U.S. Supreme Court

UNITED STATES REPORTS

VOLUME 402

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1970

APRIL 15 THROUGH JUNE 4, 1971

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1972

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price $7.25 (Buckram)

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.

RETIRED

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

OFFICERS OF THE COURT

JOHN N. MITCHELL, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
E. ROBERT SEAVER, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., 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, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, Thurgood Marshall, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

June 9, 1970.

(For next previous allotment, see 396 U. S., p. iv.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1964 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

	Page
Abodeely *v.* Iowa	936
Adams; Associated Press *v.*	901
Adcox *v.* California	977
Adler *v.* United States	944
Aero Engineering Corp. *v.* Labor Board	974
Aetna Life Insurance Co. *v.* Lester	909
Affiliated Ute Citizens of Utah *v.* United States	905
Aguirre *v.* California	923
Air Traffic Controllers Organization *v.* United States	915
Airwick Industries *v.* Carlstadt Sewerage Authority	967
Alabama; Sparks *v.*	909
Alameda Conservation Assn.; Leslie Salt Co. *v.*	908
Alaska; Delahay *v.*	901
Alexander *v.* Michigan Parole Board	980
Alexander *v.* Pasadena City Board of Education	943
Alexander *v.* Perini	914
Alexander *v.* Swank	1007
Allen; Board of Public Instruction of Broward County *v.*	952
Allen *v.* Tennessee	975
Allen *v.* VanCantfort	1008
Allied Chemical Workers *v.* Pittsburgh Plate Glass Co.	993, 1007
Almendarez *v.* Texas	974
Alonzo *v.* United States	1009
Amalgamated. For labor union, see name of trade.	
American Electric, Inc. *v.* Oldenkott	975
American Export Industries *v.* Fluor Corp	945

	Page
Amity Fabrics, Inc. *v.* United States	974
A. M. Kidder & Co.; Clement A. Evans & Co. *v.*	988
Anderson *v.* California	1011
Anderson; Fanale *v.*	966
Anderson *v.* Kentucky	993
Andrews *v.* United States	995
Ardle *v.* United States	947
Argersinger *v.* Hamlin	928
Arizona; Holmes *v.*	971
Arizona; Reynolds *v.*	910
Arizona Highway Dept.; Perez *v.*	637
Arkansas; Mississippi *v.*	926, 939
Armed Forces Induction Center at Houston; Steiner *v.*	1009
Armour & Co.; United States *v.*	673
Armstrong Equipment Co. *v.* Clark Equipment Co	909
Arriaga *v.* California	975
Ashmore; Porter *v.*	981
Associated Press *v.* Adams	901
Association. For labor union, see name of trade.	
Astrup *v.* Immigration and Naturalization Service	509
Atkins; Schmutz Mfg. Co. *v.*	932
Atlanta District Attorney; Hughes *v.*	914
Atlantic Coast Line R. Co. *v.* United States	975
Atlas Engine Works *v.* Labor Board	909
Attorney General; Gooch *v.*	995
Attorney General; Schoop *v.*	988
Attorney General; Sostre *v.*	911
Attorney General of Georgia *v.* Doe	936
Attorney General of Georgia; Doe *v.*	941
Attorney General of Pennsylvania; Kontos *v.*	975
Auburndale Freezer Corp.; Steelworkers *v.*	1013
Austin *v.* United States	1012
Babbitz; McCann *v.*	903
Bagel Bakers Council of Greater New York *v.* Labor Board	908
Balc *v.* Parsons	990
Balistrieri *v.* United States	953
Banco Nacional de Cuba; First National City Bank *v.*	940
Bankers Life & Casualty Co.; Supt. of Ins. of N. Y. *v.*	993
Banks *v.* United States	984
Barnett *v.* Illinois	929
Barney *v.* United States	989
Barresi; McDaniel *v.*	39
Bartlett; Boston & Providence Railroad Develop. Group *v.*	989

Page
Bass; United States *v*. 927
Batten; Edgerton *v*. 981
Baum *v*. United States. 907
Bay County Board of Public Instruction *v*. Youngblood. 943
Bean *v*. Illinois. 1009
Becker *v*. Nebraska. 981
Bell *v*. Burson. 535
Bellamy *v*. United States. 929
Bellefontaine; Foreman *v*. 901, 1013
Bender *v*. United States. 982
Benedict *v*. Peoria County. 929
Benjamin; Vernitron Corp. *v*. 987
Benoit *v*. United States. 990
Berend *v*. J. F. Pritchard & Co. 990
Bergenthal *v*. Wisconsin. 972
Bering *v*. Commissioner. 974
Berzanskis *v*. Daley. 999
Beto *v*. Marion. 906
Beverly *v*. Scotland Urban Enterprises. 936, 954, 960
Beverly Hills National Bank; Cia. de Nav. Almirante *v*. . . . 996
Bigsby *v*. United States. 986
Birns *v*. Perini. 950
Bissett-Berman Corp.; Dekar Industries, Inc. *v*. 904, 945
Black *v*. Russell. 947
Black *v*. United States. 975
Blackwell; Singal *v*. 924
Blackwell; Theriault *v*. 953
Blanche Ely P. T. A. *v*. Bd. of Pub. Instr. of Broward County. 952
Blanton *v*. Smith. 910
Blassick *v*. United States. 985
Blassingame *v*. United States. 945
Blonder-Tongue Laboratories *v*. Univ. of Ill. Foundation. 313
Bloss *v*. Michigan. 938
Blue Diamond Coal Co.; Mine Workers *v*. 930
B–M–G Investment Co.; Continental/Moss-Gordin *v*. 989
Boag *v*. Craven. 998
Board of Education of Chicago *v*. King. 908
Board of Education of Little Rock School District *v*. Clark. . 952
Board of Elections for the District of Columbia; Hobson *v*. . 988
Board of Jr. College Dist.; Cook County Teachers *v*. 998
Board of Pub. Instr. of Bay County *v*. Youngblood. 943
Board of Pub. Instr. of Broward County *v*. Allen. 952
Board of Pub. Instr. of Broward County; Ely P. T. A. *v*. . . . 952

Page
Board of Pub. Instr. of Manatee County *v.* Harvest..... 943
Board of Pub. Instr. of Pinellas County *v.* Bradley..... 943
Board of School Comm'rs of Mobile County; Davis *v*..... 33
Boddie; Wyman *v*..... 991
Boilermakers *v.* Hardeman..... 967
Bolettieri *v.* United States..... 945
Bolton *v.* Doe..... 936
Bolton; Doe *v*..... 941
Booker *v.* Tennessee..... 996
Book Mart *v.* Foster..... 941
Booth *v.* Warden..... 909
Borman *v.* United States..... 913
Bostic *v.* United States..... 547
Boston & Providence Railroad Development Group *v.* Bartlett. 989
Bourbeau *v.* Lancaster..... 954, 960, 964
Bournett *v.* Twomey..... 913
Bowen *v.* Kropp..... 947
Bradley; Board of Public Instr. of Pinellas County *v*..... 943
Brady *v.* Ohio..... 989
Brantley; Smith *v*..... 975
Branzburg *v.* Hayes..... 942
Braxton *v.* Perini..... 931
Brierley; Brown *v*..... 997
Brierley; Ray *v*..... 1008
Britt *v.* Tennessee..... 946
Brocato *v.* United States..... 1010
Brooks *v.* Brown..... 971
Broom *v.* Texas..... 933
Brossard *v.* United States..... 981
Brotherhood. For labor union, see name of trade.
Broward County Bd. of Pub. Instr. *v.* Allen..... 952
Broward County Bd. of Pub. Instr.; Blanche Ely P. T. A. *v*.. 952
Brown *v.* Brierley..... 997
Brown; Brooks *v*..... 971
Brown *v.* Buchkoe..... 904
Brown *v.* Hendrick..... 976
Brown *v.* LaVallee..... 990
Brown *v.* Peterson..... 948
Brown *v.* United States..... 907
Bryan; Edwards *v*..... 915
Bryant *v.* United States..... 932, 1013
Bucci Detective Agency; Smith *v*..... 977
Buchkoe; Brown *v*..... 904

Page
Buchkoe; Winegar *v*. 975
Burke *v*. Erickson 1011
Burke *v*. Hahn 933
Burns; LaVallee *v*. 1012
Burson; Bell *v*. 535
Burton *v*. New York 991
Burwell *v*. Cardwell 933
Bustos *v*. California 910, 1013
Byers; California *v*. 424
Cady; Driver *v*. 996
Cady; Humphrey *v*. 927
Cady; Morales *v*. 931, 1013
Cahn *v*. United States 944
Cain *v*. United States 905
Calarco *v*. United States 934
Caldwell *v*. Craighead 953
Caldwell; United States *v*. 942
California; Adcox *v*. 977
California; Aguirre *v*. 923
California; Anderson *v*. 1011
California; Arriaga *v*. 975
California; Bustos *v*. 910, 1013
Cailfornia *v*. Byers 424
California; Castillo *v*. 984
California; Chambers *v*. 999
California; Chatfield *v*. 951
California; Davis *v*. 932, 986
California; De La Rosa *v*. 946
California; Donovan *v*. 983
California; Groze *v*. 952
California; Harrington *v*. 923
California; Howell *v*. 932
California; Jordan *v*. 913
California; Locklear *v*. 984
California; Mason *v*. 913
California; McGautha *v*. 183
California; Nichols *v*. 910
California; Peterson *v*. 948
California; Raguse *v*. 976
California; Ramos *v*. 977
California; Reyes *v*. 1010
California; Sandoval *v*. 909
California; Teran *v*. 981

Page

California; Verdugo *v*. 985
California; Zitzer *v*. 984
California Adult Authority; Davis *v*. 928
California Dept. of Human Resources Development *v*. Java. . 121
California Motor Transport Co. *v*. Trucking Unlimited. 1008
California Superior Court; Eldon Industries *v*. 995
Campbell *v*. Florida. 936
Campbell; Perez *v*. 637
Campbell *v*. United States. 975
Canel Lodge No. 700 *v*. United Aircraft Corp. 908
Cantrell *v*. Gaffney. 923
Cantrell *v*. Kansas. 924
Capobianco; Laird *v*. 969
Cardwell; Burwell *v*. 933
Cardwell; Scott *v*. 911
Carlstadt Sewerage Authority; Airwick Industries *v*. 967
Carpenter *v*. United States. 1008
Carrizoza-Islas *v*. United States. 931
Carter; Kaufman *v*. 954, 960, 964
Carter *v*. Miller. 972
Carter *v*. Stanton. 994
Carter *v*. United States. 912
Cascade Car Wash *v*. Cascade Car Wash. 1009
Cascade Car Wash *v*. Laurent Watch Co. 1009
Castillo *v*. California. 984
Castro *v*. United States. 977
Cataldo *v*. United States. 934
C. Buck LeCraw & Co.; Meltzer *v*. 954
Central Baptist Church of Miami; Diffenderfer *v*. 903, 970
Certain Space in Chimes Building *v*. United States. 908
Chacon *v*. Nelson. 941, 1013
Chambers *v*. California. 999
Chambers *v*. United States. 944
Chandler; Tracy *v*. 997
Chapman *v*. Collins. 931
Chapman *v*. United States. 912
Charles River Civic Television *v*. Federal Com. Comm'n. . . . 1007
Charlotte-Mecklenburg Board of Education; Moore *v*. 47
Charlotte-Mecklenburg Board of Education *v*. Swann. 1
Charlotte-Mecklenburg Board of Education; Swann *v*. 1
Chas. Pfizer & Co.; United States *v*. 942
Chatfield *v*. California. 951
Chemical Cleaning, Inc. *v*. Dow Chemical Co. 945
Cherry; United States *v*. 971

	Page
Chesapeake & Ohio R. Co.; Koserkoff *v*	934
Chevron Oil Co. *v.* Huson	942
Chicago; Greene *v*	996
Chicago; Lynd *v*	923
Chicago Board of Education *v.* King	908
Chicago, B. & Q. R. Co.; Chicago, R. I. & P. R. Co. *v*	996
Chicago Great Western R. Co.; Noe *v*	1009
Chicago Housing Authority *v.* Gautreaux	922
Chicago in Trust for Use of Schools; National Bank *v*	908
Chicago Joint Board *v.* Chicago Tribune Co	973
Chicago & N. W. R. Co. *v.* Transportation Union	570
Chicago, R. I. & P. R. Co. *v.* Chicago, B. & Q. R. Co	996
Chicago, R. I. & P. R. Co. *v.* National Mediation Board	944
Chicago Tribune Co.; Clothing Workers *v*	973
Chief Judge, U. S. Court of Appeals; Brooks *v*	971
Chien Woo; Rosenberg *v*	49
Chimes Bldg. *v.* United States	908
Chipley, *In re*	1005
Chropowicki *v.* Lee	935
Ciccone; Harper *v*	911
Cimino *v.* Illinois	932
Cincinnati; Coates *v*	611
Cincinnati Board of Education; Deal *v*	962
Circuit Court of Hillsborough; Hill *v*	910
City. See also name of city.	
City Rent and Rehabilitation Adm. of N. Y.; Davenport *v*	934
Clairol, Inc. *v.* Director of Division of Taxation	902
Clark; Board of Education of Little Rock School District *v.*	952
Clark *v.* Ellenbogen	935
Clark Equipment Co.; Armstrong Equipment Co. *v*	909
Clement A. Evans & Co. *v.* A. M. Kidder & Co	988
Clermont *v.* United States	997
Clothing Workers *v.* Chicago Tribune Co	973
Clowes; Eldon Industries *v*	995
Coakley *v.* Reising	906
Coates *v.* Cincinnati	611
Cobb *v.* United States	937
Cochran *v.* United States	939
Col-An Entertainment Corp. *v.* Harper	941
Colby *v.* Kropp	931
Collins; Chapman *v*	931
Colon *v.* New York	905
Colson *v.* Morton	990
Commissioner; Bering *v*	974

Page
Commissioner; Rose *v*. 907
Commissioner of Education of New York *v*. Lee. 935
Commissioner of Internal Revenue. See Commissioner. 907
Commissioner of Pub. Welfare of Mass.; ITT Lamp Div. *v*. . 933
Commissioner of Revenue of New Mexico; EVCO *v*. 969
Commissioner of Social Services of New York *v*. Boddie. . . . 991
Commissioner of Social Services of New York *v*. Rosado. . . . 991
Commonwealth. See name of Commonwealth.
Compania de Nav. Almirante *v*. Beverly Hills Nat. Bank. . . . 996
Connecticut; Duffen *v*. 914
Connecticut; Oliver *v*. 946
Connor *v*. Johnson. 690
Connor; Picard *v*. 942, 993
Consolidated Carriers Corp. *v*. United States. 901, 1013
Consolidation Coal Co. *v*. South-East Coal Co. 983
Construction & Gen. Laborers' Union *v*. Jordan Co. 905
Conte; Murphy *v*. 910
Continental Casualty Co.; Mather Construction Co. *v*. 907
Continental/Moss-Gordin *v*. B-M-G Investment Co. 989
Cook *v*. United States Steel Corp. 987
Cook County College Teachers *v*. Bd. of Jr. College Dist. 998
Cook County School District 151 *v*. United States. 943
Cookmeyer *v*. Louisiana Dept. of Highways. 1005
Corbett *v*. Dade County School Board. 953
Corcino *v*. Government of the Virgin Islands. 976
Corrado *v*. Providence Redevelopment Agency. 947
Corrections Commissioner. See name of Commissioner.
Cortese; Epps *v*. 994
Costen *v*. Hirschbach Motor Line. 909
Cothran *v*. San Jose Water Works. 975
County. See name of county.
Court of Appeals. See U. S. Court of Appeals.
Cox *v*. May. 948
Cox *v*. Pennington. 948
Cox Enterprises; Southland Inc. *v*. 990
Craighead; Caldwell *v*. 953
Crampton *v*. Ohio. 183
Craven; Boag *v*. 998
Craven; Howard *v*. 966
Craven; Molina *v*. 980
Craven; Schlette *v*. 998
Creamer; Kontos *v*. 975
Crisp *v*. United States. 947

Page
Daddano *v.* United States 905
Dade County School Board; Corbett *v.* 953
Dade County School Board *v.* Pate 953
Daley; Berzanskis *v.* 999
Danaher; Fried *v.* 902
Daniels *v.* United States 951
Daut *v.* United States 945
Davenport *v.* City Rent and Rehabilitation Adm. of N. Y. . 934
Davenport *v.* United States 973
David *v.* United States 983
Davidson; Parisi *v.* 942
Davis *v.* Board of School Comm'rs of Mobile County 33
Davis *v.* California 932, 986
Davis *v.* California Adult Authority 928
Davis *v.* Gaffney 947
Davis *v.* Members of Selective Service Bd. No. 30 999
Davis; Pennsylvania *v.* 999
Davis *v.* Pope 1008
Deal *v.* Cincinnati Board of Education 962
Dean *v.* United States 937
Decker *v.* United States 937
Dekar Industries, Inc. *v.* Bissett-Berman Corp 904, 945
Delahay *v.* Alaska 901
De La Rosa *v.* California 946
DeLegge *v.* United States 905
DeLutro *v.* United States 983
Deming *v.* United States 949
Democratic Organization of Cook County *v.* Shakman 909
Department of Labor and Industries; G & M Empl. Serv. *v.* . 968
Department of Public Aid of Illinois; Alexander *v.* 1007
Department of Public Aid of Illinois; Townsend *v.* 1007
DeSapio *v.* United States 928, 999
DeStafano *v.* United States 972
DeVore *v.* United States 950
Dewey *v.* Reynolds Metals Co 689, 904
Diamond; Homart Development Co. *v.* 988
Diffenderfer *v.* Central Baptist Church of Miami 903, 970
Dill *v.* Greyhound Corp 952
Dillon *v.* United States 982
DiLorenzo *v.* United States 950
DiPiazza *v.* United States 949
Director of Division of Taxation; Clairol, Inc. *v.* 902
Director of Immigration. See Immigration Director.

Page

Director of Internal Revenue. See Commissioner.
Director of penal or correctional institution. See name of director.
District Attorney for Atlanta; Hughes *v*. 914
District Attorney of Dallas County; Roe *v*. 941
District Attorney of Milwaukee County *v*. Babbitz. 903
District Court in and for County of Eagle; United States *v*. . 940
District Court in and for Water Div. No. 5; United States *v*. 940
District Court of Montgomery County; Wright *v*. 990
District Director of Immigration. See Immigration Director.
District 50, Mine Workers; Mine Workers *v*. 906
District Judge. See U. S. District Judge.
District of Columbia Board of Elections; Hobson *v*. 988
Dixon *v*. Gordon. 928
Doe *v*. Bolton. 941
Doe; Bolton *v*. 936
Doe; Unborn Child of Doe *v*. 936
Donohue *v*. United States. 949
Donovan *v*. California. 983
Donovan *v*. United States. 1005
Dorr *v*. Illinois. 929
Dow Chemical Co.; Chemical Cleaning, Inc. *v*. 945
Doyle *v*. Koelbl. 908
Drew *v*. United States. 977
Driver *v*. Cady. 996
Drobnick *v*. Foss Park District. 907, 1013
Drotar *v*. United States. 939
Drown *v*. Portsmouth School District. 972
Dudley *v*. Illinois. 910
Duffen *v*. Connecticut. 914
Dunn *v*. New York. 996
Dutton; Jackson *v*. 947
Eagle County District Court; United States *v*. 940
Eason *v*. United States. 984
Eastern Airlines; Hartford Accident & Indemnity Co. *v*. 1009
Eaton *v*. United States. 931
Ebbs *v*. New York. 1011
Eckels *v*. Ross. 953
Ector *v*. Smith. 997
Edgerton *v*. Batten. 981
Edmondson *v*. United States. 931
Edwards *v*. Bryan. 915
Edwards *v*. Selective Service Local Board No. 111. 952
Edwards *v*. United States. 1012
Ehlert *v*. United States. 99

Page
Eisenberg *v.* Wisconsin 987
Eisenhardt *v.* United States 928, 1005
Elbel *v.* United States 929
Eldon Industries *v.* Clowes 995
Eldon Industries *v.* Superior Court of California 995
Electrical Workers *v.* Labor Board 906
Ellenbogen; Clark *v.* 935
Ellis; State National Bank of Alabama *v.* 973
El Ranco, Inc. *v.* First National Bank of Nevada 906
Elvin *v.* United States 995
Emmons *v.* Taylor 990
Enty *v.* Pennsylvania 913
Epps *v.* Cortese 994
Erickson; Burke *v.* 1011
Escalante *v.* Zirpoli 981
Escobedo *v.* United States 951
Ethicon, Inc. *v.* Handgards, Inc. 929
Eubank *v.* Illinois 972
Euclid; Palmer *v.* 544
Evans *v.* United States 987, 1010
Evans & Co. *v.* A. M. Kidder & Co. 988
EVCO *v.* Jones 969
EVCO Instructional Designs *v.* Jones 969
Fairbanks; Fairview Development, Inc. *v.* 901
Fairview Development, Inc. *v.* Fairbanks 901
Fallon *v.* Waggonner 941
Fanale *v.* Anderson 966
Farkas *v.* Texas Instruments, Inc. 990
Farr *v.* United States 947
Fauls *v.* United States 1011
Federal Com. Comm'n; Charles River Civic Television *v.* 1007
Federal Com. Comm'n; Greater Boston Television Corp. *v.* 1007
Federal Com. Comm'n; WHDH, Inc. *v.* 1007
Federal National Mortgage Assn.; McMillan *v.* 936
Federal Power Comm'n *v.* Florida Power Corp. 515
Federal Power Comm'n *v.* Florida Power & Light Co. 1007
Federman & Co. *v.* Zerbel 902
Ferguson *v.* Mancusi 1011
Ferree *v.* Frye 1011
Ferrone *v.* United States 1008
Fiduciary Counsel, Inc. *v.* Hodgson 973
Field; Ney *v.* 904, 1005
Fincke *v.* United States 995
Fiore *v.* United States 973

Page
First National Bank of Nevada; El Ranco, Inc. *v*..... 906
First National Bank of Waukegan *v*. Foss Park District.. 907, 1013
First National City Bank *v*. Banco Nacional de Cuba..... 940
Fitzsimmons *v*. Perini..... 910
Flesch *v*. United States..... 982
Flintkote Co. *v*. United States..... 944
Florida; Campbell *v*..... 936
Florida; Goodale *v*..... 998
Florida; Griffith *v*..... 932
Florida; Koran *v*..... 948, 949
Florida; Lay *v*..... 910
Florida; Papa *v*..... 996
Florida Power Corp.; Federal Power Comm'n *v*..... 515
Florida Power Corp.; Gainesville Utilities Dept. *v*..... 515
Florida Power & Light Co.; Federal Power Comm'n *v*..... 1007
Florida State Board of Dentistry *v*. Mack..... 925
Fluor Corp.; American Export Industries *v*..... 945
Fognini *v*. Illinois..... 911
Follette; Provenzano *v*..... 949
Follette; Randazzo *v*..... 984
Follette; Reynolds *v*..... 981
Follette; Wilson *v*..... 997
Foreman *v*. Bellefontaine..... 901, 1013
Fort Worth Independent School District; Passel *v*..... 968
Foss Park District; Drobnick *v*..... 907, 1013
Foster; Book Mart *v*..... 941
Foster; Mitchum *v*..... 941
Franco *v*. Stein Steel & Supply Co..... 973
Franco *v*. United States..... 915
Frank *v*. United States..... 974
Franke *v*. United States..... 943
Franzese *v*. United States..... 995
Frederick *v*. Schwartz..... 937, 954
Fried *v*. Danaher..... 902
Frizer *v*. McMann..... 1010
Frye; Ferree *v*..... 1011
Fuhrman *v*. United States Steel Corp..... 987
Fukumoto *v*. United States..... 977
Gaffney; Cantrell *v*..... 923
Gaffney; Davis *v*..... 947
Gaffney; Hacker *v*..... 914
Gaffney; Hoy *v*..... 1011
Gaffney; Wood *v*..... 1010
Gaines *v*. United States..... 1006

Page
Gainesville Utilities Dept. *v.* Florida Power Corp..... 515
Gaito *v.* Pennsylvania..... 946
Gallagher *v.* United States..... 1009
Ganci *v.* New York..... 924
Garcia *v.* United States..... 925
Garland, *In re*..... 954, 960, 966
Gautreaux; Chicago Housing Authority *v*..... 922
Gaylord *v.* Wolke..... 976
Gehring; Maras *v*..... 925
General Motors Corp.; Washington *v*..... 940
General Radio Co. *v.* Kepco, Inc..... 1008
Georgia; Gornto *v*..... 933
Georgia; Spencer *v*..... 991
Georgia Attorney General *v.* Doe..... 936
Georgia Attorney General; Doe *v*..... 941
Georgia Dept. of Public Safety; Bell *v*..... 535
Georgian Hall Motor Lodge *v.* Gordon..... 907
Gerstein *v.* Maryland..... 1009
Giannatti *v.* Los Angeles County..... 992
Gibbons; Sloatman *v*..... 939, 954
Gibson *v.* New York..... 951
Gill *v.* United States..... 1011
Gillespie *v.* United States..... 938
Gilmer; Williamson *v*..... 993
Gilyard *v.* Illinois..... 911
Ginsburg *v.* Richardson..... 976
Glorioso *v.* Maryland..... 972
Glucksman *v.* United States..... 929
G & M Employment Service *v.* Dept. of Labor & Industries.. 968
Goldwyn Productions *v.* Mulvey..... 923
Gonzalez-Parra *v.* United States..... 1010
Gooch *v.* Mitchell..... 995
Goodale *v.* Florida..... 998
Goodwin; Leighty *v*..... 932
Goodyear Tire & Rubber Co.; Sinatra *v*..... 906
Gordon; Dixon *v*..... 928
Gordon; Georgian Hall Motor Lodge *v*..... 907
Gordon; Messick *v*..... 907
Gornto *v.* Georgia..... 933
Gould *v.* Zelker..... 930
Government of the Virgin Islands; Corcino *v*..... 976
Graham *v.* United States..... 938
Granger *v.* Mentor..... 907
Granite Falls State Bank *v.* Schneider..... 1006

419-882 O - 72 - 2

Page
Gray *v.* Pennsylvania 967
Gray; Swanney-McDonald, Inc. *v.* 995
Greater Boston Television Corp. *v.* Federal Com. Comm'n.. 1007
Greater Buffalo Press; United States *v.* 549
Green *v.* Michigan 1010
Greene *v.* Chicago 996
Greene *v.* Maxwell 951
Greyhound Corp.; Dill *v.* 952
Griffith *v.* Florida 932
Griffin *v.* United States 970
Grijalva *v.* United States 1012
Grimes *v.* United States 989
Group Life & Health Insurance Co. *v.* United States 944
Groze *v.* California 952
Guitian *v.* United States 985
Gulf Finance Corp.; Streule *v.* 975
Gwynn *v.* United States 1011
Hacker *v.* Gaffney 914
Haggett *v.* United States 946
Hahn; Burke *v.* 933
Hairston *v.* Illinois 972
Haldane *v.* Ruppe 906
Hale *v.* United States 976
Halpern *v.* Zelker 932
Hamilton *v.* United States 985
Hamlin; Argersinger *v.* 928
Handgards, Inc.; Ethicon, Inc. *v.* 929
Hanon *v.* United States 952
Hardeman; Boilermakers *v.* 967
Hardin; Nor-Am Agricultural Products *v.* 935
Harflinger *v.* United States 973
Hargrove *v.* Rundle 912
Harper *v.* Ciccone 911
Harper; Col-An Entertainment Corp. *v.* 941
Harrington *v.* California 923
Harris *v.* LaFave 904
Harris *v.* Texas 940
Harris *v.* United States 981, 986
Hartford Accident & Indemnity Co. *v.* Eastern Airlines 1009
Hartzell Propeller Fan Co. *v.* Labor Board 945
Harvest; Board of Public Instruction of Manatee County *v.* . 943
Haslam *v.* United States 912, 976
Hathorne *v.* Texas 914
Hayes; Branzburg *v.* 942

Page
Haymarket Co-operative Bank; Pace *v*. 945
Haynes; Tippett *v*. 998
Haynes; Wade *v*. 997
Healy *v*. Illinois. 905
Heine *v*. Raus. 914
Heir of Pakarinen; Hietala *v*. 903
Hendrick; Brown *v*. 976
Hepler *v*. United States. 911
Hernandez *v*. United States. 976
Hickman *v*. United States. 965, 966
Hicks *v*. North Carolina. 913
Hietala *v*. Heir of Pakarinen. 903
Hill *v*. Circuit Court of Hillsborough. 910
Hillsborough Circuit Court; Hill *v*. 910
Hingle *v*. Perez. 929
Hirschbach Motor Line; Costen *v*. 909
H. L. Federman & Co. *v*. Zerbel. 902
Hobson *v*. Board of Elections for the District of Columbia. . 988
Hodgson; Fiduciary Counsel, Inc. *v*. 973
Hodgson; Klages Coal & Ice Co. *v*. 973
Hodgson *v*. Minnesota. 968
Hodgson *v*. Randall. 967
Hodgson; Royal Crown Bottling Co. *v*. 973
Hoffa *v*. United States. 988
Hohensee *v*. Scientific Living, Inc. 1012
Holman *v*. United States. 913
Holmes *v*. Arizona. 971
Holmes; United States *v*. 969
Homart Development Co. *v*. Diamond. 988
Hortencio *v*. Whitehead. 966
Hoskins *v*. United States. 943
Howard *v*. Craven. 966
Howard Mfg. Co. *v*. Labor Board. 930
Howell *v*. California. 932
Hoy *v*. Gaffney. 1011
Hoyel *v*. Jackson. 946
Hsu *v*. United States. 982
Hubbard *v*. Kiefel. 930
Hudson *v*. United States. 965
Hughes *v*. District Attorney for Atlanta. 914
Humble Oil & Refining Co.; Patterson *v*. 924
Humble Oil & Refining Co. *v*. Price. 934
Humphrey *v*. Cady. 927
Huson; Chevron Oil Co. *v*. 942

Page

Iachino *v.* United States 976
Iannone *v.* Maryland 973
Idaho; Polson *v.* 930
Illinois; Barnett *v.* 929
Illinois; Bean *v.* 1009
Illinois; Cimino *v.* 932
Illinois; Dorr *v.* 929
Illinois; Dudley *v.* 910
Illinois; Eubank *v.* 972
Illinois; Fognini *v.* 911
Illinois; Gilyard *v.* 911
Illinois; Hairston *v.* 972
Illinois; Healy *v.* 905
Illinois; Johnson *v.* 976
Illinois; Kirby *v.* 995
Illinois; Landgham *v.* 911
Illinois; Ligue *v.* 911
Illinois *v.* Milwaukee 940
Illinois; Mitchell *v.* 1010
Illinois; Nemke *v.* 924
Illinois; Palmer *v.* 931
Illinois; Pardo *v.* 992
Illinois; Price *v.* 902
Illinois; Rush *v.* 911
Illinois; Smith *v.* 945, 1009, 1011
Illinois; Stovall *v.* 997
Illinois; Swartz *v.* 911
Illinois; Thomas *v.* 996
Illinois Central R. Co.; Transportation Union *v.* 915
Illinois Dept. of Public Aid; Alexander *v.* 1007
Illinois Dept. of Public Aid; Townsend *v.* 1007
Immigration and Naturalization Service. See also Immigration Director.
Immigration and Naturalization Service; Astrup *v.* 509
Immigration and Naturalization Service; Li *v.* 947
Immigration Director *v.* Yee Chien Woo 49
Indiana; Maxwell *v.* 930
Indiana; Stallings *v.* 997
In re. See name of party.
Interboro Contractors *v.* Labor Board 915
Internal Revenue Service. See Commissioner.
International. For labor union, see name of trade.
International Metal Specialties *v.* Labor Board 907
International Minerals & Chemical Corp.; United States *v.* .. 558

Page
International Telephone & Telegraph Corp. *v.* Minter..... 933
Iowa; Abodeely *v*..... 936
Iozzi *v.* United States..... 943
Ippolito *v.* United States..... 953
ITT Lamp Division *v.* Minter..... 933
Jack *v.* United States..... 933
Jack & Jill Stores; Labor Board *v*..... 928
Jackson *v.* Dutton..... 947
Jackson; Hoyel *v*..... 946
Jackson *v.* Warden..... 992
Jackson County; Keene *v*..... 995
Jackson Municipal Separate School District *v.* Singleton..... 944
Jacobs *v.* United States..... 924, 950
James *v.* Valtierra..... 137
Jamieson; Tate *v*..... 974
Java; California Dept. of Human Resources Development *v*.. 121
Jewett *v.* United States..... 947
J. F. Pritchard & Co.; Berend *v*..... 990
Jiminez-Lopez *v.* United States..... 1010
John A. Zerbel & Co.; H. L. Federman & Co. *v*..... 902
Johnson; Connor *v*..... 690
Johnson *v.* Illinois..... 976
Joiner; Freeman *v*..... 1005
Jones; EVCO *v*..... 969
Jones *v.* Patuxent Institution Director..... 998
Jones *v.* United States..... 950, 985
Jordan *v.* California..... 913
Jordan Co.; Construction & Gen. Laborers' Union *v*..... 905
Kansas; Cantrell *v*..... 924
Karnes *v.* United States..... 1008
Kastigar *v.* United States..... 971
Kaufman *v.* Carter..... 954, 960, 964
Keefe; Organization for a Better Austin *v*..... 415
Kee Ming Hsu *v.* United States..... 982
Keene *v.* Jackson County..... 995
Keith *v.* United States..... 985
Kelm *v.* Patterson..... 934
Kember *v.* United States..... 923
Kentucky; Anderson *v*..... 993
Kepco, Inc.; General Radio Co. *v*..... 1008
Kerr *v.* Ohio..... 970
Kerr *v.* State Public Welfare Comm'n..... 950
Keyes *v.* School District No. 1..... 182
Kidder & Co.; Clement A. Evans & Co. *v*..... 988

