER, REGIONAL COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Marshall E. Kidder* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for respondent. Reported below: 326 F. 2d 315.

No. 917. ELKANICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Sol A. Abrams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 327 F. 2d 417.

No. 933. HENDERSON CLAY PRODUCTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Benjamin L. Bird* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. Reported below: 324 F. 2d 7.

No. 959. BUILDERS' ASSOCIATION OF KANSAS CITY *v.* GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS BUILDING & COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY & VICINITY. C. A. 8th Cir. Certiorari denied. *Harry L. Browne* and *Howard F. Sachs* for petitioner. *John J. Manning* for respondent. Reported below: 326 F. 2d 867.

No. 967. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* RIEGER. C. A. 8th Cir. Certiorari denied. *Arthur J. Donnelly* and *Jordan J. Hillman* for petitioner. *Robert J. Berens* for respondent. Reported below: 326 F. 2d 329.

No. 1051, Misc. REED *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 323 F. 2d 498.

No. 935. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, & SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES ET AL.; and

No. 1007. BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, & SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES ET AL. Motion of Transport Workers Union of America, AFL–CIO, for leave to file a brief, as *amicus curiae*, granted. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion or these petitions. *Lester P. Schoene, Milton Kramer, Harold C. Heiss, Edward B. Henslee, Jr.* and *Ruth Weyand* for petitioners in No. 935. *Max Malin* and *Ruth Weyand* for petitioner in No. 1007. *Francis M. Shea, William H. Dempsey, Jr.* and *Richard J. Flynn* for respondent carriers in both cases. *Solicitor General Cox, Assistant Attorney General Douglas, J. William Doolittle* and *David L. Rose* for the United States et al., respondents in both cases. *Paul O'Dwyer* and *Howard N. Meyer* for Transport Workers Union of America, AFL–CIO, as *amicus curiae,* in support of the petitions. Reported below: —— U. S. App. D. C. ——, 331 F. 2d 1020.

No. 1154, Misc. EX PARTE OPPENHEIMER. Supreme Court of California. Certiorari denied.

No. 887, Misc. LAWRENSON *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent.

No. 908. LEIGHTON *v.* PARAMOUNT PICTURES CORP. ET AL. Motion to dispense with printing petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit and for other relief denied. Petitioner *pro se.* *Leonard Kaufman* and *Whitney North Seymour, Jr.* for respondents.

No. 1121, Misc. WEISS *v.* SKOURAS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 1158, Misc. NEAL *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 1160, Misc. BRIDGERS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for the United States.

No. 1170, Misc. GANDY *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se.* *Richmond M. Flowers,* Attorney General of Alabama, and *Paul T. Gish, Jr.,* Assistant Attorney General, for respondent. Reported below: 276 Ala. 704, 159 So. 2d 73.

No. 1191, Misc. IN RE OPPENHEIMER. Supreme Court of California. Certiorari denied.

No. 1313, Misc. RUDOLPH *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. The application for a stay of execution presented to MR. JUSTICE BLACK, and by him referred to the Court, is also denied. *Fred Blanton, Jr.* for petitioner. Reported below: 276 Ala. 392, 162 So. 2d 486.

Rehearing Denied.

No. 753. KIRK *v.* BOEHM, SUPERINTENDENT, DEPARTMENT OF PUBLIC INSTRUCTION, PENNSYLVANIA, ET AL., 376 U. S. 512;

No. 809. PETRUSHANSKY, ALIAS GREEN, *v.* MARASCO, U. S. MARSHAL, 376 U. S. 952;

No. 816. BERSTEIN, ALIAS BERNS, *v.* MISSOURI, 376 U. S. 953;

No. 830. STEVENS BROS. FOUNDATION, INC., *v.* COMMISSIONER OF INTERNAL REVENUE, 376 U. S. 969;

No. 846, Misc. ENOS *v.* ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL., 376 U. S. 955; and

No. 951, Misc. PATTERSON *v.* VIRGINIA ELECTRIC & POWER CO., 376 U. S. 956. Petitions for rehearing denied.

No. 342. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. ET AL., 375 U. S. 880, 949; 376 U. S. 929. Motion for leave to file a third petition for rehearing denied.

APRIL 28, 1964.

Dismissal Under Rule 60.

No. 1187, Misc. LUCAS *v.* KLINGER, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus dismissed pursuant to Rule 60 of the Rules of this Court.

MAY 4, 1964.

Miscellaneous Orders.

No. 930. SANAPAW ET AL. *v.* WISCONSIN. On petition for writ of certiorari to the Supreme Court of Wisconsin. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 8, Original. ARIZONA *v.* CALIFORNIA ET AL. The petition of the Special Master for the payment of an additional fee is granted, and, all of the parties agreeing thereto, the parties are ordered to make additional payments totaling $50,000 to *Simon H. Rifkind, Esquire,* Special Master, constituting the balance of full payment of his compensation for his services as Special Master.

Such additional payments are to be made in the following proportions: Arizona, 28%; California, 28%; United States, 28%; Nevada, 12%; New Mexico, 2%; and Utah, 2%. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. [For opinion and decree in this case, see 373 U. S. 546, 376 U. S. 340.]

No. 849. INLAND EMPIRE BUILDERS, INC., ET AL. *v.* WASHINGTON ET AL.;

No. 850. HEBB & NARODICK CONSTRUCTION CO., INC., ET AL. *v.* WASHINGTON ET AL.; and

No. 851. MURRAY ET AL. *v.* WASHINGTON ET AL. On appeals from the Supreme Court of Washington. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 1239, Misc. KING *v.* NASH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted.

Nos. 735 and 934. COX *v.* LOUISIANA. Appeals from the Supreme Court of Louisiana. Probable jurisdiction noted. *Carl Rachlin, Robert Collins, Nils Douglas* and *Floyd McKissick* for appellant. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Ralph L. Roy* for appellee. Reported below: No. 735, 244 La. 1087, 156 So. 2d 448; No. 934, 245 La. 303, 158 So. 2d 172.

Certiorari Granted.

No. 787. PETER *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Duane B. Beeson* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 324 F. 2d 173.

No. 937. UNITED STATES *v.* JAKOBSON. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. *Herman Adlerstein* for respondent. Reported below: 325 F. 2d 409.

No. 936. UNITED STATES *v.* SEEGER. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. *Kenneth W. Greenawalt* for respondent. Reported below: 326 F. 2d 846.

Certiorari Denied.

No. 387. PAN AMERICAN PETROLEUM CORP. *v.* FEDERAL POWER COMMISSION. C. A. 10th Cir. Certiorari denied. *William J. Grove, Thomas H. Wall, Carroll L. Gilliam, W. W. Heard* and *Wm. H. Emerson* for petitioner. *Solicitor General Cox, Ralph S. Spritzer, Richard A. Solomon, Howard E. Wahrenbrock* and *Peter H. Schiff* for respondent. Reported below: 317 F. 2d 796.

No. 684. SUPERIOR OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 9th Cir. Certiorari denied. *Murray Christian, H. W. Varner* and *Roland B. Voight* for petitioner. *Solicitor General Cox, Ralph S. Spritzer, Richard A. Solomon, Howard E. Wahrenbrock* and *Peter H. Schiff* for respondent. Reported below: 322 F. 2d 601.

No. 835. Mueller Company *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari denied. *Thomas R. McMillen* and *A. G. Webber III* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Irwin A. Seibel, James McI. Henderson* and *Alvin L. Berman* for respondent. Reported below: 323 F. 2d 44.

No. 861. Engelhard Industries, Inc., *v.* Research Instrument Corp. C. A. 9th Cir. Certiorari denied. *Ralph B. Pastoriza* for petitioner. *Elwood S. Kendrick* for respondent. Reported below: 324 F. 2d 347.

No. 870. Boeing Company *v.* Renegotiation Board of the United States. C. A. 9th Cir. Certiorari denied. *David E. Wagoner* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for respondent. Reported below: 325 F. 2d 885.

No. 923. Hollywood Brands, Inc., *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Fred S. Ball, Jr.* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 324 F. 2d 956.

No. 924. Baldwin Bracelet Corp. et al. *v.* Federal Trade Commission. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jacob A. Stein* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, James McI. Henderson* and *J. Richard Carr* for respondent. Reported below: 117 U. S. App. D. C. 85, 325 F. 2d 1012.

No. 926. PITTSBURGH RAILWAYS CO. *v.* DUQUESNE LIGHT CO. Supreme Court of Pennsylvania. Certiorari denied. *Charles Monroe Thorp, Jr.* for petitioner. *Edmund K. Trent* and *Thomas J. Munsch, Jr.* for respondent. Reported below: 413 Pa. 1, 194 A. 2d 319.

No. 929. RONEL CORPORATION *v.* ANCHOR LOCK OF FLORIDA, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Henry L. Burkitt* and *Harold I. Kaplan* for petitioner. *Richard P. Schulze* for respondents. Reported below: 325 F. 2d 889.

No. 954. BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, ET AL. *v.* BRAXTON ET AL. C. A. 5th Cir. Certiorari denied. *Fred H. Kent, Davisson F. Dunlap* and *Elliott Adams* for petitioners. Reported below: 326 F. 2d 616.

No. 957. BELL ET AL. *v.* SCHOOL CITY OF GARY, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. *Robert L. Carter, Barbara A. Morris, Hilbert L. Bradley* and *Charles Wills* for petitioners. *Albert H. Gavit* and *Edmond J. Leeney* for respondents. Reported below: 324 F. 2d 209.

No. 960. MARASCO ET AL. *v.* COMPO SHOE MACHINERY CORP. C. A. 1st Cir. Certiorari denied. *Robert B. Russell* for petitioners. *Robert L. Thompson* for respondent. Reported below: 325 F. 2d 695.

No. 953. PRESIDENT OF INDIA, ACTING BY AND THROUGH THE DIRECTOR OF THE INDIA SUPPLY MISSION, *v.* WEST COAST STEAMSHIP CO. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John Gordon Gearin* for petitioner. *Kenneth E. Roberts* for respondent. Reported below: 327 F. 2d 638.

No. 947. WIRTZ, SECRETARY OF LABOR, *v.* MODERN TRASHMOVAL, INC. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Solicitor General Cox, Charles Donahue, Bessie Margolin* and *Jack H. Weiner* for petitioner. *Charles G. Page* for respondent. Reported below: 323 F. 2d 451.

No. 848, Misc. PERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1057, Misc. GAITO *v.* STRAUSS ET AL. C. A. 3d Cir. Certiorari denied.

Rehearing Denied.

No. 57. FAWCETT PUBLICATIONS, INC., *v.* MORRIS, 376 U. S. 513;

No. 66. UNITED STATES ET AL. *v.* J. B. MONTGOMERY, INC., 376 U. S. 389;

No. 167. UNGAR *v.* SARAFITE, JUDGE OF THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK, 376 U. S. 575; and

No. 815. STRACHAN SHIPPING CO. *v.* KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V., 376 U. S. 954. Petitions for rehearing denied.

MAY 13, 1964.

Dismissal Under Rule 60.

No. 1047, Misc. WILSON *v.* NEW YORK. Appeal from the Court of Appeals of New York. Dismissed pursuant to Rule 60 of the Rules of this Court. *Leon B. Polsky* for appellant. Reported below: 13 N. Y. 2d 277, 196 N. E. 2d 251.

MAY 18, 1964.

Miscellaneous Orders.

No. 5, Original. UNITED STATES *v.* CALIFORNIA. The joint application for an extension of time for filing answering briefs and for allowance of time for filing reply briefs is granted. Answering briefs shall be filed on or before June 15, 1964, and reply briefs shall be filed on or before July 30, 1964. The motion of Carl Whitson for leave to file a petition for intervention is denied but the alternative motion for leave to file a brief, as *amicus curiae,* is granted. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this application and motion. *Solicitor General Cox* for the United States. *Stanley Mosk,* Attorney General of California, for defendant. Movant *pro se. Solicitor General Cox* for the United States in opposition to the motion for leave to file petition for intervention. *Stanley Mosk,* Attorney General of California, and *Howard S. Goldin,* Assistant Attorney General, for the State of California in opposition to motion for leave to file petition for intervention and for leave to file brief as *amicus curiae.*

No. 16, Original. ARIZONA *v.* CALIFORNIA ET AL. The motion for leave to file a bill of complaint is denied. *Massachusetts* v. *Missouri,* 308 U. S. 1. *James B. Schnake, Richard J. Daniels, Max O. Truitt, Jr.* and *Joseph E. Smith* for plaintiff. *Jack Maxwell Howard, Holloway Jones* and *Emerson W. Rhyner* for the State of California; and *George H. Hauerken* for Charles L. Harney, Inc., defendants.

No. 1221, Misc. SARELAS *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Peter S. Sarelas,* petitioner, *pro se.*

No. 1028. STASSEN FOR PRESIDENT CITIZENS COMMITTEE *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA. (Petition for writ of certiorari to the Supreme Court of California denied, *ante*, p. 914.)

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE GOLDBERG concur, dissenting.

I would have granted certiorari in this case as the Journal entry for April 24, 1964, shows; and I file this statement of reasons pursuant to the reservation made at the time.

It is now settled, after a period of some uncertainty (cf. *Newberry* v. *United States*, 256 U. S. 232, 250), that a primary election for Representatives for the Congress is a part of the election process guaranteed by Art. I, §§ 2 and 4 of the Constitution (*United States* v. *Classic*, 313 U. S. 299); and the same reasoning applies to primary elections for Senators pursuant to the Seventeenth Amendment. *Terry* v. *Adams*, 345 U. S. 461, 468; *Gray* v. *Sanders*, 372 U. S. 368, 380.

We deal here not with the primary election for either members of Congress or the Senate but with the nominating process for a primary election [1] in which convention delegates favorable to a particular presidential candidate are chosen, the convention choice ultimately to compete for President in an election under Article II

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[1] The California Elections Code (1961) provides that nomination papers shall be left with the county clerk of the county in which they are circulated at least 60 days prior to the presidential primary. § 6081. The nomination papers in the present case are required to be signed by not less than one-half of one percent and not more than two percent of the vote for the Republican Governor at the last general election. § 6080 (a), § 6082. And it is provided in § 6087 that a "verified nomination paper is prima facie evidence that the signatures are genuine and that the persons signing it are voters, until it is otherwise proved by comparison of the signatures with the affidavits of registration in the office of the county clerk."

of the Constitution—a procedure that Congress has regulated in detail. See 3 U. S. C. § 1 *et seq.*

The Court in the *Classic* case said:

> "That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose, or its words as any the less guarantying the integrity of that choice, when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election." 313 U. S., at 316–317.

The "mode of choice" (*id.*, at 316) in California for presidential candidates is first, the nominating petition, second, the primary, third, the convention, and fourth, the general election. The fact that the "mode of choice" is enlarged to four stages is irrelevant to the constitutional purpose to protect "the free choice" of the people (*ibid.*) in federal elections.