Page
Kiefel; Hubbard *v*. 930
Kimball *v*. United States 996
King; Board of Education of Chicago *v*. 908
King *v*. North Carolina 998
King *v*. United States 976
Kirby *v*. Illinois 995
Kirkland *v*. Protective Com. of TMT Trailer Ferry 907
Kitchens *v*. McCulloch 931
Klages Coal & Ice Co. *v*. Hodgson 973
Klein *v*. New York 975
Klein *v*. United States 944
Kleppe; Silk *v*. 1012
Knight *v*. United States 976
Koelbl; Doyle *v*. 908
Kohl *v*. Perini 941
Kollar *v*. Tucson 967
Kontos *v*. Creamer 975
Koran *v*. Florida 948, 949
Koran *v*. United States 948
Koserkoff *v*. Chesapeake & Ohio R. Co. 934
Kostamo *v*. Northern City National Bank 902, 1013
Kroll *v*. United States 944
Kropp; Bowen *v*. 947
Kropp; Colby *v*. 931
Kuebel; Schilb *v*. 928
Kuhn *v*. United States 951
Labine *v*. Vincent 990
Labor Board; Aero Engineering Corp. *v*. 974
Labor Board; Atlas Engine Works *v*. 909
Labor Board; Bagel Bakers Council of Greater New York *v*. . 908
Labor Board; Electrical Workers *v*. 906
Labor Board; Hartzell Propeller Fan Co. *v*. 945
Labor Board; Howard Mfg. Co. *v*. 930
Labor Board; Interboro Contractors *v*. 915
Labor Board; International Metal Specialties *v*. 907
Labor Board *v*. Jack & Jill Stores 928
Labor Board; Magnesium Casting Co. *v*. 925
Labor Board; Mid-South Towing Co. *v*. 974
Labor Board *v*. Nash-Finch Co. 928
Labor Board *v*. Natural Gas Utility Dist. of Hawkins County. 600
Labor Board; Noll Motors *v*. 906
Labor Board *v*. Pittsburgh Plate Glass Co. 993, 1007
Labor Board; Stanley Air Tools *v*. 908
Labor Board; Tex Tan Welhausen Co. *v*. 973

Page
Laborers' Union of North America *v.* Jordan 905
Labor Union. See name of trade.
LaFave; Harris *v* 904
Laird *v.* Capobianco 969
Lamp *v.* United States Steel Corp 987
Lancaster; Bourbeau *v* 954, 960, 964
Landgham *v.* Illinois 911
Lane *v.* Texas 935
Larsen; Negre *v* 934
Lash; Willoughby *v* 998
Lashley *v.* Maryland 991
Lauchli *v.* United States 938
Laughlin *v.* U. S. Court of Appeals 904, 1013
Laurent Watch Co.; Cascade Car Wash *v* 1009
LaVallee; Brown *v* 990
LaVallee *v.* Burns 1012
LaVallee *v.* Miller 914
Lawrence *v.* Woods 983
Lay *v.* Florida 910
Lazarus; Shevin *v* 990
Leach *v.* United States 986
LeCraw & Co.; Meltzer *v* 954
Lee; Chropowicki *v* 935
Lee; Commissioner of Education of New York *v* 935
Lee; Nyquist *v* 935
Lego *v.* Twomey 928
Leighty *v.* Goodwin 932
Leitchfield Mfg. Co. *v.* United States 967
Lennox; Swarb *v* 903
Leonard; Morris *v* 974
Leslie Salt Co. *v.* Alameda Conservation Assn 908
Lester; Aetna Life Insurance Co. *v* 909
Levy *v.* United States 925
Lewis *v.* Smith 913
Li *v.* Immigration and Naturalization Service 947
Ligue *v.* Illinois 911
Liguori; United States *v* 948
Lind *v.* Richardson 948
Lindsey *v.* Normet 941, 954
Lipscomb *v.* United States 966
Littlepage *v.* United States 915, 1013
Little Rock School District Board of Education *v.* Clark 952
Local. For labor union, see name of trade.
Lo Cicero *v.* New York 997

Page
Locklear *v.* California 984
Lockridge *v.* Superior Court of Los Angeles County 910
Lodge. For labor union, see name of trade.
Lombardozzi *v.* United States 908
Lopez *v.* Ohio 913
Lopez *v.* United States 961, 965
Los Angeles County; Giannatti *v.* 992
Los Angeles County Superior Court; Lockridge *v.* 910
Los Angeles Police Dept. *v.* Robinson 944
Louisiana; Shirley *v.* 925
Louisiana Dept. of Highways; Cookmeyer *v.* 1005
Lowe *v.* Young 1006
Lucas *v.* New York 977
Lucia; United States *v.* 943
Luros; United States *v.* 363
Lykes Bros. Steamship Co.; Wheeler *v.* 922
Lynd *v.* Chicago 923
Mac. See also Mc.
Machinists & Aerospace Workers *v.* United Aircraft Corp. 908
Mack; Florida State Board of Dentistry *v.* 925
MacLeod *v.* United States 907, 990
Maggard *v.* Wainwright 946
Magnesium Casting Co. *v.* Labor Board 925
Makarewicz *v.* Scafati 980
Mallory *v.* Ohio 951
Malone *v.* Pennsylvania 910
Manarite *v.* United States 972
Manatee County Board of Public Instruction *v.* Harvest 943
Mancusi; Ferguson *v.* 1011
Mancusi; Muhammad *v.* 911
Mancusi; Scott *v.* 909
Manzanares *v.* Warden 977
Maras *v.* Gehring 925
Marchese *v.* United States 949, 1012
Maret *v.* United States 989
Marion; Beto *v.* 906
Marion County Dept. of Public Welfare; Carter *v.* 994
Martin *v.* Washington 912
Martinez *v.* Patterson 934
Martinez *v.* United States 951
Marxuach *v.* Puerto Rico Secretary of Justice 977
Maryland; Gerstein *v.* 1009
Maryland; Glorioso *v.* 972
Maryland; Iannone *v.* 973

Page
Maryland; Lashley *v*. 991
Maryland; Parker *v*. 984
Mason *v*. California. 913
Mather Construction Co. *v*. Continental Casualty Co. 907
Maxwell; Greene *v*. 951
Maxwell *v*. Indiana. 930
Maxwell; Sosa *v*. 951
Maxwell *v*. United States. 1010
May; Cox *v*. 948
Mayfield *v*. Ohio. 910
Mayor of Philadelphia *v*. Pennsylvania *ex rel*. Jamieson. 974
Mc. See also Mac.
McAfee *v*. United States. 905
McBride *v*. Pennsylvania. 946
McCann *v*. Babbitz. 903
McClanahan *v*. Morauer & Hartzell, Inc. 1008
McCulloch; Kitchens *v*. 931
McDaniel *v*. Barresi. 39
McGautha *v*. California. 183
McGee *v*. United States. 479
McGregor *v*. Watts. 980
McKenzie *v*. Patuxent Institution Director. 923
McKenzie *v*. Texas. 971
McKinney *v*. Patuxent Institution Director. 914
McKinney *v*. United States. 982
McKinney *v*. U. S. Court of Appeals. 994
McKown *v*. Pierce. 929
McMann; Frizer *v*. 1010
McMann *v*. Owen. 906
McMann; Williams *v*. 914
McMillan *v*. Federal National Mortgage Assn. 936
McPherson *v*. United States. 997
McTyre *v*. Pearson. 947
Meadows; United States *v*. 948
Mehciz *v*. United States. 974
Meltzer *v*. C. Buck LeCraw & Co. 954
Members of Selective Service Bd. No. 30; Davis *v*. 999
Mentor; Granger *v*. 907
Messick *v*. Gordon. 907
Metzger; Sparks *v*. 996
Michigan; Bloss *v*. 938
Michigan; Green *v*. 1010
Michigan; Stafford *v*. 968

Page

Michigan Parole Board; Alexander *v*. 980
Middlewest Motor Freight Bureau *v*. United States. 999
Mid-South Towing Co. *v*. Labor Board. 974
Millang *v*. United States. 981
Millard *v*. Omaha. 925
Miller; Carter *v*. 972
Miller; LaVallee *v*. 914
Miller *v*. United States. 939
Milwaukee; Illinois *v*. 940
Milwaukee County District Attorney *v*. Babbitz. 903
Mine Workers *v*. Blue Diamond Coal Co. 930
Mine Workers *v*. District 50, Mine Workers. 906
Mine Workers *v*. South-East Coal Co. 983
Ming Hsu *v*. United States. 982
Minnesota; Hodgson *v*. 968
Minnesota; Stark *v*. 930
Minter; ITT Lamp Division *v*. 933
Mississippi *v*. Arkansas. 926, 939
Missouri Pacific R. Co. *v*. United States. 944
Mitchell; Gooch *v*. 995
Mitchell *v*. Illinois. 1010
Mitchell; Pinto *v*. 961
Mitchell; Schoop *v*. 988
Mitchell; Sostre *v*. 911
Mitchell *v*. United States. 946
Mitchell; United States *v*. 904
Mitchum *v*. Foster. 941
Mobile County Board of School Comm'rs; Davis *v*. 33
Molina *v*. Craven. 980
Montgomery County District Court; Wright *v*. 990
Mooney *v*. United States. 1005
Moore *v*. Charlotte-Mecklenburg Board of Education. 47
Moore *v*. United States. 906
Morales *v*. Cady. 931, 1013
Morauer & Hartzell, Inc.; McClanahan *v*. 1008
More *v*. United States. 1012
Morelli *v*. New York. 905
Morris *v*. Leonard. 974
Morrison *v*. North Carolina. 914
Morton; Colson *v*. 990
Morton *v*. Quaker Action Group. 926
Mos *v*. United States. 913
Muhammad *v*. Mancusi. 911
Mulvey; Samuel Goldwyn Productions *v*. 923
Murphy *v*. Conte. 910

Page

Murphy *v.* Tennessee 945
Murray *v.* New Jersey 998
Murray *v.* Page 934
Nash-Finch Co.; Labor Board *v.* 928
National Bank of Albany Park *v.* Chicago 908
National Labor Relations Board. See Labor Board.
National Mediation Board; Chicago, R. I. & P. R. Co. *v.* ... 944
Natural Gas Utility Dist. of Hawkins County; Labor Board *v.* 600
Nebraska; Becker *v.* 981
Negre *v.* Larsen 934
Negron *v.* Wallace 998
Neil; Williams *v.* 998
Nelson; Chacon *v.* 941, 1013
Nelson *v.* O'Neil 622
Nelson; Szijarto *v.* 941
Nelson *v.* United States 1006
Nelson *v.* Warden 997
Nemitz; Norfolk & Western R. Co. *v.* 994
Nemke *v.* Illinois 924
Nevada; Van Sickle *v.* 925
Newark Superintendent of Schools; Porcelli *v.* 944
New Hampshire; Petkus *v.* 932
New Jersey; Murray *v.* 998
New Jersey; Norman *v.* 1009
New Jersey; Young *v.* 929
New Mexico Comm'r of Revenue; EVCO *v.* 969
New York; Burton *v.* 991
New York; Colon *v.* 905
New York; Dunn *v.* 996
New York; Ebbs *v.* 1011
New York; Ganci *v.* 924
New York; Gibson *v.* 951
New York; Klein *v.* 975
New York; Lo Cicero *v.* 997
New York; Lucas *v.* 977
New York; Morelli *v.* 905
New York; Pelicie *v.* 998
New York; Radich *v.* 989
New York; Rose *v.* 913
New York; Santobello *v.* 994
New York; Stevenson *v.* 946
New York; Vasquez *v.* 968
New York; Vermont *v.* 940
New York; Williams *v.* 947

Page

New York City Rent and Rehab. Adm.; Davenport *v*..... 934
New York Comm'r of Education *v*. Lee..... 935
New York Comm'r of Social Services *v*. Boddie..... 991
New York Comm'r of Social Services *v*. Rosado..... 991
New York State Dept. of Labor; Torres *v*..... 968
New York Supt. of Ins. *v*. Bankers Life & Cas. Co..... 993
Ney *v*. Field..... 904, 1005
Nichols *v*. California..... 910
Nix *v*. United States..... 999
Noe *v*. Chicago Great Western R. Co..... 1009
Noll Motors *v*. Labor Board..... 906
Nolte *v*. United States..... 914
Nolynn Baptist Assn. *v*. Oak Grove Church..... 925
Nor-Am Agricultural Products *v*. Hardin..... 935
Nordeste *v*. United States..... 912
Norfolk & Western R. Co. *v*. Nemitz..... 994
Noriega *v*. United States..... 908
Norman *v*. New Jersey..... 1009
Norman *v*. United States..... 987
Normet; Lindsey *v*..... 941, 954
Northampton County; Tilli *v*..... 934
North Carolina; Hicks *v*..... 913
North Carolina; King *v*..... 998
North Carolina; Morrison *v*..... 914
North Carolina; Swaney *v*..... 1006
North Carolina State Board of Education *v*. Swann..... 43
Northern City National Bank; Kostamo *v*..... 902, 1013
Nyquist *v*. Lee..... 935
Oak Grove Separate Baptist Church; Nolynn Baptist Assn. *v*. 925
Officer in Command, Houston Induction Center; Steiner *v*.. 1009
Ohio; Brady *v*..... 989
Ohio; Crampton *v*..... 183
Ohio; Kerr *v*..... 970
Ohio; Lopez *v*..... 913
Ohio; Mallory *v*..... 951
Ohio; Mayfield *v*..... 910
Ohio; Westfall *v*..... 931
Oldenkott; American Electric, Inc. *v*..... 975
Oliva *v*. United States..... 986
Oliver *v*. Connecticut..... 946
Omaha; Millard *v*..... 925
119 Cartons Obscene Magazines; United States *v*..... 969
O'Neil; Nelson *v*..... 622
Oregon; Tuck *v*..... 982

Page

Organization for a Better Austin *v.* Keefe 415
Orito *v.* United States 987
Owen; McMann *v.* 906
Pace *v.* Haymarket Co-operative Bank 945
Page; Murray *v.* 934
Page; Ward *v.* 904
Paige *v.* United States 977
Pakarinen Heir; Hietala *v.* 903
Palmer *v.* Euclid 544
Palmer *v.* Illinois 931
Papa *v.* Florida 996
Pape; Time, Inc. *v.* 970
Pappas, *In re* 942
Pardo *v.* Illinois 992
Parisi *v.* Davidson 942
Parker *v.* Maryland 984
Parker *v.* United States 930
Parsons; Balc *v.* 990
Pasadena City Board of Education; Alexander *v.* 943
Passel *v.* Fort Worth Independent School District 968
Paszek *v.* United States 911
Pate; Dade County School Board *v.* 953
Pate; Tanner *v.* 913
Patterson *v.* Humble Oil & Refining Co 924
Patterson; Kelm *v.* 934
Patterson; Martinez *v.* 934
Patuxent Institution Director; Jones *v.* 998
Patuxent Institution Director; McKenzie *v.* 923
Patuxent Institution Director; McKinney *v.* 914
Peacock *v.* Retail Credit Co 925
Pearson; McTyre *v.* 947
Pelicie *v.* New York 998
Pennington; Cox *v.* 948
Pennsylvania *v.* Davis 999
Pennsylvania; Enty *v.* 913
Pennsylvania; Gaito *v.* 946
Pennsylvania; Gray *v.* 967
Pennsylvania; Malone *v.* 910
Pennsylvania; McBride *v.* 946
Pennsylvania; Phillips *v.* 1011
Pennsylvania Attorney General; Kontos *v.* 975
Pennsylvania *ex rel.* Jamieson; Tate *v.* 974
Peoria County; Benedict *v.* 929
Perales; Richardson *v.* 389

Page

Perez *v.* Campbell 637
Perez; Hingle *v.* 929
Perez *v.* United States 146
Perini; Alexander *v.* 914
Perini; Birns *v.* 950
Perini; Braxton *v.* 931
Perini; Fitzsimmons *v.* 910
Perini; Kohl *v.* 941
Perini; Sanders *v.* 977
Peterson; Brown *v.* 948
Peterson *v.* California 948
Petkus *v.* New Hampshire 932
Pfizer & Co.; United States *v.* 942
Philadelphia Mayor *v.* Pennsylvania *ex rel.* Jamieson 974
Phillips *v.* Pennsylvania 1011
Phillips *v.* United States 931
Picard *v.* Connor 942, 993
Pierce; McKown *v.* 929
Pieters *v.* United States 972
Pinellas County Board of Public Instruction *v.* Bradley 943
Pino *v.* United States 989
Pinto *v.* Mitchell 961
Pipefitters *v.* United States 994
Pittsburgh Plate Glass Co.; Allied Chemical Workers *v.* .. 993, 1007
Pittsburgh Plate Glass Co.; Labor Board *v.* 993, 1007
Platt *v.* United States 913
Polese *v.* United States 966
Polson *v.* Idaho 930
Pope; Davis *v.* 1008
Porcelli *v.* Titus 944
Porter *v.* Ashmore 981
Portsmouth School District; Drown *v.* 972
Posner *v.* United States 982
Potter *v.* United States 930
Powers *v.* United States 1011
Price; Humble Oil & Refining Co. *v.* 934
Price *v.* Illinois 902
Prionas *v.* United States 977
Pritchard & Co.; Berend *v.* 990
Professional Air Traffic Controllers *v.* United States 915
Protective Com. of TMT Trailer Ferry; Kirkland *v.* 907
Provenzano *v.* Follette 949
Providence Redevelopment Agency; Corrado *v.* 947
Pruett *v.* Texas 902, 939, 1007

Page
Puerto Rico Secretary of Justice; Marxuach *v*..... 977
Quaker Action Group; Morton *v*..... 926
Radich *v*. New York..... 989
Ragan *v*. Richardson..... 986
Raguse *v*. California..... 976
Ramos *v*. California..... 977
Randall; Hodgson *v*..... 967
Randazzo *v*. Follette..... 984
Raus; Heine *v*..... 914
Ray *v*. Brierley..... 1008
Raymond *v*. United States..... 907
Redd *v*. United States..... 977
Reeb *v*. United States..... 912
Reese *v*. Smith..... 904
Regan; Ruderer *v*..... 1008
Reidel; United States *v*..... 351
Reising; Coakley *v*..... 906
Resor; Turpin *v*..... 970
Retail Credit Co.; Peacock *v*..... 925
Reyes *v*. California..... 1010
Reynolds *v*. Arizona..... 910
Reynolds *v*. Follette..... 981
Reynolds Metals Co.; Dewey *v*..... 689, 904
Richardson; Ginsburg *v*..... 976
Richardson; Lind *v*..... 948
Richardson *v*. Perales..... 389
Richardson; Ragan *v*..... 986
Riley *v*. United States..... 943
Ritchie; Triangle Improvement Council *v*..... 497
Rivera *v*. United States..... 947
Robbins *v*. United States..... 985
Roberts *v*. State Real Estate Comm'n..... 905
Robinson; Los Angeles Police Dept. *v*..... 944
Robinson *v*. United States..... 910
Robley *v*. United States..... 972
Rodgers *v*. United States..... 947
Roe *v*. Wade..... 941
Rogers; Silverman *v*..... 983
Romontio *v*. United States..... 903
Rosado; Wyman *v*..... 991
Rose *v*. Commissioner..... 907
Rose *v*. New York..... 913
Rosenberg *v*. Yee Chien Woo..... 49
Ross; Eckels *v*..... 953

Page

Roviaro *v.* United States 950
Royal Crown Bottling Co. *v.* Hodgson 973
Ruderer *v.* Regan 1008
Rundle; Hargrove *v.* 912
Ruppe; Haldane *v.* 906
Rush *v.* Illinois 911
Russell; Black *v.* 947
Ryan; United States *v.* 530
Sammons *v.* United States 945
Samuel Goldwyn Productions *v.* Mulvey 923
Sanchez *v.* United States 945
Sanders *v.* Perini 977
Sandoval *v.* California 909
San Jose Water Works; Cothran *v.* 975
Santobello *v.* New York 994
Sarkis *v.* United States 946
Scafati; Makarewicz *v.* 980
Scan Imports; United States *v.* 969
Schilb *v.* Kuebel 928
Schlanger *v.* Seamans 990
Schlette *v.* Craven 998
Schmutz Mfg. Co. *v.* Atkins 932
Schneider; Granite Falls State Bank *v.* 1006
School District No. 1; Keyes *v.* 182
School District 151 of Cook County *v.* United States 943
Schoop *v.* Mitchell 988
Schwartz; Frederick *v.* 937, 954
Scientific Living, Inc.; Hohensee *v.* 1012
Scotland Urban Enterprises; Beverly *v.* 936, 954, 960
Scott *v.* Cardwell 911
Scott *v.* Mancusi 909
Scott *v.* Texas 1012
Scott *v.* United States 937, 1011
Seamans; Schlanger *v.* 990
S&E Contractors *v.* United States 971
Secretary of Agriculture; Nor-Am Agricultural Products *v.* .. 935
Secretary of Air Force; Schlanger *v.* 990
Secretary of Army; Turpin *v.* 970
Secretary of Defense *v.* Capobianco 969
Secretary of Health, Education, and Welfare; Ginsburg *v.* 976
Secretary of Health, Education, and Welfare; Lind *v.* 948
Secretary of Health, Education, and Welfare *v.* Perales 389
Secretary of Health, Education, and Welfare; Ragan *v.* 986
Secretary of Interior; Colson *v.* 990

Page

Secretary of Interior *v.* Quaker Action Group..... 926
Secretary of Justice of Puerto Rico; Marxuach *v*..... 977
Secretary of Labor; Fiduciary Counsel, Inc. *v*..... 973
Secretary of Labor; Klages Coal & Ice Co. *v*..... 973
Secretary of Labor; Royal Crown Bottling Co. *v*..... 973
Secretary of Social and Health Serv. of Wash.; Tarver *v*.... 1000
Secretary of State; Silverman *v*..... 983
Selective Service Local Board No. 111; Edwards *v*..... 952
Selective Service Local Board No. 30; Davis *v*..... 999
Seyfried *v.* United States..... 912
Shaffer *v.* Valtierra..... 137
Shakman; Democratic Organization of Cook County *v*..... 909
Shaw *v.* United States..... 909
Shelton *v.* United States..... 933
Sherwood *v.* United States..... 909
Shevin *v.* Lazarus..... 990
Shirley *v.* Louisiana..... 925
Shopa *v.* United States..... 996
Silk *v.* Kleppe..... 1012
Silverman *v.* Rogers..... 983
Silverman *v.* United States..... 953
Simpson *v.* Wainwright..... 1011
Sinatra *v.* Goodyear Tire & Rubber Co..... 906
Singal *v.* Blackwell..... 924
Singleton; Jackson Municipal Separate School District *v*.... 944
Singleton *v.* United States..... 952
Skinner *v.* United States..... 997
Slaughter; Spillers *v*..... 971
Sloatman *v.* Gibbons..... 939, 954
Smith; Blanton *v*..... 910
Smith *v.* Brantley..... 975
Smith *v.* Bucci Detective Agency..... 977
Smith; Ector *v*..... 997
Smith *v.* Illinois..... 945, 1009, 1011
Smith; Lewis *v*..... 913
Smith; Reese *v*..... 904
Smith; Tarver *v*..... 1000
Smith; Trull *v*..... 904
Smith *v.* United States..... 915, 975, 976
Smith *v.* Wingo..... 971
Sosa *v.* Maxwell..... 951
Sostre *v.* Mitchell..... 911
South-East Coal Co.; Consolidation Coal Co. *v*..... 983
South-East Coal Co.; Mine Workers *v*..... 983

419-882 O - 72 - 3

Page
Southern Ute Tribe or Band of Indians; United States *v*.... 159
Southland Inc. *v*. Cox Enterprises..... 990
Soyka *v*. United States..... 984
Sparks *v*. Alabama..... 909
Sparks *v*. Metzger..... 996
Spencer *v*. Georgia..... 991
Spieler *v*. United States..... 950
Spigner *v*. United States..... 925
Spillers *v*. Slaughter..... 971
Stafford *v*. Michigan..... 968
Stallings *v*. Indiana..... 997
Stanley Air Tools *v*. Labor Board..... 908
Stanley Works *v*. Labor Board..... 908
Stanton; Carter *v*..... 994
Stark *v*. Minnesota..... 930
State. See also name of State.
State National Bank of Alabama *v*. Ellis..... 973
State Public Welfare Comm'n; Kerr *v*..... 950
State Real Estate Comm'n; Roberts *v*..... 905
State Road Comm'n of W. Va.; Triangle Imp. Council *v*.... 497
Stead *v*. United States..... 934
Steelworkers *v*. Auburndale Freezer Corp..... 1013
Steiner *v*. Armed Forces Induction Center at Houston..... 1009
Stein Steel & Supply Co.; Franco *v*..... 973
Stevenson *v*. New York..... 946
Stone *v*. United States..... 977
Stovall *v*. Illinois..... 997
Streule *v*. Gulf Finance Corp..... 975
Stribling *v*. United States..... 973
Sullivan *v*. United States..... 912, 949
Superintendent of Ins. of N. Y. *v*. Bankers Life & Cas. Co.. 993
Superintendent of penal or correctional institution. See name of superintendent.
Superintendent of Schools *v*. Barresi..... 39
Superintendent of Schools of Newark; Porcelli *v*..... 944
Superior Court of California; Eldon Industries *v*..... 995
Superior Court of Los Angeles County; Lockridge *v*..... 910
Sutton *v*. United States..... 988
Swaney *v*. North Carolina..... 1006
Swank; Alexander *v*..... 1007
Swank; Townsend *v*..... 1007
Swann *v*. Charlotte-Mecklenburg Board of Education..... 1
Swann; Charlotte-Mecklenburg Board of Education *v*..... 1
Swann; North Carolina State Board of Education *v*..... 43

Page

Swanney-McDonald, Inc. *v.* Gray 995
Swarb *v.* Lennox 903
Swartz *v.* Illinois 911
Swierenga *v.* United States 972
Szijarto *v.* Nelson 941
Taft *v.* United States 996
Tanner *v.* Pate 913
Tanner *v.* United States 912
Tarver *v.* Smith 1000
Tate *v.* Pennsylvania *ex rel.* Jamieson 974
Tate *v.* United States 930
Taxation Division Director; Clairol, Inc. *v.* 902
Taylor; Emmons *v.* 990
Taylor *v.* United States 915
Teller *v.* United States 949
Tennessee; Allen *v.* 975
Tennessee; Booker *v.* 996
Tennessee; Britt *v.* 946
Tennessee; Murphy *v.* 945
Tennessee; Wauford *v.* 946
Teran *v.* California 981
Texas; Almendarez *v.* 974
Texas; Broom *v.* 933
Texas; Harris *v.* 940
Texas; Hathorne *v.* 914
Texas; Lane *v.* 935
Texas; McKenzie *v.* 971
Texas; Pruett *v.* 902, 939, 1007
Texas; Scott *v.* 1012
Texas Instruments, Inc.; Farkas *v.* 990
Tex Tan Welhausen Co. *v.* Labor Board 973
Theriault *v.* Blackwell 953
Thirty-seven (37) Photographs; United States *v.* 363
Thomas *v.* Illinois 996
Thomas *v.* United States 984
Tiktin *v.* United States 950
Tilli *v.* Northampton County 934
Time, Inc. *v.* Pape 970
Timmons *v.* United States 914
Tippett *v.* Haynes 998
Titus; Porcelli *v.* 944
TMT Trailer Ferry Stockholders; Kirkland *v.* 907
Toliver *v.* United States 1013
Topco Associates, Inc.; United States *v.* 905

Page

Torres *v.* New York State Dept. of Labor 968
Townsend *v.* Swank 1007
Tracy *v.* Chandler 997
Tracy *v.* United States 966
Transportation Union; Chicago & N. W. R. Co. *v.* 570
Transportation Union *v.* Illinois Central R. Co 915
Triangle Improvement Council *v.* Ritchie 497
Trucking Unlimited; California Motor Transport Co. *v.* 1008
Trull *v.* Smith 904
Tuck *v.* Oregon 982
Tucker; United States *v.* 942
Tucson; Kollar *v.* 967
Turner *v.* United States 982
Turpin *v.* Resor 970
Twomey; Bournett *v.* 913
Twomey; Lego *v.* 928
2,606.84 Acres of Land in Tarrant County *v.* United States .. 916
Unborn Child of Doe *v.* Doe 936
Unicorn Enterprises; United States *v.* 970
Union. For labor union, see name of trade.
United. For labor union, see name of trade.
United Aircraft Corp.; Canel Lodge No. 700 *v.* 908
United Aircraft Corp.; Machinists & Aerospace Workers *v.* .. 908
United States; Adler *v.* 944
United States; Affiliated Ute Citizens of Utah *v.* 905
United States; Air Traffic Controllers Organization *v.* 915
United States; Alonzo *v.* 1009
United States; Amity Fabrics, Inc. *v.* 974
United States; Andrews *v.* 995
United States; Ardle *v.* 947
United States *v.* Armour & Co 673
United States; Atlantic Coast Line R. Co. *v.* 975
United States; Austin *v.* 1012
United States; Balistrieri *v.* 953
United States; Banks *v.* 984
United States; Barney *v.* 989
United States *v.* Bass 927
United States; Baum *v.* 907
United States; Bellamy *v.* 929
United States; Bender *v.* 982
United States; Benoit *v.* 990
United States; Bigsby *v.* 986
United States; Black *v.* 975
United States; Blassick *v.* 985

Page
United States; Blassingame *v*. 945
United States; Bolettieri *v*. 945
United States; Borman *v*. 913
United States; Bostic *v*. 547
United States; Brocato *v*. 1010
United States; Brossard *v*. 981
United States; Brown *v*. 907
United States; Bryant *v*. 932, 1013
United States; Cahn *v*. 944
United States; Cain *v*. 905
United States; Calarco *v*. 934
United States *v*. Caldwell. 942
United States; Campbell *v*. 975
United States; Carpenter *v*. 1008
United States; Carrizoza-Islas *v*. 931
United States; Carter *v*. 912
United States; Castro *v*. 977
United States; Cataldo *v*. 934
United States; Certain Space in Chimes Building *v*. 908
United States; Chambers *v*. 944
United States; Chapman *v*. 912
United States *v*. Chas. Pfizer & Co. 942
United States *v*. Cherry. 971
United States; Chimes Bldg. *v*. 908
United States; Clermont *v*. 997
United States; Cobb *v*. 937
United States; Cochran *v*. 939
United States; Consolidated Carriers Corp. *v*. 901, 1013
United States; Crisp *v*. 947
United States; Daddano *v*. 905
United States; Daniels *v*. 951
United States; Daut *v*. 945
United States; Davenport *v*. 973
United States; David *v*. 983
United States; Dean *v*. 937
United States; Decker *v*. 937
United States; DeLegge *v*. 905
United States; DeLutro *v*. 983
United States; Deming *v*. 949
United States; DeSapio *v*. 928, 999
United States; DeStafano *v*. 972
United States; DeVore *v*. 950
United States; Dillon *v*. 982
United States; DiLorenzo *v*. 950

Page
United States; DiPiazza *v*. 949
United States *v*. District Court in and for County of Eagle. . 940
United States *v*. District Court in and for Water Div. No. 5. . 940
United States; Donohue *v*. 949
United States; Donovan *v*. 1005
United States; Drew *v*. 977
United States; Drotar *v*. 939
United States; Eason *v*. 984
United States; Eaton *v*. 931
United States; Edmondson *v*. 931
United States; Edwards *v*. 1012
United States; Ehlert *v*. 99
United States; Eisenhardt *v*. 928, 1005
United States; Elbel *v*. 929
United States; Elvin *v*. 995
United States; Escobedo *v*. 951
United States; Evans *v*. 987, 1010
United States; Farr *v*. 947
United States; Fauls *v*. 1011
United States; Ferrone *v*. 1008
United States; Fincke *v*. 995
United States; Fiore *v*. 973
United States; Flesch *v*. 982
United States; Flintkote Co. *v*. 944
United States; Franco *v*. 915
United States; Frank *v*. 974
United States; Franke *v*. 943
United States; Franzese *v*. 995
United States; Fukumoto *v*. 977
United States; Gaines *v*. 1006
United States; Gallagher *v*. 1009
United States; Garcia *v*. 925
United States; Gill *v*. 1011
United States; Gillespie *v*. 938
United States; Glucksman *v*. 929
United States; Gonzalez-Parra *v*. 1010
United States; Graham *v*. 938
United States *v*. Greater Buffalo Press. 549
United States; Griffin *v*. 970
United States; Grijalva *v*. 1012
United States; Grimes *v*. 989
United States; Group Life & Health Insurance Co. *v*. 944
United States; Guitian *v*. 985
United States; Gwynn *v*. 1011

Page
United States; Haggett *v*..... 946
United States; Hale *v*..... 976
United States; Hamilton *v*..... 985
United States; Hanon *v*..... 952
United States; Harflinger *v*..... 973
United States; Harris *v*..... 981, 986
United States; Haslam *v*..... 912, 976
United States; Hepler *v*..... 911
United States; Hernandez *v*..... 976
United States; Hickman *v*..... 965, 966
United States; Hoffa *v*..... 988
United States; Holman *v*..... 913
United States *v.* Holmes..... 969
United States; Hoskins *v*..... 943
United States; Hudson *v*..... 965
United States; Iachino *v*..... 976
United States *v.* International Minerals & Chemical Corp.... 558
United States; Iozzi *v*..... 943
United States; Ippolito *v*..... 953
United States; Jack *v*..... 933
United States; Jacobs *v*..... 924, 950
United States; Jewett *v*..... 947
United States; Jiminez-Lopez *v*..... 1010
United States; Jones *v*..... 950, 985
United States; Karnes *v*..... 1008
United States; Kastigar *v*..... 971
United States; Kee Ming Hsu *v*..... 982
United States; Keith *v*..... 985
United States; Kember *v*..... 923
United States; Kimball *v*..... 996
United States; King *v*..... 976
United States; Klein *v*..... 944
United States; Knight *v*..... 976
United States; Koran *v*..... 948
United States; Kroll *v*..... 944
United States; Kuhn *v*..... 951
United States; Lauchli *v*..... 938
United States; Leach *v*..... 986
United States; Leitchfield Mfg. Co. *v*..... 967
United States; Levy *v*..... 925
United States *v.* Liguori..... 948
United States; Lipscomb *v*..... 966
United States; Littlepage *v*..... 915, 1013
United States; Lombardozzi *v*..... 908

Page

United States; Lopez *v*. 961, 965
United States *v*. Lucia 943
United States *v*. Luros 363
United States; MacLeod *v*. 907, 990
United States; Manarite *v*. 972
United States; Marchese *v*. 949, 1012
United States; Maret *v*. 989
United States; Martinez *v*. 951
United States; Maxwell *v*. 1010
United States; McAfee *v*. 905
United States; McGee *v*. 479
United States; McKinney *v*. 982
United States; McPherson *v*. 997
United States *v*. Meadows 948
United States; Mehciz *v*. 974
United States; Middlewest Motor Freight Bureau *v*. 999
United States; Millang *v*. 981
United States; Miller *v*. 939
United States; Missouri Pacific R. Co. *v*. 944
United States; Mitchell *v*. 946
United States *v*. Mitchell 904
United States; Mooney *v*. 1005
United States; Moore *v*. 906
United States; More *v*. 1012
United States; Mos *v*. 913
United States; Nelson *v*. 1006
United States; Nix *v*. 999
United States; Nolte *v*. 914
United States; Nordeste *v*. 912
United States; Noriega *v*. 908
United States; Norman *v*. 987
United States; Oliva *v*. 986
United States *v*. 119 Cartons Obscene Magazines 969
United States; Orito *v*. 987
United States; Paige *v*. 977
United States; Parker *v*. 930
United States; Paszek *v*. 911
United States; Perez *v*. 146
United States; Phillips *v*. 931
United States; Pieters *v*. 972
United States; Pino *v*. 989
United States; Pipefitters *v*. 994
United States; Platt *v*. 913
United States; Polese *v*. 966
United States; Posner *v*. 982

Page
United States; Potter *v*. 930
United States; Powers *v*. 1011
United States; Prionas *v*. 977
United States; Professional Air Traffic Controllers *v*. 915
United States; Raymond *v*. 907
United States; Redd *v*. 977
United States; Reeb *v*. 912
United States *v*. Reidel. 351
United States; Riley *v*. 943
United States; Rivera *v*. 947
United States; Robbins *v*. 985
United States; Robinson *v*. 910
United States; Robley *v*. 972
United States; Rodgers *v*. 947
United States; Romontio *v*. 903
United States; Roviaro *v*. 950
United States *v*. Ryan. 530
United States; Sammons *v*. 945
United States; Sanchez *v*. 945
United States; Sarkis *v*. 946
United States *v*. Scan Imports. 969
United States; School District 151 of Cook County *v*. 943
United States; Scott *v*. 937, 1011
United States; S&E Contractors *v*. 971
United States; Seyfried *v*. 912
United States; Shaw *v*. 909
United States; Shelton *v*. 933
United States; Sherwood *v*. 909
United States; Shopa *v*. 996
United States; Silverman *v*. 953
United States; Singleton *v*. 952
United States; Skinner *v*. 997
United States; Smith *v*. 915, 975, 976
United States *v*. Southern Ute Tribe or Band of Indians. 159
United States; Soyka *v*. 984
United States; Spieler *v*. 950
United States; Spigner *v*. 925
United States; Stead *v*. 934
United States; Stone *v*. 977
United States; Stribling *v*. 973
United States; Sullivan *v*. 912, 949
United States; Sutton *v*. 988
United States; Swierenga *v*. 972
United States; Taft *v*. 996

Page

United States; Tanner *v*. 912
United States; Tate *v*. 930
United States; Taylor *v*. 915
United States; Teller *v*. 949
United States *v*. Thirty-seven (37) Photographs. 363
United States; Thomas *v*. 984
United States; Tiktin *v*. 950
United States; Timmons *v*. 914
United States; Toliver *v*. 1013
United States *v*. Topco Associates, Inc. 905
United States; Tracy *v*. 966
United States *v*. Tucker. 942
United States; Turner *v*. 982
United States; 2,606.84 Acres of Land in Tarrant County *v*. . 916
United States *v*. Unicorn Enterprises. 970
United States *v*. Various Articles of "Obscene" Merchandise. . 971
United States; Verdugo *v*. 961
United States; Vermeulen *v*. 911
United States; Virga *v*. 930
United States; Viviano *v*. 983
United States *v*. Vuitch. 62
United States; Wahlquist *v*. 1010
United States; Walker *v*. 985
United States; Wallace *v*. 943
United States; Walters *v*. 910
United States; Washington *v*. 978
United States; Weber *v*. 932, 939, 1008
United States; Webster *v*. 986
United States; Weiser *v*. 949
United States; Wenzel *v*. 981
United States *v*. White. 990
United States; Whitehead *v*. 974
United States; Wild *v*. 986
United States; Williams *v*. 912, 931, 985, 987
United States; Wilson *v*. 912, 929, 930
United States; Wright *v*. 949
United States; Yoder *v*. 966
United States; Young *v*. 966
United States; Zenchak *v*. 912
United States *v*. Zizzo. 938
U. S. Circuit Judges; Tracy *v*. 997
U. S. Court of Appeals; Laughlin *v*. 904, 1013
U. S. Court of Appeals; McKinney *v*. 994
U. S. Court of Appeals Chief Judge; Brooks *v*. 971

Page
U. S. District Judge; Dixon *v*..... 928
U. S. District Judge; Escalante *v*..... 981
U. S. District Judge; Leighty *v*..... 932
U. S. District Judge; Ruderer *v*..... 1008
U. S. *ex rel.* See name of real party in interest.
United States Steel Corp.; Cook *v*..... 987
United States Steel Corp.; Fuhrman *v*..... 987
United States Steel Corp.; Lamp *v*..... 987
University of Illinois Foundation; Blonder-Tongue Labs. *v*.. 313
University of Illinois Foundation *v*. Winegard Co..... 990
Ute Citizens of Utah *v*. United States..... 905
Valtierra; James *v*..... 137
Valtierra; Shaffer *v*..... 137
VanCantfort; Allen *v*..... 1008
Van Sickle *v*. Nevada..... 925
Various Articles of "Obscene" Merchandise; United States *v*. 971
Vasquez *v*. New York..... 968
Verdugo *v*. California..... 985
Verdugo *v*. United States..... 961
Vermeulen *v*. United States..... 911
Vermont *v*. New York..... 940
Vernitron Corp. *v*. Benjamin..... 987
Vincent; Labine *v*..... 990
Virga *v*. United States..... 930
Virgin Islands; Corcino *v*..... 976
Viviano *v*. United States..... 983
Vuitch; United States *v*..... 62
Wade *v*. Haynes..... 997
Wade; Roe *v*..... 941
Waggonner; Fallon *v*..... 941
Wahlquist *v*. United States..... 1010
Wainwright; Maggard *v*..... 946
Wainwright; Simpson *v*..... 1011
Walker *v*. United States..... 985
Wallace; Negron *v*..... 998
Wallace *v*. United States..... 943
Walters *v*. United States..... 910
Ward *v*. Page..... 904
Warden. See also name of warden.
Warden; Booth *v*..... 909
Warden; Jackson *v*..... 992
Warden; Manzanares *v*..... 977
Warden; Nelson *v*..... 997
Washington *v*. General Motors Corp..... 940

Page

Washington; Martin *v*. 912
Washington *v*. United States 978
Washington Social and Health Services; Tarver *v*. 1000
Water Division No. 5 District Court; United States *v*. 940
Watts; McGregor *v*. 980
Wauford *v*. Tennessee 946
Weber *v*. United States 932, 939, 1008
Webster *v*. United States 986
Weiser *v*. United States 949
Welhausen Co. *v*. Labor Board 973
Wenzel *v*. United States 981
Westfall *v*. Ohio 931
West Virginia Road Comm'n; Triangle Imp. Council *v*. 497
WHDH, Inc. *v*. Federal Com. Comm'n 1007
Wheeler *v*. Lykes Bros. Steamship Co 922
White; United States *v*. 990
Whitehead; Hortencio *v*. 966
Whitehead *v*. United States 974
Wild *v*. United States 986
Williams *v*. McMann 914
Williams *v*. Neil 998
Williams *v*. New York 947
Williams *v*. United States 912, 931, 985, 987
Williamson *v*. Gilmer 993
Willoughby *v*. Lash 998
Wilson *v*. Follette 997
Wilson *v*. United States 912, 929, 930
Winegar *v*. Buchkoe 975
Winegard Co.; University of Illinois Foundation *v*. 990
Wingo; Smith *v*. 971
Wisconsin; Bergenthal *v*. 972
Wisconsin; Eisenberg *v*. 987
Wisconsin *v*. Yoder 994
Wolke; Gaylord *v*. 976
Woo; Rosenberg *v*. 49
Wood *v*. Gaffney 1010
Woods; Lawrence *v*. 983
Wright *v*. District Court of Montgomery County 990
Wright *v*. United States 949
Wyman *v*. Boddie 991
Wyman *v*. Rosado 991
Yee Chien Woo; Rosenberg *v*. 49
Yoder *v*. United States 966
Yoder; Wisconsin *v*. 994

Page
Young; Lowe *v*..... 1006
Young *v*. New Jersey..... 929
Young *v*. United States..... 966
Youngblood; Board of Public Instruction of Bay County *v*.. 943
Zelker; Gould *v*..... 930
Zelker; Halpern *v*..... 932
Zenchak *v*. United States..... 912
Zerbel; H. L. Federman & Co. *v*..... 902
Zerbel & Co.; H. L. Federman & Co. *v*..... 902
Zirpoli; Escalante *v*..... 981
Zitzer *v*. California..... 984
Zizzo; United States *v*..... 938

TABLE OF CASES CITED

Page

Accardi v. Shaughnessy, 347 U. S. 260 278
Adkins v. Children's Hospital, 261 U. S. 525 255
Adriaanse v. United States, 184 F. 2d 968 326
Aghnides v. Holden, 226 F. 2d 949 318
Agrashell, Inc. v. Bernard Sirotta Co., 281 F. Supp. 704 318
Alberts v. California, 354 U. S. 476 354
Albertson v. SACB, 382 U. S. 70 429–431, 460, 469, 470
Aldridge v. Celebrezze, 339 F. 2d 190 406
Alexander v. Holmes County Bd. of Ed., 396 U. S. 19 14, 31
Alexander v. United States, 201 U. S. 117 533
Allegheny County v. Frank Mashuda Co., 360 U. S. 185 261
American Newspaper Publishers v. NLRB, 193 F. 2d 782 578
American Power & Light v. SEC, 329 U. S. 90 279
American Trucking Assns. v. United States, 344 U. S. 298 277
Anderson, In re, 69 Cal. 2d 613 191, 299, 304
Andres v. United States, 333 U. S. 740 199, 201
A. & P. Tea Co. v. Supermarket Corp., 340 U. S. 147 343
Aptheker v. Secretary of State, 378 U. S. 500 379
A Quantity of Books v. Kansas, 378 U. S. 205 309
Arizona v. California, 373 U. S. 546 272

Page

Armstrong v. Manzo, 380 U. S. 545 542
Ashbrook v. State, 49 Ohio App. 298 219, 228, 234, 288, 292
Ashwander v. TVA, 297 U. S. 288 369
Association. For labor union, see name of trade.
Atkinson v. White, 60 Me. 396 322
Atlanta Motel v. United States, 379 U. S. 241 153
Bachellar v. Maryland, 397 U. S. 564 259
Baggett v. Bullitt, 377 U. S. 360 257
Bagley v. State, 247 Ark. 113 196
Bahler v. Fletcher, 474 P. 2d 329 326
Baker Mfg. Co. v. Whitewater Mfg. Co., 430 F. 2d 1008 335
Bantam Books v. Sullivan, 372 U. S. 58 419
Barber v. Page, 390 U. S. 719 627
Barrett Line v. United States, 326 U. S. 179 279
Beckman v. Mall, 317 U. S. 597 151
Beckman Instruments v. Technical Dev. Corp., 433 F. 2d 55 345
Bender v. Wickard, 319 U. S. 731 151
Ber v. Celebrezze, 332 F. 2d 293 405
Berner v. British Commonwealth Airlines, 346 F. 2d 532 333
Bernhard v. Bank of America, 19 Cal. 2d 807 323–329
Bigelow v. Old Dominion Copper, 225 U. S. 111 321

Page

Blount v. Rizzi, 400 U. S. 410 359, 367–369, 375, 383, 386
Board of Ed. v. Barnette, 319 U. S. 624 113, 114
Boddie v. Connecticut, 401 U. S. 371 256, 476, 937, 939, 954–961
Bolling v. Sharpe, 347 U. S. 497 253
Bouie v. Columbia, 378 U. S. 347 253, 254, 546
Bowles v. Seminole Rock & Sand, 325 U. S. 410 105
Boyce Motor Lines v. United States, 342 U. S. 337 559–562, 566
Boyd v. United States, 116 U. S. 616 449, 450
Boykin v. Alabama, 395 U. S. 238 255, 256, 269
Boys Markets v. Retail Clerks, 398 U. S. 235 327, 584
Brady v. United States, 397 U. S. 742 212
Brasher v. Celebrezze, 340 F. 2d 413 406
Breard v. Alexandria, 341 U. S. 622 377
Breaux v. Finch, 421 F. 2d 687 406
Brewer v. School Bd., 397 F. 2d 37 21
Bridges v. Gardner, 368 F. 2d 86 406
Bristol v. Moser, 55 Ariz. 185 669
Brobston v. Darby Borough, 290 Pa. 331 322
Brookhart v. Janis, 384 U. S. 1 627
Brotherhood. For labor union, see name of trade.
Brown v. Bd. of Ed., 347 U. S. 483 5, 6, 12, 15–18, 21, 22, 27, 31, 46
Brown v. Bd. of Ed., 349 U. S. 294 12, 13, 15, 21, 27
Brown v. Mississippi, 297 U. S. 278 243
Brown v. United States, 356 U. S. 148 215

Page

Brown v. Walker, 161 U. S. 591 215, 439, 470
Browning v. Hooper, 269 U. S. 396 254, 256, 272
Brown Shoe v. United States, 370 U. S. 294 553
Brulotte v. Thys Co., 379 U. S. 29 344
Bruszewski v. United States, 181 F. 2d 419 325
Bruton v. United States, 391 U. S. 123 625–628, 630, 631, 633–635
Burnette v. Davis, 382 U. S. 42 694
Burns v. Richardson, 384 U. S. 73 694
Butler v. Michigan, 352 U. S. 380 382
Buttfield v. Stranahan, 192 U. S. 470 276
Byers v. Justice Court, 71 Cal. 2d 1039 437, 438, 451, 468
Cafeteria Workers v. McElroy, 367 U. S. 886 309
Calder v. Bull, 3 Dall. 386 253
California v. Green, 399 U. S. 149 626–628
California Dept. of Human Resources v. Java, 402 U. S. 121 968
Calton v. Utah, 130 U. S. 83 200
Camacho v. Gardner, 104 Ariz. 555 644
Cantwell v. Connecticut, 310 U. S. 296 77, 615
Carbice Corp. v. American Patents, 283 U. S. 27 344
Carroll v. Princess Anne, 393 U. S. 175 270, 419
Carroll v. United States, 354 U. S. 394 67, 83, 84, 89, 94, 533
Carter v. Carter Coal, 298 U. S. 238 272
Cauefield v. Fidelity & Cas. Co., 378 F. 2d 876 326
Ceballos v. Shaughnessy, 352 U. S. 599 511
Celebrezze v. Sutton, 338 F. 2d 417 406
Celebrezze v. Warren, 339 F. 2d 833 406

Page

Cephus v. United States, 117 U. S. App. D. C. 15 216
Chambers v. Florida, 309 U. S. 227 244
Chaplinsky v. New Hampshire, 315 U. S. 568 613
Chapman v. California, 386 U. S. 18 625
Chimel v. California, 395 U. S. 752 923
Chrysler Corp. v. United States, 316 U. S. 556 675, 686
Citizen Pub. Co. v. United States, 394 U. S. 131 555
Citizens to Preserve Overton Park v. Volpe, 401 U. S. 402 119
City. See name of city.
Cleveland v. Anderson, 13 Ohio App. 2d 83 615
Cline v. Frink Dairy, 274 U. S. 445 272
Cobbledick v. United States, 309 U. S. 323 532, 533
Coca Cola v. Pepsi-Cola, 36 Del. 124 322
Cochran v. Celebrezze, 325 F. 2d 137 405
Cohen v. Perales, 412 F. 2d 44; 416 F. 2d 1250 398
Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U. S. 714 649
Commonwealth. See also name of Commonwealth.
Commonwealth v. Tilghman, 4 S. & R. 127 262
Communist Party v. SACB, 367 U. S. 1 276
Compco Corp. v. Day-Brite Lighting, 376 U. S. 234 343, 345
Connally v. General Constr. Co., 269 U. S. 385 257, 614
Consolidated Edison v. NLRB, 305 U. S. 197 401, 407, 413
Consolo v. FMC, 383 U. S. 607 401
Construction Laborers v. Curry, 371 U. S. 542 418, 421

Page

Consumers Digest v. Consumer Magazine, 92 Ill. App. 2d 54 421
Continental Baking v. Woodring, 286 U. S. 352 539
Cooper v. Aaron, 358 U. S. 1 253
Cooper v. Pate, 378 U. S. 546 657
Corrections Commissioner. See name of commissioner.
Counselman v. Hitchcock, 142 U. S. 547 449, 469, 476
County. See name of county.
Covey v. Somers, 351 U. S. 141 256
Cox v. Louisiana, 379 U. S. 536 615
Cox v. Louisiana, 379 U. S. 559 620
Cox v. New Hampshire, 312 U. S. 569 258
Crowell v. Benson, 285 U. S. 22 369
Cummings v. Missouri, 4 Wall. 277 253
Cuno Corp. v. Automatic Devices, 314 U. S. 84 343
Currin v. Wallace, 306 U. S. 1 256
Cuthrell v. Celebrezze, 330 F. 2d 48 405
Davis v. Bd. of School Comm'rs, 402 U. S. 33 19, 27, 29
Davis v. Bd. of School Comm'rs, 414 F. 2d 609 35
Davis v. McKinnon & Mooney, 266 F. 2d 870 326
Davis v. United States, 374 F. 2d 1 101
Delaware Indians v. Cherokee Nation, 193 U. S. 127 174
Delli Paoli v. United States, 352 U. S. 232 631
Dempsey v. Tynan, 143 Conn. 202 646
Dennis v. United States, 341 U. S. 494 258, 388
Desmond v. Kramer, 96 N. J. Super. 96 327

419-882 O - 72 - 4

Page

Detroit & T. S. L. R. Co. v. Transportation Union, 396 U. S. 142 576, 581, 588, 595
DeWitt, Inc. v. Hall, 19 N. Y. 2d 141 327
DiBella v. United States, 369 U. S. 121 533
Dickinson v. United States, 346 U. S. 389 488
Director of penal or correctional institution. See name of director.
Dodsworth v. Celebrezze, 349 F. 2d 312 406
Doe v. Dept. of Transportation, 412 F. 2d 674 408
Doe v. General Hospital of D. C., 313 F. Supp. 1170 71
Doe v. General Hospital of D. C., 140 U. S. App. D. C. 149 and 153 72
Doe v. Scott, 321 F. Supp. 1385 76
Dole Valve v. Perfection Bar Equip., 318 F. Supp. 122 347
Dombrowski v. Pfister, 380 U. S. 479 257, 259, 375, 378, 620
Donato v. Fishburn, 90 Ariz. 210 669
Douglas v. Alabama, 380 U. S. 415 625, 627
Douglas v. California, 372 U. S. 353 144, 145, 959, 960
Draper v. Washington, 372 U. S. 487 958
Dreyer v. Illinois, 187 U. S. 71 254, 272
Duisen v. State, 441 S. W. 2d 688 196
Duncan v. Louisiana, 391 U. S. 145 235
Dupkunis v. Celebrezze, 323 F. 2d 380 405
Durham v. United States, 214 F. 2d 862 565
Durham v. United States, 401 U. S. 481 962
Dyson v. Stein, 401 U. S. 200 79
Eagle, Star & British Dominions Ins. v. Heller, 149 Va. 82 322, 327

Page

Edwards v. South Carolina, 372 U. S. 229 615
Ehlert v. United States, 402 U. S. 99 969
Eisel v. Columbia Packing, 181 F. Supp. 298 326, 333
Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711 575
Ellis v. Bd. of Pub. Instruction, 423 F. 2d 203 27
Ellis v. Crockett, 51 Haw. 45 326
Ellis v. United States, 356 U. S. 674 959
Embree v. Kansas City Road Dist., 240 U. S. 242 272
Emspak v. United States, 349 U. S. 190 438
Erie R. Co. v. Tompkins, 304 U. S. 64 321, 324
Ernst, In re, 294 F. 2d 556 196
Escobedo v. Dept. of Motor Vehicles, 35 Cal. 2d 870 645
Escobedo v. Illinois, 378 U. S. 478 924
Estep v. United States, 327 U. S. 114 483, 486
Ethyl Gasoline v. United States, 309 U. S. 436 344
Eubank v. Richmond, 226 U. S. 137 254, 256, 272
Ewing v. Mytinger & Casselberry, 339 U. S. 594 542
Ex parte. See name of party.
Fahey v. Mallonee, 332 U. S. 245 277, 542
Falbo v. United States, 320 U. S. 549 483
Farmer v. Killingsworth, 102 Ariz. 44 644
FCC v. RCA Communications, 346 U. S. 86 253, 256, 279
FPC v. Tuscarora Indians, 362 U. S. 99 514
Ferguson v. Georgia, 365 U. S. 570 220
Ferguson v. Moore-McCormack Lines, 352 U. S. 521 497, 508
Ferguson v. Skrupa, 372 U. S. 726 255

Page

Fernandez v. Mackell, 401 U. S. 66 903, 935
Field v. Clark, 143 U. S. 649 272
First Nat. Bk. v. Reeves, 27 Ariz. 508 669
First Suburban Water Dist. v. McCanless, 177 Tenn. 128 602, 607
Fitzpatrick v. United States, 178 U. S. 304 215
Flake v. Gardner, 399 F. 2d 532 406
Flemming v. Nestor, 363 U. S. 603 401
Fletcher v. Peck, 6 Cranch 87 286
Florida ex rel. Thomas v. Culver, 253 F. 2d 507 196
Florida Lime Growers v. Jacobsen, 362 U. S. 73 90, 93
Florida Lime Growers v. Paul, 373 U. S. 132 649
Fortson v. Dorsey, 379 U. S. 433 694
Free v. Bland, 369 U. S. 663 649
Freedman v. Maryland, 380 U. S. 51 309, 359, 367–371, 374, 377, 378, 382, 383, 386
Frost & Frost Trucking v. Railroad Comm'n, 271 U. S. 583 539
Gable v. Jenkins, 397 U. S. 592 355
Garner v. Louisiana, 368 U. S. 157 268
Garner v. Teamsters, 346 U. S. 485 307
Garrity v. New Jersey, 385 U. S. 493 240, 469
Gault, In re, 387 U. S. 1 256
General Com. of Adjustment v. M-K-T R. Co., 320 U. S. 323 577, 578
General Trading v. State Tax Comm'n, 322 U. S. 335 369, 644
Giaccio v. Pennsylvania, 382 U. S. 399 207, 258, 262–265, 272, 310

Page

Gibbons v. Ogden, 9 Wheat. 1 150, 649
Gibson v. United States, 194 U. S. 182 665
Gibson v. United States, 329 U. S. 338 483
Gideon v. Wainwright, 372 U. S. 335 235, 256, 540, 959
Gillaspie v. Dept. of Pub. Safety, 152 Tex. 459 646
Gillette v. United States, 401 U. S. 437 112, 113, 256, 490
Ginzburg v. United States, 383 U. S. 463 79, 379
Girouard v. United States, 328 U. S. 61 327
Goldberg v. Kelly, 397 U. S. 254 124, 135, 136, 255, 256, 269, 309, 402, 406, 407, 539–542
Goldsmith v. Bd. of Tax Appeals, 270 U. S. 117 539
Gomillion v. Lightfoot, 364 U. S. 339 141
Good Health Dairy v. Emery, 275 N. Y. 14 322
Graham v. John Deere Co., 383 U. S. 1 314, 331–333
Graham v. Locomotive Firemen, 338 U. S. 232 582, 595
Graves v. Associated Transport, 344 F. 2d 894 326
Green v. County School Bd., 391 U. S. 430 7, 13–15, 18, 21, 25, 27, 31, 38, 41, 46
Green v. Gardner, 391 F. 2d 606 406
Green v. United States, 365 U. S. 301 217–219, 236
Gregory v. Chicago, 394 U. S. 111 614
Griffin v. California, 380 U. S. 609 207, 210
Griffin v. Illinois, 351 U. S. 12 958, 961
Griffin v. School Bd., 377 U. S. 218 14
Griswold v. Connecticut, 381 U. S. 479 73, 78, 255, 265
Grosso v. United States, 290 U. S. 62 429–431, 437, 438, 449, 452–462, 477, 978

Page

Gunn v. University Com., 399 U. S. 383 936
Hamilton v. State, 39 Ohio App. 153 228
Hampton & Co. v. United States, 276 U. S. 394 273
Hannah v. Larche, 363 U. S. 420 401
Hansberry v. Lee, 311 U. S. 32 329
Harper v. Virginia Bd. of Elections, 383 U. S. 663 145, 226
Harries v. Air King Prods., 183 F. 2d 158 331
Harrington v. California, 395 U. S. 250 627
Harris v. Zion's Savings Bk., 317 U. S. 447 648
Harrisburg, The, 119 U. S. 199 321
Hastings v. Thurston, 100 Ariz. 302 644
Haynes v. United States, 390 U. S. 85 369, 429–431, 438, 453, 460, 937, 938
Hebert v. Louisiana, 272 U. S. 312 242
Hecht Co. v. Bowles, 321 U. S. 321 15
Heimke v. Munoz, 106 Ariz. 26 648
Heiser v. Woodruff, 327 U. S. 726 324
Helvering v. Davis, 301 U. S. 619 1003
Helvering v. Hallock, 309 U. S. 106 328
Herndon v. Lowry, 301 U. S. 242 77
Hess v. Pawloski, 274 U. S. 352 539
Hill v. Florida, 325 U. S. 538 649
Hill v. United States, 368 U. S. 424 219, 220, 237
Hines v. Davidowitz, 312 U. S. 52 649, 650
Hoffman v. United States, 341 U. S. 479 432, 435–442
Holt v. United States, 218 U. S. 245 432

Page

Home Owners Sav. & Loan v. Northwestern Fire & Marine Ins., 354 Mass. 448 326
Hoppe v. State, 29 Ohio App. 467 228, 247
Housing Authority v. Superior Court, 35 Cal. 2d 550 138
Howell v. State, 102 Ohio St. 411 233, 234, 292
Howell v. Vito's Trucking, 20 Mich. App. 140 327
Hughes v. United States, 342 U. S. 353 682, 686
Hull, Ex parte, 312 U. S. 546 255
Hunter v. Erickson, 393 U. S. 385 140, 141
Hunter v. State, 222 Tenn. 672 196
Hurtado v. California, 110 U. S. 516 243, 253, 254
Hutcheson v. United States, 369 U. S. 599 476
Immigration Service v. Stanisic, 395 U. S. 62 105
Industrial Workers v. Galveston Wharves, 400 F. 2d 320 573
In re. See name of party.
International. For labor union, see name of trade.
IBM v. United States, 298 U. S. 131 344
International Salt v. United States, 332 U. S. 392 344
International Shoe v. FTC, 280 U. S. 291 555
International Shoe v. Pinkus, 278 U. S. 261 660
Ivanhoe Irrig. Dist. v. McCracken, 357 U. S. 275 1003
Jackman v. Rosenbaum Co., 260 U. S. 22 203
Jackson v. Bishop, 404 F. 2d 571 992
Jackson v. Denno, 378 U. S. 368 232, 255, 256, 266, 268
Jenkins v. Atlantic C. L. R. Co., 89 S. C. 408 322
Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287 644

Page
Johns v. State, 42 Ohio App. 412 228
Johnson v. Avery, 393 U. S. 483 255
Johnson v. Commonwealth, 208 Va. 481 196
Jones v. Lemond, 396 U. S. 1227 111, 115
Jordan v. De George, 341 U. S. 223 79
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 77
Justice v. Gardner, 360 F. 2d 998 406
Katz v. United States, 389 U. S. 347 965
Katzenbach v. McClung, 379 U. S. 294 153
Katzinger Co. v. Chicago Mfg. Co., 329 U. S. 394 343, 345
Kay v. United States, 303 U. S. 1 258
Keene v. United States, 266 F. 2d 378 101
Kelly v. Wyman, 294 F. Supp. 893 541
Keokuk & W. R. Co. v. Missouri, 152 U. S. 301 321
Kerotest Mfg. Co. v. C-O-Two Co., 342 U. S. 180 329, 344
Kesler v. Dept. of Pub. Safety, 369 U. S. 153 98, 638, 643, 644, 647, 650–654, 658, 661, 664–671
Keyishian v. Regents, 385 U. S. 589 619
King v. Smith, 392 U. S. 309 135
Klopfer v. North Carolina, 386 U. S. 213 235
Konigsberg v. State Bar, 366 U. S. 36 463
Kraly v. National Distillers, 319 F. Supp. 1349 345
Kunz v. New York, 340 U. S. 290 619
Kurlan v. Comm'r, 343 F. 2d 625 326
Labine v. Vincent, 401 U. S. 532 476
Labor Board. See NLRB.