California, zealous to protect that right, creates the presumption that signatures on a petition are signatures of bona fide electors. Elections Code § 6087.[2]

In this case, however, the presumption is defeated, not because the signatories to the nominating petitions are found to be unqualified but for reasons that relate solely to the administrative convenience of the county clerks. They certify as qualified voters only those that their office has indexed; and concededly the indices are not up

[2] Note 1, *supra.*

to date. A voter recently moving to a new district and registering in time nevertheless loses his franchise—not because of any disqualification or irregularity, not because of his failure to do something required, and not because of his commission of a wrongful act. He has done all in his power to qualify as a voter; but his vote is not counted in the nominating stage of the electoral process merely on account of administrative congestion. This to me is at least arguably an impermissible state denial of a federal right; the question is substantial; [3] and I regret it was not argued and decided on the merits.

No. 1296, Misc. DELANEY *v.* OREGON. Motion for leave to file petition for writ of habeas corpus denied.

No. 1197, Misc. STEBBINS *v.* CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of mandamus and for other relief denied.

Certiorari Granted.

No. 927. UNITED MINE WORKERS OF AMERICA *v.* PENNINGTON ET AL. C. A. 6th Cir. Certiorari granted. *Harrison Combs, E. H. Rayson, R. R. Kramer* and *M. E. Boiarsky* for petitioner. *John A. Rowntree* for respondents. Reported below: 325 F. 2d 804.

No. 944. UNITED STATES ET AL. *v.* POWELL ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard, Norman Sepenuk* and *Burton Berkley* for the United States et al. *Bernard G. Segal* and *Samuel D. Slade* for respondents. Reported below: 325 F. 2d 914.

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[3] No other infirmity is shown on the papers before us; and the Supreme Court of California in denying relief wrote no opinion.

No. 971. INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC., *v.* AMERICAN OIL CO. C. A. 7th Cir. Certiorari granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *William Belshaw, Benedict R. Danko, David E. Feller, Elliot Bredhoff, Jerry D. Anker* and *Michael H. Gottesman* for petitioner. *Richard P. Tinkham* and *Daniel F. Kelly* for respondent. Reported below: 324 F. 2d 903.

No. 999, Misc. LINKLETTER *v.* WALKER, WARDEN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. Case transferred to the appellate docket. *Truman Hobbs* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Teddy W. Airhart, Jr.,* Assistant Attorney General, for respondent. Reported below: 323 F. 2d 11.

Certiorari Denied. (See also No. 949, ante, p. 215; No. 771, Misc., ante, p. 216; and No. 1087, Misc, ante, p. 216.

No. 862. REICH ET AL. *v.* WEBB ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Jack Corinblit* for petitioners. *John Whyte* for Webb et al., and *Thomas W. Clarke* for Beverly Hills Federal Savings & Loan Association, respondents. Reported below: 218 Cal. App. 2d 862, 32 Cal. Rptr. 803.

No. 894. VANCE ET AL., DOING BUSINESS AS VANCE DAIRY, *v.* FREEMAN, SECRETARY OF AGRICULTURE. C. A. 5th Cir. Certiorari denied. *Alfred Moore, John B. Carroll* and *Arthur E. Sutherland* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Pauline B. Heller* for respondent. Reported below: 319 F. 2d 841; 325 F. 2d 663.

No. 868. TAYLOR ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *George L. Russell, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 326 F. 2d 277.

No. 901. JOHN REINER & Co. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Charles Rembar* and *George Zolotar* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Kathryn H. Baldwin* for the United States. Reported below: —— Ct. Cl. ——, 325 F. 2d 438.

No. 928. LITCHFIELD SECURITIES CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph F. Monaghan* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States. Reported below: 325 F. 2d 667.

No. 932. BYRTH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 327 F. 2d 917.

No. 945. MASSEY-FERGUSON LTD. *v.* INTERMOUNTAIN FORD TRACTOR SALES CO. ET AL. C. A. 10th Cir. Certiorari denied. *John F. Sonnett* and *Dennis McCarthy* for petitioner. *Joseph L. Alioto* and *Brigham E. Roberts* for respondents. Reported below: 325 F. 2d 713.

No. 946. SECURITY STATE BANK OF PHARR, TEXAS, *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jackson Littleton* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 325 F. 2d 92.

729-256 O-65-55

No. 938. LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS, *v.* KENNEDY, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson,* Attorney General of Mississippi, *Dugas Shands* and *Guy N. Rogers,* Assistant Attorneys General, and *Peter M. Stockett, Jr.* and *William A. Allain,* Special Attorneys General, for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent. Reported below: 325 F. 2d 210.

No. 950. SARELAS *v.* SHEEHAN. C. A. 7th Cir. Certiorari denied. *Peter S. Sarelas,* petitioner, *pro se.* Reported below: 326 F. 2d 490.

No. 952. MARYLAND CASUALTY CO. *v.* HALLATT. C. A. 5th Cir. Certiorari denied. *Dewey Knight* for petitioner. *Lawrence G. Ropes, Jr.* for respondent. Reported below: 326 F. 2d 275.

No. 955. HOWARD, ALIAS JONES, *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Salvatore E. Oddo* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 327 F. 2d 765.

No. 956. LYON STEAMSHIP LTD. *v.* SULLIVAN. Supreme Court of Washington. Certiorari denied. *Lane Summers* for petitioner. Reported below: 63 Wash. 2d 316, 387 P. 2d 76.

No. 964. BENNETT *v.* FORD MOTOR CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Samuel Intrater* for petitioner. *Ralph L. Chappell, Leo A. Rosetta* and *Laidler B. Mackall* for respondent. Reported below: 117 U. S. App. D. C. 34, 325 F. 2d 230.

No. 963. University National Stockholders Protective Committee, Inc., *v.* University National Life Insurance Co. et al. C. A. 6th Cir. Certiorari denied. *Robert L. Taylor* for petitioner. Reported below: 328 F. 2d 425.

No. 965. Pauling et al. *v.* McNamara, Secretary of Defense, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Francis Heisler, Charles A. Stewart* and *Oliver Ellis Stone* for petitioners. *Solicitor General Cox* for respondents. Reported below: —— U. S. App. D. C. ——, 331 F. 2d 796.

No. 969. Bryant et al. *v.* Moore et al. Supreme Court of Ohio. Certiorari denied. *Louis C. Capelle* for petitioners. *George H. Elliott* for respondents.

No. 970. Anonymous No. 1, An Attorney, *v.* Coordinating Committee on Discipline. Court of Appeals of New York. Certiorari denied. *Leonard Feldman* for petitioner. *Henry Weiner* for respondent.

No. 972. Melville Confections, Inc., *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied. *Frederick W. Turner, Jr.* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 327 F. 2d 689.

No. 978. Brody, doing business as Albert French Restaurant, *v.* Epstein, Chairman of the New York State Liquor Authority, et al. Court of Appeals of New York. Certiorari denied. *Edward D. Burns* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Samuel A. Hirshowitz,* First Assistant Attorney General, for respondents.

No. 966. HERRON *v.* PORTLAND COLLECTION BUREAU ET AL. Supreme Court of Oregon. Certiorari denied.

No. 976. JOHNSON & JOHNSON *v.* KENDALL COMPANY. C. A. 7th Cir. Certiorari denied. *Sidney Neuman, Thorley von Holst, Robert L. Austin* and *Harold Haidt* for petitioner. *William E. Anderson, Charles H. Walker* and *Harry R. Pugh, Jr.* for respondent. Reported below: 327 F. 2d 391.

No. 979. KEENER RUBBER, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *John G. Ketterer* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 326 F. 2d 968.

No. 994. STEARNS ET AL. *v.* HERTZ CORPORATION. C. A. 8th Cir. Certiorari denied. *Allen H. Surinsky* for petitioners. *John J. Shanahan* for respondent. Reported below: 326 F. 2d 405.

No. 1012. GATES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Daniel P. Ward* and *Elmer C. Kissane* for respondent. Reported below: 29 Ill. 2d 586, 195 N. E. 2d 161.

No. 1013. KROCK *v.* ELECTRIC MOTOR & REPAIR CO., INC. C. A. 1st Cir. Certiorari denied. *Edward D. Burns* for petitioner. *Frank L. Kozol* for respondent. Reported below: 327 F. 2d 213.

No. 1049. GLIDDEN COMPANY *v.* ZDANOK ET AL. C. A. 2d Cir. Certiorari denied. *Frank C. Heath* and *Chester Bordeau* for petitioner. *Morris Shapiro* and *Harry Katz* for respondents. Reported below: 327 F. 2d 944.

No. 925. HEUER *v.* CRESCENT RIVER PORT PILOTS ASSOCIATION. Petition for writ of certiorari to the Supreme Court of Louisiana and for other relief denied. *Janet Mary Riley* for petitioner. *Peter H. Beer* for respondent. Reported below: 245 La. 580, 159 So. 2d 288.

No. 958. PAUL REVERE LIFE INSURANCE CO. *v.* FIRST NATIONAL BANK IN DALLAS, ADMINISTRATOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William D. Neary* and *Orville F. Grahame* for petitioner. *Robert A. Fanning* for respondent. Reported below: 328 F. 2d 483.

No. 991. SPINELLI *v.* ISTHMIAN STEAMSHIP CO. ET AL. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that certiorari should be granted. *Nathan Baker* for petitioner. *Robert P. Hart* for Isthmian Steamship Co., and *Sidney A. Schwartz* and *Joseph Arthur Cohen* for International Terminal Operating Co., Inc., respondents. Reported below: 326 F. 2d 871.

No. 844, Misc. SAUNDERS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George W. Shadoan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 116 U. S. App. D. C. 326, 323 F. 2d 628.

No. 944, Misc. WILLIAMS *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Bernard J. Haugen* for respondent.

No. 760, Misc. McKnight *v.* Beto, Corrections Director. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 953, Misc. Johnson *v.* Bennett, Director, Bureau of Prisons, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondents.

No. 1004, Misc. Wilson *v.* United States. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1019, Misc. Jones *v.* Jones. Appellate Court of Illinois, First District. Certiorari denied.

No. 1029, Misc. Gager *v.* Ladd, Commissioner of Patents. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondent.

No. 1076, Misc. Lane *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 321 F. 2d 573.

No. 1107, Misc. Schneider *v.* Weissberger et al. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1137, Misc. D'Ambrosio *v.* New York. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *Edward S. Silver* and *Aaron E. Koota* for respondent.

No. 1044, Misc. STACEY *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. Reported below: 324 F. 2d 934.

No. 1099, Misc. COLEMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1082, Misc. HERSH *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Philip A. Loomis, Jr., Walter P. North* and *Jacob H. Stillman* for respondent. Reported below: 325 F. 2d 147.

No. 1103, Misc. IN RE BOYER. C. A. 3d Cir. Certiorari denied. Reported below: 328 F. 2d 620.

No. 1118, Misc. MCCORMACK *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1147, Misc. YATES *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 375 S. W. 2d 271.

No. 1163, Misc. SATTERFIELD ET AL. *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari denied. *William McKelvey* for petitioners. *Reginald Leo Duff* and *James S. Rowen* for respondent. Reported below: 323 F. 2d 783.

No. 1177, Misc. STEWART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 325 F. 2d 745.

No. 1183, Misc. MARTINEZ *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Charles Eugene Benson* for petitioner. Reported below: 373 S. W. 2d 246.

No. 1149, Misc. POLLINO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Benjamin Harmatz* for petitioner.

No. 1141, Misc. SPINNEY *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 325 F. 2d 436.

No. 1162, Misc. STEPNEY *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 1167, Misc. KALEC *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1175, Misc. MARTIN *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1181, Misc. CLARK *v.* PATE, WARDEN, ET AL. Circuit Court of Will County, Illinois. Certiorari denied.

No. 1182, Misc. HERNANDEZ *v.* EYMAN, WARDEN, ET AL. Supreme Court of Arizona. Certiorari denied.

No. 1192, Misc. JOHNSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1193, Misc. NASH *v.* REINCKE, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *John F. McGowan* for respondent. Reported below: 325 F. 2d 310.

No. 1198, Misc. SEAY *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1213, Misc. CARROLL *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1216, Misc. CONWAY *v.* SAN QUENTIN PRISON OFFICIALS ET AL. C. A. 9th Cir. Certiorari denied.

No. 1195, Misc. McINTOSH *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Reported below: 260 N. C. 749, 133 S. E. 2d 652.

No. 1229, Misc. TANNER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 329 F. 2d 170.

No. 1211, Misc. WIGGINS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent.

No. 1223, Misc. CORBETT, ALIAS OSBORNE, *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *William H. Erickson* for petitioner. *Duke W. Dunbar*, Attorney General of Colorado, and *John E. Bush* and *Richard L. Eason*, Assistant Attorneys General, for respondent. Reported below: 153 Colo. —, 387 P. 2d 409.

No. 1244, Misc. WILLIAMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 21, Misc. POLAND *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of San Joaquin. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Lawrence Speiser* for petitioner. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier*, Assistant Attorney General, for respondent. *Solicitor General Cox* filed memoranda for the United States.

No. 1248, Misc. CASE *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 1259, Misc. ALLISON *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 1081, Misc. STEBBINS *v.* UNITED STATES. Motion to use other records denied. Petition for writ of certiorari to the United States Court of Claims denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for the United States.

No. 1128, Misc. FORD *v.* CALIFORNIA. Petition for writ of certiorari to the Supreme Court of California and for other relief denied. Reported below: 60 Cal. 2d 772, 388 P. 2d 892.

Rehearing Denied.

No. 209. STONER *v.* CALIFORNIA, 376 U. S. 483;

No. 223. RUGENDORF *v.* UNITED STATES, 376 U. S. 528;

No. 767. IN RE CROW, 376 U. S. 647;

No. 821. KLINE *v.* MINNESOTA, 376 U. S. 962;

No. 847. BOYAJIAN, DOING BUSINESS AS PRECISION TESTING LABORATORIES, *v.* OLD COLONY ENVELOPE CO., INC., ET AL., 376 U. S. 969;

No. 865. BROWN ET AL. *v.* UNAUTHORIZED PRACTICE OF LAW COMMITTEE OF CUYAHOGA COUNTY, OHIO, 376 U. S. 970;

No. 886. HUGHES *v.* UNITED STATES, *ante*, p. 907;

No. 905. ANTHONY *v.* COUNTY OF LOS ANGELES, 376 U. S. 963; and

No. 932, Misc. WALKER *v.* PATE, WARDEN, 376 U. S. 972. Petitions for rehearing denied.

No. 848. MICHALSKY *v.* CITY OF NEW YORK, 376 U. S. 971. Motion to dispense with printing petition granted. Petition for rehearing denied.

No. 800. SUBURBAN TELEPHONE CO. *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. ET AL., 376 U. S. 648. Petition for rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this petition.

MAY 25, 1964.

Miscellaneous Orders.

No. 1108. CARRINGTON *v.* RASH ET AL. On petition for writ of certiorari to the Supreme Court of Texas. The motion under Rule 43 (4) for expeditious treatment is denied. *W. C. Peticolas* on the motion.

No. 1036, Misc. RANDALL *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. *Melvin L. Wulf* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for the United States.

No. 1104, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *James W. Kynes,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 1267, Misc. GOMEZ *v.* HEINZE, WARDEN;
No. 1329, Misc. IN RE LUGO;
No. 1336, Misc. MOORE *v.* RANDOLPH, WARDEN;
No. 1344, Misc. HARRIS *v.* MCGINNIS, CORRECTIONS COMMISSIONER, ET AL.; and
No. 1356, Misc. MOORE *v.* COX, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1316, Misc. MCQUAIDE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR; and
No. 1335, Misc. ROBERTSON *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 1189, Misc. TANSIMORE *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

Certiorari Granted. (*See also No. 785, ante, p. 266.*)

No. 1000. JANKOVICH ET AL., DOING BUSINESS AS CALUMET AVIATION CO., *v.* INDIANA TOLL ROAD COMMISSION. Supreme Court of Indiana. Certiorari granted. *Straley Thorpe* and *Bernard Dunau* for petitioners. *Paul J. DeVault* for respondent. *Eugene Tyler* for the City of Gary, Indiana, as *amicus curiae*, in support of the petition. Reported below: 244 Ind. 574, 193 N. E. 2d 237.

No. 1010. FEDERAL TRADE COMMISSION *v.* COLGATE-PALMOLIVE CO. ET AL. C. A. 1st Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Orrick, Philip B. Heymann* and *James McI. Henderson* for petitioner. *John F. Sonnett* for Colgate-Palmolive Co., and *H. Thomas Austern* for Ted Bates & Co., Inc., respondents. Reported below: 326 F. 2d 517.

No. 1061, Misc. CRIDER *v.* ZURICH INSURANCE CO. Motion for leave to file supplement to the petition for writ of certiorari granted. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. Case transferred to the appellate docket. *J. Terry Huffstutler* for petitioner. *Frank E. Spain* for respondent. Reported below: 324 F. 2d 499.

Certiorari Denied. (*See also No. 1096, Misc., ante, p. 269); No. 1156, Misc., ante, p. 268; and Misc. Nos. 1316 and 1335, supra.*)

No. 1176, Misc. BUCHTEL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 904. KING ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. *Releford McGriff* for petitioners. *William H. Maness* for Atlantic Coast Line Railroad Co., and *Richard R. Lyman* for Grand Lodge Brotherhood Railway Carmen of America, respondents. Reported below: 323 F. 2d 1005.

No. 918. EVANSTON CAB CO. ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioners. *John C. Melaniphy, Sydney R. Drebin* and *Robert J. Collins* for City of Chicago et al.; and *Howard Ellis* and *Don H. Reuben* for Yellow Cab Co. et al., respondents. Reported below: 325 F. 2d 907.

No. 940. BURLINGTON-ROCK ISLAND RAILROAD CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harry R. Jones, Eldon Martin, Eaton Adams, F. B. Walker* and *Rice M. Tilley* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for the United States. Reported below: 321 F. 2d 817.

No. 961. AMERICAN TOBACCO CO. *v.* GREEN ET AL.; and

No. 997. GREEN ET AL. *v.* AMERICAN TOBACCO CO. C. A. 5th Cir. Certiorari denied. *Edward R. Neaher* for petitioner in No. 961 and respondent in No. 997. *Neal Rutledge* and *Lawrence V. Hastings* for respondents in No. 961 and petitioners in No. 997. Reported below: 325 F. 2d 673.

No. 980. MCMANUS *v.* LAKE CENTRAL AIRLINES. C. A. 2d Cir. Certiorari denied. *James F. McManus*, petitioner, *pro se*. *Edward R. Neaher* and *Lino A. Graglia* for respondent. Reported below: 327 F. 2d 212.

No. 973. GAYLES *v.* UNITED STATES;
No. 974. SPURLARK *v.* UNITED STATES;
No. 975. GREEN *v.* UNITED STATES; and
No. 1288, Misc. DAVIS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles B. Evins* for petitioner in No. 973. *Evelyn F. Johnson* and *Glenn T. Johnson, Sr.* for petitioner in No. 974. *George F. Callaghan* and *Julius Lucius Echeles* for petitioner in No. 975. *George N. Leighton* for petitioners in No. 1288, Misc. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 327 F. 2d 715.

No. 984. NEWCOMB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 327 F. 2d 649.

No. 985. PICKENS ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Michel A. Maroun* for petitioners. Reported below: 245 La. 680, 160 So. 2d 577.

No. 986. MARSH SUPERMARKETS, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *William E. Roberts* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 327 F. 2d 109.

No. 988. BEASLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Bernard Povich* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 327 F. 2d 566.

No. 989. HASKELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irving I. Erdheim* and *Theodore Krieger* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 327 F. 2d 281.

No. 992. JENKINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Sam Crossland* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 327 F. 2d 21.

No. 1025. KIRKORIAN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Leonard J. Kerpelman* for petitioner. Reported below: 233 Md. 324, 196 A. 2d 866.

No. 780, Misc. WILLIAMS *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent. Reported below: 323 F. 2d 731.

No. 799, Misc. SOUDER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Stanley E. Rutkowski* for respondent.

No. 955, Misc. PARHAM *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Lawrence Speiser* for petitioner. *Stanley Mosk*, Attorney General of California, and *Albert W. Harris, Jr.*, Deputy Attorney General, for respondent. *Solicitor General Cox* filed a memorandum for the United States. Reported below: 60 Cal. 2d 378, 384 P. 2d 1001.

No. 992, Misc. CARTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Jerome Nelson* for the United States. Reported below: 325 F. 2d 697.

No. 1032, Misc. REID *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles S. Vizzini* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 117 U. S. App. D. C. 112, 326 F. 2d 655.

No. 1046, Misc. TURNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 325 F. 2d 988.

No. 1048, Misc. DEMES *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 220 Cal. App. 2d 423, 33 Cal. Rptr. 896.

No. 1056, Misc. WION *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 325 F. 2d 420.

No. 1111, Misc. WALLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Harold J. Goodman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 326 F. 2d 314.

No. 1132, Misc. KEENAN *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. Reported below: 346 Mass. 534, 194 N. E. 2d 637.

No. 1164, Misc. MACK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 326 F. 2d 481.

No. 1178, Misc. BREAZEALE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 1194, Misc. STIEHLER *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1196, Misc. WARD *v.* HEROLD, ACTING HOSPITAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 1204, Misc. CERMAK *v.* NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 1209, Misc. COLBERT *v.* KROPP, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 1218, Misc. RAVEN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 233 Md. 241, 196 A. 2d 446.

No. 1225, Misc. BERRY *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 1226, Misc. WILLIAMS *v.* SUPREME COURT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

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No. 1233, Misc. WHITE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1235, Misc. HOWELL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1237, Misc. PETTY *v.* PORTER. C. A. 6th Cir. Certiorari denied. *John S. Wrinkle* for petitioner. *Ray H. Moseley* for respondent. Reported below: 322 F. 2d 308.

No. 1241, Misc. LOVE *v.* OKLAHOMA ET AL. Court of Criminal Appeals of Oklahoma. Certiorari denied.

No. 1243, Misc. RODRIGUEZ *v.* NEW YORK. Court of General Sessions, New York County, New York. Certiorari denied.

No. 1247, Misc. GOLENBOCK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1251, Misc. OPPENHEIMER *v.* BOIES. Supreme Court of Arizona. Certiorari denied. Reported below: 95 Ariz. 292, 389 P. 2d 696.

No. 1252, Misc. DENMAN ET AL *v.* COUNTY OF BARNSTABLE ET AL. Supreme Judicial Court of Massachusetts. Certiorari denied. Reported below: 346 Mass. 412, 193 N. E. 2d 572.

No. 1255, Misc. KASS *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1258, Misc. WALKER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 1261, Misc. WINTER *v.* JOHNSTON, HOSPITAL DIRECTOR. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

No. 1262, Misc. BIRCHER *v.* KANSAS. Supreme Court of Kansas. Certiorari denied.

No. 1323, Misc. PIRKLE *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se.* *Richmond M. Flowers,* Attorney General of Alabama, and *Peter M. Lind,* Assistant Attorney General, for respondent. Reported below: 276 Ala. 262, 160 So. 2d 878.

No. 979, Misc. DOMNEYS *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Fred E. Weisgal* for petitioner. *Thomas B. Finan,* Attorney General of Maryland, for respondent. Reported below: 232 Md. 659, 194 A. 2d 443.

No. 1165, Misc. WALLACH *v.* LIEBERMAN ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit and for other relief denied.

Rehearing Denied.

No. 87. SIMPSON *v.* UNION OIL CO. OF CALIFORNIA, *ante,* p. 13. Petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition.

No. 1121, Misc. WEISS *v.* SKOURAS ET AL., *ante,* p. 919. Petition for rehearing denied.

JUNE 1, 1964.

Miscellaneous Orders.

No. 592. GRIFFIN ET AL. *v.* COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY ET AL., *ante*, p. 218. The motion of the petitioners that the judgment issue forthwith is granted. *Henry L. Marsh III, Robert L. Carter* and *S. W. Tucker* on the motion.

No. 1006. RADIO & TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* BROADCAST SERVICE OF MOBILE, INC. On petition for writ of certiorari to the Supreme Court of Alabama. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1403, Misc. HEAD *v.* CALIFORNIA. Motion for leave to file petition for writ of certiorari denied.

No. 1349, Misc. MADDOX *v.* HOLMAN, WARDEN;

No. 1350, Misc. MCDONALD *v.* KROPP, WARDEN;

No. 1378, Misc. MCDERMOTT ET AL. *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT;

No. 1388, Misc. TESTA *v.* SUPERINTENDENT, DEUEL VOCATIONAL INSTITUTION;

No. 1394, Misc. DUGGIN *v.* TENNESSEE ET AL.; and

No. 1404, Misc. HORNER *v.* FLORIDA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1276, Misc. SHOENFIELD *v.* HUGHES ET AL. Motion for leave to file petition for writ of mandamus denied. *Michael M. Kearney* for petitioner.

No. 1303, Misc. HARPER *v.* SMITH, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 1228, Misc. EASTER *v.* BRUNE ET AL., JUDGES. Motion for leave to file petition for writ of prohibition denied.

Certiorari Granted. (*See also Nos. 981 and 1004, ante, p. 405.*)

No. 914. CALIFORNIA ET AL. *v.* LO-VACA GATHERING CO. ET AL.;

No. 915. SOUTHERN CALIFORNIA GAS CO. ET AL. *v.* LO-VACA GATHERING CO. ET AL.; and

No. 990. FEDERAL POWER COMMISSION *v.* LO-VACA GATHERING CO. ET AL. C. A. 5th Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. *J. Calvin Simpson* and *John T. Murphy* for petitioners in No. 914. *John Ormasa* and *Milford Springer* for petitioners in No. 915. *Solicitor General Cox, Ralph S. Spritzer, Frank Goodman, Richard A. Solomon, Howard E. Wahrenbrock* and *Peter H. Schiff* for petitioner in No. 990. *Bradford Ross, George D. Horning, Jr.* and *Hugh Q. Buck* for respondents in all cases. Reported below: 323 F. 2d 190.

No. 998. UNITED STATES *v.* FIRST NATIONAL CITY BANK. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harold C. Wilkenfeld* for the United States. *Henry Harfield* for respondent. *Edward J. Ross* for Chase Manhattan Bank et al., as *amici curiae,* in opposition. Reported below: See 321 F. 2d 14.

Certiorari Denied. (*See also No. 1022, Misc., ante, p. 404; and No. 1025, Misc., ante, p. 406.*)

No. 1003. SWALLOW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Joseph Keig, Sr.* for petitioner. *Solicitor General Cox* for the United States. Reported below: 325 F. 2d 97.

No. 882. GUIDO *v.* UNITED STATES;

No. 883. MICELE *v.* UNITED STATES;

No. 1052, Misc. SAKAL, ALIAS SACKO, *v.* UNITED STATES;

No. 1146, Misc. PELLEGRINI *v.* UNITED STATES; and

No. 1155, Misc. MCGARRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner in No. 882. *Alvin W. Block* for petitioner in No. 883. Petitioners *pro se* in Misc. Nos. 1052, 1146 and 1155. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 327 F. 2d 222.

No. 922. WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC., ET AL. *v.* TAMPA ELECTRIC CO. Supreme Court of Florida. Certiorari denied. *William C. Wise* and *Lawrence Potamkin* for petitioners. *William C. Chanler* and *D. Fred McMullen* for respondent. Reported below: 158 So. 2d 136.

No. 1005. BERGMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joe B. Goodwin* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 332 F. 2d 279.

No. 999. GENERAL TIRE & RUBBER CO. *v.* WATKINS, U. S. DISTRICT JUDGE. The motion of Firestone Tire and Rubber Co. et al. for leave to file a brief, as *amici curiae,* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. *Norman P. Ramsey* and *Charles J. Merriam* for petitioner. *Edward S. Irons, William Wade Beckett, Mary Helen Sears* and *Stanley M. Clark* for Firestone Tire and Rubber Co. et al., as *amici curiae,* in opposition. Reported below: 331 F. 2d 192.

No. 1008. GOLDBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Thomas D. McBride* and *Raymond J. Bradley* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 330 F. 2d 30.

No. 1001. PRUDENTIAL INSURANCE CO. OF AMERICA *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 3d Cir. Certiorari denied. *Richard J. Congleton* and *Lawrence J. Latto* for petitioner. *Solicitor General Cox, Philip A. Loomis, Jr., Allan F. Conwill* and *Walter P. North* for respondent. Reported below: 326 F. 2d 383.

No. 122. PALERMO *v.* UNITED STATES;
No. 134. SICA *v.* UNITED STATES;
No. 141. CARBO *v.* UNITED STATES; and
No. 145. GIBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. *Jacob Kossman* for petitioner in No. 122. *Russell E. Parsons* for petitioner in No. 134. *William B. Beirne, A. L. Wirin* and *Fred Okrand* for petitioner in No. 141. *William R. Ming, Jr.* and *Loren Miller* for petitioner in No. 145. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. *Robert W. Kenny* for the American Civil Liberties Union of Southern California, as *amicus curiae,* in support of the petition in No. 141. Reported below: 314 F. 2d 718.

No. 1011. HOWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Menahem Stim* and *Allen S. Stim* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 328 F. 2d 854.

No. 1002. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Joseph A. Ball, Max F. Deutz* and *Herman F. Selvin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 329 F. 2d 437.

No. 1015. No. 3 BULL TOWING CO. ET AL. *v.* MONSANTO CHEMICAL CO. C. A. 6th Cir. Certiorari denied. *John D. Martin, Jr.* and *George E. Morrow* for petitioners. *Clarence Clifton* and *Charles Kohlmeyer, Jr.* for respondent. Reported below: 326 F. 2d 18.