Page
Labor union. See name of trade.
Lambert v. California, 355 U. S. 225 565
Lanzetta v. New Jersey, 306 U. S. 451 71, 75, 257, 616
Lapenieks v. Immigration Service, 389 F. 2d 343 513
Lear, Inc. v. Adkins, 395 U. S. 653 334, 345, 346, 349
Leary v. United States, 395 U. S. 6 70, 438, 453, 460, 937, 939
Lee v. England, 206 F. Supp. 957 665
Lee v. State, 32 Ohio St. 113 289
Leeper v. Texas, 139 U. S. 462 296
Levy v. Louisiana, 391 U. S. 68 78
Lewis v. Roberts, 267 U. S. 467 639, 648, 655, 665
Lewis v. United States, 348 U. S. 419 437
Liberty Mutual Ins. v. George Colon & Co., 260 N. Y. 305 322
Lichter v. United States, 334 U. S. 742 253, 280, 286
Litchfield v. Goodnow, 123 U. S. 549 321
Lober v. Moore, 135 U. S. App. D. C. 146 325
Local. For labor union, see name of trade.
Local Loan Co. v. Hunt, 292 U. S. 234 648, 660
Locomotive Engineers v. B. & O. R. Co., 372 U. S. 284 573
Locomotive Firemen v. Chicago, B. & Q. R. Co., 225 F. Supp. 11 573
Londoner v. Denver, 210 U. S. 373 539
Lonergan v. Crucible Steel, 37 Ill. 2d 599 421
Long v. District Court of Iowa, 385 U. S. 192 958
Long v. United States, 59 F. 2d 602 405

Page

Louisiana v. United States, 380 U. S. 145 256, 267, 272
Louisiana Power v. Thibodaux, 360 U. S. 25 261
Lovell v. Griffin, 303 U. S. 444 256, 267, 419
Loving v. Virginia, 388 U. S. 1 78, 265
Lucas v. Velikanje, 2 Wash. App. 888 327
Luck v. United States, 121 U. S. App. D. C. 151 215
Lustik v. Rankila, 269 Minn. 515 327
Lynch v. Chicago Transit, 62 Ill. App. 2d 220 327
Mac. See also Mc.
MacGregor v. Westinghouse, 329 U. S. 402 345
Machinists v. Street, 367 U. S. 740 575, 576, 581, 588, 598
Mackey v. United States, 401 U. S. 667 478, 630, 632, 923, 924, 938
Malloy v. Hogan, 378 U. S. 1 210, 436, 439, 449, 459
Marbury v. Madison, 1 Cranch 137 250
Marchetti v. United States, 390 U. S. 39 429–431, 437, 438, 449, 452–462, 469, 470, 477, 978, 979
Marcus v. Search Warrant, 367 U. S. 717 309, 359
Martin v. Finch, 415 F. 2d 793 406
Martin v. Struthers, 319 U. S. 141 419
Maryland v. Capital Airlines, 267 F. Supp. 298 326
Maryland v. Wirtz, 392 U. S. 183 154
Mathews v. New York Racing Assn., 193 F. Supp. 293 326
Maxwell v. Bishop, 398 F. 2d 138 196
Maxwell v. Bishop, 393 U. S. 997; 395 U. S. 918 185
Maxwell v. Bishop, 398 U. S. 262 185, 196
Mayberry v. Pennsylvania, 400 U. S. 455 266

Page

Mc. See also Mac.
McCants v. State, 282 Ala. 397 196
McCarthy v. Arndstein, 266 U. S. 34 437, 450, 469, 476
McDonald v. Bd. of Election, 394 U. S. 802 145
McDowell v. Davis, 104 Ariz. 69 648
McFarland v. American Sugar, 241 U. S. 79 253
McKart v. United States, 395 U. S. 185 483–487, 495, 496
McKinley v. United States, 249 U. S. 397 256
McMann v. Richardson, 397 U. S. 759 212, 213
McMillin v. Gardner, 384 F. 2d 596 406
McMullen v. Celebrezze, 335 F. 2d 811 406
McNabb v. United States, 318 U. S. 332 250
Medley, In re, 134 U. S. 160 253
Mefford v. Gardner, 383 F. 2d 748 408
Melson v. Sard, 131 U. S. App. D. C. 102 239, 240
Mempa v. Rhay, 389 U. S. 128 211, 219, 237
Mercoid v. Mid-Continent Investment, 320 U. S. 661 343
Meyer v. Nebraska, 262 U. S. 390 78
Michelson v. United States, 335 U. S. 469 213, 215, 230
Miller v. Anckaitis, 436 F. 2d 115 653
Miller v. Schoene, 276 U. S. 272 272
Miller v. State, 224 Ga. 627 196
Mills v. Alabama, 384 U. S. 214 98, 418, 421
Miracle v. Celebrezze, 351 F. 2d 361 405
Miranda v. Arizona, 384 U. S. 436 255, 449, 450, 924
Missouri v. Lewis, 101 U. S. 22 296
Molinaro v. New Jersey, 396 U. S. 365 968
Monroe v. Bd. of Comm'rs, 391 U. S. 450 7

Page

Moon v. Celebrezze, 340 F. 2d 926 406
Moore v. Dempsey, 261 U. S. 86 242
Moore v. Missouri, 159 U. S. 673 296
Moore v. United States, 360 F. 2d 353 327
Moragne v. States Marine Lines, 398 U. S. 375 321
Morissette v. United States, 342 U. S. 246 564, 565
Mortensen v. Knight, 81 Ariz. 325 669
Morton Salt v. Suppiger Co., 314 U. S. 488 344
Motion Picture Patents v. Universal Film, 243 U. S. 502 344
Mulford v. Smith, 307 U. S. 38 279
Mullane v. Central Hanover Bk., 339 U. S. 306 256, 541, 542
Mulloy v. United States, 398 U. S. 410 484
Murchison, In re, 349 U. S. 133 255, 256, 266, 409
Murphy v. Waterfront Comm'n, 378 U. S. 52 214, 215, 437, 442, 450
Muskrat v. United States, 219 U. S. 346 48
Musser v. Utah, 333 U. S. 95 258
Myers v. United States, 272 U. S. 52 272
Nash v. Florida Industrial Comm'n, 389 U. S. 235 131, 649
Nash v. United States, 229 U. S. 373 76
NAACP v. Button, 371 U. S. 415 383
NBC v. United States, 319 U. S. 190 276
NLRB v. American Nat. Ins. Co., 343 U. S. 395 583
NLRB v. Columbia Enameling & Stamping, 306 U. S. 292 401
NLRB v. Gissel Packing, 395 U. S. 575 279

Page

NLRB v. Gullett Gin Co., 340 U. S. 361 136
NLRB v. Hearst Publications, 322 U. S. 111 605
NLRB v. Insurance Agents, 361 U. S. 477 575, 583, 597, 598
NLRB v. Pittsburgh S. S. Co., 337 U. S. 656 321
NLRB v. Randolph Electric, 343 F. 2d 60 603, 605
NLRB v. Reed & Prince Co., 205 F. 2d 131 578, 579
Near v. Minnesota, 283 U. S. 697 254, 418
Negre v. Larsen, 401 U. S. 437 112
Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570 421
New Lamp Chimney Co. v. Ansonia Brass & Copper, 91 U. S. 656 660
New State Ice v. Liebmann, 285 U. S. 262 312
New York Central Securities v. United States, 287 U. S. 12 278
New York Underwriters v. Superior Court, 104 Ariz. 544 644
Nickerson v. Kutschera, 390 F. 2d 812 318
Nickerson v. Kutschera, 419 F. 2d 983 318, 339
Nickerson v. Pep Boys, 247 F. Supp. 221 318
Niemotko v. Maryland, 340 U. S. 268 256, 259, 283
North Carolina v. Alford, 400 U. S. 25 269, 307
North Carolina v. Pearce, 395 U. S. 711 255, 256, 265, 286
North Carolina Bd. of Ed. v. Swann, 402 U. S. 43 47
Nyyssonen v. Bendix Corp., 342 F. 2d 531 331
Oestereich v. Selective Service Bd., 393 U. S. 233 483
Offutt v. United States, 348 U. S. 11 409
Olmstead v. United States, 277 U. S. 438 452, 474

	Page
Opp Cotton Mills v. Administrator, 312 U. S. 126	539, 542
Page v. Celebrezze, 311 F. 2d 757	406
Palko v. Connecticut, 302 U. S. 319	203
Panama Refining v. Ryan, 293 U. S. 388	253
Parke-Davis & Co. v. H. K. Mulford Co., 189 F. 95	331
Parker v. North Carolina, 397 U. S. 790	212
Pat Perusse Realty v. Lingo, 249 Md. 33	326
Pease v. Peck, 18 How. 595	261
Peckham v. United States, 96 U. S. App. D. C. 312	69
Pennington v. Snow, 471 P. 2d 370	326
Pennsylvania v. Ashe, 302 U. S. 51	246
Pennsylvania R. Co. v. NLRB, 261 U. S. 72	593
People v. Anderson, 64 Cal. 2d 633	303
People v. Aranda, 63 Cal. 2d 518	632
People v. Bandhauer, 66 Cal. 2d 524	300
People v. Bandhauer, 1 Cal. 3d 609	303
People v. Belous, 71 Cal. 2d 954	76
People v. Fitzpatrick, 61 Misc. 2d 1043	196
People v. Floyd, 1 Cal. 3d 694	300
People v. Friend, 47 Cal. 2d 749	303
People v. Garner, 57 Cal. 2d 135	300
People v. Golston, 58 Cal. 2d 535	298
People v. Green, 47 Cal. 2d 209	304
People v. Harrison, 59 Cal. 2d 622	302
People v. Hill, 66 Cal. 2d 536	299, 304
People v. Hillery, 65 Cal. 2d 795	303
People v. Hines, 61 Cal. 2d 164	299, 308
People v. Jones, 52 Cal. 2d 636	299
People v. Ketchel, 59 Cal. 2d 503	305
People v. Kidd, 56 Cal. 2d 759	299, 300, 305
People v. King, 1 Cal. 3d 791	298
People v. Langdon, 52 Cal. 2d 425	299
People v. Lookadoo, 66 Cal. 2d 307	191
People v. Love, 53 Cal. 2d 843	300
People v. Love, 56 Cal. 2d 720	299, 300, 304
People v. McGautha, 70 Cal. 2d 770	302
People v. Moore, 53 Cal. 2d 451	304
People v. Morse, 60 Cal. 2d 631	299, 307
People v. Moya, 53 Cal. 2d 819	300
People v. Nothaus, 147 Colo. 210	645
People v. Ohio Cas. Ins., 232 F. 2d 474	326
People v. Polk, 63 Cal. 2d 443	303
People v. Purvis, 60 Cal. 2d 323	299
People v. Roberts, 40 Cal. 2d 483	632
People v. Sosa, 251 Cal. App. 2d 9	299
People v. Terry, 61 Cal. 2d 137	300, 303
People v. Washington, 71 Cal. 2d 1061	303
People v. Welch, 58 Cal. 2d 271	299, 300
Perales v. Secretary, 288 F. Supp. 313	398
Perkins v. Lukens Steel, 310 U. S. 113	278
Perlman v. United States, 247 U. S. 7	532–534
Permian Basin Area Rate Cases, 390 U. S. 747	528

Page

Phelps Dodge Corp. v. NLRB, 313 U. S. 177 279
Phillips v. Celebrezze, 330 F. 2d 687 406
Picard v. United Aircraft, 128 F. 2d 632 334, 339
Piccirillo v. New York, 400 U. S. 548 442, 478
Piedmont Aviation v. Air Line Pilots, 416 F. 2d 633 573, 587
Pierce v. Gardner, 388 F. 2d 846 406
Pointer v. Texas, 380 U. S. 400 235, 625
Pope v. Atlantic C. L. R. Co., 345 U. S. 379 421
Pope Mfg. Co. v. Gormully, 144 U. S. 224 345
Poresky, Ex parte, 290 U. S. 30 539
Poulos v. New Hampshire, 345 U. S. 395 259
Precision Instrument v. Automotive Maintenance Machinery, 324 U. S. 806 343
Provident Tradesmens Bk. v. Lumbermens Mutual Cas. Co., 411 F. 2d 88 325
Public Workers v. Mitchell, 330 U. S. 75 963, 988
Queen v. Boyes, 1 B. & S. 311 470
Radio Comm'n v. Nelson Bros., 289 U. S. 266 278
Railroad Telegraphers v. Chicago & N. W. R. Co., 362 U. S. 330 575, 582, 595
Railroad Trainmen v. Akron & B. B. R. Co., 128 U. S. App. D. C. 59 573
Railroad Trainmen v. Atlantic C. L. R. Co., 127 U. S. App. D. C. 298 573
Railroad Trainmen v. Chicago R. & I. R. Co., 353 U. S. 30 582, 598
Railroad Trainmen v. Howard, 343 U. S. 768 578, 582, 595
Railroad Trainmen v. Jacksonville Terminal, 394 U. S. 369 574, 579, 583

Page

Railway Clerks v. Non-Contract Employees, 380 U. S. 650 576
Raley v. Ohio, 360 U. S. 423 458, 459, 466, 477
Raney v. Bd. of Ed., 391 U. S. 443 7
Rathbun v. United States, 355 U. S. 107 965
Ratliff v. Celebrezze, 338 F. 2d 978 405
Ray v. Pierson, 386 U. S. 547 962
Red Lion Broadcasting v. FCC, 395 U. S. 367 276, 279
Redrup v. New York, 386 U. S. 767 360, 380, 938
Reitz v. Mealey, 314 U. S. 33 638, 643, 644, 647, 650–654, 660, 664–671
Rescue Army v. Municipal Court, 331 U. S. 549 468
Roberts v. LaVallee, 389 U. S. 40 958
Roberts v. Russell, 392 U. S. 293 625, 627, 631–634
Robinson v. California, 370 U. S. 660 255
Rochin v. California, 342 U. S. 165 225
Rockefeller v. Catholic Medical Center, 397 U. S. 820 95
Roe v. Wade, 314 F. Supp. 1217 75, 76
Rogers v. United States, 340 U. S. 367 439
Rosado v. Wyman, 397 U. S. 397 135, 1003
Rosenberg v. United States, 346 U. S. 273 285
Rosenblum v. Griffin, 89 N. H. 314 646
Roth v. United States, 354 U. S. 476 353–361, 376, 379, 380
Rowan v. Post Office Dept., 397 U. S. 728 420
Ruth v. Rhodes, 66 Ariz. 129 669
St. Johnsbury Trucking v. United States, 220 F. 2d 393 562, 566
St. Paul v. Hoffmann, 223 Minn. 76 646

Page

Samuels v. Mackell, 401 U. S. 66 903, 935
Sanders v. Yuba County, 247 Cal. App. 2d 748 992
Sanderson v. Balfour, 109 N. H. 213 326
Sandoval v. Chenoweth, 102 Ariz. 241 644
Sanks v. Georgia, 401 U. S. 144 502
Scales v. United States, 367 U. S. 203 565
Schacht v. United States, 398 U. S. 58 259
Schaffer Transp. Co. v. United States, 355 U. S. 83 527
Schechter Poultry v. United States, 295 U. S. 495 253
Schecter v. Killingsworth, 93 Ariz. 273 644, 654, 667
Schine Theatres v. United States, 334 U. S. 110 556
Schmerber v. California, 384 U. S. 757 432, 435, 448–450
Schneider v. Rusk, 377 U. S. 163 253
Schneider v. Smith, 390 U. S. 17 369
Schneider v. State, 308 U. S. 147 419, 615
Schroeder v. New York, 371 U. S. 208 235
Scott v. Commanding Officer, 431 F. 2d 1132 101
Scott v. United States, 135 U. S. App. D. C. 377 240
Scott Paper v. Marcalus Co., 326 U. S. 249 344, 345
Screws v. United States, 325 U. S. 91 98
Scruggs v. Haynes, 252 Cal. App. 2d 256 992
Seaboard World Airlines v. Transport Workers, 425 F. 2d 1086 573
Seattle Trust v. Roberge, 278 U. S. 116 254, 255, 272
Sears, Roebuck v. Stiffel Co., 376 U. S. 225 343, 345, 649
SEC v. Chenery Corp., 318 U. S. 80 279, 527
Segura v. Patterson, 402 F. 2d 249 196

Page

Seguros Tepeyac v. Jernigan, 410 F. 2d 718 325
Shapiro v. Thompson, 394 U. S. 618 92, 93, 253, 255, 539
Shapiro v. United States, 335 U. S. 1 428, 440
Shelton v. State, 102 Ohio St. 376 219, 233
Shen v. Esperdy, 428 F. 2d 293 52, 54
Sherbert v. Verner, 374 U. S. 398 539
Shomberg v. United States, 348 U. S. 540 512
Shuttlesworth v. Birmingham, 382 U. S. 87 260
Sicurella v. United States, 348 U. S. 385 279
Silber v. United States, 370 U. S. 717 321
Silsby v. State, 119 Ohio St. 314 228, 289
Silverthorne Lumber v. United States, 251 U. S. 385 979
Simmons v. United States, 390 U. S. 377 211, 212, 238, 239
Sims v. Eyman, 405 F. 2d 439 196
Skinner v. Oklahoma, 316 U. S. 535 78, 204
Slochower v. Bd. of Ed., 350 U. S. 551 539
Smith v. California, 361 U. S. 147 257, 379, 380
Sniadach v. Family Finance Corp., 395 U. S. 337 236, 539, 542, 1003
Sola Electric v. Jefferson Electric, 317 U. S. 173 345, 649
Spalding v. New York ex rel. Backus, 4 How. 21 662
Specht v. Patterson, 386 U. S. 605 211, 218, 237, 247, 268
Speiser v. Randall, 357 U. S. 513 309, 539
Spencer v. Texas, 385 U. S. 554 209, 210, 213, 215, 221, 230, 231
Spevack v. Klein, 385 U. S. 511 255, 449, 469

Page

Sprague v. Ticonic Nat. Bk., 307 U. S. 161 959
Stancavage v. Celebrezze, 323 F. 2d 373 405
Standard Oil v. United States, 337 U. S. 293 553
Stanley v. Georgia, 394 U. S. 557 309, 354–360, 367, 375, 376, 379–382
Stark v. Wickard, 321 U. S. 288 575
State. See also name of State.
State v. Ames, 50 Ohio Law Abs. 311 233
State v. Austin, 71 Ohio St. 317 227
State v. Caldwell, 135 Ohio St. 424 233, 234, 289, 292
State v. Carter, 21 Ohio St. 2d 212 295
State v. Ellis, 98 Ohio St. 21 288
State v. Ferguson, 175 Ohio St. 390 233, 289, 293
State v. Ferranto, 112 Ohio St. 667 288
State v. Frohner, 150 Ohio St. 53 228
State v. Hector, 19 Ohio St. 2d 167 228
State v. Henley, 15 Ohio St. 2d 86 290, 293
State v. Johnson, 34 N. J. 212 196
State v. Kelbach, 23 Utah 2d 231 196
State v. Klumpp, 15 Ohio Op. 2d 461 195, 233, 289
State v. Latham, 190 Kan. 411 196
State v. Lucear, 93 Ohio App. 281 233, 234
State v. Meyer, 163 Ohio St. 279 290, 293
State v. Murdock, 172 Ohio St. 221 228
State v. Pollard, 21 Ohio St. 2d 171 228
State v. Reed, 85 Ohio App. 36 289
State v. Roseboro, 276 N. C. 185 196

Page

State v. Smith, 123 Ohio St. 237 288
State v. Smith, 74 Wash. 2d 744 196
State v. Stewart, 176 Ohio St. 156 289
State v. Walters, 145 Conn. 60 196
State v. Williams, 85 Ohio App. 236 228
Steele v. Louisville & N. R. Co., 323 U. S. 192 594
Stellwagen v. Clum, 245 U. S. 605 648
Stone v. Farmers' Bank, 174 U. S. 409 321
Street v. New York, 394 U. S. 576 615
Sullivan v. Cheatham, 264 Ala. 71 645
Sunshine Anthracite Coal v. Adkins, 310 U. S. 381 278
Superintendent of penal or correctional institution. See name of superintendent.
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U. S. 1 35, 37, 41, 42, 44–46, 182, 953
Sweezy v. New Hampshire, 354 U. S. 234 254, 272
Swift v. Director of Selective Serv. (CADC 1971) 101
Swift & Co. v. United States, 276 U. S. 311 676
Swift & Co. v. Wickham, 382 U. S. 111 90, 650, 662, 667
Switchmen v. Nat. Mediation Bd., 320 U. S. 297 580
Tate v. Short, 401 U. S. 395 657
Teague v. Customs Comm'r, 394 U. S. 977 962, 963
Technograph Printed Circuits v. Packard Bell Electronics, 290 F. Supp. 308 318
Technograph Printed Circuits v. United States, 178 Ct. Cl. 543 318, 331
Tehan v. Shott, 382 U. S. 406 450

Page

Teitelbaum Furs v. Dominion Ins., 58 Cal. 2d 601 327, 333
Teitel Film v. Cusack, 390 U. S. 139 367–369, 374, 386
Terminal Assn. v. Railroad Trainmen, 318 U. S. 1 596
Terminiello v. Chicago, 337 U. S. 1 615
Texas & N. O. R. Co. v. Railway Clerks, 281 U. S. 548 578, 588
Textile Workers v. Lincoln Mills, 353 U. S. 448 582
Thomas v. Culver, 253 F. 2d 507 196
Thomas v. United States, 368 F. 2d 941 240
Thompson v. Louisville, 362 U. S. 199 259
Thornhill v. Alabama, 310 U. S. 88 77, 259, 382, 419, 616
Thorpe v. Housing Authority, 393 U. S. 268 105
Tidewater Patent Dev. Co. v. Kitchen, 371 F. 2d 1004 318, 347
Times Film Corp. v. Chicago, 365 U. S. 43 612
Toledo v. Sims, 14 Ohio Op. 2d 66 616
Tot v. United States, 319 U. S. 463 70
Town. See name of town.
Townsend v. Burke, 334 U. S. 736 211, 236, 247
Triplett v. Lowell, 297 U. S. 638 317–322, 327, 330, 332, 334, 338, 342, 345, 347–350
Trop v. Dulles, 356 U. S. 86 202
Tumey v. Ohio, 273 U. S. 510 266
Tunstall v. Locomotive Firemen, 323 U. S. 210 595
Turner v. State, 21 Ohio Law Abs. 276 195, 233
Turner v. United States, 396 U. S. 398 388
Udall v. Tallman, 380 U. S. 1 105

Page

Union. For labor union, see name of trade.
Union Pacific R. Co. v. Price, 360 U. S. 601 588
United. For labor union, see name of trade.
United Air Lines v. Wiener, 335 F. 2d 379 326
United States v. Al-Majied Muhammad, 364 F. 2d 223 101
United States v. Aluminum Co., 247 F. Supp. 308 557
United States v. Armour & Co., 398 U. S. 268 673, 683
United States v. Atlantic Refining, 360 U. S. 19 682, 686
United States v. Balint, 258 U. S. 250 564, 565, 569
United States v. Bell Telephone, 128 U. S. 315 343
United States v. Blue, 384 U. S. 251 73, 532, 533
United States v. Bd. of Pub. Instruction, 395 F. 2d 66 21
United States v. Borden Co., 308 U. S. 188 73
United States v. Branker, 418 F. 2d 378 239
United States v. Brown, 381 U. S. 437 253
United States v. Burr, 25 F. Cas. 38 440, 441, 459, 463
United States v. Burroughs, 289 U. S. 159 65, 87–92
United States v. Calderon, 348 U. S. 160 216
United States v. Chicago Express, 235 F. 2d 785 566
United States v. Cohen Grocery, 255 U. S. 81 616
United States v. Cramp & Sons, 206 U. S. 118 174
United States v. Darby, 312 U. S. 100 151, 152
United States v. Dotterweich, 320 U. S. 277 569
United States v. Du Pont, 353 U. S. 586 556
United States v. Felin & Co., 334 U. S. 624 181

Page

United States v. 56 Cartons of Magazines, 253 F. Supp. 498 373
United States v. Freed, 401 U. S. 601 560, 564, 565
United States v. Freeman, 388 F. 2d 246 114
United States v. Gearey, 368 F. 2d 144 101, 102
United States v. Grimaud, 220 U. S. 506 276
United States v. Gypsum Co., 333 U. S. 364 344
United States v. Haley, 358 U. S. 644 151
United States v. Harriss, 347 U. S. 612 545, 546, 619
United States v. Hoellger, 273 F. 2d 760 513
United States v. Howard, 352 U. S. 212 277
United States v. Jackson, 390 U. S. 570 209, 238, 239
United States v. Johnson, 315 F. 2d 714 237
United States v. Jorn, 400 U. S. 470 98
United States v. Kahriger, 345 U. S. 22 437, 438
United States v. Menasche, 348 U. S. 528 512
United States v. Montgomery County Bd. of Ed., 395 U. S. 225 19, 20
United States v. Murdock, 290 U. S. 389 564
United States v. National Dairy, 372 U. S. 29 74, 257, 619, 620
United States v. Nordlof, 440 F. 2d 840 101
United States v. Ohio, 385 U. S. 9 151
United States v. Omaha Indians, 253 U. S. 275 181
United States v. One Carton of Film, 247 F. Supp. 450 372
United States v. 1,000 Copies of Magazine, 254 F. Supp. 595 373
United States v. 127,295 Copies of Magazines, 295 F. Supp. 1186 373

Page

United States v. Palumbo, 401 F. 2d 270 215
United States v. Penn Mfg. Co., 337 U. S. 198 181
United States v. Petrillo, 332 U. S. 1 73
United States v. Phillipsburg Nat. Bk., 399 U. S. 350 553
United States v. Raines, 362 U. S. 17 619
United States v. Reidel, 402 U. S. 351 375–380
United States v. Reliable Sales, 376 F. 2d 803 373
United States v. Richardson, 204 F. 2d 552 917
United States v. Robel, 389 U. S. 258 382, 619
United States v. Rock Royal Co-op, 307 U. S. 533 256, 276
United States v. Rumely, 345 U. S. 41 97, 369
United States v. Seeger, 380 U. S. 163 112
United States v. 77 Cartons of Magazines, 300 F. Supp. 851 372
United States v. Shannon, 342 U. S. 288 508
United States v. Sisson, 399 U. S. 267 84
United States v. Stoppelman, 406 F. 2d 127 101
United States v. Sullivan, 274 U. S. 259 428–430, 434, 439, 441, 461, 462, 470–472
United States v. Sweet, 399 U. S. 517 67, 91–94
United States v. Swift & Co., 189 F. Supp. 885 676
United States v. Swift & Co., 270 U. S. 124 181
United States v. Swift & Co., 286 U. S. 106 676, 686
United States v. Taylor, 351 F. 2d 228 101
United States v. Ten Erotic Paintings, 311 F. Supp. 884 372
United States v. 35 MM Film, 311 F. Supp. 108 372

Page

United States v. 392 Copies of Magazine, 253 F. Supp. 485 373
United States v. 37 Photographs, 402 U. S. 363 969
United States v. United Air Lines, 216 F. Supp. 709 326, 330
United States v. U. S. Coin & Currency, 401 U. S. 715 477, 937–939, 978, 979
United States v. Ventresca, 380 U. S. 102 980
United States v. Vuitch, 402 U. S. 62 258
United States v. Wade, 388 U. S. 218 225, 255, 432, 433, 436, 463, 473
United States v. Waters, 175 F. 2d 340 94
United States v. Weller, 401 U. S. 254 82, 94
United States v. Wexler, 8 F. 2d 880 322
United States v. White, 401 U. S. 745 965
United States v. Wrightwood Dairy, 315 U. S. 110 151
United States v. Wunderlich, 342 U. S. 98 278
U. S. ex rel. See name of real party in interest.
Universal Camera v. NLRB, 340 U. S. 474 401, 527
University of Ill. Foundation v. Winegard Co., 271 F. Supp. 412 315, 316
Ute Indians v. United States, 117 Ct. Cl. 433 160
Virginian R. Co. v. System Federation, 300 U. S. 515 575, 578, 579, 582, 583, 588, 593, 594, 598
Waley v. Johnston, 316 U. S. 101 269
Walker v. Birmingham, 388 U. S. 307 532
Walker Process Equip. v. Food Machinery, 382 U. S. 172 344
Walz v. Tax Comm'n, 397 U. S. 664 203

Page

Ward v. Winstead, 400 U. S. 1019 963
Warden. See name of warden.
Wayman v. Southard, 10 Wheat. 1 271, 272, 277
Welsh v. United States, 398 U. S. 333 103, 107, 112, 113, 490
West Coast Hotel v. Parrish, 300 U. S. 379 255
Westfall v. United States, 274 U. S. 256 154
Westinghouse v. Formica Co., 266 U. S. 342 345
West Va. Bd. of Ed. v. Barnette, 319 U. S. 624 360
White v. Zutell, 263 F. 2d 613 405
Whiteley v. Warden, 401 U. S. 560 933
Wickard v. Filburn, 317 U. S. 111 151
Wilke & Holzheiser v. Dept. of Alcoholic Bev. Control, 65 Cal. 2d 349 305
Williams v. Florida, 399 U. S. 78 213, 216
Williams v. New York, 337 U. S. 241 217, 218, 246
Williams v. Oklahoma City, 395 U. S. 458 959
Williams v. United States, 78 U. S. App. D. C. 147 69
Williams v. United States, 341 U. S. 97 618
Williams v. United States, 401 U. S. 646 924
Williams v. U. S. Fidelity & Guaranty, 236 U. S. 549 648, 660
Willner v. Com. on Character, 373 U. S. 96 541
Wilson v. State, 225 So. 2d 321 196
Winship, In re, 397 U. S. 358 308, 310
Winston v. United States, 172 U. S. 303 200
Winters v. New York, 333 U. S. 507 77, 258
Wisconsin v. Constantineau, 400 U. S. 433 542

	Page
Witherspoon v. Illinois, 391 U. S. 510	185, 201, 247, 248, 302
Witmer v. United States, 348 U. S. 375	484, 486, 490
Wright v. Georgia, 373 U. S. 284	546
Yakus v. United States, 321 U. S. 414	273
Yick Wo v. Hopkins, 118 U. S. 356	252, 257, 259, 272
Youngblood v. Bd. of Pub. Instruction, 430 F. 2d 625	41
Younger v. Harris, 401 U. S. 37	259, 903, 935
Zavelo v. Reeves, 227 U. S. 625	662
Zdanok v. Glidden Co., 327 F. 2d 944	323, 326, 330, 333
Zywicke v. Brogli, 24 Wis. 2d 685	666

TABLE OF STATUTES CITED

(A) Statutes of the United States

	Page
1874, Apr. 29, c. 136, 18 Stat. 36	159
1880, June 15, c. 223, 21 Stat. 199	159
1882, July 28, c. 357, 22 Stat. 178	159
1888, May 1, c. 213, 25 Stat. 113, § 4	159
1890, July 2, c. 647, 26 Stat. 209, as amended,	
§ 1	549
§ 2	313
§ 5	673
1891, Mar. 3, c. 517, 26 Stat. 826	62
1895, Feb. 20, c. 113, 28 Stat. 677	159
1897, Jan. 15, c. 29, 29 Stat. 487, § 1	183
1898, July 1, c. 541, 30 Stat. 544, as amended,	
§§ 1, 17	637
1901, Mar. 3, c. 854, 31 Stat. 1189, § 935	62
1903, Feb. 11, c. 544, 32 Stat. 823, § 2	549
1907, Mar. 2, c. 2564, 34 Stat. 1246	62
1909, Mar. 3, c. 263, 35 Stat. 781	159
1914, Oct. 15, c. 323, 38 Stat. 730, as amended,	
§ 4	313
§ 7	549, 673
1917, Feb. 5, c. 29, 39 Stat. 874, as amended,	
§ 19	509
Mar. 1, c. 144, 39 Stat. 948, as amended, § 3	916
1919, Oct. 28, c. 85, 41 Stat. 305	424
1920, Feb. 28, c. 91, 41 Stat. 456	570
1920, June 10, c. 285, 41 Stat. 1063, as amended, §§ 202, 205, 206, 313	515
1921, Nov. 23, c. 136, 42 Stat. 227, § 223	424
1925, Feb. 28, c. 368, 43 Stat. 1053, §§ 301–319	62
1926, May 20, c. 347, 44 Stat. 577, as amended, §§ 1, 2, 5, 6, 10	570
1927, Mar. 4, c. 509, 44 Stat. 1424	389
1930, June 17, c. 497, 46 Stat. 590, §§ 305, 602, 604, 652	363
1932, Mar. 23, c. 90, 47 Stat. 70, §§ 4, 7, 8	570
1934, June 18, c. 576, 48 Stat. 984	159
June 19, c. 652, 48 Stat. 1064	965
June 21, c. 691, 48 Stat. 1185	570
1935, May 3, c. 89, 49 Stat. 166, § 3	637
July 5, c. 372, 49 Stat. 449, as amended,	
§ 2	600
§ 8	570, 600
§ 10	389
Aug. 14, c. 531, 49 Stat. 620, as amended,	
§§ 205, 216	389
§ 218	600
§§ 221, 223	389
§§ 301–303, 901–905	121
Aug. 26, c. 687, 49 Stat. 803, § 213	515

419-882 O - 72 - 5

	Page
1936, June 19, c. 592, 49 Stat. 1526, § 3	611
June 30, c. 881, 49 Stat. 2036, as amended, § 10	183
1937, Sept. 1, c. 896, 50 Stat. 888	137
1938, June 22, c. 575, 52 Stat. 840, § 1	637
June 28, c. 776, 52 Stat. 1209	159
1940, June 28, c. 439, 54 Stat. 670, as amended, § 20	509
1941, Aug. 18, c. 377, 55 Stat. 638, § 2	916
1942, Apr. 28, c. 247, 56 Stat. 226, § 403	183
May 9, c. 295, 56 Stat. 271	62
1945, Mar. 2, c. 19, 59 Stat. 10, § 2	916
1946, Aug. 13, c. 959, 60 Stat. 1049, §§ 2, 12	159
1947, June 23, c. 120, 61 Stat. 136, § 101	600
1948, June 24, c. 625, 62 Stat. 604, § 4	99, 509
§§ 6, 10, 12	99, 479
June 25, c. 647, 62 Stat. 1009	49
July 1, c. 783, 62 Stat. 1206	509
1949, May 24, c. 139, 63 Stat. 89, § 58	62
1950, Sept. 23, c. 1024, 64 Stat. 987, as amended, § 3	183
Dec. 29, c. 1184, 64 Stat. 1125	549
1951, June 19, c. 144, 65 Stat. 75, § 1	509
1952, June 27, c. 477, 66 Stat. 163, as amended, § 203	49
§§ 315, 316, 318, 405	509
June 30, c. 530, 66 Stat. 296, § 301	183
1953, Aug. 7, c. 336, 67 Stat. 400, § 2	49
1954, May 11, c. 199, 68 Stat. 81	183
May 25, c. 222, 68 Stat. 120, § 48	637
Sept. 1, c. 1206, 68 Stat. 1052, § 106	389
Sept. 3, c. 1264, 68 Stat. 1248, § 202	916
1957, Sept. 11, Pub. L. 85–316, 71 Stat. 639, § 15	49
1960, July 14, Pub. L. 86–648, 74 Stat. 504, § 1	49
1963, Aug. 28, Pub. L. 88–108, 77 Stat. 132	570
1964, July 2, Pub. L. 88–352, 78 Stat. 241, § 201 et seq.	146
§§ 401, 407	1, 39
1965, July 27, Pub. L. 89–92, 79 Stat. 282	183
Aug. 6, Pub. L. 89–110, 79 Stat. 437, § 5	690
Oct. 3, Pub. L. 89–236, 79 Stat. 911, § 3	49
1966, Oct. 15, Pub. L. 89–670, 80 Stat. 931, § 6	558
1967, June 30, Pub. L. 90–40, 81 Stat. 100, § 1	99, 479
1968, Jan. 2, Pub. L. 90–248, 81 Stat. 821, § 158	389
May 29, Pub. L. 90–321, 82 Stat. 146, Tit. II	146
Aug. 23, Pub. L. 90–495, 82 Stat. 815, §§ 30, 37	497
1970, Jan. 1, Pub. L. 91–190, 83 Stat. 852	916
1971, Jan. 2, Pub. L. 91–644, 84 Stat. 1880, § 14	62
Jan. 2, Pub. L. 91–646, 84 Stat. 1894, §§ 101, 202–205, 210, 220	497