No. 1016. CERMAK CLUB, INC., ET AL. *v.* ILLINOIS LIQUOR CONTROL COMMISSIONERS. Supreme Court of Illinois. Certiorari denied. *Morris Gordon Meyers* for petitioners. *William G. Clark,* Attorney General of Illinois, and *Raymond S. Sarnow* and *Richard A. Michael,* Assistant Attorneys General, for respondents. Reported below: 30 Ill. 2d 90, 195 N. E. 2d 178.

No. 1014. FEDERAL TRADE COMMISSION *v.* AMERICAN OIL CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Cox, James McI. Henderson* and *Miles J. Brown* for petitioner. *Hammond E. Chaffetz* and *Frederick M. Rowe* for respondent. Reported below: 325 F. 2d 101.

No. 973, Misc. SMITH *v.* UNITED STATES; and

No. 974, Misc. BOWDEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se* in No. 973, Misc. *Bernard Margolius* for petitioner in No. 974, Misc. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 117 U. S. App. D. C. 1, 324 F. 2d 879.

No. 898, Misc. PACCIONE *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. *Emmet J. Bondurant* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent. Reported below: 323 F. 2d 378.

No. 976, Misc. KIRKWOOD *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, for respondent.

No. 1031, Misc. MCBEE *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: 213 Tenn. 15, 372 S. W. 2d 173.

No. 1035, Misc. LEGGETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Daniel R. Dixon* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 326 F. 2d 613.

No. 1049, Misc. CREWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 326 F. 2d 755.

No. 1059, Misc. WILSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Daniel P. Ward* and *Elmer C. Kissane* for respondent. Reported below: 29 Ill. 2d 82, 193 N. E. 2d 449.

No. 1071, Misc. ELLIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 1062, Misc. ARMSTRONG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1091, Misc. JONES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Robert J. Amoury* for petitioner.

No. 1097, Misc. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. Perry Langford* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 326 F. 2d 124.

No. 1113, Misc. WALKER ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John J. Sexton* for petitioners. *Solicitor General Cox* for the United States. Reported below: 117 U. S. App. D. C. 151, 327 F. 2d 597.

No. 1135, Misc. RINDGO *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 1144, Misc. WILLIAMS *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 1145, Misc. CLARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 325 F. 2d 1019.

No. 1116, Misc. SORCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1172, Misc. ABRAMSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 326 F. 2d 565.

No. 1186, Misc. KING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 326 F. 2d 415.

No. 1222, Misc. ALLEN *v.* LAVALLEE, WARDEN. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 1224, Misc. JACKSON *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied. *Allan Brotsky* for petitioner. Reported below: 325 F. 2d 573.

No. 1242, Misc. LEEK *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 234 Md. 607, 197 A. 2d 423.

No. 1246, Misc. LONG *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 327 F. 2d 495.

No. 1245, Misc. WHITE *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1253, Misc. KAHIGAS *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Louis Hering* for petitioner.

No. 1254, Misc. URBANO *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 1256, Misc. BURGHARDT *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1268, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1269, Misc. TIRADO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Herbert S. Siegal* for petitioner.

No. 1270, Misc. PERRY *v.* MAXWELL, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 175 Ohio St. 369, 195 N. E. 2d 103.

No. 1271, Misc. BADDERS *v.* UHLER. Court of Appeals of Maryland. Certiorari denied.

No. 1274, Misc. MCCORMACK *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 1285, Misc. WELLMAN *v.* HEINZE, WARDEN. Supreme court of California. Certiorari denied.

No. 1277, Misc. MOONEYHAM *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Reported below: 192 Kan. 620, 390 P. 2d 215.

No. 1281, Misc. VAN RENSSELAER ET AL. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. *Frank C. Sibley* for petitioners. *George W. Coombe, Jr.* and *Aloysius F. Power* for respondent. Reported below: 324 F. 2d 354.

No. 1291, Misc. BEAUCHAMP *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 1294, Misc. MCLAIN *v.* RANDOLPH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1077, Misc. LAND *v.* FLORIDA. Petition for writ of certiorari to the Supreme Court of Florida denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court. The stay of execution heretofore granted by MR. JUSTICE BLACK pending the disposition of the petition for writ of certiorari is hereby extended for a period of 60 days from this date to allow the petitioner to file a petition for a writ of habeas corpus. If a petition for writ of habeas corpus is so filed, this stay is to continue pending disposition of the petition for a writ of habeas corpus. Petitioner *pro se.* *James W. Kynes,* Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, for respondent. Reported below: 156 So. 2d 8.

No. 1304, Misc. LEEPER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for the United States. Reported below: 117 U. S. App. D. C. 310, 329 F. 2d 878.

No. 1312, Misc. BRAY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for the United States.

No. 112, Misc. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 316 F. 2d 212.

No. 1219, Misc. TRAUB *v.* CONNECTICUT. Motion to use the record in No. 1285, Misc., October Term, 1962, granted. Petition for writ of certiorari to the Supreme Court of Errors of Connecticut denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *John D. LaBelle* and *Harry W. Hultgren, Jr.* for respondent. Reported below: 151 Conn. 246, 196 A. 2d 755.

Rehearing Denied.

No. 58. A. L. MECHLING BARGE LINES, INC., ET AL. *v.* UNITED STATES ET AL., 376 U. S. 375;

No. 59. BOARD OF TRADE OF THE CITY OF CHICAGO *v.* UNITED STATES ET AL., 376 U. S. 375;

No. 684. SUPERIOR OIL CO. *v.* FEDERAL POWER COMMISSION, *ante*, p. 922;

No. 821, Misc. MASSENGALE *v.* MASSENGALE, 376 U. S. 970;

No. 856, Misc. SANDERS *v.* ALABAMA, *ante*, p. 125; and

No. 1094, Misc. KIMBALL *v.* UNITED STATES, *ante*, p. 911. Petitions for rehearing denied.

No. 34. BROTHERHOOD OF RAILROAD TRAINMEN *v.* VIRGINIA EX REL. VIRGINIA STATE BAR, *ante*, p. 1. Motion of American Bar Association for leave to file a brief, as *amicus curiae*, in support of rehearing granted. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this motion and petition.

JUNE 8, 1964.

Miscellaneous Orders.

No. 134. SICA *v.* UNITED STATES. (Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied, *ante,* p. 953.) The application for a stay of the issuance of the order denying the petition for a writ of certiorari presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, is denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application. *Russell E. Parsons* and *Thomas G. Laughlin* on the application for petitioner.

No. 1266, Misc. SCHWARTZ ET AL. *v.* UNDERWOOD, U. S. DISTRICT JUDGE. Motion for leave to amend and supplement petition for writ of mandamus granted. Motion for leave to file petition for writ of mandamus denied. *Jack G. Day* for petitioners.

No. 1286, Misc. SMITH *v.* SEARCY, CLERK OF THE ILLINOIS SUPREME COURT, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 1260, Misc. MOSS *v.* NEBRASKA. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Melvin Kent Kammerlohr,* Assistant Attorney General, for respondent.

No. 1402, Misc. ARMSTRONG *v.* DICKSON, WARDEN, ET AL.;

No. 1411, Misc. THOMAS *v.* HOLMAN, WARDEN;

No. 1421, Misc. LOFTIS *v.* EYMAN, WARDEN, ET AL.; and

No. 1445, Misc. IN RE PEEBLES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 610. FIBREBOARD PAPER PRODUCTS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. Certiorari, 375 U. S. 963, to the United States Court of Appeals for the District of Columbia Circuit. The motion of the respondents to remove this case from the summary calendar is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *Solicitor General Cox* on the motion.

No. 1415, Misc. PINKERTON *v.* MAXWELL, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Probable Jurisdiction Noted.

No. 701. AMERICAN OIL CO. *v.* NEILL ET AL. Appeal from the Supreme Court of Idaho. Probable jurisdiction noted. *Calvin Dworshak* for appellant. *Allan G. Shepard,* Attorney General of Idaho, *Wm. M. Smith,* Assistant Attorney General, and *Faber F. Tway* for appellees. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Stephen J. Pollak, I. Henry Kutz* and *Robert A. Bernstein* for the United States, as *amicus curiae,* in support of appellant. Reported below: 86 Idaho 7, 383 P. 2d 350.

Certiorari Granted.

No. 1041. COMMISSIONER OF INTERNAL REVENUE *v.* BROWN ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Gilbert E. Andrews* for petitioner. *Robert T. Mautz* for respondents. *Arthur A. Armstrong* for West Los Angeles Institute for Cancer Research, as *amicus curiae,* in opposition. Reported below: 325 F. 2d 313.

Certiorari Denied. (*See also No. 1415, Misc., supra.*)

No. 942. KERR ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Harvey N. Black* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 326 F. 2d 225.

No. 987. PRADO OIL & GAS CO. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 1026. SKELLY OIL CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 1080. HAMON ET AL. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David T. Searls* for petitioner in No. 987. *Hawley C. Kerr, Bradford Ross. M. Darwin Kirk, Homer McEwen, Jr., Dale E. Doty* and *Bruce R. Merrill* for petitioners in No. 1026. *Wm. Taylor LaGrone, Alfred C. DeCrane, Jr., M. Darwin Kirk, Homer E. McEwen, Jr.* and *Dale E. Doty* for petitioners in No. 1080. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn, Kathryn H. Baldwin, Richard A. Solomon, Howard E. Wahrenbrock, Robert L. Russell* and *Peter H. Schiff* for the Federal Power Commission; *Kent H. Brown* and *Morton L. Simons* for the Public Service Commission of the State of New York; and *William T. Coleman, Jr., Harold E. Kohn, Richardson Dilworth, David K. Kadane* and *Bertram D. Moll* for United Gas Improvement Co. et al., respondents in Nos. 987 and 1026. *Solicitor General Cox* and *Richard A. Solomon* for the Federal Power Commission, and *Kent H. Brown* and *Morton L. Simons* for the Public Service Commission of the State of New York, respondents in No. 1080. Reported below: Nos. 987 and 1026, 117 U. S. App. D. C. 287, 329 F. 2d 242.

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No. 749. KELLER *v.* WISCONSIN EX REL. STATE BAR OF WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. *Frank M. Coyne* for petitioner. *George Thompson,* Attorney General of Wisconsin, and *Warren H. Resh,* Assistant Attorney General, for respondent. *Solicitor General Cox* and *Robert W. Ginnane* filed a memorandum for the United States. Reported below: 21 Wis. 2d 100, 123 N. W. 2d 905.

No. 983. CHICAGO NORTH SHORE & MILWAUKEE RAILWAY CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Elden McFarland* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 326 F. 2d 860.

No. 1017. ROSE COURTS, INC., *v.* HASTINGS ET UX. Supreme Court of Arkansas. Certiorari denied. *Henry E. Spitzberg* for petitioner. *W. H. Jewell* for respondents. Reported below: 237 Ark. 426, 373 S. W. 2d 583.

No. 1019. WEBSTER ET AL. *v.* MIDLAND ELECTRIC COAL CORP. ET AL. Appellate Court of Illinois, Second District. Certiorari denied. *Sidney Z. Karasik* for petitioners. *Hamilton K. Beebe* for Midland Electric Coal Corp. et al., and *William J. Voelker, Jr., Edmund Burke* and *Willard P. Owens* for International Union, United Mine Workers of America, et al., respondents. Reported below: 43 Ill. App. 2d 359, 193 N. E. 2d 212.

No. 1020. EISENBERG ET UX. *v.* GOLDSTEIN ET AL. Supreme Court of Illinois. Certiorari denied. *Irving Eisenberg, pro se,* for petitioners. *Ben H. Kessler* for respondents. Reported below: 29 Ill. 2d 617, 195 N. E. 2d 184.

No. 1021. HANDELSVENNOOTSCHAP NORMA N. V. ET AL. *v.* KENNEDY, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry P. de Vries* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *Bruno A. Ristau* for respondents. Reported below: 117 U. S. App. D. C. 228, 328 F. 2d 529.

No. 1022. FELDMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Michael A. Querques, Donald H. Mintz* and *Daniel E. Isles* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 329 F. 2d 372.

No. 1023. WELLS FARGO BANK ET AL., EXECUTORS, *v.* PLATT ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. *Edwin S. Pillsbury* for petitioners. *Roy A. Bronson* for respondents. Reported below: 222 Cal. App. 2d 658, 35 Cal. Rptr. 377.

No. 1036. ATKINSON DREDGING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Hugh S. Meredith* and *George H. Revercomb* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 329 F. 2d 158.

No. 1040. DAVIS ET UX. *v.* BARR, CHAIRMAN, MISSISSIPPI TAX COMMISSION, ET AL. Supreme Court of Mississippi. Certiorari denied. Petitioners *pro se*. *Joe T. Patterson,* Attorney General of Mississippi, and *John E. Stone,* Assistant Attorney General, for respondents. Reported below: —— Miss. ——, 157 So. 2d 505.

No. 983, Misc. SASSER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1009. IN RE TINDALL ET AL. Supreme Court of California. Certiorari denied. *Gregory S. Stout* for petitioners. Reported below: 60 Cal. 2d 469, 386 P. 2d 473.

No. 1031. SILVERMAN, ADMINISTRATOR, *v.* CITY OF NEW YORK. Appellate Term, Supreme Court of New York, First Department. Certiorari denied. *Wilbur G. Silverman*, petitioner, *pro se*. *Leo A. Larkin* and *Seymour B. Quel* for respondent.

No. 1034. HOLSTENSSON ET AL. *v.* V-M CORPORATION. C. A. 6th Cir. Certiorari denied. *Donald J. Simpson* and *Robert G. Howlett* for petitioners. *John A. Dienner* and *Edward C. Grelle* for respondent. Reported below: 325 F. 2d 109.

No. 1044. EASTERN EXPRESS, INC., *v.* MACK WAREHOUSE CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Richard W. Galiher* for petitioner. *William J. Toy* and *Walter B. Gibbons* for respondents. Reported below: 326 F. 2d 554.

No. 1046. WEISS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Michael Juviler* for respondent.

No. 1047. MILLER & CO. OF BIRMINGHAM, INC., *v.* LOUISVILLE & NASHVILLE RAILROAD CO. C. A. 5th Cir. Certiorari denied. *James E. Clark* for petitioner. *James A. Simpson* and *Joseph L. Lenihan* for respondent. Reported below: 328 F. 2d 73.

No. 1039. HOOPER *v.* CHRYSLER MOTORS CORP. C. A. 5th Cir. Certiorari denied. *Albert Smith* for petitioner. *David W. Kendall* and *Clarence P. Brazill, Jr.* for respondent.

No. 1053. UNITED STATES TIME CORP. *v.* HAMILTON WATCH CO. C. A. 2d Cir. Certiorari denied. *John Hoxie* for petitioner. *Robert E. LeBlanc, Richard A. Whiting* and *George B. Mickum III* for respondent. Reported below: 327 F. 2d 338.

No. 1066. SWINGLINE INC. ET AL. *v.* OVERLAND MACHINED PRODUCTS, INC. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Maximilian Bader* and *I. Walton Bader* for petitioners. Reported below: 224 Cal. App. 2d 46, 36 Cal. Rptr. 330.

No. 1093. MCCREERY *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. *John N. Frolich* for petitioner. *Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for respondent.

No. 1005, Misc. WHITTINGTON *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 1076. MURPHY, WARDEN, *v.* EVERETT. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Edward S. Silver* and *Frank Di Lalla* for petitioner. *Edward E. Clark* for respondent. Reported below: 329 F. 2d 68.

No. 1027. UNITED STATES *v.* COMMUNIST PARTY OF THE UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney* and *George B. Searls* for the United States. *John J. Abt* and *Joseph Forer* for respondent. Reported below: —— U. S. App. D. C. ——, 331 F. 2d 807.

No. 1072, Misc. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 325 F. 2d 596.

No. 1089, Misc. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 1115, Misc. AHLSTEDT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harrison C. Thompson, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 325 F. 2d 257.

No. 1166, Misc. BURROUGHS *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Edsel W. Haws*, Deputy Attorney General, for respondents.

No. 1098, Misc. ALLEN *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Petitioner *pro se*. *Charles Nesbitt,* Attorney General of Oklahoma, and *Jack A. Swidensky,* Assistant Attorney General, for respondent. Reported below: 389 P. 2d 523.

No. 1120, Misc. LYONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 325 F. 2d 370.

No. 1143, Misc. GAWANTKA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 327 F. 2d 129.

No. 1161, Misc. RUA *v.* UNITED STATES C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 321 F. 2d 140.

No. 1169, Misc. PAULEY *v.* KING, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *Albert L. Sommerville, Jr.* and *George H. Mitchell,* Assistant Attorneys General, for respondent.

No. 1185, Misc. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 328 F. 2d 256.

No. 1202, Misc. EDGAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *J. J. Kilimnik* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 328 F. 2d 132.

No. 1227, Misc. NICHOLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 325 F. 2d 716.

No. 1230, Misc. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 328 F. 2d 304.

No. 1231, Misc. HARGRAVES ET AL. *v.* HAMILTON ET AL. Supreme Court of Mississippi. Certiorari denied. *R. L. Netterville* and *H. Alva Brumfield* for petitioners. *Oliver M. Hornsby* for respondents. Reported below: —— Miss. ——, 161 So. 2d 179.

No. 1234, Misc. BYRNES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 327 F. 2d 825.

No. 1236, Misc. PRYSOCK *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Benito Gaguine* and *Joseph J. Kessler* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 1278, Misc. OLIVE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 327 F. 2d 647.

No. 1283, Misc. MARTIN *v.* TEXAS INDEMNITY INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. *Curtis E. Hill* for petitioner. *Neth L. Leachman* for respondents.

No. 1292, Misc. JOHNSON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1295, Misc. MURPHY *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 20 App. Div. 2d 222, 246 N. Y. S. 2d 562.

No. 1300, Misc. MOORE *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1301, Misc. BUTLER *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *Howard S. Grimm* for petitioner. Reported below: 244 Ind. 620, 193 N. E. 2d 899.

No. 1308, Misc. WRIGHT *v.* PAGE, WARDEN. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 390 P. 2d 921.

No. 1309, Misc. BARBER *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 327 F. 2d 101.

No. 1302, Misc. DARLING *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1307, Misc. FOSTER *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1319, Misc. REDFIELD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 117 U. S. App. D. C. 231, 328 F. 2d 532.

No. 1320, Misc. KURTH *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 1324, Misc. HUDSON *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1325, Misc. BAILEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Franklin M. Schultz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 117 U. S. App. D. C. 241, 328 F. 2d 542.

No. 1343, Misc. POWELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1347, Misc. FLORES *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1355, Misc. BLACKMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 107. UNITED STATES *v.* BARNETT ET AL., 376 U. S. 681;

No. 336. MERCER *v.* THERIOT, *ante*, p. 152;

No. 958. PAUL REVERE LIFE INSURANCE CO. *v.* FIRST NATIONAL BANK IN DALLAS, ADMINISTRATOR, *ante*, p. 935; and

No. 1296, Misc. DELANEY *v.* OREGON, *ante*, p. 929. Petitions for rehearing denied.

JUNE 10, 1964.

Dismissal Under Rule 60.

No. 1290, Misc. MCIVER *v.* TEXAS. On petition for writ of certiorari to the Court of Criminal Appeals of Texas. Petition dismissed pursuant to Rule 60 of the Rules of this Court.

JUNE 12, 1964.

Dismissals Under Rule 60.

No. 920. DOERR *v.* ELDER ET AL. On petition for writ of certiorari to the Supreme Court of Nebraska. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Robert L. Stern* and *Clarence A. Davis* for petitioner. Reported below: 175 Neb. 483, 122 N. W. 2d 528.

No. 921. GENERAL MOTORS ACCEPTANCE CORP. *v.* MACKRILL. Appeal from the Supreme Court of Nebraska. Dismissed pursuant to Rule 60 of the Rules of this Court. *Robert L. Stern* and *Charles S. Reed* for appellant. *Max Kier* for appellee. Reported below: 175 Neb. 631, 122 N. W. 2d 742.

JUNE 15, 1964.

Miscellaneous Orders.

No. 89. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 376 U. S. 492. The motion of petitioners to retax costs is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *Jerry D. Anker* for petitioners on the motion. *Kenneth C. McGuiness* for respondent Carrier Corporation in opposition.

No. 386. FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL., *ante*, p. 33. The motion of Texaco Inc. for an order perfecting proper venue on remand is denied. *Alfred C. DeCrane, Jr.* and *Paul F. Schlicher* for movant.

No. 585. MCLAUGHLIN ET AL. *v.* FLORIDA. Appeal from the Supreme Court of Florida. (Probable jurisdiction noted, *ante*, p. 914.) The motion of appellants to remove the case from the summary calendar is granted. *Jack Greenberg* for movants.

No. 801. BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES *v.* UNITED AIR LINES, INC. Certiorari, *ante*, p. 903, to the United States Court of Appeals for the Sixth Circuit. The motion of the respondent to require certification of additional parts of the record is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *Stuart Bernstein* for movant.

No. 1441, Misc. IN RE OWENS ET AL. Motion for leave to file petition for writ of habeas corpus denied. *David N. Fields* for petitioners.

No. 1314, Misc. IN RE DISBARMENT OF DOLNICK. It having been reported to the Court that Stanley Dolnick, of Philadelphia, Commonwealth of Pennsylvania, has been disbarred from the practice of the law by the judgment of the Supreme Court of Pennsylvania, Eastern District, duly entered on the 4th day of April, 1964, and this Court by order of April 20, 1964, having suspended the said Stanley Dolnick 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 to the rule has expired;

IT IS ORDERED that the said Stanley Dolnick be, and he is hereby, disbarred and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 1357, Misc. SOSTRE *v.* DESMOND, CHIEF JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, *William D. Bresinhan*, Assistant Attorney General, and *Julius L. Sackman* for respondents.

No. 1393, Misc. BAXSTROM *v.* HEROLD, STATE HOSPITAL DIRECTOR;

No. 1443, Misc. TOMLIN *v.* BOMAR, WARDEN; and

No. 1454, Misc. ORTEGA *v.* HEINZE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1431, Misc. ALLEN *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 941. DOMBROWSKI ET AL. *v.* PFISTER, CHAIRMAN, JOINT LEGISLATIVE COMMITTEE ON UN-AMERICAN ACTIVITIES OF THE LOUISIANA LEGISLATURE, ET AL. Appeal from the United States District Court for the Eastern District of Louisiana. The motion of the National Lawyers Guild for leave to file a brief, as *amicus curiae,* is granted. The motion of the American Civil Liberties Union et al. for leave to file a brief, as *amici curiae,* is granted. Probable jurisdiction noted. MR. JUSTICE BLACK took no part in the consideration or decision of this case. *Arthur Kinoy, William M. Kunstler, Michael J. Kunstler, A. P. Tureaud* and *Leon Hubert* for appellants. *Jack N. Rogers* and *Robert H. Reiter* for the Joint Legislative Committee on Un-American Activities. *Ernest Goodman* and *David Rein* for National Lawyers Guild, as *amicus curiae,* in support of appellants. *Louis Lusky* and *Melvin L. Wulf* for American Civil Liberties Union et al., as *amici curiae,* in support of appellants. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *M. E. Culligan* and *John E. Jackson, Jr.,* Assistant Attorneys General, filed an objection and opposition to the motion of National Lawyers Guild. Reported below: 227 F. Supp. 556.

Certiorari Granted. (*See No. 553, Misc., 378 U. S. 127, and No. 1130, Misc., 378 U. S. 129.*)

Certiorari Denied. (*See also No. 1345, Misc., 378 U. S. 126.*)

No. 1045. GOLDFARB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Albert A. Goldfarb,* petitioner *pro se. Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 328 F. 2d 280.

No. 1018. New Jersey *v.* Godfrey. C. A. 3d Cir. Certiorari denied. *Norman Heine* for petitioner. *M. Gene Haeberle* for respondent. Reported below: 327 F. 2d 311.

No. 1030. Hooper *v.* United States. Court of Claims. Certiorari denied. *Oscar F. Irwin* and *William Hillyer* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: —— Ct. Cl. ——, 326 F. 2d 982.

No. 1038. Galbreath *v.* City of Chicago. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *John C. Melaniphy* for respondent. Reported below: 29 Ill. 2d 136, 193 N. E. 2d 759.

No. 1042. Aronson *v.* McNeill, State Hospital Superintendent. Court of Appeals of New York. Certiorari denied. *David N. Fields* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondent.

No. 1050. City of Detroit et al. *v.* General Motors Corp. Supreme Court of Michigan. Certiorari denied. *Vance G. Ingalls, Julius C. Pliskow, Aloysius J. Suchy* and *William F. Koney* for petitioners. *Robert E. McKean, Aloysius F. Power, Donald K. Barnes* and *Thomas J. Hughes* for respondent. Reported below: 372 Mich. 234, 126 N. W. 2d 108.

No. 1058. De Rieras et vir *v.* Madero et al. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 223 Cal. App. 2d 450, 35 Cal. Rptr. 782.

No. 1052. JONES *v.* PRESIDENT & DIRECTORS OF GEORGETOWN COLLEGE, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bernard Margolius* and *Ralph H. Deckelbaum* for petitioner. *Edward Bennett Williams* and *Harold Ungar* for respondent. Reported below: —— U. S. App. D. C. ——, ——, 331 F. 2d 1000, 1010.

No. 1054. WERLING ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Hubert I. Teitelbaum* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 328 F. 2d 992.

No. 1055. HEARD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Henry C. Lowenhaupt* and *Owen T. Armstrong* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 326 F. 2d 962.

No. 1056. GOLDBERG ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Morris A. Shenker* for petitioners. *T. W. Bruton,* Attorney General of North Carolina, and *Harry W. McGalliard,* Deputy Attorney General, for respondent. Reported below: 261 N. C. 181, 134 S. E. 2d 334.

No. 1059. CERTAIN INTERESTS IN PROPERTY IN THE BOROUGH OF BROOKLYN, COUNTY OF KINGS, STATE OF NEW YORK, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Bernard L. Bermant, George B. Kenner* and *Herbert Monte Levy* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *Edmund B. Clark* for the United States. Reported below: 326 F. 2d 109.

No. 1060. Chicago Automobile Trade Assn. et al. *v.* Madden, Regional Director, Thirteenth Region, National Labor Relations Board, et al. C. A. 7th Cir. Certiorari denied. *Frederick W. Turner, Jr.* and *Karl W. Grabemann* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Glen M. Bendixsen* for respondents. Reported below: 328 F. 2d 766.

No. 1064. Rees et al. *v.* Local Union No. 9, International Brotherhood of Electrical Workers, AFL–CIO, et al. C. A. 7th Cir. Certiorari denied. Petitioners *pro se*. *Bernard M. Mamet* for respondents. Reported below: 327 F. 2d 627.

No. 1074. Brown et al. *v.* Brown, Administrator, Employment Security Division, Department of Labor of Louisiana, et al. Supreme Court of Louisiana. Certiorari denied. *A. P. Tureaud* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, for Brown, and *Bascom D. Talley, Jr.* and *Richard F. Knight* for Crown Zellerbach Corp., respondents. Reported below: 245 La. 639, 160 So. 2d 227.

No. 1088. DeSisto *v.* United States. C. A. 2d Cir. Certiorari denied. *Frank Serri* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 329 F. 2d 929.

No. 1113. Smith et al. *v.* Virgin Islands et al. C. A. 3d Cir. Certiorari denied. *Warren H. Young* and *John D. Marsh* for petitioners. *Francisco Corneiro,* Attorney General of the Virgin Islands, and *James E. Nickerson* for respondents. Reported below: 329 F. 2d 135.

No. 1116. RAILROAD YARDMASTERS OF AMERICA, AFL–CIO, *v.* ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY Co. C. A. 5th Cir. Certiorari denied. *Charles J. Morris* for petitioner. *Ernest D. Grinnell, Jr., Paul R. Moody* and *John H. Pickering* for respondent. Reported below: 328 F. 2d 749.

No. 1143. J. B. MICHAEL & Co., INC., *v.* POWERS. C. A. 6th Cir. Certiorari denied. *Longstreet Heiskell* for petitioner. *Thomas R. Prewitt* for respondent. Reported below: 329 F. 2d 674.

No. 1149. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 329 F. 2d 316.

No. 608. NEERING *v.* FLORIDA. Motion to strike portions of respondent's brief denied. Petition for writ of certiorari to the Supreme Court of Florida denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Luke G. Galant* for petitioner. *James W. Kynes,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent. Reported below: 155 So. 2d 874.

No. 1043. BENNETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Stanley M. Rosenblum* and *Merle L. Silverstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 329 F. 2d 209.

No. 1153, Misc. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for the United States. Reported below: 323 F. 2d 672.

No. 1067. AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, ET AL. *v.* LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSN., AFL–CIO, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Jacob Sheinkman* for petitioners. *S. G. Lippman* and *Tim L. Bornstein* for respondents. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* filed a memorandum for the National Labor Relations Board. Reported below: 117 U. S. App. D. C. 120, 326 F. 2d 663.

No. 1133, Misc. BERRY *v.* WARDEN, QUEENS HOUSE OF DETENTION. C. A. 2d Cir. Certiorari denied.

No. 1337, Misc. WILLIAMS *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 1232, Misc. BROWN *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1280, Misc. LIPSCOMB *v.* KENNEDY, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondents.

No. 1289, Misc. BROWN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 41 N. J. 590, 198 A. 2d 441.

No. 1298, Misc. KEMPINSKI *v.* UNITED STATES. Court of Claims. Certiorari denied. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

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No. 1140, Misc. CROSS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 1299, Misc. PERRA *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied.

No. 1305, Misc. GLAZEWSKI *v.* SIGAFOOS ET AL. Supreme Court of New Jersey. Certiorari denied.

No. 1311, Misc. SMYTHE *v.* RUNDLE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 1330, Misc. BANKER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1332, Misc. PUNTURI *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1338, Misc. HALL *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 233 Md. 378, 196 A. 2d 874.