Page

U. S. Code.
Title 5 (Supp. V), § 551 et seq. 183
§ 556 389
Title 8 (1946 ed., Supp. V), § 155 509
Title 8, §§ 1101, 1426, 1427, 1429 509
Title 8 (Supp. V), § 1153 49
Title 11, §§ 1, 35 637
Title 15,
§ 1 549
§ 2 313
§ 5 673
§ 13a 611
§ 15 313
§ 18 ..... 549, 673
§ 29 549
Title 16, §§ 824a, 824d, 824e, 825*l* 515
Title 18,
§ 32 146
§ 242 611
§ 659 146
§ 834 558
§§ 1111, 1112, 1151–1165 62
§ 1201 ..... 146, 183
§ 1461 351
§§ 2312–2315 146
§ 3731 .... 62, 351, 558
Title 18 (Supp. V), § 891 et seq. 146
Title 19, §§ 1305, 1602, 1604, 1652 363
Title 23, § 133 497
Title 23 (Supp. V), §§ 502, 505, 506, 511. 497
Title 25, §§ 70a, 70k ... 159
Title 26,
§ 103 600
§ 7203 183
§ 7602 978
Title 28 (1940 ed.), § 225 62
Title 28,
§§ 294, 295 ... 925, 1005
§ 1252 415
§ 1253 .. 43, 47, 62, 415
§ 1257 ..... 415, 611
§ 1292 ..... 415, 530
§§ 1331, 1337 570

Page

U. S. Code—Continued.
Title 28—Continued.
§ 1651 673
§ 1732 389
§ 2101 962
§§ 2201, 2202 313
§ 2281 ..... 47, 637
§ 2282 62
Title 29,
§§ 104, 107, 108 570
§ 152 600
§ 158 ..... 570, 600
Title 33, §§ 701, 701b–8, 701m 916
Title 35, §§ 101–103, 282, 285, 288 313
Title 41, §§ 43a, 321, 322 183
Title 42,
§ 405 389
§ 418 600
§ 421 389
§§ 501–503, 1101–1105 121
§ 1401 et seq. 137
§§ 2000c, 2000c–6 .. 1, 39
Title 42 (Supp. V),
§§ 416, 423 389
§ 1973c 690
§ 4331 et seq. 916
Title 45, §§ 151, 152, 155, 156, 160 570
Title 49 (Supp. V), § 1655 558
Title 50, § 782 183
Title 50 (Supp. V), § 782 183
Title 50 App. (1946 ed., Supp. III), § 454 ... 509
Title 50 App. (1952 ed.), § 454 509
Title 50 App.,
§ 454 99
§ 456 479
§ 460 99
Title 50 App. (Supp. V), § 456 ..... 99, 479
§ 460 479
§ 462 ..... 99, 479
Administrative Procedure Act 183, 389
All Writs Act 673
Bankruptcy Act 637
Business Records Act 389

Page

Circuit Court of Appeals Act 62
Civil Rights Act of 1964... 1, 39, 146
Clayton Act..... 313, 549, 673
Consumer Credit Protection Act 146
Criminal Appeals Act..... 62, 351, 558
Declaratory Judgment Act. 313
Department of Transportation Act..... 558
Displaced Persons Act of 1948 49
Expediting Act..... 549
Fair Share Refugee Act.. 49
Federal-Aid Highway Act of 1968 497
Federal Communications Act 965
Federal Corrupt Practices Act 62
Federal Kidnaping Act.... 183
Federal Power Act..... 515
Immigration Act of 1917... 509
Immigration and Nationality Act..... 49, 509
Indian Claims Commission Act 159
Internal Revenue Code of 1954,
§ 103 600
§ 7203 183
§ 7602 978
Judicial Code.... 43, 47, 62, 313, 389, 415, 530, 570, 611, 637, 673, 925, 962, 1005

Page

Jurisdictional Acts of 1909, 1938 159
Labor Management Relations Act, 1947..... 600
Longshoremen's and Harbor Workers' Compensation Act 389
Military Selective Service Act of 1967..... 99, 479
National Environmental Policy Act of 1969..... 916
National Labor Relations Act 389, 570, 600
National Prohibition Act... 424
Norris-LaGuardia Act..... 570
Omnibus Crime Control Act of 1970..... 62
Patent Code..... 313
Railway Labor Act..... 570
Refugee Relief Act of 1953. 49
Renegotiation Act of 1942.. 183
Revenue Act of 1921..... 424
Selective Service Act of 1948 ..... 99, 479, 509
Sherman Act..... 313, 549, 673
Social Security Act. 121, 389, 600
Tariff Act of 1930..... 363
Transportation Act, 1920... 570
Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970..... 497
United States Housing Act of 1937..... 137
Universal Military Training and Service Act..... 509
Voting Rights Act of 1965. 690

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

Alabama.
Code, Tit. 36, § 74.... 637
Alaska.
Stat. §§ 28.20.010, 28.-20.350 637
Arizona.
Rev. Stat. Ann. §§ 25–211, 25–214, 25–215, 28–1101, 28–1102, 28–1141 to 28–1144, 28–1161 to 28–1165, 28–1167 to 28–1178, 28–1222, 33–1124..... 637

Arizona—Continued.
Motor Vehicle Safety Responsibility Act, Arts. 1–4..... 637
Arkansas.
Stat. Ann. § 75–1457... 637
California.
Const. (1849), Art. VIII. 137
Const., Art. I, § 7..... 183
Const., Arts. IV, §§ 1, 24; XI, § 2; XIII, § 40; XVIII; XXX-IV, § 1..... 137

Page

California—Continued.
Amendatory Acts 1873–1874, c. 508, p. 457.. 183
Laws 1965, c. 872..... 424
Evidence Code..... 622
Govt. Code §§ 815.2, 844.6 992
Health & Safety Code §§ 33701 et seq., 34240 137
Penal Code §§ 190.1, 1181, 1239, 4500.... 183
Unemp. Ins. Code §§ 976–978, 1025–1032, 1251 et seq., 1281, 1327, 1328, 1334–1338, 1380, 2739..... 121
Vehicle Code §§ 1–42275 424
Vehicle Code § 16372.. 637
Colorado.
Rev. Stat. Ann. § 13–7–25 637
Rev. Stat. Ann. §§ 39–19–1 to 39–19–10... 183
Sex Offenders Act..... 183
Connecticut.
Gen. Stat. Rev. § 14–131 637
Gen. Stat. Rev. § 53a–46 183
Delaware.
Code Ann., Tit. 21, § 2943 637
District of Columbia.
Code (1901), § 935.... 62
Code Ann. §§ 22–201, 23–105 62
Code Ann. § 40–464... 637
Motor Vehicle Safety Responsibility Act... 637
Owners' Financial Responsibility Act..... 637
Florida.
Stat. § 324.131..... 637
Georgia.
Laws 1970, No. 1333, p. 949..... 183
Code Ann. § 92A–601 et seq..... 535
Code Ann. § 92A–605.. 637
Motor Vehicle Safety Responsibility Act... 535, 637

Page

Hawaii.
Rev. Stat. § 287–17.... 637
Idaho.
Code § 49–1514..... 637
Illinois.
Const., Art. 6, § 5..... 415
Ann. Stat., c. 95½, § 7–310 637
Indiana.
Ann. Stat. § 47–1049.. 637
Iowa.
Code § 321A.14..... 637
Kansas.
Stat. Ann. § 8–744.... 637
Kentucky.
Rev. Stat. § 187.420... 637
Louisiana.
Rev. Stat. Ann. § 32: 893 637
Maine.
Rev. Stat. Ann., Tit. 29, § 783..... 637
Maryland.
Ann. Code, Art. 66A, § 24 363
Ann. Code, Art. 66½, § 7–315 637
Massachusetts.
Gen. Laws Ann., c. 90, § 22A 637
Michigan.
Comp. Laws § 257.513. 637
Minnesota.
Stat. § 170.33..... 637
Mississippi.
Code Ann. § 8285–14.. 637
Missouri.
Rev. Stat. § 303.110... 637
Montana.
Rev. Codes Ann. § 53–431 637
Nebraska.
Rev. Stat. § 60–519.... 637
Nevada.
Rev. Stat. § 485.303... 637
New Hampshire.
Rev. Stat. Ann. § 268:9. 637
New Jersey.
Stat. Ann. § 39:6–35... 637
New Mexico.
Stat. Ann. §§ 40A–29–2.1, 40A–29–2.2..... 183
Stat. Ann. § 64–24–78.. 637

	Page
New York.	
Penal Law § 65.00	183
Penal Law § 125.05	62
Penal Law §§ 125.30, 125.35	183
Veh. & Traf. Law § 337	637
North Carolina.	
Gen. Stat. § 20–279.14	637
Gen. Stat. § 115–176.1	43
Gen. Stat. § 115–186	1
North Dakota.	
Cent. Code § 39–16.1–04	637
Ohio.	
Laws 1898, p. 223	183
Rev. Code Ann. §§ 2901.01, 2945.06, 2945.40, 2947.05, 2947.06	183
Rev. Code Ann. § 4509.43	637
Oklahoma.	
Stat. Ann., Tit. 47, § 7–315	637
Oregon.	
Rev. Stat. § 486.211	637
Pennsylvania.	
Laws 1794, c. 1777	183
Act of Mar. 20, 1797, 3 Smith's Laws 281	183
Stat. Ann., Tit. 18, §§ 4406, 4701, 4716	183
Stat. Ann., Tit. 75, § 1414	637
Rhode Island.	
Gen. Laws Ann. § 31–32–15	637
South Carolina.	
Code Ann. § 46–748	637
South Dakota.	
Comp. Laws Ann. § 32–35–58	637
Tennessee.	
Laws 1837–1838, c. 29	183
Code Ann. §§ 6–2601 to 6–2627, 8–2701, 8–2708 to 8–2710	600
Code Ann. § 59–1236	637
Utility District Law of 1937	600
Texas.	
Code Crim. Proc., Art. 37.07	183
Rev. Civ. Stat. Ann., Art. 6701h, § 14	637
Utah.	
Code Ann. § 41–12–15	637
Motor Vehicle Safety Responsibility Act	637
Vermont.	
Stat. Ann., Tit. 23, § 802	637
Virginia.	
Code Ann. § 46.1–444	637
Washington.	
Rev. Code § 46.29.380	637
Rev. Code §§ 74.04.055, 74.23.005, 74.23.900	1000
West Virginia.	
Code Ann. § 17D–4–6	637
Wisconsin.	
Stat. § 344.26	637
Wyoming.	
Stat. Ann. § 31–299	637

(C) Treaties

	Page
1863, Oct. 7, 13 Stat. 673 (Treaty with the Tabeguache Band of Utah Indians)	159
1868, Mar. 2, 15 Stat. 619 (Treaty with the Ute Indians)	159

(D) Foreign Statutes

	Page
England.	
Magna Carta	183
6 Edw. 1, c. 9	183
23 Hen. 8, c. 1, §§ 3, 4	183
England—Continued.	
1 Edw. 6, c. 12, § 10	183
59 Geo. 3, c. 46	183
Statute of Gloucester	183

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1970

SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.

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

No. 281. Argued October 12, 1970—Decided April 20, 1971*

The Charlotte-Mecklenburg school system, which includes the city of Charlotte, North Carolina, had more than 84,000 students in 107 schools in the 1968–1969 school year. Approximately 29% (24,000) of the pupils were Negro, about 14,000 of whom attended 21 schools that were at least 99% Negro. This resulted from a desegregation plan approved by the District Court in 1965, at the commencement of this litigation. In 1968 petitioner Swann moved for further relief based on *Green* v. *County School Board,* 391 U. S. 430, which required school boards to "come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." The District Court ordered the school board in April 1969 to provide a plan for faculty and student desegregation. Finding the board's submission unsatisfactory, the District Court appointed an expert to submit a desegregation plan. In February 1970, the expert and the board presented plans, and the court adopted the board's plan, as modified, for the junior and senior high schools, and the expert's proposed plan for the elementary schools. The Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans,

*Together with No. 349, *Charlotte-Mecklenburg Board of Education et al.* v. *Swann et al.,* also on certiorari to the same court.

but vacated the order respecting elementary schools, fearing that the provisions for pairing and grouping of elementary schools would unreasonably burden the pupils and the board. The case was remanded to the District Court for reconsideration and submission of further plans. This Court granted certiorari and directed reinstatement of the District Court's order pending further proceedings in that court. On remand the District Court received two new plans, and ordered the board to adopt a plan, or the expert's plan would remain in effect. After the board "acquiesced" in the expert's plan, the District Court directed that it remain in effect. *Held:*

1. Today's objective is to eliminate from the public schools all vestiges of state-imposed segregation that was held violative of equal protection guarantees by *Brown* v. *Board of Education,* 347 U. S. 483, in 1954. P. 15.

2. In default by the school authorities of their affirmative obligation to proffer acceptable remedies, the district courts have broad power to fashion remedies that will assure unitary school systems. P. 16.

3. Title IV of the Civil Rights Act of 1964 does not restrict or withdraw from the federal courts their historic equitable remedial powers. The proviso in 42 U. S. C. § 2000c–6 was designed simply to foreclose any interpretation of the Act as expanding the existing powers of the federal courts to enforce the Equal Protection Clause. Pp. 16–18.

4. Policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities are among the most important indicia of a segregated system, and the first remedial responsibility of school authorities is to eliminate invidious racial distinctions in those respects. Normal administrative practice should then produce schools of like quality, facilities, and staffs. Pp. 18–19.

5. The Constitution does not prohibit district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. *United States* v. *Montgomery County Board of Education,* 395 U. S. 225, was properly followed by the lower courts in this case. Pp. 19–20.

6. In devising remedies to eliminate legally imposed segregation, local authorities and district courts must see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish a dual system. Pp. 20–21.

1 Syllabus

7. Four problem areas exist on the issue of student assignment:

(1) *Racial quotas.* The constitutional command to desegregate schools does not mean that every school in the community must always reflect the racial composition of the system as a whole; here the District Court's very limited use of the racial ratio—not as an inflexible requirement, but as a starting point in shaping a remedy—was within its equitable discretion. Pp. 22–25.

(2) *One-race schools.* While the existence of a small number of one-race, or virtually one-race, schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part. Pp. 25–26.

An optional majority-to-minority transfer provision has long been recognized as a useful part of a desegregation plan, and to be effective such arrangement must provide the transferring student free transportation and available space in the school to which he desires to move. Pp. 26–27.

(3) *Attendance zones.* The remedial altering of attendance zones is not, as an interim corrective measure, beyond the remedial powers of a district court. A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. The pairing and grouping of noncontiguous zones is a permissible tool; judicial steps going beyond contiguous zones should be examined in light of the objectives to be sought. No rigid rules can be laid down to govern conditions in different localities. Pp. 27–29.

(4) *Transportation.* The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not effectively dismantle the dual school system is supported by the record, and the remedial technique of requiring bus transportation as a tool of school desegregation was within that court's power to provide equitable relief. An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process; limits on travel time will vary with many factors, but probably with none more than the age of the students. Pp. 29–31.

8. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once a unitary system has been achieved. Pp. 31–32.

431 F. 2d 138, affirmed as to those parts in which it affirmed the District Court's judgment. The District Court's order of August 7, 1970, is also affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Julius LeVonne Chambers and *James M. Nabrit III* argued the cause for petitioners in No. 281 and respondents in No. 349. With them on the briefs were *Jack Greenberg, Norman J. Chachkin, C. O. Pearson,* and *Anthony G. Amsterdam.*

William J. Wagonner and *Benjamin S. Horack* argued the cause and filed briefs for respondents in No. 281 and petitioners in No. 349.

Solicitor General Griswold argued the cause for the United States as *amicus curiae* in both cases. With him on the brief was *Assistant Attorney General Leonard.*

Briefs of *amici curiae* in No. 281 were filed by *Earl Faircloth,* Attorney General, *Robert J. Kelly,* Deputy Attorney General, *Ronald W. Sabo,* Assistant Attorney General, and *Rivers Buford* for the State of Florida; by *Andrew P. Miller,* Attorney General, *William G. Broaddus* and *Theodore J. Markow,* Assistant Attorneys General, *Lewis F. Powell, Jr., John W. Riely,* and *Guy K. Tower* for the Commonwealth of Virginia; by *Claude R. Kirk, Jr., pro se,* and *Gerald Mager* for Claude R. Kirk, Jr., Governor of Florida; by *W. F. Womble* for the Winston-Salem/Forsyth County Board of Education; by *Raymond B. Witt, Jr.,* and *Eugene N. Collins* for the Chattanooga Board of Education; by *Kenneth W. Cleary* for the School Board of Manatee County, Florida; by *W. Crosby Few* and *John M. Allison* for the School Board of Hillsborough County, Florida; by *Sam J. Ervin,*

Jr., Charles R. Jonas, and *Ernest F. Hollings* for the Classroom Teachers Association of the Charlotte-Mecklenburg School System, Inc.; by *Mark Wells White, Jr.,* for Mrs. H. W. Cullen et al., members of the Board of Education of the Houston Independent School District; by *Jack Petree* for the Board of Education of Memphis City Schools; by *Sherwood W. Wise* for the Jackson Chamber of Commerce, Inc., et al.; by *Stephen J. Pollak, Benjamin W. Boley,* and *David Rubin* for the National Education Association; by *William L. Taylor, Richard B. Sobol,* and *Joseph L. Rauh, Jr.,* for the United Negro College Fund, Inc., et al.; by *Owen H. Page* for Concerned Citizens Association, Inc.; by *Charles S. Conley, Floyd B. McKissick,* and *Charles S. Scott* for the Congress of Racial Equality; by the Tennessee Federation for Constitutional Government et al.; by *William C. Cramer, pro se,* and *Richard B. Peet,* joined by *Albert W. Watson* et al., for William C. Cramer; by *Charles E. Bennett, pro se, James C. Rinaman, Jr.,* and *Yardley D. Buckman* for Charles E. Bennett; by *Calvin H. Childress* and *M. T. Bohannon, Jr.,* for David E. Allgood et al.; by William B. Spong, Jr., and by Newton Collier Estes.

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

We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown* v. *Board of Education,* 347 U. S. 483 (1954) (*Brown I*).

This case and those argued with it [1] arose in States having a long history of maintaining two sets of schools in a

[1] *McDaniel* v. *Barresi,* No. 420, *post,* p. 39; *Davis* v. *Board of School Commissioners of Mobile County,* No. 436, *post,* p. 33; *Moore* v. *Charlotte-Mecklenburg Board of Education,* No. 444, *post,*

single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown* v. *Board of Education* was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Meanwhile district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in *Brown I,* appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

I

The Charlotte-Mecklenburg school system, the 43d largest in the Nation, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. The area is large—550 square miles—spanning roughly 22 miles east-west and 36 miles north-south. During the 1968–1969 school year the system served more than 84,000 pupils in 107 schools. Approximately 71% of the pupils were found to be white and 29% Negro. As of

---

p. 47; *North Carolina State Board of Education* v. *Swann,* No. 498, *post,* p. 43. For purposes of this opinion the cross-petitions in Nos. 281 and 349 are treated as a single case and will be referred to as "this case."

June 1969 there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000—approximately 14,000 Negro students—attended 21 schools which were either totally Negro or more than 99% Negro.

This situation came about under a desegregation plan approved by the District Court at the commencement of the present litigation in 1965, 243 F. Supp. 667 (WDNC), aff'd, 369 F. 2d 29 (CA4 1966), based upon geographic zoning with a free-transfer provision. The present proceedings were initiated in September 1968 by petitioner Swann's motion for further relief based on *Green* v. *County School Board,* 391 U. S. 430 (1968), and its companion cases.[2] All parties now agree that in 1969 the system fell short of achieving the unitary school system that those cases require.

The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals.

In April 1969 the District Court ordered the school board to come forward with a plan for both faculty and student desegregation. Proposed plans were accepted by the court in June and August 1969 on an interim basis

---

[2] *Raney* v. *Board of Education,* 391 U. S. 443 (1968), and *Monroe* v. *Board of Commissioners,* 391 U. S. 450 (1968).

only, and the board was ordered to file a third plan by November 1969. In November the board moved for an extension of time until February 1970, but when that was denied the board submitted a partially completed plan. In December 1969 the District Court held that the board's submission was unacceptable and appointed an expert in education administration, Dr. John Finger, to prepare a desegregation plan. Thereafter in February 1970, the District Court was presented with two alternative pupil assignment plans—the finalized "board plan" and the "Finger plan."

The Board Plan. As finally submitted, the school board plan closed seven schools and reassigned their pupils. It restructured school attendance zones to achieve greater racial balance but maintained existing grade structures and rejected techniques such as pairing and clustering as part of a desegregation effort. The plan created a single athletic league, eliminated the previously racial basis of the school bus system, provided racially mixed faculties and administrative staffs, and modified its free-transfer plan into an optional majority-to-minority transfer system.

The board plan proposed substantial assignment of Negroes to nine of the system's 10 high schools, producing 17% to 36% Negro population in each. The projected Negro attendance at the 10th school, Independence, was 2%. The proposed attendance zones for the high schools were typically shaped like wedges of a pie, extending outward from the center of the city to the suburban and rural areas of the county in order to afford residents of the center city area access to outlying schools.

As for junior high schools, the board plan rezoned the 21 school areas so that in 20 the Negro attendance would range from 0% to 38%. The other school, located in the heart of the Negro residential area, was left with an enrollment of 90% Negro.

The board plan with respect to elementary schools relied entirely upon gerrymandering of geographic zones. More than half of the Negro elementary pupils were left in nine schools that were 86% to 100% Negro; approximately half of the white elementary pupils were assigned to schools 86% to 100% white.

The Finger Plan. The plan submitted by the court-appointed expert, Dr. Finger, adopted the school board zoning plan for senior high schools with one modification: it required that an additional 300 Negro students be transported from the Negro residential area of the city to the nearly all-white Independence High School.

The Finger plan for the junior high schools employed much of the rezoning plan of the board, combined with the creation of nine "satellite" zones.[3] Under the satellite plan, inner-city Negro students were assigned by attendance zones to nine outlying predominately white junior high schools, thereby substantially desegregating every junior high school in the system.

The Finger plan departed from the board plan chiefly in its handling of the system's 76 elementary schools. Rather than relying solely upon geographic zoning, Dr. Finger proposed use of zoning, pairing, and grouping techniques, with the result that student bodies throughout the system would range from 9% to 38% Negro.[4]

The District Court described the plan thus:

> "Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably

[3] A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding the school.

[4] In its opinion and order of December 1, 1969, later incorporated in the order appointing Dr. Finger as consultant, the District Court stated:

"Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve varia-

> be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school."

Under the Finger plan, nine inner-city Negro schools were grouped in this manner with 24 suburban white schools.

On February 5, 1970, the District Court adopted the board plan, as modified by Dr. Finger, for the junior and senior high schools. The court rejected the board elementary school plan and adopted the Finger plan as presented. Implementation was partially stayed by the Court of Appeals for the Fourth Circuit on March 5, and this Court declined to disturb the Fourth Circuit's order, 397 U. S. 978 (1970).

On appeal the Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools. While agreeing that the District Court properly disapproved the board plan concerning these schools, the Court of Appeals feared that the pairing and grouping of elementary schools would place an unreasonable burden on the board and the system's pupils. The case was remanded to the District Court for reconsideration and submission of further plans. 431 F. 2d

---

tions in pupil ratios. In default of any such plan from the school board, the court will start with the thought . . . that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable." 306 F. Supp. 1299, 1312.

138. This Court granted certiorari, 399 U. S. 926, and directed reinstatement of the District Court's order pending further proceedings in that court.

On remand the District Court received two new plans for the elementary schools: a plan prepared by the United States Department of Health, Education, and Welfare (the HEW plan) based on contiguous grouping and zoning of schools, and a plan prepared by four members of the nine-member school board (the minority plan) achieving substantially the same results as the Finger plan but apparently with slightly less transportation. A majority of the school board declined to amend its proposal. After a lengthy evidentiary hearing the District Court concluded that its own plan (the Finger plan), the minority plan, and an earlier draft of the Finger plan were all reasonable and acceptable. It directed the board to adopt one of the three or in the alternative to come forward with a new, equally effective plan of its own; the court ordered that the Finger plan would remain in effect in the event the school board declined to adopt a new plan. On August 7, the board indicated it would "acquiesce" in the Finger plan, reiterating its view that the plan was unreasonable. The District Court, by order dated August 7, 1970, directed that the Finger plan remain in effect.

II

Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. None of the parties before us challenges the Court's decision of May 17, 1954, that

> "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore,

419-882 O - 72 - 6

> we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . .
>
> "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." *Brown* v. *Board of Education, supra,* at 495.

None of the parties before us questions the Court's 1955 holding in *Brown II,* that

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of

> equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. 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, 299–300 (1955).

Over the 16 years since *Brown II,* many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

By the time the Court considered *Green* v. *County School Board,* 391 U. S. 430, in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws. In *Green,* the Court was confronted with a record of a freedom-of-choice program that the District Court had found to operate in fact to preserve a dual system more than a decade after *Brown II.* While acknowledging that a freedom-of-choice concept could be a valid remedial measure in some circumstances, its failure to be effective in *Green* required that:

> "The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." *Green, supra,* at 439.

This was plain language, yet the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities. *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19, restated the basic obligation asserted in *Griffin* v. *School Board*, 377 U. S. 218, 234 (1964), and *Green, supra,* that the remedy must be implemented *forthwith.*

The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts.[5] The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population,[6] movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

---

[5] The necessity for this is suggested by the situation in the Fifth Circuit where 166 appeals in school desegregation cases were heard between December 2, 1969, and September 24, 1970.

[6] Elementary public school population (grades 1–6) grew from 17,447,000 in 1954 to 23,103,000 in 1969; secondary school population (beyond grade 6) grew from 11,183,000 in 1954 to 20,775,000 in 1969. Digest of Educational Statistics, Table 3, Office of Education Pub. 10024–64; Digest of Educational Statistics, Table 28, Office of Education Pub. 10024–70.

III

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U. S., at 437–438.

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329–330 (1944), cited in *Brown II, supra,* at 300.

This allocation of responsibility once made, the Court attempted from time to time to provide some guidelines for the exercise of the district judge's discretion and for the reviewing function of the courts of appeals. However, a school desegregation case does not differ fundamentally from other cases involving the framing of

equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.

The school authorities argue that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964, 42 U. S. C. § 2000c. The language and the history of Title IV show that it was enacted not to limit but to define the role of the Federal Government in the implementation of the *Brown I* decision. It authorizes the Commissioner of Education to provide technical assistance to local boards in the preparation of desegregation plans, to arrange "training insti-

tutes" for school personnel involved in desegregation efforts, and to make grants directly to schools to ease the transition to unitary systems. It also authorizes the Attorney General, in specified circumstances, to initiate federal desegregation suits. Section 2000c (b) defines "desegregation" as it is used in Title IV:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 2000c–6, authorizing the Attorney General to institute federal suits, contains the following proviso:

> "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

On their face, the sections quoted purport only to insure that the provisions of Title IV of the Civil Rights Act of 1964 will not be read as granting new powers. The proviso in § 2000c–6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "de facto segregation," where racial imbalance exists in the

schools but with no showing that this was brought about by discriminatory action of state authorities. In short, there is nothing in the Act that provides us material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I.* The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

IV

We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause. Although the several related cases before us are primarily concerned with problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.

In *Green,* we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. 391 U. S., at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment. In these areas, normal administra-

tive practice should produce schools of like quality, facilities, and staffs. Something more must be said, however, as to faculty assignment and new school construction.

In the companion *Davis* case, *post,* p. 33, the Mobile school board has argued that the Constitution requires that teachers be assigned on a "color blind" basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.

In *United States* v. *Montgomery County Board of Education,* 395 U. S. 225 (1969), the District Court set as a goal a plan of faculty assignment in each school with a ratio of white to Negro faculty members substantially the same throughout the system. This order was predicated on the District Court finding that:

> "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year 1968–69." Quoted at 395 U. S., at 232.

The District Court in *Montgomery* then proceeded to set an initial ratio for the whole system of at least two Negro teachers out of each 12 in any given school. The Court of Appeals modified the order by eliminating what it regarded as "fixed mathematical" ratios of faculty and substituted an initial requirement of *"substantially* or *approximately"* a five-to-one ratio. With respect to the future, the Court of Appeals held that the numerical ratio should be eliminated and that compliance should not be tested solely by the achievement of specified proportions. *Id.,* at 234.

We reversed the Court of Appeals and restored the District Court's order in its entirety, holding that the order of the District Judge

> "was adopted in the spirit of this Court's opinion in *Green* . . . in that his plan 'promises realistically to work, and promises realistically to work *now*.' The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. . . . We also believe that under all the circumstances of this case we follow the original plan outlined in *Brown II* . . . by accepting the more specific and expeditious order of [District] Judge Johnson . . . ." 395 U. S., at 235–236 (emphasis in original).

The principles of *Montgomery* have been properly followed by the District Court and the Court of Appeals in this case.

The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence

the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out. Cf. *United States* v. *Board of Public Instruction,* 395 F. 2d 66 (CA5 1968); *Brewer* v. *School Board,* 397 F. 2d 37 (CA4 1968).

V

The central issue in this case is that of student assignment, and there are essentially four problem areas:

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;

(3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

(4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

(1) *Racial Balances or Racial Quotas.*

The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have

impact on other forms of discrimination. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

In this case it is urged that the District Court has imposed a racial balance requirement of 71%–29% on individual schools. The fact that no such objective was actually achieved—and would appear to be impossible—tends to blunt that claim, yet in the opinion and order of the District Court of December 1, 1969, we find that court directing

> "that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . , [t]hat no school [should] be operated with an all-black or predominantly black student body, [and] [t]hat pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students."

The District Judge went on to acknowledge that variation "from that norm may be unavoidable." This contains intimations that the "norm" is a fixed mathematical

racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

As the voluminous record in this case shows,[7] the predicate for the District Court's use of the 71%–29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans.[8] As the statement of facts shows, these findings are abun-

[7] It must be remembered that the District Court entered nearly a score of orders and numerous sets of findings, and for the most part each was accompanied by a memorandum opinion. Considering the pressure under which the court was obliged to operate we would not expect that all inconsistencies and apparent inconsistencies could be avoided. Our review, of course, is on the orders of February 5, 1970, as amended, and August 7, 1970.

[8] The final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. As discussed below, the Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, as noted by the District Court and Court of Appeals, the board plan did not assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps.

dantly supported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger was designated to assist the District Court to do what the board should have done.

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances.[9] As we said in *Green,* a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(2) *One-race Schools.*

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominately

---

[9] In its August 3, 1970, memorandum holding that the District Court plan was "reasonable" under the standard laid down by the Fourth Circuit on appeal, the District Court explained the approach taken as follows:

"This court has not ruled, and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*" (Emphasis in original.)

of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant

the transferring student free transportation and space must be made available in the school to which he desires to move. Cf. *Ellis* v. *Board of Public Instruction,* 423 F. 2d 203, 206 (CA5 1970). The court orders in this and the companion *Davis* case now provide such an option.

(3) *Remedial Altering of Attendance Zones.*

The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones. An additional step was pairing, "clustering," or "grouping" of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools. More often than not, these zones are neither compact [10] nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

---

[10] The reliance of school authorities on the reference to the "revision of . . . attendance areas into *compact* units," *Brown II,* at 300 (emphasis supplied), is misplaced. The enumeration in that opinion of considerations to be taken into account by district courts was patently intended to be suggestive rather than exhaustive. The decision in *Brown II* to remand the cases decided in *Brown I* to local courts for the framing of specific decrees was premised on a recognition that this Court could not at that time foresee the particular means which would be required to implement the constitutional principles announced. We said in *Green, supra,* at 439:

"The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."

419-882 O - 72 - 7

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.

We hold that the pairing and grouping of noncontiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought. Ju-

dicial steps in shaping such zones going beyond combinations of contiguous areas should be examined in light of what is said in subdivisions (1), (2), and (3) of this opinion concerning the objectives to be sought. Maps do not tell the whole story since noncontiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.

(4) *Transportation of Students.*

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969–1970 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, *Davis, supra.*[11] The

[11] During 1967–1968, for example, the Mobile board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles. During 1966–1967, 7,116 students in the metropolitan area were bused daily. In Charlotte-Mecklenburg, the system as a whole, without regard to desegregation plans, planned to bus approximately 23,000 students this year, for an average daily round trip of 15 miles. More elementary school children than high school children were to be bused, and four- and five-year-olds travel the longest routes in the system.

Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most." [12] This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly

---

[12] The District Court found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally, it should be noted that North Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes. N. C. Gen. Stat. § 115–186 (b) (1966).

impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

VI

The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term "reasonableness." In *Green, supra,* this Court used the term "feasible" and by implication, "workable," "effective," and "realistic" in the mandate to develop "a plan that promises realistically to work, and . . . to work *now.*" On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.

At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander.*

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither

school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

For the reasons herein set forth, the judgment of the Court of Appeals is affirmed as to those parts in which it affirmed the judgment of the District Court. The order of the District Court, dated August 7, 1970, is also affirmed.

It is so ordered.

Syllabus

DAVIS ET AL. *v.* BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY ET AL.

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

No. 436. Argued October 13–14, 1970—Decided April 20, 1971

East of the major highway that divides the metropolitan area of Mobile, Ala., live 94% of the area's Negro students, and the schools there are 65% Negro and 35% white. West of the highway the schools are 12% Negro and 88% white. The Court of Appeals approved a desegregation plan which, like the District Court's plan, insofar as those areas were concerned, treated the western section as isolated from the eastern, with unified geographic zones and providing no transportation of students for desegregation purposes. Though some reduction in the number of all-Negro schools was achieved for the 1970–1971 school year, nine elementary schools in the eastern section (attended by 64% of all Negro elementary school pupils in the metropolitan area) were over 90% Negro, and over half of the Negro junior and senior high school students went to all-Negro or nearly all-Negro schools. With regard to the faculty and staff ratio in each of Mobile County's schools, the Court of Appeals directed the District Court to require the school board to establish "substantially the same" ratio as that for the whole district. *Held:*

1. The Court of Appeals decision dealing with the faculty and staff ratio is affirmed. *Swann* v. *Charlotte-Mecklenburg Board of Education, ante,* p. 1, at 19–20. P. 35.

2. The Court of Appeals erred in treating the eastern part of metropolitan Mobile in isolation from the rest of the school system, and in not adequately considering the possible use of all available techniques to achieve the maximum amount of practicable desegregation. P. 38.

430 F. 2d 883 and 889, affirmed in part and reversed and remanded in part.

BURGER, C. J., delivered the opinion for a unanimous Court.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *James M. Nabrit III, Michael*

Davidson, Norman J. Chachkin, and *Anthony G. Amsterdam.*

Abram L. Philips, Jr., argued the cause for respondents Board of School Commissioners of Mobile County et al. With him on the brief were *George F. Wood, John J. Sparkman, James B. Allen,* and *Jack Edwards. Samuel L. Stockman* argued the cause for respondents Mobile County Council Parent-Teacher Associations et al. With him on the brief were *W. A. Kimbrough, Jr.,* and *John W. Adams, Jr.*

Solicitor General Griswold argued the cause for the United States as *amicus curiae.* With him on the brief was *Assistant Attorney General Leonard.*

Briefs of *amici curiae* were filed by *Albert P. Brewer,* Governor, *MacDonald Gallion,* Attorney General, and *Joseph D. Phelps,* Special Assistant Attorney General, for the State of Alabama; by *A. F. Summer,* Attorney General, and *Semmes Luckett,* Special Assistant Attorney General, for the State of Mississippi; by *Robert V. Light* and *Herschel H. Friday* for the Little Rock School District et al., and by *William L. Taylor, Richard B. Sobol,* and *Joseph L. Rauh, Jr.,* for the United Negro College Fund, Inc., et al.

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

Petitioners in this case challenge as inadequate a school desegregation plan for Mobile County, Alabama. The county is large and populous, embracing 1,248 square miles and the city of Mobile. The school system had 73,500 pupils in 91 schools at the beginning of the 1969 academic year; approximately 58% of the pupils were white and 42% Negro. During the 1967–1968 school year, the system transported 22,000 pupils daily in over

200 school buses, both in the rural areas of the county and in the outlying areas of metropolitan Mobile.

The present desegregation plan evolved from one developed by the District Court in response to the decision of the Court of Appeals for the Fifth Circuit in *Davis* v. *Board of School Comm'rs,* 414 F. 2d 609 (CA5 1969), that an earlier desegregation plan formulated by the District Court on the basis of unified geographic zones was "constitutionally insufficient and unacceptable, and such zones must be redrawn." The Court of Appeals held that that earlier plan had "ignored the unequivocal directive to make a conscious effort in locating attendance zones to desegregate and eliminate past segregation." *Id.,* at 610.

The District Court responded with a new zoning plan which left 18,623, or 60%, of the system's 30,800 Negro children in 19 all-Negro or nearly all-Negro schools. On appeal, the Court of Appeals reviewed all aspects of desegregation in Mobile County. Additional information was requested regarding earlier desegregation plans for the rural parts of the county, and those plans were approved. They are not before us now. The Court of Appeals concluded that with respect to faculty and staff desegregation the board had "almost totally failed to comply" with earlier orders, and directed the District Court to require the board to establish a faculty and staff ratio in each school "substantially the same" as that for the entire district. 430 F. 2d 883, 886. We affirm that part of the Court of Appeals' opinion for the reasons given in *Swann* v. *Charlotte-Mecklenburg Board of Education, ante,* p. 1, at 19–20.

Regarding junior and senior high schools, the Court of Appeals reversed the District Court and directed implementation of a plan that was intended to eliminate the seven all-Negro schools remaining under the District

Court's scheme. This was to be achieved through pairing and adjusting grade structures within metropolitan Mobile, without bus transportation or split zoning. The Court of Appeals then turned to the difficult problem of desegregating the elementary schools of metropolitan Mobile. The metropolitan area is divided by a major north-south highway. About 94% of the Negro students in the metropolitan area live on the east side of the highway between it and the Mobile River. The schools on that side of the highway are 65% Negro and 35% white. On the west side of the highway, however, the schools are 12% Negro and 88% white. Under the District Court's elementary school plan for the metropolitan area, the eastern and western sections were treated as distinct, without either interlocking zones or transportation across the highway. Not surprisingly, it was easy to desegregate the western section, but in the east the District Court left 12 all-Negro or nearly all-Negro elementary schools, serving over 90% of all the Negro elementary students in the metropolitan area.

The Court of Appeals rejected this solution in favor of a modified version of a plan submitted by the Department of Justice. As further modified after a second appeal, this plan reduced the number of all-Negro or nearly all-Negro elementary schools from 12 to six schools, projected to serve 5,310 students, or about 50% of the Negro elementary students in the metropolitan area. Like the District Court's plan, the Court of Appeals' plan was based on treating the western section in isolation from the eastern. There were unified geographic zones, and no transportation of students for purposes of desegregation. The reduction in the number of all-Negro schools was achieved through pairing, rezoning, and adjusting grade structures within the eastern section. With yet further modifications not material

here, this plan went into effect at the beginning of the 1970–1971 school year.

The enrollment figures for the 1970–1971 school year show that the projections on which the Court of Appeals based its plan for metropolitan Mobile were inaccurate. Under the Court of Appeals' plan as actually implemented, nine elementary schools in the eastern section of metropolitan Mobile were over 90% Negro as of September 21, 1970 (instead of six as projected), and they housed 7,651 students, or 64% of all the Negro elementary school pupils in the metropolitan area. Moreover, the enrollment figures indicate that 6,746 Negro junior and senior high school students in metropolitan Mobile, or over half, were then attending all-Negro or nearly all-Negro schools, rather than none as projected by the Court of Appeals. These figures are derived from a report of the school board to the District Court; they were brought to our attention in a supplemental brief for petitioners filed on October 10, 1970, and have not been challenged by respondents.

As we have held, "neighborhood school zoning," whether based strictly on home-to-school distance or on "unified geographic zones," is not the only constitutionally permissible remedy; nor is it *per se* adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. See *Swann, supra,* at 22–31. The measure of any desegregation plan is its effectiveness.

On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of metropolitan Mobile in isolation from the rest of the school system, and that inadequate consideration was given to the possible use of bus transportation and split zoning. For these reasons, we reverse the judgment of the Court of Appeals as to the parts dealing with student assignment, and remand the case for the development of a decree "that promises realistically to work, and promises realistically to work *now*." *Green* v. *County School Board*, 391 U. S. 430, 439 (1968).

It is so ordered.

Syllabus

McDANIEL, SUPERINTENDENT OF SCHOOLS, ET AL. *v.* BARRESI ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 420. Argued October 13, 1970—Decided April 20, 1971

The Board of Education of Clarke County, Ga. (with a two-to-one white-Negro elementary school system ratio), devised a student assignment plan for desegregating elementary schools which establishes geographic zones drawn to promote desegregation and also provides that pupils in heavily concentrated Negro "pockets" walk or go by bus to schools in other attendance zones. The resulting Negro elementary enrollment ranges from 20% to 40% in all but two schools, where it is 50%. Respondent parents sued to enjoin the plan's operation. The state trial court denied an injunction. The Georgia Supreme Court reversed, holding that the plan violated (1) equal protection because it "[treated] students differently because of their race," and (2) the Civil Rights Act of 1964, because Title IV prohibits a school board from requiring busing to achieve a racial balance. *Held:*

1. In compliance with its duty to convert to a unitary system, the school board properly took race into account in fixing the attendance lines. P. 41.

2. Title IV, a direction to federal officials, does not restrict state officials in assigning students within their systems. Pp. 41–42.

226 Ga. 456, 175 S. E. 2d 649, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Eugene A. Epting argued the cause and filed a brief for petitioners.

E. Freeman Leverett argued the cause and filed a brief for respondents.

Briefs of *amici curiae* were filed by *Solicitor General Griswold* and *Assistant Attorney General Leonard* for the United States, and by *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Alfred L. Evans, Jr.,* and *J. Lee Perry,* Assistant Attorneys General, for the State of Georgia.

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

We granted certiorari in this case to review a state court order enjoining the operation of a school desegregation plan. The action was brought in the Superior Court of Clarke County, Georgia, by parents of children attending public elementary schools in that county. Named as defendants were the Superintendent of Education and members of the Clarke County Board of Education. The trial court denied respondents' request for an injunction, but on appeal the Supreme Court of Georgia reversed, 226 Ga. 456, 175 S. E. 2d 649 (1970). This Court then granted certiorari, 400 U. S. 804 (1970).

Beginning in 1963, the Clarke County Board of Education began a voluntary program to desegregate its public schools. The student-assignment plan presently at issue, involving only elementary schools, has been in effect since the start of the 1969 academic year. The plan, adopted by the Board of Education and approved by the Department of Health, Education, and Welfare,[1] relies primarily upon geographic attendance zones drawn to achieve greater racial balance. Additionally, the pupils in five heavily Negro "pockets" either walk or are transported by bus to schools located in other attendance zones.[2] As a consequence the Negro enrollment of each

[1] It may well be that the Board of Education adopted the present student-assignment plan because of urgings of federal officials and fear of losing federal financial assistance. The state trial court, however, made no findings on these matters. No federal officials are parties in this case.

[2] Where the distance between the student's residence and his assigned school is more than 1½ miles, free transportation is provided. There is no challenge here to the feasibility of the transportation provisions of the plan. The annual transportation expenses of the present plan are reported in the record to be $11,070 less than the school system spent on transportation during the 1968–1969 school year under dual operation.

elementary school in the system varies generally between 20% and 40%, although two schools have a 50% Negro enrollment. The white-Negro ratio of elementary pupils in the system is approximately two to one.

Respondents contend in this action that the board's desegregation plan violates the Fourteenth Amendment of the Federal Constitution and Title IV of the Civil Rights Act of 1964. The Supreme Court of Georgia upheld both contentions, concluding first that the plan violated the Equal Protection Clause "by treating students differently because of their race." The court concluded also that Title IV prohibited the board from "requiring the transportation of pupils or students from one school to another . . . in order to achieve such racial balance . . . ." We reject these contentions.

The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines. To have done otherwise would have severely hampered the board's ability to deal effectively with the task at hand. School boards that operated dual school systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board,* 391 U. S. 430, 437–438 (1968). In this remedial process, steps will almost invariably require that students be assigned "differently because of their race." See *Swann* v. *Charlotte-Mecklenburg Board of Education, ante,* p. 1; *Youngblood* v. *Board of Public Instruction,* 430 F. 2d 625, 630 (CA5 1970). Any other approach would freeze the status quo that is the very target of all desegregation processes.

Nor is the board's plan barred by Title IV of the Civil Rights Act of 1964. The sections relied upon by respondents (42 U. S. C. §§ 2000c (b), 2000c–6) are di-

rected only at federal officials and are designed simply to foreclose any interpretation of the Act as expanding the powers of federal officials to enforce the Equal Protection Clause. *Swann, supra,* at 17. Title IV clearly does not restrict state school authorities in the exercise of their discretionary powers to assign students within their school systems.

Reversed.

NORTH CAROLINA STATE BOARD OF EDUCATION ET AL. *v.* SWANN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

No. 498. Argued October 13, 1970—Decided April 20, 1971

North Carolina's Anti-Busing Law, which flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibits busing for such purposes, *held* invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. Pp. 45–46.

312 F. Supp. 503, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Andrew A. Vanore, Jr., Assistant Attorney General of North Carolina, argued the cause for appellants. With him on the brief were *Robert B. Morgan*, Attorney General, and *Ralph Moody*, Deputy Attorney General.

James M. Nabrit III argued the cause for appellees. With him on the brief were *Jack Greenberg, Norman J. Chachkin, J. LeVonne Chambers, C. O. Pearson,* and *Anthony G. Amsterdam.*

Solicitor General Griswold and *Assistant Attorney General Leonard* filed a brief for the United States as *amicus curiae.*

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

This case is here on direct appeal pursuant to 28 U. S. C. § 1253 from the judgment of a three-judge court in the United States District Court for the Western District of North Carolina. The District Court declared unconstitutional a portion of the North Carolina General

419-882 O - 72 - 8

Statutes known as the Anti-Busing Law,[1] and granted an injunction against its enforcement.[2] The proceeding before the three-judge court was an ancillary proceeding connected with the school desegregation case heretofore discussed, *Swann* v. *Charlotte-Mecklenburg Board of Education, ante,* p. 1. The instant appeal was taken by the North Carolina State Board of Education and four state officials. We granted the Charlotte-Mecklenburg school board's motion to join in the appeal, 400 U. S. 804 (1970).

When the litigation in the *Swann* case recommenced in the spring of 1969, the District Court specifically directed that the school board consider altering attendance areas, pairing or consolidation of schools, bus transportation of students, and any other method which would effectuate a racially unitary system. That litigation was actively prosecuted. The board submitted a series of proposals, all rejected by the District Court as inadequate. In the midst of this litigation over the remedy to implement the District Court's order, the North Carolina Legislature enacted the anti-busing bill, set forth in relevant part in footnote 1.

Following enactment of the anti-busing statute the plaintiffs in the *Swann* case obtained leave to file a sup-

---

[1] So far as here relevant, N. C. Gen. Stat. § 115–176.1 (Supp. 1969) reads as follows:

"No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing."

[2] 312 F. Supp 503 (1970). The opinion as printed grants only declaratory relief. However, the District Court amended its original opinion by withdrawing Part V and entering an order dated June 22, 1970, which enjoined all parties "from enforcing, or seeking the enforcement of," the portion of the statute found unconstitutional.

plemental complaint which sought injunctive and declaratory relief against the statute. They sought to convene a three-judge court, but no action was taken on the requests at that time because the school board thought that the anti-busing law did not interfere with the school board's proposed plan to transport about 4,000 Negro children to white suburban schools. 306 F. Supp 1291 (WDNC 1969). Other parties were added as defendants by order of the District Court dated February 25. In addition, certain persons who had brought a suit in state court to enjoin or impede the order of the federal court, the attorneys for those litigants, and state judges who at various times entered injunctions against the school authorities and blocked compliance with orders of the District Court were also joined; a three-judge court was then convened.

We observed in *Swann, supra,* at 16, that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. But more important the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation,

would render illusory the promise of *Brown* v. *Board of Education,* 347 U. S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann,* the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green* v. *County School Board,* 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.

We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in *Swann, supra,* at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it.

The remainder of the order of the District Court is affirmed for the reasons stated in its opinion, 312 F. Supp. 503.

Affirmed.

MOORE ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

No. 444. Argued October 13, 1970—Decided April 20, 1971

Since both parties in this action challenging a school desegregation plan seek the same result, *viz.*, a holding that North Carolina's Anti-Busing Law is constitutional, there is no Art. III case or controversy. Additionally, on the facts of this case, no direct appeal to this Court lies under 28 U. S. C. § 1253.

312 F. Supp. 503, appeal dismissed for lack of jurisdiction.

Whiteford S. Blakeney argued the cause for appellants. With him on the brief was *William H. Booe.*

William J. Waggoner argued the cause for appellees. With him on the brief was *Benjamin S. Horack.*

Solicitor General Griswold and *Assistant Attorney General Leonard* filed a brief for the United States as *amicus curiae.*

PER CURIAM.

Appellants seek review of the decision of the United States District Court for the Western District of North Carolina declaring a portion of the North Carolina anti-busing statute unconstitutional, and enjoining its enforcement. It is a companion case to No. 498, *North Carolina State Board of Education* v. *Swann, ante,* p. 43. We postponed decision on the question of jurisdiction, 400 U. S. 803 (1970), and after hearing on the merits we now dismiss the appeal for lack of jurisdiction.

At the hearing both parties argued to the three-judge court that the anti-busing law was constitutional and urged that the order of the District Court adopting the Finger plan should be set aside. We are thus confronted

with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution. *Muskrat* v. *United States,* 219 U. S. 346 (1911). Additionally, since neither party sought an injunction to restrain a state officer from enforcing a state statute alleged to be unconstitutional, 28 U. S. C. § 2281, this is not an appeal from "any civil action, suit or proceeding required . . . to be heard . . . by a district court of three judges," 28 U. S. C. § 1253, and hence no direct appeal to this Court is available.

Dismissed.

Syllabus

ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE *v.* YEE CHIEN WOO

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

No. 156. Argued February 23, 1971—Decided April 21, 1971

In 1953, respondent fled mainland China, of which he was a national, going to Hong Kong, where he resided with his family until 1960, when he came to the United States as a business visitor. He remained in this country, though he kept his business in Hong Kong for several years. His temporary permit having expired, the Immigration and Naturalization Service (INS) in 1966 began deportation proceedings. Respondent then sought classification as a refugee under § 203 (a) (7) of the Immigration and Nationality Act of 1952, which provides that aliens may apply in any non-Communist country for conditional entry into the United States if (i) they have fled from any Communist country because of persecution or fear of persecution for reasons of race, religion, or political opinion, (ii) are remaining away from that country for those reasons, and (iii) are not nationals of the country in which they apply for conditional entry. The INS Director denied respondent's application on the ground that § 203 (a) (7) requires that "physical presence in the United States [be] a consequence of an alien's flight in search of a refuge" and that such presence must be "reasonably proximate to the flight and not one following a flight remote in point of time or intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge." Without deciding whether resettlement would have barred respondent's claim, the District Court reversed the INS determination, on the ground that respondent had never firmly resettled in Hong Kong. The Court of Appeals affirmed on the basis that the relevant factor was not the "firmly resettled" issue but that under § 203 (a) (7) (iii) respondent was a national of Communist China, from which he was a refugee, and not a national of Hong Kong. *Held:* Whether a refugee has already "firmly resettled" in another country is relevant to determining the availability to him of the asylum provision of § 203 (a) (7), since Congress did not intend to grant asylum to a refugee who

has found permanent shelter in another country, and the § 203 (a) (7) (iii) nationality requirement is no substitute for the "resettlement" concept. Pp. 52–58.

419 F. 2d 252, reversed and remanded.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, WHITE, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 58.

Charles Gordon argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit, Beatrice Rosenberg, Paul C. Summitt,* and *George W. Masterton.*

Gordon G. Dale argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondent, Yee Chien Woo, is a native of mainland China, a Communist country, who fled that country in 1953 and sought refuge in Hong Kong. He lived in Hong Kong until 1959 when he came to the United States as a visitor to sell merchandise through a concession at a trade fair in Portland, Oregon. After a short stay, he returned to Hong Kong only to come back to the United States in 1960 to participate in the San Diego Fair and International Trade Mart to promote his Hong Kong business. Thereafter he remained in the United States although he continued to maintain his clothing business in Hong Kong until 1965. In 1965 respondent's wife and son obtained temporary visitor's permits and joined him in this country. By 1966 all three had overstayed their permits and were no longer authorized to remain in this country. After the Immigration and Naturalization Service began deportation proceedings, Yee Chien Woo applied for an immigrant visa claiming a "preference"

as an alien who had fled a Communist country fearing persecution as defined in § 203 (a)(7) of the Immigration and Nationality Act of 1952, as amended, 79 Stat. 913, 8 U. S. C. § 1153 (a)(7) (1964 ed., Supp. V).

The District Director of the Immigration and Naturalization Service denied respondent's application because "the applicant's presence in the United States . . . was not and is not now a physical presence which was *a consequence of his flight in search of refuge* from the Chinese mainland." (Emphasis added.) On appeal within the Immigration and Naturalization Service, the decision of the District Director was affirmed by the Regional Commissioner on the ground that "Congress did not intend that an alien, though formerly a refugee, who had established roots or acquired a residence in a country other than the one from which he fled would again be considered a refugee for the purpose of gaining entry into and or subsequently acquiring status as a resident in this, the third country."

Respondent then sought review in the United States District Court for the Southern District of California which reversed the District Director's determination. That court, without ever deciding whether resettlement would have barred respondent's claim, found as a matter of fact that he had never firmly resettled in Hong Kong.[1] The Immigration and Naturalization Service appealed to the United States Court of Appeals for the Ninth Circuit. That court affirmed the District Court because in its view whether Yee Chien Woo was "firmly resettled" in Hong Kong was "irrelevant" to

[1] "Without expressing any opinion as to why Congress chose to omit the 'firmly resettled' provision in the amendments to the Refugee Relief Act of 1953, this court finds that plaintiff was never 'firmly resettled' and still qualifies as a refugee under the terms of section 203 (a)(7). Accordingly, the District Director erred in denying plaintiff's application." 295 F. Supp. 1370, 1372 (1968).

consideration of his application for an immigration quota. It stated:

> "Whether appellee was firmly resettled in Hong Kong is not, then, relevant. What is relevant is that he is not a national of Hong Kong (or the United Kingdom); that he is a national of no country but Communist China and as a refugee from that country remains stateless." 419 F. 2d 252, 254 (1969).

The Court of Appeals for the Second Circuit in a case decided after the Ninth Circuit decision below faced the issue of the relevancy of resettlement and expressly declined to follow the Ninth Circuit interpretation of the statute.[2] *Shen* v. *Esperdy,* 428 F. 2d 293 (1970). We granted certiorari in this case to resolve the conflict. 400 U. S. 864 (1970).

Since 1947 the United States has had a congressionally enacted immigration and naturalization policy which granted immigration preferences to "displaced persons," "refugees," or persons who fled certain areas of the world because of "persecution or fear of persecution on account of race, religion, or political opinion." Although the language through which Congress has implemented this policy since 1947 has changed slightly from time to time, the basic policy has remained constant—to provide a haven for homeless refugees and to fulfill American responsibilities in connection with the International Refugee Organization of the United Nations. This policy is currently embodied in the "Seventh Preference" of § 203

---

[2] The Second Circuit dealt at length with the Ninth Circuit's opinion in this case, concluding:

"In so far as Yee Chien Woo v. Rosenberg holds that the concept of firm resettlement is irrelevant to applications made under section 203 (a)(7) of the Act, we must disagree with the Ninth Circuit." 428 F. 2d 293, 298 (1970).

(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1153 (a) (1964 ed., Supp. V), which provides in pertinent part:

> "(a) Aliens who are subject to the numerical limitations specified in section 201 (a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> . . . . .
>
> "(7) [A]liens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, . . . and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made . . . ."

The Ninth Circuit supported its conclusion that the "firmly resettled" concept was irrelevant under § 203 (a) (7) upon two bases. First, the court noted that the "firmly resettled" language was first introduced in the Displaced Persons Act of 1948, 62 Stat. 1009, and was then expressly stated in the Refugee Relief Act of 1953, 67 Stat. 400, both of which are predecessors of the present legislation.[3] However, when the Refugee Relief Act of

[3] The Displaced Persons Act of 1948 defined a "displaced person" by reference to the Constitution of the International Refugee Organization (IRO) and to persons who were of concern to that organization. Persons ceased to be of concern to the IRO when they acquired a new nationality or by their firm establishment. S. Rep. No. 950, 80th Cong., 2d Sess., 68.

The Refugee Relief Act of 1953 provided: " 'Refugee' means any person in a country or area which is neither Communist nor Com-

1953 was extended in 1957, the "firmly resettled" language was dropped in favor of a formula defining an eligible refugee as "any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee" from certain areas. 71 Stat. 643. The 1957 Act was then followed by the Fair Share Refugee Act of 1960, 74 Stat. 504, which defined "refugee" as one "not a national of the area in which the application is made, and (3) [who] is within the mandate of the United Nations High Commissioner for Refugees." Finally, the present legislation was added to the Immigration and Nationality Act in 1965. From the 1957 abandonment of the words "firmly resettled" the Court of Appeals determined that Congress had purposely rejected "resettlement" as a test for eligibility for refugee status.

Second, the Ninth Circuit gave particular significance to the statutory requirement that refugees "are not nationals of the countries or areas in which their application for conditional entry is made." Thus, in the court's view, Congress intended to substitute the "not nationals" requirement for the not "firmly resettled" requirement. For substantially the reasons stated by the Second Circuit in *Shen* v. *Esperdy,* 428 F. 2d 293 (1970), we find no congressional intent to depart from the established concept of "firm resettlement" and we do not give the "not nationals" requirement of § 203 (a)(7)(A)(iii) as broad a construction as did the court below.

While Congress did not carry the words "firmly resettled" over into the 1957, 1960, and 1965 Acts from the

---

munist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation." Refugee Relief Act of 1953, § 2 (a), 67 Stat. 400.

earlier legislation, Congress did introduce a new requirement into the 1957 Act—the requirement of "flight." The 1957 Act, as well as the present law, speaks of persons who have *"fled"* to avoid persecution.[4] Both the terms "firmly resettled" and "fled" are closely related to the central theme of all 23 years of refugee legislation—the creation of a haven for the world's homeless people. This theme is clearly underlined by the very titles of the Acts over the years from the Displaced Persons Act in 1948 through the Refugee Relief Act and the Fair Share Refugee Act of 1960. Respondent's reliance on the Fair Share Refugee Act of 1960 to show that Congress abandoned the "firmly resettled" concept is particularly misplaced because Congress envisioned that legislation not only as the means through which this country would fulfill its obligations to refugees, but also as an incentive to

---

[4] The 1957 amendments to the Refugee Relief Act of 1953 did not mark any great change in American refugee policy. Congress was primarily concerned with distributing 18,656 visas that were originally authorized under the 1953 Act but remained unissued when that Act expired on January 1, 1957. The Senate report on the bill states the congressional intent: "It is the intention of the committee that the distribution of this remainder will be made in a fair and equitable manner, without any prescribed numerical limitations for any particular group, according to the showing of hardship, persecution, and the welfare of the United States." S. Rep. No. 1057, 85th Cong., 1st Sess., 6. Indeed, after the 1957 Act became law the Immigration and Naturalization Service promulgated and uniformly administered regulations which specifically referred to the resettlement requirement.

"§ 44.1 *Definitions.*

. . . . . .

"(f) 'Refugee' means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled and who is in urgent need of assistance for the essentials of life or for transportation." 22 CFR § 44.1 (1958), 22 Fed. Reg. 10826 (Dec. 27, 1957).

other nations to do likewise.[5] Far from encouraging resettled refugees to leave one secure haven for another, the Act established United States quotas as a percentage—25%—of the refugees absorbed by all other cooperating nations. The Fair Share Refugee Act, like its successor and predecessors, was enacted to help alleviate the suffering of homeless persons and the political instability associated with their plight. It was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives. Nor could Congress have intended to make refugees in flight from persecution compete with all of the world's resettled refugees for the 10,200 entries and permits afforded each year under § 203 (a)(7). Such an interpretation would subvert the lofty goals embodied in the whole pattern of our refugee legislation.

In short, we hold that the "resettlement" concept is not irrelevant. It is one of the factors which the Immigration and Naturalization Service must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution. The District Director applied the correct legal

---

[5] Careful study of the Fair Share Refugee Act demonstrates that resettlement was relevant even under that legislation. In order to qualify as a refugee under the Fair Share Refugee Act, the alien had to be "within the mandate of the United Nations High Commissioner for Refugees." Specifically excluded from the Commissioner's competence was a person who "is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country . . . ." Statute of the Office of the United Nations High Commissioner for Refugees, c. II, par. 7 (b), contained in G. A. Res. 428 (V), December 14, 1950. It appears that under this statute, Yee Chien Woo probably would not have fallen within the Commissioner's mandate because although he was not a Hong Kong (or British) national, he possessed valid Hong Kong identity papers enabling him to return and live there.

standard when he determined that § 203 (a)(7) requires that "physical presence in the United States [be] a consequence of an alien's flight in search of refuge," and further that "the physical presence must be one which is reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge." [6]

Finally, we hold that the requirement of § 203 (a)(7)(A)(iii) that refugees not be "nationals of the countries or areas in which their application for conditional entry is made" is not a substitute for the "resettlement" concept. In the first place that section is not even applicable to respondent. He was applying for an immigrant visa, not a conditional entry permit to which part (A)(iii) of subsection 7 is expressly limited. He had already been granted entry to the United States as a business visitor. Second, even if the provision were applicable, the country

[6] The legal standard employed by the District Director and approved here today does not exclude from refugee status those who have fled from persecution and who make their flight in successive stages. Certainly many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. Such stops do not necessarily mean that the refugee's aim to reach these shores has in any sense been abandoned. However, there are many refugees who have firmly resettled in other countries and who either never aimed to reach these shores or have long since abandoned that aim. In the words of the District Director, the presence of such persons in this country is not "one which is reasonably proximate to the flight" or is "remote in point of time or interrupted by intervening residence in a third country." Such persons are not entitled to refugee status under § 203 (a)(7).

In this very case, the District Court found that Yee Chien Woo was not firmly resettled even though he had lived in Hong Kong for six years after his initial flight. We do not express an opinion on that finding but merely remand the case to the Court of Appeals for review in accord with the proper legal standard.

"in which" respondent's application was made was the United States and he was certainly not a national of this country. Had he been a national he of course would have been entitled to remain here. Section 203 (a)(7)(A)(iii) applies only to applications for conditional entry into this country made to Immigration and Naturalization officers authorized to accept such applications at points outside the United States.

Because it was under the erroneous impression that resettlement was irrelevant to refugee status under § 203 (a)(7), the Court of Appeals failed to review the District Court's finding that respondent had never firmly resettled in Hong Kong. The District Director is, of course, entitled to review of that determination under the legal test set out in this opinion and the appropriate standards for judicial review. Consequently, the judgment below is reversed and the case is remanded to the Ninth Circuit for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

On March 8, 1966, the respondent, who fled mainland China for Hong Kong in 1953 and has resided in the United States since May 22, 1960, filed with the Immigration and Naturalization Service an application for adjustment of status pursuant to § 203 (a)(7) of the Immigration and Nationality Act, as amended, 8 U. S. C. § 1153 (a)(7) (1964 ed., Supp. V). By the terms of § 203 (a)(7) applicants for adjustment of status are required to show:

1. that they "have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status;"

2. that "because of persecution or fear of persecution

on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area . . . ;"

3. that they "are unable or unwilling to return to such country or area on account of race, religion, or political opinion;"

4. that they "are not nationals of the countries or areas in which their application for conditional entry is made . . . ."

The District Director denied the respondent's application for adjustment of status because of "intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge." An administrative appeal was certified to the Regional Commissioner who held that § 203 (a)(7) does not apply "to aliens who although they had fled from their own country were later resettled in another country."

Section 203 (a)(7) contains no requirement that an applicant shall not have "resettled" prior to his application for conditional entry or adjustment of status. A requirement that an applicant shall not have "firmly resettled" did appear in an earlier version of the law but was eliminated by the 1957 amendments to the Refugee Relief Act of 1953. The requirement was not reintroduced in any of the subsequent enactments. To the contrary, cognizant House and Senate committees rejected a proposal of the Department of State that contained a requirement that a refugee alien must be one who "has not been firmly resettled . . . ." S. Rep. No. 1651, 86th Cong., 2d Sess., 19; H. R. Rep. No. 1433, 86th Cong., 2d Sess., 12. Senator Kennedy, who, as Chairman of the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, presided over Senate hearings on the present § 203 (a)(7), stated that refugees "[a]s defined in this bill" "must be currently settled in countries other than their home-

419-882 O - 72 - 9

lands." 111 Cong. Rec. 24227. This statement is flatly inconsistent with the proposition that the persons described in § 203 (a)(7) cannot have resettled in another country following their original flight.

In the face of the unambiguous language of § 203 (a)(7) and this clear legislative history, the Court today holds that a requirement of firm resettlement may properly be read back into the statute so as not to subvert what it considers to be the "central theme" of refugee legislation—"the creation of a haven for the world's homeless people." I have no doubt that in enacting refugee legislation Congress intended to provide a haven for the homeless. But the Court offers no reason to believe that Congress did not also intend to help those others who have fled their homeland because of oppression, have found a temporary refuge elsewhere, and now desire to immigrate to the United States. Congress may well have concluded that such people should be preferred to immigrants who have not suffered such hardship. The clear language of § 203 (a)(7) demonstrates to me that this was exactly what Congress intended to accomplish.