No. 1339, Misc. COLLINS *v.* RANDOLPH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1340, Misc. RAMSEY *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1342, Misc. BURTON *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Reported below: 377 S. W. 2d 155.

No. 1341, Misc. PRYOR *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Reported below: 377 S. W. 2d 156.

No. 1377, Misc. TOTH *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied.

No. 1351, Misc. FLOYD *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1359, Misc. GLASS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 328 F. 2d 754.

No. 1360, Misc. JACKSON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. *Thomas W. Brown* for petitioner.

No. 1366, Misc. BRUNJES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 329 F. 2d 339.

No. 714, Misc. TRINTA ET AL. *v.* SUPERIOR COURT OF PUERTO RICO ET AL. Supreme Court of Puerto Rico. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Vicente Geigel Polanco* for petitioners. *Fernando Ruiz-Suria* for respondents. *Solicitor General Cox, Charles Donahue, Bessie Margolin* and *Robert E. Nagle* filed a memorandum for the United States, as *amicus curiae*. Reported below: —— P. R. ——.

No. 1384, Misc. MCKINNEY *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1354, Misc. FOSTER *v.* INDIANA ET AL. C. A. 7th Cir. Certiorari denied.

No. 1395, Misc. IN RE HENIG ET AL. C. A. 3d Cir. Certiorari denied.

No. 1322, Misc. JOHNSON ET AL. *v.* YEAGER, PRISON KEEPER. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Curtis R. Reitz, Stanford Shmukler* and *M. Gene Haeberle* for petitioners. *Norman Heine* for respondent. Reported below: 327 F. 2d 311.

No. 1238, Misc. LEVY *v.* MACY ET AL., COMMISSIONERS, U. S. CIVIL SERVICE COMMISSION. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox* for respondents.

Rehearing Denied.

No. 292. MISSOURI PACIFIC RAILROAD CO. *v.* ELMORE & STAHL, *ante*, p. 134;

No. 386. FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL., *ante*, p. 33;

No. 387. PAN AMERICAN PETROLEUM CORP. *v.* FEDERAL POWER COMMISSION, *ante*, p. 922;

No. 969. BRYANT ET AL. *v.* MOORE ET AL., *ante*, p. 933;

No. 977. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* JONES MOTOR CO., INC., *ante*, p. 217;

No. 850, Misc. CUNNINGHAM *v.* UNITED STATES, 376 U. S. 924;

No. 1082, Misc. HERSH *v.* SECURITIES AND EXCHANGE COMMISSION, *ante*, p. 937; and

No. 1189, Misc. TANSIMORE *v.* UNITED STATES, *ante*, p. 942. Petitions for rehearing denied.

No. 938. LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS, *v.* KENNEDY, ATTORNEY GENERAL, *ante*, p. 932. Motion to dispense with printing the petition granted. Petition for rehearing denied.

JUNE 17, 1964.

Dismissal Under Rule 60.

No. 1184. AUSTIN MAILERS UNION No. 136 *v.* NEWSPAPERS, INC. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Harold G. Kennedy* for petitioner. Reported below: 329 F. 2d 312.

JUNE 19, 1964.

Certiorari Denied.

No. 1532, Misc. ANDERSON ET VIR *v.* RALEIGH FITKIN-PAUL MORGAN MEMORIAL HOSPITAL ET AL. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Bernard Margolius* and *Ralph H. Deckelbaum* for petitioners. Reported below: 42 N. J. 421, 201 A. 2d 537.

JUNE 22, 1964.

Miscellaneous Orders.

No. 556. UNITED MINE WORKERS OF AMERICA *v.* WHITE OAK COAL CO., INC. (Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied, 375 U. S. 966.) The respondent is requested to file a response to the petition for rehearing.

No. 1125, Misc. IN RE STOUT. Motion for leave to file petition for writ of mandamus denied and petitioner granted 60 days from the expiration of the statutory time within which to file a petition for writ of certiorari.

No. 1468, Misc. LEE *v.* BETO, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

Nos. 735 and 934. COX *v.* LOUISIANA. Appeals from the Supreme Court of Louisiana. (Probable jurisdiction noted, *ante,* p. 921.) The motion of the appellant for leave to proceed further herein *in forma pauperis* is granted. It is ordered that the printing of the records be dispensed with. *Carl Rachlin* on the motion.

No. 1101, Misc. MCNEER *v.* HEINZE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, and *Doris H. Maier,* Assistant Attorney General, for respondent.

No. 5, Original. UNITED STATES *v.* CALIFORNIA. The joint motion to set this case down for oral argument on the exceptions to the report of the Special Master is granted and two hours are allotted to each side for that purpose. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Solicitor General Cox* for the United States. *Stanley Mosk,* Attorney General of California, for defendant. [For earlier orders herein, see 375 U. S. 927, 990; *ante,* p. 926.]

No. 400. GARRISON *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. (Probable jurisdiction noted, 375 U. S. 900.) Argued April 22, 1964. This case is restored to the calendar for reargument. *Eberhard P. Deutsch* argued the cause for appellant. With him on the briefs was *René H. Himel, Jr. Jack P. F. Gremillion,* Attorney General of Louisiana, argued the cause for appellee. With him on the briefs were *M. E. Culligan* and *John E. Jackson, Jr.,* Assistant Attorneys General. Reported below: 244 La. 787, 154 So. 2d 400.

No. 985, Misc. HERB *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *James W. Kynes*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 1361, Misc. GEORGIA *v.* TUTTLE, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion of Congress of Racial Equality, Inc., et al. for leave to file a brief, as *amici curiae*, granted. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *Eugene Cook*, Attorney General of Georgia, *Albert Sidney Johnson*, Assistant Attorney General, and *J. Robert Sparks* for petitioner. *Donald L. Hollowell* and *Jack Greenberg* for Rachel et al., respondents. *William M. Kunstler, Arthur Kinoy, Nils R. Douglas, Robert F. Collins, Carl Rachlin, Floyd B. McKissick* and *Michael J. Kunstler* for Congress of Racial Equality, Inc., et al., as *amici curiae*, in opposition.

Probable Jurisdiction Noted.

No. 1073. LOUISIANA ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the Eastern District of Louisiana. Probable jurisdiction noted. *Jack P. F. Gremillion*, Attorney General of Louisiana, *Carroll Buck*, First Assistant Attorney General, and *Harry J. Kron, Jr.*, Assistant Attorney General, for appellants. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for the United States. Reported below: 225 F. Supp. 353.

No. 1087. FREEDMAN *v.* MARYLAND. Appeal from the Court of Appeals of Maryland. Probable jurisdiction noted. *Felix J. Bilgrey, Richard C. Whiteford* and *Louis H. Pollak* for appellant. *Thomas B. Finan*, Attorney General of Maryland, and *Robert F. Sweeney*, Assistant Attorney General, for appellee. Reported below: 233 Md. 498, 197 A. 2d 232.

No. 1097. UNITED STATES *v.* MISSISSIPPI ET AL. Appeal from the United States District Court for the Southern District of Mississippi. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene* and *Howard A. Glickstein* for the United States. *Joe T. Patterson,* Attorney General of Mississippi, *Dugas Shands,* Assistant Attorney General, *P. M. Stockett* and *Charles Clark,* Special Assistant Attorneys General, and *Aubrey Bell,* for appellees. Reported below: 229 F. Supp. 925.

Certiorari Granted. (*See also No. 4, 378 U. S. 548; No. 5, 378 U. S. 587; No. 8, 378 U. S. 551; No. 246, 378 U. S. 576; No. 718, 378 U. S. 577; No. 761, 378 U. S. 550; No. 14, Misc., 378 U. S. 582; No. 57, Misc., 378 U. S. 552; No. 298, Misc., 378 U. S. 566; No. 396, Misc., 378 U. S. 567; No. 682, Misc., 378 U. S. 568; No. 729, Misc., 378 U. S. 569; No. 893, Misc., 378 U. S. 570; No. 900, Misc., 378 U. S. 562; No. 915, Misc., 378 U. S. 584; No. 930, Misc., 378 U. S. 571; No. 934, Misc., 378 U. S. 586; No. 963, Misc., 378 U. S. 572; No. 994, Misc., 378 U. S. 573; No. 1011, Misc., 378 U. S. 549; No. 1017, Misc., 378 U. S. 544; No. 1050, Misc., 378 U. S. 589; No. 1078, Misc., 378 U. S. 574; No. 1117, Misc., 378 U. S. 575; No. 1134, Misc., 378 U. S. 546; and No. 1173, Misc., 378 U. S. 585.*)

No. 105. HAMM *v.* CITY OF ROCK HILL. Supreme Court of South Carolina. Certiorari granted. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Matthew J. Perry, Lincoln C. Jenkins, Jr., Donald James Sampson* and *Willie T. Smith, Jr.* for petitioner. *Daniel R. McLeod,* Attorney General of South Carolina, and *Everett N. Brandon,* Assistant Attorney General, for respondent. Reported below: 241 S. C. 420, 128 S. E. 2d 907.

No. 432. LUPPER ET AL. *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari granted. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III* and *Wiley A. Branton* for petitioners. *Bruce Bennett,* Attorney General of Arkansas, and *Jack L. Lessenberry,* Assistant Attorney General, for respondent. Reported below: 236 Ark. 596, 367 S. W. 2d 750.

No. 869. STANFORD *v.* TEXAS. 57th Judicial District Court of Texas. Certiorari granted. *Maury Maverick, Jr., John J. McAvoy* and *Melvin L. Wulf* for petitioner. *Waggoner Carr,* Attorney General of Texas, *Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, and *James E. Barlow* for respondent.

No. 782. UNITED STATES *v.* VENTRESCA. C. A. 1st Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. *Edward C. Maher* and *Matthew R. McCann* for respondent. Reported below: 324 F. 2d 864.

No. 1068. VETERANS OF THE ABRAHAM LINCOLN BRIGADE *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Leonard B. Boudin, Victor Rabinowitz* and *David Rein* for petitioner. *Solicitor General Cox* for respondent. Reported below: 117 U. S. App. D. C. 404, 331 F. 2d 64.

No. 700, Misc. GRIFFIN *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of California granted. Case transferred to the appellate docket. *Morris Lavine* for petitioner. Reported below: 60 Cal. 2d 182, 383 P. 2d 432.

Certiorari Denied. (See also No. 330, 378 U. S. 578; No. 706, 378 U. S. 557; No. 853, 378 U. S. 558; No. 1048, 378 U. S. 581; and No. 699, Misc., 378 U. S. 582.)

No. 24. BEADLE ET AL. *v.* SCHOLLE ET AL. Supreme Court of Michigan. Certiorari denied. *Edmund E. Shepherd, Whitney North Seymour* and *Jerome H. Kern* for petitioners. *Frank J. Kelley,* Attorney General of Michigan, and *Eugene Krasicky,* Solicitor General, for Hare; and *Theodore Sachs* for Scholle, respondents. Reported below: 367 Mich. 176, 116 N. W. 2d 350.

Nos. 379 and 380. PAN-AMERICAN LIFE INSURANCE CO. *v.* LORIDO. Supreme Court of Florida, and District Court of Appeal of Florida, Third District. Certiorari denied. *James A. Dixon* and *Sam Daniels* for petitioner. *Mortimer Fried* for respondent. *Solicitor General Cox* filed a memorandum for the United States. Reported below: 154 So. 2d 200.

No. 553. FINCH ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioners *pro se. Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent.

No. 673. PAN-AMERICAN LIFE INSURANCE CO. *v.* RECIO. District Court of Appeal of Florida, Third District. Certiorari denied. *James A. Dixon* and *Sam Daniels* for petitioner. *Wesley G. Carey* for respondent. Reported below: 154 So. 2d 197.

No. 1061. SANTANA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Francisco Ponsa Feliu* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 329 F. 2d 854.

No. 930. SANAPAW ET AL. *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. *John W. Cragun, Charles A. Hobbs* and *Richard A. Baenen* for petitioners. *George Thompson,* Attorney General of Wisconsin, and *Harold H. Persons,* Assistant Attorney General, for respondent. *Solicitor General Cox, Frank Goodman* and *Roger P. Marquis* filed a memorandum for the United States. Reported below: 21 Wis. 2d 377, 124 N. W. 2d 41.

No. 951. CARPENTERS LOCAL UNION NO. 345, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, ET AL. *v.* RUBIN, DOING BUSINESS AS HOWARD RUBIN & CO. Chancery Court of Shelby County, Tennessee. Certiorari denied. *Anthony J. Sabella* for petitioners. *Irving Strauch* for respondent.

No. 1057. EISENHOWER, ALIAS ANDRE, ALIAS FORD, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Warren E. Magee* for petitioner. *Solicitor General Cox* for the United States. Reported below: 327 F. 2d 663.

No. 1063. NORTHERN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John Jay Hooker, Jr.* and *James C. Kirby, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 329 F. 2d 794.

No. 1077. WALLACE *v.* GRONOUSKI, POSTMASTER GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert C. Handwerk* and *Sherman C. Shelton* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. Reported below: 117 U. S. App. D. C. 264, 328 F. 2d 565.

No. 1062. BULLARD *v.* FLORIDA. District Court of Appeal of Florida, First District, and Supreme Court of Florida. Certiorari denied. *Leo L. Foster* and *W. Dexter Douglass* for petitioner. Reported below: See 151 So. 2d 343.

No. 1070. MARCELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jack Wasserman, David Carliner, Michel A. Maroun* and *G. Wray Gill* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 328 F. 2d 961.

No. 1065. PRUCHA ET AL. *v.* WEISS ET AL. Court of Appeals of Maryland. Certiorari denied. *Clayton A. Dietrich* for petitioners. Reported below: 233 Md. 479, 197 A. 2d 253.

No. 1081. WALTHAM PRECISION INSTRUMENT CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *B. Paul Noble* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Irwin A. Seibel* and *James McI. Henderson* for respondent. Reported below: 327 F. 2d 427.

No. 1082. KROGNESS ET AL. *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *Howard R. Lonergan* for petitioners. *George H. Corey* for respondent. Reported below: —— Ore. ——, 388 P. 2d 120.

No. 1084. MUGNOLA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 328 F. 2d 460.

No. 1085. PARNESS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Seymour Kleinman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1089. BABSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James W. Heyer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 330 F. 2d 662.

No. 1090. BLUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Benjamin Siet* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 329 F. 2d 49.

No. 1094. HAMM ET VIR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Joseph A. Maun* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *John B. Jones, Jr.* for respondent. Reported below: 325 F. 2d 934.

No. 1095. TIDEWATER OIL CO. *v.* LESSIG. C. A. 9th Cir. Certiorari denied. *Moses Lasky* for petitioner. *Maxwell Keith* for respondent. Reported below: 327 F. 2d 459.

No. 1102. HOUSTON MARITIME ASSOCIATION, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert Eikel* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 117 U. S. App. D. C. 304, 329 F. 2d 259.

No. 1104. REALIST, INCORPORATED, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Herbert P. Wiedemann* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 328 F. 2d 840.

No. 1187. RUTHERFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frank Serri* for petitioner. Reported below: 332 F. 2d 444.

No. 15. FORD ET AL. *v.* TENNESSEE. Supreme Court of Tennessee, Middle Division. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, James M. Nabrit III* and *Derrick A. Bell, Jr.* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *Walker T. Tipton,* Assistant Attorney General, for respondent. Reported below: 210 Tenn. 105, 355 S. W. 2d 102, 356 S. W. 2d 726.

No. 95. WILLIAMSON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stanley Fleishman* and *Sam Rosenwein* for petitioner. *A. L. Wirin* and *Fred Okrand* for American Civil Liberties Union of Southern California, as *amicus curiae,* in support of the petition. Reported below: 207 Cal. App. 2d 839, 24 Cal. Rptr. 734.

No. 99. WENZLER ET AL. *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stanley Fleishman* and *Sam Rosenwein* for petitioners. *Byron B. Gentry* for respondent.

No. 1035. BERTMAN, DOING BUSINESS AS BERTMAN FOOD PRODUCTS, *v.* J. A. KIRSCH CO. C. A. 2d Cir. Certiorari denied. *Leonard Feldman* for petitioner. *Richard J. Burke* and *Myron L. Shapiro* for respondent.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG join, dissenting from the denial of certiorari.

The United States contracted with Bertman, the petitioner here, for the delivery of imported tomato paste. Bertman in turn contracted with J. A. Kirsch Co. to supply the paste. After the United States had taken delivery, it claimed that the paste was spoiled, and it sued Bertman for breach of contract. In addition to defending against the Government's claims, Bertman brought Kirsch in as a defendant, claiming that if the paste was defective then the blame rested on Kirsch and that if the Government recovered against Bertman he in turn was entitled to recover against Kirsch. After a trial in the United States District Court, the jury found that the paste was not defective, and the court entered judgment holding Bertman not liable. Since Bertman owed the Government nothing, naturally Kirsch owed Bertman nothing, and judgment was entered holding that Bertman should recover nothing from Kirsch. Under 28 U. S. C. § 2107 and Fed. Rules Civ. Proc. 73, a party aggrieved by a judgment of this kind has sixty days in which to appeal. In this case the only party which stood to lose by the judgments when entered was the United States. At some time on the 60th day it filed a notice of appeal with the clerk of the court. At the moment this appeal was filed, Bertman once again was subject to the danger of liability which had originally caused him to bring Kirsch into the suit as a defendant. The natural defensive step for Bertman to take then was to file a notice of appeal against Kirsch, but notice of the Government's appeal was not served on Bertman until after the 60

days had passed—too late, both courts below held, for Bertman to take his appeal. Thus, even though Bertman's ability to protect himself against paying for another man's wrong depended on his having notice of the Government's appeal just as much as it depended on his having notice when he was sued in the first place, neither the statutes nor the rules required that he have notice in time to file his own appeal.

I am aware of the argument that an able, alert, ever-diligent lawyer could have, had he tried hard enough, discovered that the Government had appealed—even in the closing hours of the sixtieth day. I do not doubt that had Bertman's counsel been Superman, his X-ray eyes would have told him that a notice of appeal was being filed blocks away in the courthouse, or had he been a lawyer with no clients but Bertman he could have spent the sixtieth day hovering at the clerk's office to see whether the Government would file a notice of appeal. But Bertman's counsel (so far as the record shows) is not Superman, nor should the law expect him to be. The record is barren of any suggestion that he fell short of the standards generally expected of a capable lawyer. He relied, as lawyers in our system of jurisprudence are entitled to do, on the principle expressed by Daniel Webster when he said that due process means a law which "hears before it condemns." A chance to be heard, of course, requires notice. Bertman had no notice of the Government's appeal in time to file his own appeal. A system of appeals which fails to give this notice, whether by statute or rule, fails to provide the most elemental requirement of due process. The only construction of this rule consistent with due process and with the purpose of the Civil Rules to secure the "just . . . determination of every action"* would therefore be to hold that Bertman's filing within a reasonable time after notice was timely. Cf. *Fallen* v. *United States,* 378 U. S. 139.

*Fed. Rules Civ. Proc. 1.

No. 1110. PAN-AMERICAN LIFE INSURANCE CO. *v.* THEYE Y AJURIA. Supreme Court of Louisiana. Certiorari denied. *James A. Dixon* and *Sam Daniels* for petitioner. *Leon Sarpy* for respondent. Reported below: 245 La. 755, 161 So. 2d 70.

No. 1188. MERINO *v.* UNITED STATES MARSHAL. C. A. 9th Cir. Certiorari denied. *A. Kenneth Pye, Michael J. Stack, Jr.* and *Peter J. Hughes* for petitioner. *Solicitor General Cox* for respondent. Reported below: 326 F. 2d 5.

No. 1069. FATEMI ET AL. *v.* UNITED STATES. Motion to dispense with printing the petition for writ of certiotiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Lawrence C. Moore* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 1071. SHENANDOAH VALLEY BROADCASTING, INC., ET AL. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS. Motion to use portions of the record in No. 323, October Term, 1963, granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Ralstone R. Irvine* and *Walter R. Mansfield* for petitioners. *Arthur H. Dean, William Piel, Jr., Herman Finkelstein* and *Lloyd N. Cutler* for respondent. Reported below: 331 F. 2d 117.

No. 323, Misc. MEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 316 F. 2d 467.

No. 1109. LaVallee, Warden, et al. *v.* Durocher et al. Motion of respondents for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Ronald J. Offenkrantz* and *Barry Mahoney,* Assistant Attorneys General, for petitioners. *Leon B. Polsky* for respondents. Reported below: 330 F. 2d 303.

Mr. Justice Harlan, dissenting.

I believe that the issue in this case has an importance which justifies departure from my usual practice of not noting a dissent to a denial of certiorari with which I do not agree. The issue is whether this Court's holding in *Gideon* v. *Wainwright,* 372 U. S. 335, is required to be given retroactive effect. That question; which is of continuing concern in the administration of criminal justice in a substantial number of States, deserves plenary consideration by this Court, which it has not yet had. See my dissenting opinion in *Pickelsimer* v. *Wainwright,* 375 U. S. 2, 3.

I would grant certiorari and set the case for argument.

No. 1214. Schenker et al. *v.* E. I. duPont de Nemours & Co., Inc., et al. C. A. 2d Cir. Certiorari denied. Mr. Justice Harlan and Mr. Justice White took no part in the consideration or decision of this petition. *David Schenker, pro se,* for petitioners. *John E. F. Wood, Philip C. Scott* and *Malcolm H. Bell* for respondents. Reported below: 329 F. 2d 77.

No. 914, Misc. Hill *v.* New York. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 13 N. Y. 2d 842, 192 N. E. 2d 232.

No. 1083. BURT *v.* CITY OF PALM SPRINGS, CALIFORNIA. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the District Court of Appeal of California, Fourth Appellate District, denied. Reported below: 224 Cal. App. 2d 122, 36 Cal. Rptr. 422.

No. 641, Misc. MORRIS *v.* ROUSOS. C. A. 10th Cir. Certiorari denied.

No. 1179, Misc. FISHER *v.* UNITED STATES; and
No. 1180, Misc. LINDQUIST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *John S. Connolly* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 324 F. 2d 775.

No. 574, Misc. LEE *v.* FLORIDA. District Court of Appeal of Florida, First District. Certiorari denied. *Howard W. Dixon* for petitioner. *Richard W. Ervin,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent. Reported below: 153 So. 2d 351.

No. 863, Misc. SHIPP *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Vincent Hallinan* and *Carl B. Shapiro* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack E. Goertzen,* Deputy Attorney General, for respondent. Reported below: 59 Cal. 2d 845, 382 P. 2d 577.

No. 942, Misc. RAYMOND *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *David H. Kubert* for petitioner. Reported below: 412 Pa. 194, 194 A. 2d 150.

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No. 750, Misc. SMITH ET AL. *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. *Hymen B. Mintz* for petitioners. Reported below: 323 F. 2d 146.

No. 889, Misc. ANDERSON *v.* KROPP, WARDEN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Donald T. Kane,* Assistant Attorney General, for respondent.

No. 957, Misc. CLAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 326 F. 2d 196.

No. 982, Misc. REYNOLDS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 41 N. J. 163, 195 A. 2d 449.

No. 1139, Misc. REYNOLDS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Philip J. Mylod* for petitioner. Reported below: 41 N. J. 163, 195 A. 2d 449.

No. 1088, Misc. RANDAZZO ET AL. *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioners. *Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for respondent. Reported below: 220 Cal. App. 2d 768, 34 Cal. Rptr. 65; 220 Cal. App. 2d 926, 34 Cal. Rptr. 71.

No. 1206, Misc. THOMAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 327 F. 2d 795.

No. 1124, Misc. HALLIDAY *v.* HERITAGE, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondents. Reported below: 327 F. 2d 494.

No. 1136, Misc. BROTHERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Boris H. Lakusta* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 328 F. 2d 151.

No. 1150, Misc. WILLIAMS *v.* SOUTH CAROLINA; and No. 1151, Misc. MORRIS *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Lincoln C. Jenkins, Jr.* and *Matthew J. Perry* for petitioner in No. 1150, Misc. Petitioner *pro se* in No. 1151, Misc. *Daniel R. McLeod,* Attorney General of South Carolina, and *Joseph C. Coleman* and *Edward B. Latimer,* Assistant Attorneys General, for respondent. Reported below: 243 S. C. 225, 133 S. E. 2d 744.

No. 1174, Misc. SMITH *v.* BREAZEALE, PENITENTIARY SUPERINTENDENT. Supreme Court of Mississippi. Certiorari denied. *Melvin L. Wulf* and *R. Jess Brown* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for respondent. Reported below: —— Miss. ——, 158 So. 2d 686.

No. 1188, Misc. NELSON ET AL. *v.* NEW HAMPSHIRE. Supreme Court of New Hampshire. Certiorari denied. *Leo Patrick McGowan* and *Richard W. Leonard* for petitioners. *William Maynard,* Attorney General of New Hampshire, and *Alexander J. Kalinski,* Assistant Attorney General, for respondent. Reported below: 105 N. H. 184, 196 A. 2d 52.

No. 1203, Misc. OSBORNE *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent. Reported below: 328 F. 2d 131.

No. 1217, Misc. FRISON *v.* CLEMMER, CORRECTIONS DIRECTOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 1249, Misc. JONES *v.* TAYLOR, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondents. Reported below: 327 F. 2d 493.

No. 1264, Misc. PURVIS *v.* SUPERIOR COURT OF ALAMEDA COUNTY. Supreme Court of California. Certiorari denied. *Herman W. Mintz,* for petitioner. *Stanley Mosk,* Attorney General of California, *Arlo Smith,* Chief Assistant Attorney General, and *Albert W. Harris, Jr.* and *John F. Kraetzer,* Deputy Attorneys General, for respondent.

No. 1273, Misc. WILLIAMS *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 327 F. 2d 322.

No. 1287, Misc. FERGUSON *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *John T. Corrigan* for respondent. Reported below: 175 Ohio St. 390, 195 N. E. 2d 794.

No. 1279, Misc. LIPSCOMB *v.* BLACKWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent.

No. 1297, Misc. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Frank J. Martell* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 327 F. 2d 959.

No. 1310, Misc. RAMSEY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 327 F. 2d 784.

No. 1317, Misc. COLEMAN *v.* DENNO, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. *Martin Garbus* for petitioner. Reported below: 330 F. 2d 441.

No. 1328, Misc. BENTON *v.* ARIZONA ET AL. Supreme Court of Arizona. Certiorari denied.

No. 1333, Misc. DIRRING *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 328 F. 2d 512.

No. 1352, Misc. PHILLIP *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Samuel S. Mitchell* for petitioner. *T. W. Bruton,* Attorney General of North Carolina, and *Richard T. Sanders,* Assistant Attorney General, for respondent. Reported below: 261 N. C. 263, 134 S. E. 2d 386.

No. 1353, Misc. JOHNSON *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Robert P. Whelan* for petitioner.

No. 1358, Misc. BRANT *v.* TETLOW. C. A. 1st Cir. Certiorari denied. *Aram K. Berberian* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent. Reported below: 328 F. 2d 890.

No. 1363, Misc. HOLLY *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1364, Misc. SMITH *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1367, Misc. BARONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 330 F. 2d 543.

No. 1368, Misc. BOSTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Lester Landy* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 330 F. 2d 937.

No. 1369, Misc. DELANO *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. *John W. Low* for petitioner. Reported below: 327 F. 2d 693.

No. 1399, Misc. KERRIGAN *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. Petitioner *pro se.* *Ruth I. Abrams* for respondent. Reported below: 346 Mass. 786, 196 N. E. 2d 190.

No. 1370, Misc. DARLING *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1371, Misc. WILSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 325 F. 2d 224.

No. 1372, Misc. WOLENSKI *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1373, Misc. CUNNINGHAM *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1375, Misc. SINETTE *v.* DICKSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1379, Misc. GLANCY *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1385, Misc. PRATER *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1392, Misc. KING *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1401, Misc. SULLIVAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frank Serri* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 329 F. 2d 755.

No. 1408, Misc. DUVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1405, Misc. CLARK *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Ira Gammerman* for petitioner. *Thomas V. McMahon* for respondent. Reported below: 328 F. 2d 591.

No. 1398, Misc. DERRITT *v.* STATE BOARD OF REAL ESTATE EXAMINERS. Supreme Court of Ohio. Certiorari denied. *John G. Pegg* and *John H. Bustamante* for petitioner. *William B. Saxbe,* Attorney General of Ohio, and *James M. Dunphy,* Assistant Attorney General, for respondent.

No. 1410, Misc. ZELNICK *v.* PENNSYLVANIA. Superior Court of Pennsylvania. Certiorari denied. Reported below: 202 Pa. Super. 129, 195 A. 2d 171.

No. 1416, Misc. JACKSON *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 954, Misc. SIMCOX *v.* HARRIS, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert E. Hannon* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent. Reported below: 324 F. 2d 376.

No. 1412, Misc. FINKELSTEIN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 14 N. Y. 2d 608, 198 N. E. 2d 265.

No. 1427, Misc. MCDOWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 330 F. 2d 920.

No. 639, Misc. SPENCER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for respondent. Reported below: 60 Cal. 2d 64, 383 P. 2d 134.

MR. JUSTICE GOLDBERG, dissenting from denial of certiorari.

Petitioner, an indigent defendant, was, after a jury trial, convicted of murder and sentenced to death. The California Supreme Court affirmed the conviction, 60 Cal. 2d 64, 383 P. 2d 134, and petitioner seeks a writ of certiorari.