Whether the Attorney General has discretion concerning the order in which § 203 (a)(7) applications are processed is a different issue and one that is not before us. The Attorney General has not sought to invoke whatever discretion he may have to process the applications of the homeless before turning to those whose plight may be thought less pressing.[1] Indeed it appears

[1] Section 203 (c), 8 U. S. C. § 1153 (c) (1964 ed., Supp. V), which provides that visas shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General, does not by its terms apply to visas issued pursuant to § 203 (a)(7). And Senator Kennedy stated that under § 203 (a)(7) "the cases of greatest need can be processed at once." 111 Cong. Rec. 24227.

that in many years a number of the visas annually available for § 203 (a)(7) applicants have gone unused.[2]

The only issue before the Court is whether a refugee is totally barred from any consideration under § 203 (a)(7) by virtue of resettlement following flight. In view of the language of the statute and its legislative history, I cannot but conclude that under § 203 (a)(7) the respondent was eligible for the adjustment of status that he sought.

For these reasons I dissent.

---

[2] 1969 Annual Report, Immigration and Naturalization Service 38.

UNITED STATES *v.* VUITCH

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

No. 84. Argued January 12, 1971—Decided April 21, 1971

Appellee physician's indictments for producing and attempting to produce abortions in violation of D. C. Code § 22–201 was dismissed by the District Court on the ground of unconstitutional vagueness. That court held that the word "health" was overly vague, and, relying on *Williams* v. *United States*, 78 U. S. App. D. C. 147, 138 F. 2d 81, held that once an abortion is proved, the burden is on the doctor to persuade the jury that it was necessary to preserve the mother's life or health. The Government appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. *Held:*

1. Although the abortion statute applies only to the District of Columbia, this Court has jurisdiction of the appeal under § 3731, which provides for direct appeals from district court judgments "in all criminal cases . . . dismissing any indictment where such decision is based upon the invalidity . . . of the statute upon which the indictment . . . is founded." Once the appeal is properly here, this Court should not refuse to consider it because it might have been taken to the Court of Appeals. Pp. 64–67.

2. The statute is not unconstitutionally vague. Pp. 67–73.

(a) Under § 22–201 the burden is on the prosecution to plead and prove that an abortion was not "necessary for the preservation of the mother's life or health." Pp. 69–71.

(b) The word "health" in the statute, in accord with general usage and modern understanding, and a recent interpretation of § 22–201 by the federal courts, includes psychological as well as physical well-being, and as thus construed is not overly vague. Pp. 71–72.

305 F. Supp. 1032, reversed and remanded.

BLACK, J., delivered the opinion of the Court, in Part I of which BURGER, C. J., and DOUGLAS, STEWART, and WHITE, JJ., joined, and in Part II of which BURGER, C. J., and HARLAN, WHITE, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 73. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 74.

HARLAN, J., filed an opinion dissenting as to jurisdiction, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 81. STEWART, J., filed an opinion dissenting in part, *post*, p. 96. BLACKMUN, J., filed a separate opinion, *post*, p. 97.

Samuel Huntington argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Roger A. Pauley.*

Joseph L. Nellis and *Norman Dorsen* argued the cause for appellee. With *Mr. Nellis* on the brief was *Joseph Sitnick.*

Briefs of *amici curiae* were filed by *David W. Louisell* for Dr. Bart Heffernan; by *Alfred L. Scanlan, Thomas J. Ford,* and *Gary R. Alexander* for Dr. William F. Colliton, Jr., et al.; by *Robert E. Dunne* for Robert L. Sassone; by *Marilyn G. Rose* for the National Legal Program on Health Problems of the Poor; by *Sylvia S. Ellison* for Human Rights for Women, Inc.; by *Lola Boswell* for the Joint Washington Office for Social Concern et al.; and by *Ralph Temple, Melvin L. Wulf,* and *Norma G. Zarky* for the American Civil Liberties Union et al.

MR. JUSTICE BLACK delivered the opinion of the Court.*

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of D. C. Code Ann. § 22–201 (1967). Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DC 1969). The United States ap-

*THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join in Part I of this opinion. THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join in Part II of this opinion.

pealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the District of Columbia. That Act [1] gives us jurisdiction over direct appeals from district court judgments "in all criminal cases . . . dismissing any indictment . . . where such decision . . . is based upon the invalidity . . . of the statute upon which the indictment . . . is founded." 18 U. S. C. § 3731. The decision appealed from is a dismissal of indictments on the ground that the District of Columbia abortion law, on which the indictments were based, is unconstitutionally vague. This abortion statute, D. C. Code Ann. § 22–201, is an Act of Congress applicable only in the District of Columbia and we suggested that the parties argue whether a decision holding unconstitutional such a statute is appealable directly to this Court under the Criminal Appeals Act. The literal wording of the Act plainly includes this statute, even though it applies only to the District. A piece of legislation so limited is nevertheless a "statute" in the sense

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded." 18 U. S. C. § 3731.

that it was duly enacted into law by both Houses of Congress and was signed by the President. And the Criminal Appeals Act contains no language that purports to limit or qualify the term "statute." On the contrary, the Act authorizes Government appeals from district courts to the Supreme Court in *"all criminal cases"* where a district court judgment dismissing an indictment is based upon the invalidity of the statute on which the indictment is founded.

An examination of the legislative history of the Criminal Appeals Act and its amendments suggests no reason why we should depart from the Act's literal meaning and exclude District of Columbia (hereafter sometimes D. C.) statutes from its coverage. The committee reports and floor debates contain no discussion indicating that the term "statute" does not include statutes applicable only to the District of Columbia.[2] We therefore conclude that we have jurisdiction over this appeal under the Criminal Appeals Act.

Our Brother HARLAN has argued in dissent that we do not have jurisdiction over this direct appeal. He suggests that such a result is supported by the decision in *United States* v. *Burroughs,* 289 U. S. 159 (1933), the policy underlying the Criminal Appeals Act, and the canon of construction that statutes governing direct appeals to this Court should be strictly construed.

It is difficult to see how the *Burroughs* decision lends much force to his argument, since that case held only that the term "district court" in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia. *Id.,* at 163–164. The dissent goes on to suggest the Act should be construed in light of the

---

[2] See H. R. Conf. Rep. No. 8113, 59th Cong., 2d Sess.; H. R. Rep. No. 2119, 59th Cong., 1st Sess.; H. R. Rep. No. 45 and S. Rep. No. 868, 77th Cong., 1st Sess.; H. R. Conf. Rep. No. 2052, 77th Cong., 2d Sess.

congressional purpose of avoiding "inconsistent enforcement of criminal laws." *Post,* at 92. This purpose would not be served by our refusing to decide this case now after it has been orally argued. In the last several years, abortion laws have been repeatedly attacked as unconstitutionally vague in both state and federal courts with widely varying results. A number of these cases are now pending on our docket. A refusal to accept jurisdiction here would only compound confusion for doctors, their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws. Finally, my Brother HARLAN'S dissent also appears to rely on the fact that this Court has never accepted jurisdiction over a direct appeal under the Criminal Appeals Act involving the validity of a District of Columbia statute. *Post,* at 93. Since this Court has never either accepted or rejected jurisdiction of such an appeal, it is difficult to see how the complete absence of precedent in this Court lends any weight whatever to his argument. Neither previous cases nor the purpose behind the Criminal Appeals Act provides any satisfactory reason why the term "statute" should not include those statutes applicable only in the District of Columbia.

One other procedural problem remains. We asked the parties to brief the question whether the Government could have appealed this case to the Court of Appeals for the District of Columbia Circuit under D. C. Code Ann. § 23–105 (Supp. 1970), and, if so, whether we should refuse to entertain the appeal here as a matter of sound judicial administration. That D. C. Code provision states:

> "In all criminal prosecutions the United States . . . shall have the same right of appeal that is given to the defendant . . . ."

The relationship between the Criminal Appeals Act and this Code section was considered in *Carroll* v. *United States,* 354 U. S. 394, 411 (1957), where the Court concluded:

> "[C]riminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. § 3731 [the Criminal Appeals Act], although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [D. C. Code Ann. § 23–105 (Supp. 1970)]."

Since we have concluded above that this appeal is covered by the Criminal Appeals Act, it would seem to follow from *Carroll* that the Act's provisions control and no appeal could have been taken to the Court of Appeals. Although *Carroll* seems to be dispositive, it has been suggested that it may now be limited by *United States* v. *Sweet,* 399 U. S. 517 (1970), which contains some language suggesting that the Government may be empowered to take an appeal to the Court of Appeals under § 23–105 even when a direct appeal would be proper here under the Criminal Appeals Act. *Id.,* at 518. We do not elaborate upon that suggestion. We only hold that once an appeal is properly here under the Criminal Appeals Act, we should not refuse to consider it because it might have been taken to another court.

II

We turn now to the merits. Appellee Milan Vuitch was indicted for producing and attempting to produce abortions in violation of D. C. Code Ann. § 22–201. That Act provides in part:

> "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or

> miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years . . . ."

Without waiting for trial, the District Judge dismissed the indictments on the ground that the abortion statute was unconstitutionally vague. In his view, set out substantially in full below,[3] the statute was vague for two principal reasons:

1. The fact that once an abortion was proved a physician "is presumed guilty and remains so unless a jury

---

[3] The District Judge stated:

"It is suggested that these words ['as necessary for the preservation of the mother's life or health'] are not precise; that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities; and that they interfere with a woman's right to avoid childbirth for any reason. The word 'health' is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D. C. abortion statute now prevailing. The Court of Appeals established by such early cases as Peckham v. United States, 96 U. S. App. D. C. 312, 226 F. 2d 34 (1955), cert. denied 350 U. S. 912, 76 S. Ct. 195, 100 L. Ed. 800, and Williams v. United States, 78 U. S. App. D. C. 147, 138 F. 2d 81, 153 A. L. R. 1213 (1943), that upon the Government establishing that a physician committed an abortion, the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as Leary v. United States, 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), and United States v. Gainey, 380 U. S. 63, 85 S. Ct. 754, 13

can be persuaded that his acts were necessary for the preservation of the woman's life or health."

2. The presence of the "ambivalent and uncertain word 'health.' "

In concluding that the statute places the burden of persuasion on the defendant once the fact of an abortion has been proved,[4] the court relied on *Williams* v. *United States,* 78 U. S. App. D. C. 147, 138 F. 2d 81 (1943). There the Court of Appeals for the District of Columbia Circuit held that the prosecution was not required to prove as part of its case in chief that the operation was not necessary to preserve life or health. *Id.,* at 147, 149, 138 F. 2d, at 81, 83. The court indicated that once the prosecution established that an abortion had been performed the defendant was required "to come forward with evidence which with or without other evidence is sufficient to create a reasonable doubt of guilt." *Id.,* at 150, 138 F. 2d, at 84. The District Court here appears to have read *Williams* as holding that once an abortion is proved, the burden of persuading the jury that it was legal (*i. e.,* necessary to the preservation of the mother's life or health) is cast upon the physician. Whether or not this is a correct reading of *Williams,* we

---

L. Ed. 2d 658 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. . . ." 305 F. Supp. 1032, 1034.

[4] The trial court also cited *Peckham* v. *United States,* 96 U. S. App. D. C. 312, 226 F. 2d 34 (1955), as dealing with the D. C. abortion law. However, the opinion in that case does not discuss the burden of proof under the statute.

believe it is an erroneous interpretation of the statute. Certainly a statute that outlawed only a limited category of abortions but "presumed" guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment. *Tot* v. *United States,* 319 U. S. 463 (1943); *Leary* v. *United States,* 395 U. S. 6, 36 (1969). But of course statutes should be construed whenever possible so as to uphold their constitutionality.

The statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health. It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception. When Congress passed the District of Columbia abortion law in 1901 and amended it in 1953, it expressly authorized physicians to perform such abortions as are necessary to preserve the mother's "life or health." Because abortions were authorized only in more restrictive circumstances under previous D. C. law, the change must represent a judgment by Congress that it is desirable that women be able to obtain abortions needed for the preservation of their lives or health.[5] It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell within that category. Placing such a burden of proof

[5] Before 1901 the existing statute allowed abortion only "for the purpose of preserving the life of any woman pregnant . . . ." W. Abert & B. Lovejoy, The Compiled Statutes in Force in the District of Columbia, c. XVI, § 15, p. 159 (1894).

on a doctor would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession. Generally, doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health. We are unable to believe that Congress intended that a physician be required to prove his innocence. We therefore hold that under D. C. Code Ann. § 22–201, the burden is on the prosecution to plead and prove that an abortion was not "necessary for the preservation of the mother's life or health."

There remains the contention that the word "health" is so imprecise and has so uncertain a meaning that it fails to inform a defendant of the charge against him and therefore the statute offends the Due Process Clause of the Constitution. See, *e. g., Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939). We hold that it does not. The trial court apparently felt that the term was vague because there "is no indication whether it includes varying degrees of mental as well as physical health." 305 F. Supp., at 1034. It is true that the legislative history of the statute gives no guidance as to whether "health" refers to both a patient's mental and physical state. The term "health" was introduced into the law in 1901 when the statute was enacted in substantially its present form. The House Report [6] on the bill contains no discussion of the term "health" and there was no Senate report. Nor have we found any District of Columbia cases prior to this District Court decision that shed any light on the question. Since that decision, however, the issue has been considered in *Doe* v. *General Hospital of the District of Columbia,* 313 F. Supp. 1170 (DC 1970). There District Judge Waddy construed the statute to

[6] H. R. Rep. No. 1017, 56th Cong., 1st Sess.

permit abortions "for mental health reasons whether or not the patient had a previous history of mental defects." *Id.*, at 1174–1175. The same construction was followed by the United States Court of Appeals for the District of Columbia Circuit in further proceedings in the same case. 140 U. S. App. D. C. 149 and 153, 434 F. 2d 423 and 427 (1970). We see no reason why this interpretation of the statute should not be followed. Certainly this construction accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.[7]

We therefore hold that properly construed the District of Columbia abortion law is not unconstitutionally vague, and that the trial court erred in dismissing the indictments on that ground. Appellee has suggested that there are other reasons why the dismissal of the indictments should be affirmed. Essentially, these arguments

---

[7] Our Brother DOUGLAS appears to fear that juries might convict doctors in any abortion case simply because some jurors believe all abortions are evil. Of course such a danger exists in all criminal cases, not merely those involving abortions. But there are well-established methods defendants may use to protect themselves against such jury prejudice: continuances, changes of venue, challenges to prospective jurors on *voir dire*, and motions to set aside verdicts which may have been produced by prejudice. And of course a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt.

are based on this Court's decision in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Although there was some reference to these arguments in the opinion of the court below, we read it as holding simply that the statute was void for vagueness because it failed in that court's language to "give that certainty which due process of law considers essential in a criminal statute." 305 F. Supp., at 1034. Since that question of vagueness was the only issue passed upon by the District Court it is the only issue we reach here. *United States* v. *Borden Co.,* 308 U. S. 188 (1939); *United States* v. *Petrillo,* 332 U. S. 1 (1947); *United States* v. *Blue,* 384 U. S. 251, 256 (1966).

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE WHITE, concurring.

I join the Court's opinion and judgment. As to the facial vagueness argument, I have these few additional words. This case comes to us unilluminated by facts or record. The District Court's holding that the District of Columbia statute is unconstitutionally vague on its face because it proscribes all abortions except those necessary for the preservation of the mother's life or health was a judgment that the average person could not understand which abortions were permitted and which were prohibited. But surely the statute puts everyone on adequate notice that the health of the mother, whatever that phrase means, is the governing standard. It should also be absolutely clear that a doctor is not free to perform an abortion on request without considering whether the patient's health requires it. No one of average intelligence could believe that under this statute abortions not dictated by health considerations are legal.

Thus even if the "health" standard were unconstitutionally vague, which I agree is not the case, the statute is not void on its face since it reaches a class of cases in which the meaning of "health" is irrelevant and no possible vagueness problem could arise. We do not, of course, know whether this is one of those cases. Until we do facial vagueness claims must fail. Cf. *United States* v. *National Dairy Corp.*, 372 U. S. 29 (1963).

MR. JUSTICE DOUGLAS, dissenting in part.

While I agree with Part I of the Court's opinion that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physician to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." D. C. Code Ann. § 22–201 (1967).

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. If we could read the Act as making that determination conclusive, not subject to review by judge and by jury, the case would be simple, as MR. JUSTICE STEWART points out. But that does such violence to the statutory scheme that I believe it is beyond the range of judicial

interpretation so to read the Act. If it is to be revised in that manner, Congress should do it.

Hence I read the Act, as did the District Court, as requiring submission to court and jury of the physician's decision. What will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by peremptory challenges. But vagueness of criminal statutes introduces another element that is uncontrollable. Are the concepts so vague that possible offenders have no safe guidelines for their own action? Are the concepts so vague that jurors can give them a gloss and meaning drawn from their own predilections and prejudices? Is the statutory standard so easy to manipulate that although physicians can make good-faith decisions based on the standard, juries can nonetheless make felons out of them?

The Court said in *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453, that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process."

A three-judge court in evaluating a Texas statutory standard as to whether an abortion was attempted "for the purpose of saving the life of the mother" said:

> "How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years?" *Roe* v. *Wade,* 314 F. Supp. 1217, 1223.

419-882 O - 72 - 10

The *Roe* case was followed by a three-judge court in *Doe* v. *Scott,* 321 F. Supp. 1385, which struck down an Illinois statute which sanctioned an abortion "necessary for the preservation of the woman's life." And see *People* v. *Belous,* 71 Cal. 2d 954, 458 P. 2d 194.

A doctor may well remove an appendix far in advance of rupture in order to prevent a risk that may never materialize. May he act in a similar way under this abortion statute?

May he perform abortions on unmarried women who want to avoid the "stigma" of having an illegitimate child? Is bearing a "stigma" a "health" factor? Only in isolated cases? Or is it such whenever the woman is unmarried?

Is any unwanted pregnancy a "health" factor because it is a source of anxiety?

Is an abortion "necessary" in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?

Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?

Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's "health"?

Mr. Justice Holmes, in holding that "unreasonable" restraint of trade was an adequate constitutional standard of criminality, said in *Nash* v. *United States,* 229 U. S. 373, 377, that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he

incur a fine or a short imprisonment, as here; he may incur the penalty of death."

He wrote in a context of economic regulations which are restrained by few, if any, constitutional guarantees.

Where, however, constitutional guarantees are implicated, the standards of certainty are more exacting.

Winters v. *New York,* 333 U. S. 507, 514, 519, held void for vagueness a state statute which as construed made it a crime to print stories of crime "so massed as to incite to crime," since such a regulatory scheme trenched on First Amendment rights of the press.

The standard of "sacrilegious" can be used in such an accordion-like way as to infringe on religious rights protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 505.

The requirement of a "narrowly drawn" statute when the regulation touches a protected constitutional right (*Cantwell* v. *Connecticut,* 310 U. S. 296, 311; *Thornhill* v. *Alabama,* 310 U. S. 88, 100) is only another facet of the void-for-vagueness problem.

What the Court held in *Herndon* v. *Lowry,* 301 U. S. 242, is extremely relevant here. The ban of publications made to incite insurrection was held to suffer the vice of vagueness:

> "The statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt.
>
> . . . . . .
>
> "Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection. . . . *The law, as thus construed, licenses the jury to cre-*

ate its own standard in each case." Id., at 261, 262, 263. (Italics added.)

If these requirements of certainty are not imposed then the triers of fact have "a power to invade imperceptibly (and thus unreviewably) a realm of constitutionally protected personal liberties." Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 104 (1960).

Abortion touches intimate affairs of the family, of marriage, of sex, which in *Griswold* v. *Connecticut,* 381 U. S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in "the right of privacy." They include the right to procreate (*Skinner* v. *Oklahoma,* 316 U. S. 535), the right to marry across the color line (*Loving* v. *Virginia,* 388 U. S. 1), the intimate familial relations between children and parents (*Meyer* v. *Nebraska,* 262 U. S. 390; *Levy* v. *Louisiana,* 391 U. S. 68, 71–72). There is a compelling personal interest in marital privacy and in the limitation of family size. And on the other side is the belief of many that the fetus, once formed, is a member of the human family and that mere personal inconvenience cannot justify the fetus' destruction. This is not to say that government is powerless to legislate on abortions. Yet the laws enacted must not trench on constitutional guarantees which they can easily do unless closely confined.

Abortion statutes deal with conduct which is heavily weighted with religious teachings and ethical concepts.[1]

---

[1] "There remains the moral issue of abortion as murder. We submit that this is insoluble, a matter of religious philosophy and religious principle and not a matter of fact. We suggest that those who believe abortion is murder need not avail themselves of it. On the other hand, we do not believe that such conviction should limit the freedom of those not bound by identical religious conviction. Although the moral issue hangs like a threatening cloud over any

Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." *Jordan* v. *De George,* 341 U. S. 223, 242 (dissenting opinion). The difficulty and danger are compounded when religion adds another layer of prejudice.[2] The end result is that juries condemn what they personally disapprove.

The subject of abortions—like cases involving obscenity [3]—is one of the most inflammatory ones to reach

---

open discussion of abortion, the moral issuses are not all one-sided. The psychoanalyst Erik Erikson stated the other side well when he suggested that 'The most deadly of all possible sins is the mutilation of a child's spirit.' There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood." The Right to Abortion: A Psychiatric View 218–219 (Group for the Advancement of Psychiatry, Vol. 7, Pub. No. 75, 1969).

[2] Mr. Justice Clark recently wrote: "Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of 'ensoulment' or 'person-hood,' *i. e.,* the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which 'ensoulment' occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, *i. e.,* able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth." Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. L. Rev. (L. A.) 1, 4 (1969).

[3] I have expressed my views on the vagueness of criminal laws governing obscenity in *Dyson* v. *Stein,* 401 U. S. 200, 204 (dissenting opinion). And see the dissent of MR. JUSTICE BLACK in *Ginzburg* v. *United States,* 383 U. S. 463, 476.

the Court. People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued. The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has. That means that jurors may give it such meaning as they choose, while physicians are left to operate outside the law. Unless the statutory code of conduct is stable and in very narrow bounds, juries have a wide range and physicians have no reliable guideposts. The words "necessary for the preservation of the mother's life or health" become free-wheeling concepts, too easily taking on meaning from the juror's predilections or religious prejudices.

I would affirm the dismissal of these indictments and leave to the experts the drafting of abortion laws [4] that protect good-faith medical practitioners from the treacheries of the present law.

---

[4] Clark, *supra*, n. 2, at 10–11.

Cf. New York's new abortion law effective July 1, 1970, N. Y. Penal Law § 125.05, subd. 3 (Supp. 1970–1971):

"An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy." And see Hall, The Truth About Abortion in New York, 13 Columbia Forum, Winter 1970, p. 18; Schwartz, The Abortion Laws, 67 Ohio St. Med. J. 33 (1971).

MR. JUSTICE HARLAN, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting as to jurisdiction.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of D. C. Code Ann. § 22–201 (1967), the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "[f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded." [1] It is not con-

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct

tested that, but for this provision of the Criminal Appeals Act, the Government would have a right of appeal to the Court of Appeals for the District of Columbia Circuit under D. C. Code Ann. § 23–105 (Supp. 1970), which provides:

> "In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found

---

appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

"If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

As noted in *United States* v. *Weller,* 401 U. S. 254 (1971), these provisions were amended by § 14 (a) of the Omnibus Crime Control Act of 1970, 84 Stat. 1890. But cases begun in the District Court before the new statute took effect are not affected. See *United States* v. *Weller, supra,* at 255 n. 1.

> that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside."

The Court today—relying on the generic reference to "statutes" and "all criminal cases" in the text of 18 U. S. C. § 3731 and the absence of an express exclusion of statutes applicable only within the District of Columbia—concludes that 18 U. S. C. § 3731 rather than D. C. Code Ann. § 23–105 provides the proper appellate route for this case. I must disagree.

I

The historical development of the Government's right to appeal in criminal cases both in the District of Columbia and throughout the Nation is surveyed in *Carroll* v. *United States*, 354 U. S. 394 (1957). Section 23–105 of the D. C. Code was passed in 1901 as § 935 of the Code of 1901. 31 Stat. 1341. Prior to the Criminal Appeals Act of 1907, the Government had no right of appeal in criminal cases outside of the District of Columbia. To remedy this situation, a bill was introduced in the House of Representatives. That bill practically tracked the language of the D. C. statute, and made no provision for direct appeal to this Court. 40 Cong. Rec. 5408. The accompanying House Report described the bill as follows: "The accompanying bill will extend [§ 935] of the code of the District of Columbia to all districts in the United States." H. R. Rep. No. 2119, 59th Cong., 1st Sess., 2 (1906). That bill passed the House, but the Senate Committee on the Judiciary rejected the House approach of simply extending the provisions of the D. C. appeals statute to the rest of the Nation; the Senate Committee instead substituted a more narrowly drawn measure which enumerated specific substantive categories of crim-

inal cases to be appealable by the Government and allocated jurisdiction over these appeals between the Supreme Court and the then Circuit Courts of Appeals according to the allocation of appellate jurisdiction for civil cases established in the Circuit Court of Appeals Act of 1891. S. Rep. No. 3922, 59th Cong., 1st Sess. (1906). See *Carroll* v. *United States, supra,* at 402 n. 11. Even that bill as narrowed could not pass the Senate; it provoked extended debate in which the opponents of the measure focused on the potential for abuse of individual rights arising from repeated court proceedings, delays in appeals, and restraints on personal freedom while the Government prosecuted its appeal. See generally *United States* v. *Sisson,* 399 U. S. 267 (1970). The upshot of these debates was that Senator Nelson, the bill's floor manager in the Senate, agreed to accept a variety of amendments which further narrowed the categories of cases appealable by the Government and made special provision for the defendant's release on his own recognizance. See 41 Cong. Rec. 2818–2825.[2]

It is at this point that Senator Clarke of Arkansas offered an amendment limiting the Government's right to appeal decisions dismissing indictments or arresting judgments for insufficiency of the indictment to instances where the decision was based upon "the invalidity or construction of the statute." The purpose of that amendment was described by Senator Clarke as follows:

> "Mr. President, the object of the amendment is to limit the right of appeal upon the part of the General Government to the validity or constitutionality of the statute in which the prosecution is proceeding. It has been enlarged by the addition of another clause, which gives the right of appeal where the

[2] The bill had been amended earlier to require the Government to take an appeal within 30 days. 41 Cong. Rec. 2193–2194.

construction by the trial court is such as to decide that there is no offense committed, notwithstanding the validity of the statute, and in other respects the proceeding may remain intact. I think that is a broad enough right to concede to the General Government in the prosecution of persons in the court.

. . . . .

"In view of the defects that recent years have disclosed, I do not believe it to be sound policy to go beyond the necessities as they have developed defects in our procedure. A case recently occurring has drawn attention to the fact that if a circuit judge or a district judge holding the circuit should determine that a statute of Congress was invalid, the United States is without means of having that matter submitted to a tribunal that under the Constitution has power to settle that question. I do not believe the remedy ought to be any wider than the mischief that has been disclosed. I do not believe that any additional advantages ought to be given to the General Government in the prosecution of persons arraigned in court, but I do believe the paragraph ought to be perfected in that behalf, so as to provide that there shall be an appeal to the court having authority to give uniformity to the practice which shall prevail in all the courts of the United States, and that they shall be ready to say, and say promptly, what the statute means and whether or not it is a valid statute.

. . . . .

"So I think this amendment gives expression to the proposition that the remedy we provide here now should be no wider than the defect that has been disclosed in the preceding criminal procedure; and that is that whenever the validity of a statute has been adversely decided by a trial court, wherever its

> unconstitutionality has been pronounced by a trial court, the Government ought to have the right to promptly submit that to the tribunal having authority to dispose of such questions in order that there may be a uniform enforcement of the law throughout the entire limits of the United States.
>
> "This is the purpose I have, Mr. President, and having discussed it with the distinguished Senator from Wisconsin . . . and the distinguished Senator from Minnesota [Mr. NELSON], we agreed that that would probably meet the defect." 41 Cong. Rec. 2819–2820.

See generally 41 Cong. Rec. 2819–2822.

The bill as thus amended passed the Senate; the House disagreed to the Senate amendment, but yielded in conference. The bill in conference was amended to provide for direct appeals to the Supreme Court. See H. R. Conf. Rep. No. 8113, 59th Cong., 2d Sess. (1907). No explanation was given in the conference report for the exclusive direct appeal route.

I draw from these legislative materials the following relevant propositions: (1) The Congress was definitely advertent to the existence of a Governmental appeal right in criminal cases within the District; (2) the Congress explicitly rejected the simple approach of extending the D. C. provision to the Nation; (3) the particular provision of the Act relied on by the Government as supporting its direct appeal in this case was amended with a view to limiting its reach to a relatively precise defect, *i. e.*, the debilitating effect on the enforcement of criminal laws arising from conflicting judicial interpretations; and (4) the substitution of an exclusive direct appeal to this Court, while not expressly explained, is perfectly compatible with the goal of promptly achieving uniformity in construction of statutes applicable nationwide, while at the same time being wholly unnecessary to the resolu-

tion of conflicting district court constructions of local D. C. statutes, given the existence of a right of appeal to the Court of Appeals for the District of Columbia Circuit.

II

The question of overlap between the appellate routes available to the Government in criminal cases under the D. C. Code and 18 U. S. C. § 3731 was first dealt with by this Court in *United States* v. *Burroughs,* 289 U. S. 159 (1933). In *Burroughs* the defendants were indicted in the then Supreme Court of the District of Columbia for violation of the Federal Corrupt Practices Act, a statute of nationwide applicability. They successfully demurred on two grounds: one involving the construction of the statute, and the other involving the sufficiency of the indictment as a pleading. The Government took an appeal to the Court of Appeals for the District of Columbia under the D. C. appeals statute. The appellate court certified to this Court the question whether it had jurisdiction over an appeal where a § 3731-type challenge was joined with a challenge to the sufficiency of the indictment as a pleading. The Court disposed of the question by holding that the Criminal Appeals Act is inapplicable to any criminal case appealable under the provisions of the D. C. Code:

> *"The Criminal Appeals Act, in naming the courts from which appeals may be taken to this court, employs the phrase 'district courts'; not 'courts of the United States,' or 'courts exercising the same jurisdiction as district courts.' We need not, however, determine whether the statute should be construed to embrace criminal cases tried in the Supreme Court of the District if § 935 of the District Code were not in effect.* That section deals comprehensively with appeals in criminal cases from all of the courts of first instance of the District and

> confers on the Court of Appeals jurisdiction of appeals by the Government seeking review of the judgments of those courts. The Criminal Appeals Act, on the other hand, affects only certain specified classes of decisions in district courts, contains no repealing clause, and no reference to the courts of the District of Columbia or the territorial courts, upon many of which jurisdiction is conferred by language quite similar to that of the Code of Law of the District. We cannot construe it as impliedly repealing the complete appellate system created for the District of Columbia by § 935 of the Code, in the absence of expression on the part of Congress indicating that purpose. Implied repeals are not favored; and if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force. . . ." 289 U. S., at 163–164.[3] (Emphasis added.)

The holding in *Burroughs* established a complete separation of the two statutory schemes for Government appeals in criminal cases; the essence of the Court's rationale was a presumption against implied repeals.

In 1942, Congress amended the Criminal Appeals Act to provide for Government appeals to the Courts of Appeals from all decisions dismissing indictments or arresting judgments of convictions except where a right of direct appeal to this Court exists. 56 Stat. 271. The new amendment expressly included the United States Court of Appeals for the District of Columbia Circuit as

[3] The Court's opinion characterizes *Burroughs* as having "held only that the term 'district court' in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia." *Ante,* at 65. As I read the italicized portion of the above-quoted passage, that is the precise question that the *Burroughs* Court concluded it did *not* have to decide, in light of its holding that the Criminal Appeals Act could not, by implication, effect the repeal of § 935 of the District Code.

one of the intermediate appellate tribunals to which the Government could appeal;[4] in addition, the Act added a new provision to the Judicial Code establishing appellate jurisdiction in the then circuit courts of appeals "in criminal cases on appeals taken by the United States in cases where such appeals are permitted by law." 56 Stat. 272. The latter provision also expressly incorporated the United States Court of Appeals for the District of Columbia Circuit.[5] *Ibid.*

The legislative history of the 1942 amendment offers no explication of congressional intent in including the D. C. courts within the Act.[6] It is certain that this amendment generates some form of overlap between the two statutory schemes for Governmental appeals in criminal cases. In *Carroll* v. *United States,* 354 U. S. 394, 411 (1957), the Court recognized the new situation created by the 1942 amendment:

> "It may be concluded, then, that even today criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [the D. C. statute] . . . ."

That, however, leaves open the question which cases come within the categories set forth in 18 U. S. C. § 3731.

---

[4] These explicit references were subsequently omitted by amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the federal courts.

[5] This last provision was an amendment to 28 U. S. C. § 225 (1940 ed.); see 56 Stat. 272 and *Carroll* v. *United States, supra,* at 398 n. 5.