Prior to the trial, petitioner entered pleas of not guilty and not guilty by reason of insanity. The court pursuant to California law thereupon appointed two psychiatrists "to examine the defendant and investigate his sanity." On the basis of their examinations and interviews, the psychiatrists filed a report "stating that in their opinion defendant was sane . . . at the time of the alleged commission of the crimes." At the start of the trial petitioner withdrew his plea of not guilty by reason of insanity. Nevertheless, during the guilt phase of the trial, which under California procedure is separate from the punishment phase, the State called one of the psychiatrists, who related incriminating statements "made by defendant in the course of the psychiatric examination."

Under § 1027 of the California Penal Code, whenever "a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists . . . to examine the defendant and investigate his sanity." Even if the defendant subsequently withdraws his insanity plea, the psychiatrists "may be called" to testify concerning their interviews with the defendant. The defendant may not invoke any privilege to prevent disclosure of the

content of such interviews. On its face this provision applies equally to affluent as well as to indigent defendants, for any defendant, interposing a defense of insanity, is subject to interviews and examinations by state-hired psychiatrists who may later be called by the State to testify as witnesses against the defendant. However, the interaction of another California rule, namely, that any communication between a defendant and a privately hired psychiatrist is privileged, see, *e. g.*, *Jones* v. *Superior Court*, 58 Cal. 2d 56, 61, 372 P. 2d 919, 922, and the California procedure under § 1027 creates a critical difference between the affluent defendant and the indigent defendant. An affluent defendant, before deciding to interpose an insanity defense, may seek the advice of a private psychiatrist and, if the defendant thereby determines that there is no basis for an insanity defense, any incriminating statements made in the course of the psychiatric examination are privileged and not admissible in evidence against the defendant. In contrast, an indigent defendant, unable to retain a private psychiatrist, must, in order to determine whether he has a basis for an insanity defense, submit to interviews with state-hired psychiatrists. If the indigent defendant then determines that there is no basis for such a defense, notwithstanding the withdrawal of that defense, any incriminating statements made in the interviews with the psychiatrists are not privileged and may be used against the defendant at his trial. An indigent defendant therefore is often in effect compelled to choose between foregoing an insanity defense and waiving his privilege against self-incrimination.

Petitioner contends that the operation of these laws effects an invidious discrimination between the affluent defendant who is able to retain a private psychiatrist and the indigent defendant who lacks funds to do so, in that the latter, but not the former, is required to surrender his constitutional privilege against self-incrimination as a

condition of ascertaining whether there is any basis for a plea of not guilty by reason of insanity.

I believe that petitioner's claim raises substantial and important questions under the Equal Protection and Due Process Clauses of the Constitution. See, *e. g., Griffin* v. *Illinois,* 351 U. S. 12; *Gideon* v. *Wainwright,* 372 U. S. 335; *Douglas* v. *California,* 372 U. S. 353; *Lane* v. *Brown,* 372 U. S. 477; *Draper* v. *Washington,* 372 U. S. 487. "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' " *Griffin* v. *Illinois, supra,* at 17. This Court should, in my view, grant the petition for a writ of certiorari to consider whether the California procedure for pleading not guilty by reason of insanity is consonant with this "central aim" of our Constitution. Accordingly, I respectfully dissent from the denial of the petition.

No. 1414, Misc. SOFOCLEOUS *v.* MARYLAND. Circuit Court of Anne Arundel County, Maryland. Certiorari denied.

No. 1201, Misc. GUST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Hayden C. Covington* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 328 F. 2d 891.

No. 1348, Misc. TOWNSEND *v.* BALKCOM, WARDEN. Petition for writ of certiorari to the Supreme Court of Georgia denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. Reported below: 219 Ga. 708, 135 S. E. 2d 399.

Rehearing Denied.

No. 157. PARDEN ET AL. *v.* TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT ET AL., *ante*, p. 184;

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No. 1144, Misc. WILLIAMS *v.* ANDERSON, JAIL SUPERINTENDENT, *ante*, p. 956. Petitions for rehearing denied.

No. 122. PALERMO *v.* UNITED STATES;

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No. 141. CARBO *v.* UNITED STATES, *ante*, p. 953. Petitions for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions.

No. 253. MARKS *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 214. Petition for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 538. G. L. CHRISTIAN & ASSOCIATES *v.* UNITED STATES, 375 U. S. 954, 376 U. S. 929. Motion for leave to file second petition for rehearing denied.

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PRICE FIXING. See **Antitrust Acts**, 3; **McGuire Act.**

PRIORITY.

Federal tax lien—State tax lien—Solvent debtor.—A State's choate tax lien against a solvent debtor takes priority over a later federal tax lien asserted under 26 U. S. C. §§ 6321 and 6322. United States v. Vermont, p. 351.

PROCEDURE. See also **Constitutional Law**, II; IV, 10; VIII; **Eleventh Amendment; Evidence; Federal Rules of Civil Procedure; Foreign Corporations; Freedom of Association; Jurisdiction**, 1–2; **Schools; Taxes**, 1; **Voters.**

1. *Supreme Court—Deciding case on the merits—Remanding to state court.*—In view of the past history, this Court decides the case on its merits rather than remanding it to the state court for that purpose, but, though this Court has power to formulate a decree for entry in the state court, the case is remanded for entry of a decree. NAACP v. Alabama, p. 288.

2. *Supreme Court—Review of judgments below.*—The Supreme Court may consider all substantial federal questions determined in

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the earlier stages of the litigation in its review of the second judgment entered in the case. Mercer v. Theriot, p. 152.

3. *Supreme Court—Review of state criminal conviction—Opportunity to present evidence of jury discrimination.*—Petitioner must be given an opportunity to offer evidence to support his claim of systematic exclusion of Negroes from juries, which would entitle him to a new trial, since the state court decided his constitutional claim on the merits, without allowing him to introduce evidence thereon. Coleman v. Alabama, p. 129.

4. *District Court—Abstention.*—Where the District Court's jurisdiction is properly invoked and the relevant state constitutional and statutory provisions are plain and unambiguous, abstention is not necessary. Davis v. Mann, p. 678.

5. *District Courts—Abstention—Doubtful issue of state law.*—District courts do not necessarily abstain when faced with a doubtful issue of state law, as abstention involves a discretionary exercise of equity power. Baggett v. Bullitt, p. 360.

6. *District Courts—Abstention—Protracted delay.*—In view of the long delay resulting from state and county resistance to the enforcement of constitutional rights here involved, District Court abstention pending state judicial resolution of the legality of conduct under the constitution and laws of Virginia is not required or appropriate. Griffin v. School Board, p. 218.

7. *District Courts—Malapportionment of election districts—Proximity of election.*—In awarding relief for malapportionment of election districts, a district court should consider the proximity of a forthcoming election and the complexities of the election laws, and should rely on general equitable principles. Reynolds v. Sims, p. 533; WMCA, Inc., v. Lomenzo, p. 633; Davis v. Mann, p. 678; Roman v. Sincock, p. 695; Lucas v. Colorado General Assembly, p. 713.

8. *District Court—State licensing requirements—Abstention.*—Abstention by District Court is not automatically required and is not warranted where not requested by either party in protracted litigation and where there is no danger that a federal decision would disrupt state licensing regulations. Hostetter v. Idlewild Liquor Corp., p. 324.

9. *State court—Procedural rule—Failure to consider claims of constitutional rights.*—Despite substantial compliance with a procedural rule, a state court's reliance on strict adherence and consequent failure to consider asserted constitutional rights, was wholly unwarranted. NAACP v. Alabama, p. 288.

PUBLIC SCHOOLS. See **Constitutional Law**, IV, 1, 10; V; **Eleventh Amendment**; **Federal Rules of Civil Procedure**; **Schools**; **Taxes**, 1.

PUNITIVE DAMAGES. See **Federal-State Relations**; **Labor Management Relations Act.**

RACIAL DISCRIMINATION. See **Constitutional Law**, IV, 1, 10; **Eleventh Amendment**; **Federal Rules of Civil Procedure**; **Procedure**, 1, 3, 6, 9; **Schools**; **Taxes**, 1.

RAILROADS. See **Constitutional Law**, I, 1; **Federal Employers' Liability Act**; **Transportation**, 1.

REAPPORTIONMENT. See **Constitutional Law**, IV, 2–9; **Legislatures**; **Procedure**, 7; **Voters.**

RELIGIOUS FREEDOM. See **Constitutional Law**, V.

REMEDIES. See **Constitutional Law**, IV, 1–10; **Procedure**, 3–8; **Securities Exchange Act**; **Voters.**

RESALE PRICE MAINTENANCE. See **McGuire Act.**

RES JUDICATA. See **Jurisdiction**, 2.

RESTRAINING ORDER. See **Jurisdiction**, 2.

RIGHT TO COUNSEL. See also **Constitutional Law**, VIII.

Criminal law—Investigations—Statement in absence of attorney.—Statement elicited by federal agents during post-indictment investigation, in absence of his attorney, deprived petitioner of right to counsel under Sixth Amendment, making statement inadmissible as evidence against him. Massiah v. United States, p. 201.

RULES. See **Federal Rules of Civil Procedure**; **Natural Gas Act.**

SALES. See **Antitrust Acts**, 3; **Constitutional Law**, I, 2; **Taxes**, 2.

SCHOOLS. See also **Constitutional Law**, IV, 1, 10; V; **Eleventh Amendment**; **Federal Rules of Civil Procedure**; **Taxes**, 1.

District Court authority—Operation of public schools—Closing of schools.—The District Court may order that county public schools not be closed to avoid the law while the State permits other public schools to remain open at taxpayers' expense. Griffin v. School Board, p. 218.

SECONDARY BOYCOTTS. See **Federal-State Relations**; **Labor Management Relations Act**; **National Labor Relations Act**, 2–3.

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SECURITIES EXCHANGE ACT.

Private suits by stockholders—Remedies available.—Private suits are permissible under § 27 of the Securities Exchange Act of 1934 for violation of § 14 (a) for both derivative and direct causes, and the federal courts will provide the requisite remedies. J. I. Case Co. v. Borak, p. 426.

SEGREGATION. See **Constitutional Law,** IV, 1, 10; **Eleventh Amendment; Federal Rules of Civil Procedure; Schools; Taxes,** 1.

SHERMAN ACT. See **Antitrust Acts,** 3.

SHIP CHARTERS. See **Maritime Commission.**

SIXTH AMENDMENT. See **Constitutional Law,** VIII; **Right to Counsel.**

SOLICITATION OF LEGAL BUSINESS. See **Constitutional Law,** VI.

SOVEREIGN IMMUNITY. See **Constitutional Law,** I, 1; **Federal Employers' Liability Act.**

STATE EMPLOYEES. See **Constitutional Law,** III, 2.

STATUTE OF LIMITATIONS. See **Insurance.**

STOCKHOLDERS. See **Securities Exchange Act.**

STRIKES. See **Federal-State Relations; Labor Management Relations Act; National Labor Relations Act,** 1–3.

TAXES. See also **Constitutional Law,** I, 2; IV, 1; **Eleventh Amendment; Federal Rules of Civil Procedure; Priority; Schools.**

1. *District Court authority—Levying taxes to operate desegregated schools.*—The District Court may require the County Supervisors to levy taxes as is done in other counties in the State for nonracial operation of the county public schools. Griffin v. School Board, p. 218.

2. *State tax on doing business—Foreign corporation—"In-state" activities.*—The bundle of corporate activities within the State afforded a proper basis for imposition of a state tax on a foreign corporation doing business there. General Motors v. Washington, p. 436.

TEACHERS. See **Constitutional Law,** III, 2.

TRADEMARKS. See **McGuire Act.**

TRANSPORTATION. See also **Constitutional Law,** I, 1; **Federal Employers' Liability Act.**

1. *Interstate commerce—Liability for damage—Perishable commodities.*—Under § 20 (11) of the Interstate Commerce Act a carrier, while not an absolute insurer, is liable for damages to perishable and nonperishable commodities, other than livestock, while in its possession, unless caused by an act of God, a public enemy, the shipper, public authority, or the inherent vice or nature of the goods. Missouri P. R. Co. v. Elmore & Stahl, p. 134.

2. *Motor carriers—Backhauling—Exempt private carriage.*—Section 203 (c) of the Interstate Commerce Act does not prohibit all backhauling, and where the backhaul furthers the carrier's primary general merchandise business it is exempt private carriage. Red Ball Motor Freight v. Shannon, p. 311.

TRANSPORTATION ACT. See **Interstate Commerce Commission.**

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TWENTY-FIRST AMENDMENT. See **Constitutional Law,** I, 3; IX; **Procedure,** 8.

UNIONS. See **Constitutional Law,** VI; **Federal-State Relations; Labor; Labor Management Relations Act; National Labor Relations Act.**

VAGUENESS. See **Constitutional Law,** III, 2.

VENUE. See also **Natural Gas Act.**

Where company "is located or has its principal place of business"—State of incorporation—Dismissal for lack of venue.—The term "is located" in § 19 (b) of the Natural Gas Act refers, in the case of a corporation, to the State of its incorporation, and the Court of Appeals should have dismissed the petition for lack of venue where natural gas corporation brought an action seeking review of Federal Power Commission order in a circuit other than where it was incorporated. Federal Power Comm'n v. Texaco, p. 33.

VESSELS. See **Maritime Commission.**

VIRGINIA. See **Constitutional Law,** IV, 1–2, 4–5; VI; **Eleventh Amendment; Federal Rules of Civil Procedure; Procedure,** 4, 6–7; **Schools; Taxes,** 1.

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State or federal election—Unequal apportionment.—The right of suffrage is denied by dilution of a citizen's vote in a state or federal election. Reynolds v. Sims, p. 533.

WAIVER. See **Constitutional Law**, I, 1; **Federal Employers' Liability Act.**

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WITNESSES.

Antitrust Immunity Act—Immunity from prosecution—Testimony before congressional subcommittee.—Act of February 25, 1903, as amended, did not immunize from prosecution a witness who testified before a congressional subcommittee, since the Act confines immunity to those who testify in judicial proceedings under oath and in response to a subpoena. United States v. Welden, p. 95.

WORDS.

1. *"Individual employed by any person."*—§ 8 (b) (4) (1), National Labor Relations Act, as amended, 29 U. S. C. (Supp. IV) § 158 (b) (4) (i). Labor Board v. Servette, p. 46.

2. *"Is located."*—§ 19 (b), Natural Gas Act, 15 U. S. C. § 717r (b). Federal Power Comm'n v. Texaco, p. 33.

3. *"Other than picketing."*—§ 8 (b) (4) (ii), National Labor Relations Act, as amended, 29 U. S. C. (Supp. IV) § 158 (b) (4) (ii). Labor Board v. Fruit Packers, p. 58.

4. *"Threaten, coerce, or restrain."*—§ 8 (b) (4) (ii), National Labor Relations Act, as amended, 29 U. S. C. (Supp. IV) § 158 (b) (4) (ii). Labor Board v. Servette, p. 46.

5. *"Within the scope, and in furtherance, of a primary business enterprise."*—§ 203 (c), Interstate Commerce Act, 49 U. S. C. § 303 (c). Red Ball Motor Freight v. Shannon, p. 311.

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