[6] The focus was on the decision to accord the Government a right of appeal to the courts of appeals where no direct appeal to this Court lay. See H. R. Rep. No. 45, 77th Cong., 1st Sess. (1941); S. Rep. No. 868, 77th Cong., 1st Sess. (1941).

III

After this Court's holding in *Burroughs,* it was clear that if Congress wished to effectuate any displacement of the pre-1907 route for Government appeals of criminal cases within the District of Columbia, some express manifestation of its intent was required. The 1942 amendment followed the *Burroughs* decision. Since Congress then acted to create some overlap between the two statutes without further limiting the categories of directly appealable criminal cases, it may be argued that we should presume Congress intended, as of 1942, to embrace within the very special appeals procedures of 18 U. S. C. § 3731 criminal cases based upon statutes applicable only within the District.

But that presumption from a completely silent legislative record flies in the face of the principle that statutes creating a right of direct appeal to this Court should be narrowly construed. Cf. *Swift & Co.* v. *Wickham,* 382 U. S. 111, 128–129 (1965); *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73, 92–93 (1960) (Frankfurter, J., dissenting). And, in light of the legislative history of the 1907 Act and this Court's explicit holding in *Burroughs* that the 1907 Act had no impact on cases appealable under the D. C. provision, it is especially inappropriate to rely on the absence of any further limiting language in the 1942 amendment as a justification for reading the term "statute" as encompassing criminal prosecutions in the District based on local as well as nationwide statutes.

The legislative history of the 1907 Act suggests a perfectly plausible reason for interpreting the language "based upon the invalidity or construction of the statute" as excluding D. C. statutes: that language was put in the Act by Senator Clarke with the express intention of limiting the Act's goal to remedying the precise defect of

inconsistent enforcement of criminal statutes arising from the lack of a Government appeal. The Court of Appeals for the District of Columbia Circuit constitutes a perfectly adequate appellate tribunal for resolving conflicting interpretations given local statutes by judges within the District of Columbia.[7] Where, however, the Government brings a prosecution in the District of Columbia based on a statute of nationwide applicability, the Court of Appeals for the District of Columbia Circuit cannot achieve uniformity in the enforcement of the statute.

As an original proposition, then, a construction of the relevant provisions of the 1907 Act as excluding criminal cases in the District brought under local statutes but including cases brought under nationwide statutes would have been consistent both with the express purpose of Senator Clarke's amendment and the canon of strict construction as applied to direct appeals statutes.[8] But the

---

[7] The Government suggests a construction of the Criminal Appeals Act excluding D. C. statutes would require the Court to exclude other criminal statutes of only limited territorial application, *e. g.*, 18 U. S. C. §§ 1111–1112 (punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States"); 18 U. S. C. §§ 1151–1165 (regulating offenses within Indian territory). See Brief for the United States 15–16. But I would not construe 18 U. S. C. § 3731 as excluding D. C. criminal cases punishable under D. C. statutes because they are of limited territorial application; rather, the point is that given the existence of a prior right of Government appeal, the risks of disuniformity which Senator Clarke described the statute as intended to cure do not exist.

[8] The Government suggests, in its Supplemental Memorandum for the United States 6–7, that a construction of the 1907 Act excluding statutes applicable only within the District of Columbia from the scope of the first two provisions leads to the "anomalous consequence" that 18 U. S. C. § 3731 would still allow a direct appeal in a D. C. case where the motion-in-bar provision is concerned. *E. g., United States* v. *Sweet,* 399 U. S. 517 (1970). The alleged "anomaly" would seem to argue for the conclusion that D. C. cases involving the motion-in-bar provision are not directly appealable

419-882 O - 72 - 11

Court in *Burroughs* took the position that Congress could not displace the pre-existing appellate route to any extent without indicating an express intent to do so; *Burroughs,* significantly, involved a prosecution under a statute of nationwide applicability. Subsequently, Congress did expressly indicate an intent to displace the alternative appellate route available within the District. The extent of that displacement, I think, should now be measured by the express goal of the relevant provision of the 1907 Act, as limited by Senator Clarke: avoidance of inconsistent enforcement of criminal laws. That theory of legislative purpose—combined with the *Burroughs* holding that Congress should be required to affirmatively indicate an intent to displace the prior appellate route—yields an interpretation of the 1907 Act as amended in 1942 which is consistent with the canon of strict construction generally applied to direct appeals statutes.[9]

---

here, either. Certainly, the Court's disposition in *Sweet* would not foreclose that result.

In any event, the purpose Senator Clarke had in mind in offering his limiting amendment with regard to the first two provisions of 18 U. S. C. § 3731 was rather clearly expressed; that he failed to address himself to the motion-in-bar provision—which, after all, received very little attention in the prolonged debates on the floor of the Senate—hardly justifies an expansive reading of the other provisions of the Act.

[9] The Government relies principally on *Shapiro* v. *Thompson,* 394 U. S. 618, 625 n. 4 (1969), as supporting its construction of the generic reference to "statutes" in 18 U. S. C. § 3731 to include statutes applicable only within the District of Columbia. *Shapiro* dealt with 28 U. S. C. § 2282, which requires a three-judge court to hear requests for injunctions against the enforcement of "any Act of Congress" when the ground for the requested relief is the alleged unconstitutionality of the Act. Decisions of such three-judge courts are, under the circumstances set forth in 28 U. S. C. § 1253, directly appealable to this Court. In *Shapiro,* the Court noted at least one prior instance where the Court had taken jurisdiction over a case involving a statute applicable only within the District and then stated: "Section 2282 requires a three-judge court to hear a

IV

I have little doubt that, had the Criminal Appeals Act not been recently amended to dispense with direct appeals to this Court, see n. 1, *supra,* the interpretation of the Act I have suggested would be adopted by the Court. This Court has never taken jurisdiction over a direct appeal from a dismissal of a prosecution brought in the District of Columbia for violation of a statute applicable within the District. It is worth noting that, given the

---

challenge to the constitutionality of '*any* Act of Congress.' We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia." 394 U. S., at 625 n. 4 (emphasis in original).

The *Shapiro* approach is obviously inappropriate for the present problem. First, despite the Government's assertion to the contrary, see Brief for the United States 15, the phrase "*any* Act of Congress" is arguably broader than a generic reference to "statutes." Indeed, the *Shapiro* Court explicitly chose to emphasize the presence of the word "any" in the relevant portion of that statute. Second, while an exercise of jurisdiction in a case where jurisdiction is not challenged is of little precedential value, the Court in *Shapiro* still chose to take note of such a prior case; in the present context, this Court has never taken jurisdiction of a § 3731 appeal involving a statute applicable only within the District.

Third, and most importantly, Congress at the time of the three-judge court Acts altered the principles of both original and appellate jurisdiction for the substantive categories of litigation involved; the new procedural routes reflect crucial considerations of comity between sovereigns and among the branches of the Federal Government. See generally Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964). There is no legislative history supporting the notion that the new procedures were narrowed to alleviate particular defects of inconsistent constitutional interpretation due to the absence of any appellate route for the substantive categories of cases to be included within the Act.

In these circumstances, it is fair to conclude that the principle of strict construction applicable to such statutes must yield to the "inert language" of the statute. Cf. *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73, 92 (1960) (Frankfurter, J., dissenting).

Court's adherence to the principles of *Carroll* v. *United States, supra,* the rather absurd waste of our judicial resources on cases such as *United States* v. *Waters,* 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U. S. 869 (1948), and *United States* v. *Sweet,* 399 U. S. 517 (1970), see n. 8, *supra,* could not even be avoided by the exercise of governmental discretion in choosing appellate routes. In light of *Carroll,* I cannot believe that a perfectly acceptable reading of congressional purpose underpinning the definition of categories of cases directly appealable under 18 U. S. C. § 3731 which excludes statutes applicable only within the District of Columbia would have been turned down by the Court.

Of course, the recent elimination of the direct appeal route removes a great deal of the incentive to continue the stringent standards of construction with respect to this statute that have traditionally prevailed in this Court. Indeed, at this stage of the game, the canon of strict construction produces the ironic result of compelling a relatively greater expenditure of judicial energies in assessing our jurisdiction over the remainder of the criminal cases pending in the district courts of the Nation at the time of the most recent amendment than would be involved in deciding those cases on the merits. Nonetheless, this very Term we have indicated that we intend to adhere to the rules of construction evolved by this Court during the long and tortuous history of this statute. *United States* v. *Weller,* 401 U. S. 254 (1971).

The only response we are offered to the reading of congressional purpose I have suggested is that the interests of avoiding inconsistent enforcement of criminal laws argues for exercising jurisdiction over this case because similar statutes in other jurisdictions are under attack on vagueness grounds. See the Court's opinion, at 65–66. Surely those of my Brethren who subscribe to the views

on jurisdiction expressed in the opinion of the Court must recognize that we cannot limit the category of appealable cases under this provision of the Act to prosecutions brought under D. C. statutes which are (a) duplicated in other jurisdictions, and (b) under attack on similar federal question grounds in other jurisdictions. The proffered response is, therefore, not truly a reason for concluding we have jurisdiction over the relevant category of cases; rather, it is a reason for exercising our power in this one case to settle Dr. Vuitch's vagueness claim in spite of the absence of the jurisdictional prerequisites which legitimize the exercise of that judicial power.

V

Having concluded that the Government cannot directly appeal the dismissal of the indictments to this Court under the provisions of 18 U. S. C. § 3731, it also follows that we cannot utilize the remand provisions of that statute to reroute the appeal to the Court of Appeals for the District of Columbia Circuit. However, we do have jurisdiction to determine our jurisdiction, and, in the analogous three-judge court situation where an alternative appellate route exists but the statute according this Court direct jurisdiction over the certain appeals includes no remand procedure, this Court has vacated the judgment of the court of original jurisdiction and remanded the case to that court for the entry of a fresh decree from which timely appeal may be taken to the proper appellate tribunal. *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens,* 397 U. S. 820 (1970). The instant case, of course, is a criminal prosecution, and there is a consideration not present in the three-judge court situation: *i. e.,* the additional anxiety caused the defendant by virtue of the Government's erroneous choice of appellate routes. But, while 18 U. S. C. § 3731

cannot empower us to transfer the case, that statute is still relevant as an expression of congressional policy to save the Government's appeal where an erroneous choice of appellate routes is made, even at the expense of additional anxiety to the defendant. Accordingly, I think the proper disposition of this case would be to vacate the judgment of the District Court and remand the case for the entry of a fresh judgment from which the Government could take a timely appeal to the Court of Appeals for the District of Columbia Circuit pursuant to D. C. Code Ann. § 23–105.

VI

Notwithstanding the views on jurisdiction expressed above, and speaking only for myself, and not for those of my Brethren who agree with my discussion of the jurisdictional issue in this case, I have concluded, substantially for the reasons set forth in MR. JUSTICE BLACKMUN's separate opinion, that I should also reach the merits. Accordingly, I concur in Part II of the Court's opinion and the judgment of the Court.

MR. JUSTICE STEWART, dissenting in part.

I agree that we have jurisdiction of this appeal for the reasons stated in Part I of the Court's opinion.

As to the merits of this controversy, I share at least some of the constitutional doubts about the abortion statute expressed by the District Court. But, as this Court today correctly points out, "statutes should be construed whenever possible so as to uphold their constitutionality." The statute before us can be so construed, I think, simply by extending the reasoning of the Court's opinion to its logical conclusion.

The statute legalizes any abortion performed "under the direction of a competent licensed practitioner of medicine" if "necessary for the preservation of the mother's life or health." Under the statute, therefore,

the legal practice of medicine in the District of Columbia includes the performing of abortions. For the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health. As the Court says, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

It follows, I think, that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute. To put it another way, I think the question of whether the performance of an abortion is "necessary for the . . . mother's life or health" is entrusted under the statute exclusively to those licensed to practice medicine, without the overhanging risk of incurring criminal liability at the hands of a second-guessing lay jury. I would hold, therefore, that "a competent licensed practitioner of medicine" is wholly immune from being charged with the commission of a criminal offense under this law.

It is true that the statute can be construed in other ways, as MR. JUSTICE DOUGLAS has made clear. But I would give it the reading I have indicated "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely,* 345 U. S. 41, 47.

MR. JUSTICE BLACKMUN.

Although I join MR. JUSTICE HARLAN in his conclusion that this case is not properly here by direct appeal under 18 U. S. C. § 3731, a majority, and thus the Court, holds otherwise. The case is therefore here and requires decision.

The five Justices constituting the majority, however, are divided on the merits. One feels that D. C. Code Ann. § 22–201 (1967) lacks the requirements of proce-

dural due process and would affirm the dismissal of the indictments. One would hold that a licensed physician is immune from charge under the statute. Three would hold that, properly construed, the statute is not unconstitutionally vague and that the dismissal of the indictments on that ground was error.

Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits. See *Screws* v. *United States,* 325 U. S. 91, 134 (1945) (addendum by Mr. Justice Rutledge); *United States* v. *Jorn,* 400 U. S. 470, 487–488 (1971) (statement of BLACK and BRENNAN, JJ.); *Mills* v. *Alabama,* 384 U. S. 214, 222–223 (1966) (separate opinion of HARLAN, J.); *Kesler* v. *Department of Public Safety,* 369 U. S. 153, 174, 179 (1962) (STEWART, J., concurring in part, and Warren, C. J., dissenting). Assuming, as I must in the light of the Court's decision, that the Court does have jurisdiction of the appeal, I join Part II of MR. JUSTICE BLACK's opinion and the judgment of the Court.

EHLERT *v.* UNITED STATES

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

No. 120. Argued January 13, 1971—Decided April 21, 1971

The refusal of petitioner's local board to reopen his classification and pass on his conscientious objector claim, made after mailing of his induction notice but before induction, on the basis of a Selective Service regulation that permitted post-induction notice reopening only for a "change in the registrant's status resulting from circumstances over which the registrant had no control," *held* not unreasonable as a limitation on the time within which a local board must act on such a claim, in light of the Government's assurance that one whose beliefs assertedly crystallize after mailing of an induction notice will have full opportunity to obtain an in-service determination of his claim without having to perform combatant training or service pending such disposition. Pp. 101–107.

422 F. 2d 332, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 108. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 119.

Paul N. Halvonik argued the cause for petitioner. With him on the briefs were *Stanley J. Friedman, Mortimer H. Herzstein,* and *Marvin M. Karpatkin.*

Assistant Attorney General Rehnquist argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Marshall Tamor Golding.*

Norman Leonard filed a brief for the Lawyers' Selective Service Panel of San Francisco as *amicus curiae* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether a Selective Service local board must reopen the classification of a registrant who claims that his conscientious objection to war in any form crystallized between the mailing of his notice to report for induction and his scheduled induction date. The petitioner before us made no claim to conscientious objector status until after he received his induction notice. Before the induction date, he then wrote to his local board and asked to be allowed to present his claim. He represented that his views had matured only after the induction notice had made immediate the prospect of military service. After Selective Service proceedings not material here, the petitioner's local board notified him that it had declined to reopen his classification because the crystallization of his conscientious objection did not constitute the "change in the registrant's status resulting from circumstances over which the registrant had no control" required for post-induction notice reopening under a Selective Service regulation.[1] The petitioner then refused to submit to induction, and a grand jury in the United States District Court for the Northern District of California indicted him for violation of the Military Selective Service Act of 1967.[2]

---

[1] 32 CFR § 1625.2 (1971) provides, in pertinent part:

"[T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . or an Order to Report for Civilian Work and Statement of Employer . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

[2] Military Selective Service Act of 1967, § 12 (a), 50 U. S. C. App. § 462 (a) (1964 ed., Supp. V), provides in pertinent part:

"[A]ny person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the

The petitioner waived trial by jury, and the District Court, holding that ripening of conscientious objector views could not be a circumstance over which a registrant had no control, found the petitioner guilty. The conviction was affirmed by the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, and we granted certiorari, 397 U. S. 1074, to resolve a conflict among the circuits over the interpretation of the governing Selective Service regulation.[3]

A regulation explicitly providing that no conscientious objector claim could be considered by a local board unless filed before the mailing of an induction notice would, we think, be perfectly valid, provided that no inductee could be ordered to combatant training or service before a prompt, fair, and proper in-service determination of his claim. The Military Selective Service Act of 1967 confers on the President authority "to prescribe the necessary rules and regulations to carry out the provisions of this title . . . ." 50 U. S. C. App. § 460 (b)(1). To read out of the authority delegated by this section the power to make reasonable timeliness rules would render it impossible to require the submission, before mailing

---

execution of this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

[3] In accord with the position of the Ninth Circuit, see *United States* v. *Al-Majied Muhammad*, 364 F. 2d 223, 224 (CA4); *Davis* v. *United States*, 374 F. 2d 1, 4 (CA5); *United States* v. *Taylor*, 351 F. 2d 228, 230 (CA6) (*semble*).

Contra, *United States* v. *Gearey*, 368 F. 2d 144, 150 (CA2), 379 F. 2d 915 (after remand), cert. denied, 389 U. S. 959; *Scott* v. *Commanding Officer*, 431 F. 2d 1132, 1136 (CA3); *United States* v. *Nordlof*, 440 F. 2d 840 (CA7); *Keene* v. *United States*, 266 F. 2d 378, 384 (CA10); *Swift* v. *Director of Selective Service*, —— U. S. App. D. C. ——, 448 F. 2d 1147. See also *United States* v. *Stoppelman*, 406 F. 2d 127, 131 n. 7 (CA1) (dictum), cert. denied, 395 U. S. 981.

of an induction notice, of a claim matured before that time. The System needs and has the power to make reasonable timeliness rules for the presentation of claims to exemption from service.[4]

A regulation barring post-induction notice presentation of conscientious objector claims, with the proviso mentioned, would be entirely reasonable as a timeliness rule. Selective Service boards must already handle prenotice claims, and the military has procedures for processing conscientious objector claims that mature in the service. Allocation of the burden of handling claims that first arise in the brief period between notice and induction seems well within the discretion of those concerned with choosing the most feasible means for operating the Selective Service and military systems. Further, requiring in-service presentation of post-notice claims would deprive no registrant of any legal right and would not leave a "no man's land" time period in which a claim then arising could not be presented in any forum.

The only unconditional right conferred by statute upon conscientious objectors is exemption from *combatant* training and service.[5] The Selective Service law, indeed, provides for noncombatant training and service for those objectors to whose induction there is no ob-

---

[4] The power of the Selective Service System to set reasonable time limits for presentation of claims, with the penalty of forfeiture for noncompliance, seems never to have been questioned by any court. See, *e. g.*, *United States* v. *Gearey*, 368 F. 2d 144, 149 and n. 9 (CA2).

[5] The statute on conscientious objection begins:

"Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Military Selective Service Act of 1967, § 6 (j), 81 Stat. 104, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V).

stacle.[6] The right to civilian service "in lieu of . . . induction" arises only if a registrant's "claim is sustained by the local board." It does not follow, given the power to make reasonable timeliness rules, that a registrant has an unconditional right to present his claim to the local board before induction, any more than he has such a right after induction. Congress seems rather carefully to have confined the unconditional right created by the statute to immunity from combatant training and service. Consequently, requiring those whose conscientious objection has not crystallized until after their induction notices to present their claims after induction would work no deprivation of statutory rights, so long as the claimants were not subjected to combatant training or service until their claims had been acted upon.

That those whose views are late in crystallizing can be required to wait, however, does not mean they can be deprived of a full and fair opportunity to present the merits of their conscientious objector claims for consideration under the same substantive criteria that must guide the Selective Service System. See *Welsh* v. *United States*, 398 U. S. 333. The very assertion of crystallization just before induction might cast doubt upon the

---

[6] *Ibid.*:

"Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in [Military Selective Service Act of 1967, § 4 (b), 50 U. S. C. App. § 454 (b)] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate . . . ."

genuineness of some claims, but there is no reason to suppose that such claims could not be every bit as bona fide and substantial as the claims of those whose conscientious objection ripens before notice or after induction. It would be wholly arbitrary to deny the late crystallizer a full opportunity to obtain a determination on the merits of his claim to exemption from combatant training and service just because his conscientious scruples took shape during a brief period in legal limbo.[7] A system in which such persons could present their claims after induction, with the assurance of no combatant training or service before opportunity for a ruling on the merits, would be wholly consistent with the conscientious objector statute.[8]

The regulation we must interpret in this case does not unambiguously create such a system. Rather, it bars post-notice reopening "unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." It is clear that the regulation was meant to cover at least such nonvolitional changes as injury to the registrant or death in his family making him the sole surviving son. The Government urges that

---

[7] Since such a "no man's land" would be intolerable, our decision today simply involves settling in which forum late crystallizers must have an opportunity for a ruling on the merits. Whether they must have such an opportunity at all cannot be open to question. Of course, a claimant who, after induction, declined to utilize available administrative procedures or who failed to observe reasonable and properly publicized time cutoffs might forfeit his claim.

[8] There is no reason to suppose that a Selective Service local board, faced with the need to fill its monthly quotas, would be more sensitive in applying the legal standards that govern all conscientious objector claims than would the Army, whose mission is to train inductees as members of military units of maximum effectiveness and morale.

the regulation be confined to just such "objectively identifiable" and "extraneous" events and circumstances. The petitioner contends that post-notice crystallization of conscientious objection is both a "circumstance" within the meaning of the regulation and one over which the registrant has no control.

We need not take sides in the somewhat theological debates about the nature of "control" over one's own conscience that the phrasing of this regulation has forced upon so many federal courts. Rather, since the meaning of the language is not free from doubt, we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such. *Immigration Service* v. *Stanisic,* 395 U. S. 62, 72; *Thorpe* v. *Housing Authority,* 393 U. S. 268, 276; *Udall* v. *Tallman,* 380 U. S. 1, 16–17; *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 413–414.

The Government argues for an interpretation identical in effect with the unambiguous rule hypothecated above, which, we have said, would clearly be a reasonable timeliness rule, consistent with the conscientious objector statute. The Government's interpretation is a plausible construction of the language of the actual regulation, though admittedly not the only possible one. Given the ambiguity of the language, it is wholly rational to confine it to those "objectively identifiable" and "extraneous" circumstances that are most likely to prove manageable without putting undue burdens on the administration of the Selective Service System. It appears, moreover, that this position has been consistently urged by the Government in litigation when it was not foreclosed by adverse local precedent.

There remains for consideration whether the conditions for the validity of such a rule, discussed above, are met in practice. It appears undisputed that when an inductee

presents a prima facie claim of conscientious objection that complies with timeliness rules for in-service cognizability, he is given duty involving the minimum practicable conflict with his asserted beliefs.[9] It is thus evident that armed forces policy substantially meets the requirement of no combat training or service before an opportunity for a ruling on the claim.

As for the absence of any no man's land, the pertinent military regulations are somewhat inconsistent in their phrasing, perhaps because of the sharp division among the courts of appeals. They contain language appearing to recognize the obligation of the service to hear the claims of those whose alleged conscientious objection has crystallized between notice and induction, but they also contain formulations seeming to look the other way.[10]

---

[9] Department of Defense Directive No. 1300.6, § VI B (May 10, 1968):

"With respect to persons who have already served a portion of their obligated service who request discharge or non-combatant service for conscientious objection, the following actions will be taken:

. . . . . .

"2. Pending decision on the case and to the extent practicable the person will be employed in duties which involve the minimum conflict with his asserted beliefs. . . ."

Army Regulation No. 635–20, ¶ 6*a* (July 31, 1970):

"[I]ndividuals who have submitted formal applications . . . for discharge based on conscientious objection will be retained in their units and assigned duties providing the minimum practicable conflict with their asserted beliefs pending a final decision on their applications. In the case of trainees, this means that they will not be required to train in the study, use, or handling of arms or weapons. . . ."

[10] See Army Regulation No. 635–20, ¶ 3:

"*a*. Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the military service.

"*b*. Federal courts have held that a claim to exemption from

We are assured, however, by a letter included in the briefs in this case from the General Counsel of the Department of the Army to the Department of Justice, that present practice allows presentation of such claims, and that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims.[11] Our conclusion in this case is based upon that assurance.[12] For if, contrary to that assurance, a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim for determination under established criteria, see *Welsh* v. *United States, supra,* a wholly different case would be presented.

Given the prevailing interpretation of the Army regulation, we hold that the Court of Appeals did not misconstrue the Selective Service regulation in holding that

---

military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. . . . Requests for discharge after entering military service will not be favorably considered when—

"(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment."

See also Department of Defense Directive No. 1300.6, § IV B 2.

[11] "You also asked whether the Army allows a soldier to file for discharge in instances where his conscientious objector views are fixed after notice of induction but prior to entry into the military service. Present practice grants the soldier the opportunity to file in such cases."

The letter additionally explains the composition and operation of the Army I–O Conscientious Objector Review Board, which has the responsibility of ruling on applications for conscientious objector discharges. The Board is composed of a senior officer, an officer in the Judge Advocate General Corps, a chaplain, and a Medical Corps officer. Only two votes are required to approve an application.

[12] The same letter from the General Counsel of the Department of the Army reports that the identical interpretation prevailed in 1965, when the petitioner first was ordered to report for induction.

419-882 O - 72 - 12

it barred presentation to the local board of a claim that allegedly arose between mailing of a notice of induction and the scheduled induction date. Accordingly the judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

The rather stuffy judicial notion that an inductee's realization that he has a "conscientious" objection to war is not a circumstance over which he has "no control" within the meaning of the Regulation [1] is belied by experience. Saul of Tarsus would be a good witness: [2]

> "Now as he journeyed he approached Damascus, and suddenly a light from heaven flashed about him. And he fell to the ground and heard a voice saying to him, 'Saul, Saul, why do you persecute me?' And he said, 'Who are you, Lord?' And he said, 'I am Jesus, whom you are persecuting; but rise and enter the city, and you will be told what you are to do.' "

The stories of sudden conversion are legion in religious history; and there is no reason why the Selective Service boards should not recognize them, deal with them, and, if sincere, act on them even though they come after notice of induction has been received.

The Court holds that the proper remedy is in-service processing of these claims. That is to say, the claims that come so late, even though they come prior to induction, are to be processed by military rather than by civilian personnel.

This conclusion is not required by the Regulation for, as I have said, sudden conversion is a commonplace in religious experiences. And we deal here with religious,

---

[1] 32 CFR § 1625.2 (1971).

[2] 9 Acts 3–6 (rev. Standard ed. 1952).

ethical, philosophical attitudes that are commonly summarized in capsule form by reference to "conscience."

It is therefore a *tour de force* for the Court to say that in-service processing by the military is required. Certainly that result is not mandated by the Act.[3] Since it is not, we have a choice in construction which really involves a choice of policy. Faced with that choice we should not hesitate to leave these matters to civilian authorities.

Chief Justice Stone, before coming to this Bench, served with two other lawyers named by President Wilson to screen conscientious objectors in World War I. One of the three was in the military, the other two were civilians. In the account he wrote, he said: [4]

> "[I]t was the relatively small residue of non-religious objectors who brought to the Board its real perplexities. While conscience is commonly associated with religious convictions, all experience teaches us that the supreme moral imperative which sometimes actuates men to choose one course of action in preference to another and to adhere to it at all costs may be dissociated from what is commonly recognized as religious experience. The President's order expressly recognized that scruples against participating in war might be conscientious although not religious. How to detect the presence

[3] See § 6 (j) of the Military Selective Service Act of 1967, 81 Stat. 104, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V): "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

[4] Stone, The Conscientious Objector, 21 Col. U. Q. 253, 263 (1919).

> of such scruples and to distinguish them from the mere extremist support of more or less novel social or political theories and from mere individualistic resistance to the will of the majority, such as one sometimes sees in the petulant disobedience of an ill-disciplined child, was the difficult task."

The mind of the military has reacted more violently to the conscientious objector than the mind of the priest or other civilian.

The story of in-service processing of these claims in World War I is an unpleasant one:

> "The phrase 'well-recognized religious sect' was given the most rigorous interpretation, and any who based conscientious objections on political rather than religious foundations got short shrift. Such objectors were either 'shot to death by musketry,' 'imprisoned for long terms by court martial,' or subjected to indignities and physical violence 'by their more patriotic fellows.' " [5]

Another account [6] is substantially the same:

> "In military camp and prison alike, objectors were often subjected to indignities and to physical cruelty. Some were beaten; others were hung by their fingers to the doors of their cells in such a way that their feet barely touched the floor. In one case, an objector who refused to don the army uniform was kept in a damp cell, where he contracted pneumonia and died. His dead body was then dressed in the uniform that in life he had spurned, and, thus attired, was sent home to his family. A number of objectors among the absolutists went on hunger strikes and had to be fed forcibly."

---

[5] A. Mason, Harlan Fiske Stone: Pillar of the Law 102 (1956).

[6] M. Sibley & P. Jacob, Conscription of Conscience 15 (1952).

According to the accounts, the treatment of conscientious objectors in World War II was not as severe as in World War I. But the main disciplinary device was to give the man an order and then court-martial him for failure to obey the order. "Here punishment *varied,* but common sentences for objectors were five to ten years, although these were not infrequently reduced on review by Washington. Sentences on the whole were much lighter than those imposed by *courts-martial* during the First World War but more severe, on the average, than those meted out by *civil courts* during the Second World War. Sentences of general courts-martial were served in the several disciplinary barracks of the Army, but in some instances objectors were first sent to a 'rehabilitation center,' where the Army gave prisoners a second chance to 'reform'; if 'reformation' did not take place, they served out their sentences in the disciplinary barracks. Army regulations provided for periodic and automatic clemency reviews, the first during the initial six months of the sentence and subsequent reviews once each year." [7] (Emphasis added.)

I have placed in the Appendix to this dissent a summary of a recent (1969) record in one military center, showing how one conscientious objector in *Jones* v. *Lemond,* 396 U. S. 1227, was treated.

I do not suggest that every detention center in the Armed Services is like the brig on Treasure Island, San Francisco Bay. Nor do I suggest that every conscientious objector is treated as cruelly as was the plaintiff in the *Lemond* case. I do suggest however that in my time every conscientious objector was "fair game" to most top sergeants who considered that he had a "yellow streak" and therefore was a coward or was un-American. The conscientious objector never had an easy time asserting First Amendment rights in the Armed Services.

[7] *Id.,* at 108.

What might happen to him in the barracks or in the detention center is, of course, not the measure of what would transpire at the hearings. But the military mind is educated in other values; it does not reflect the humanistic, philosophical values most germane to ferreting out First Amendment claims that are genuine.

Our decisions on conscientious objection leave considerable latitude for administrative findings. On one hand *Gillette* v. *United States* and *Negre* v. *Larsen,* 401 U. S. 437, make it clear that objection to a particular war will not qualify for conscientious objector status. On the other hand, both *United States* v. *Seeger,* 380 U. S. 163, and *Welsh* v. *United States,* 398 U. S. 333, demonstrate that the objector need not be religious and his views may be based on broad humanistic grounds. There are subtleties in these positions for, as noted, "§ 6 (j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should [not] be read to exclude those who hold strong beliefs about our domestic and foreign affairs or *even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy.*" 398 U. S., at 342 (opinion of BLACK, J.) (emphasis added).

Thus under the Court's interpretations of § 6 (j) those who do not qualify are those who lack sincerity, do not oppose all wars, or those who rest their beliefs "solely upon considerations of policy, pragmatism, or expediency." *Id.,* at 342–343. Decision as to whether an individual is entitled to a conscientious objector status under these broad criteria requires great sensitivity on the part of those who have the final say.

Ehlert's claim itself falls somewhere between *Gillette* and *Welsh.* In addition it raises claims between pragmatism and a respect for human life and values. His beliefs are not religious in nature. He stated they came

from "the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager-to-know and questioning mind." In a letter refusing induction he stated his objection was "that the sole purpose of military service in this country today is preparation for a nuclear orgasm which would be totally destructive of human life and values." On his Form 150 he wrote "that service in the armed forces of this country at this time is work toward the end of the destruction of the human race. I consider that my duty not to work for the destruction of the human race is superior to any duties which may arise from any human relation." He added he would use force where its use "would not make more probable the destruction of the human race."

While it appears that Ehlert's claim may be sufficiently close to *Gillette* to foreclose his claim, other claims in this sensitive area may not be as close to *Gillette,* yet also may be beyond *Welsh.* In a choice between civilian and military factfinders dealing in an area of conscience clearly the former are to be preferred.

Moreover, proof of a conscientious objector's claim will usually be much more difficult after induction than before. Military exigencies may take him far from his neighborhood, the only place where he can find the friends and associates who know him. His chances of having a fair hearing are therefore lessened when the hearing on his claim is relegated to in-service procedures. For these reasons I would resolve any ambiguities in the law in favor of pre-induction review of his claim and not relegate him to the regime where military philosophy, rather than the First Amendment, is supreme.

Beyond all these arguments is a constitutional one. Induction itself may violate the privileges of conscience engrained in the First Amendment. A compelled act was the heart of the case presented by *Board of Education* v. *Barnette,* 319 U. S. 624, when children of Je-

hovah's Witnesses protested the requirement that they salute the flag. We said:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort . . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *Id.*, at 640–641.

To some conscientious objectors, taking the one step forward is an act violating the conscience, since wearing the uniform in any form is as revolting to them as saluting the flag was to the children in the *Barnette* case.[8] To another conscientious objector the bearing of arms, not acting as orderlies, say, in military hospitals, is the

[8] See *United States* v. *Freeman*, 388 F. 2d 246, 248–249.

act at which he rebels. The sorting and sifting of these claims and all varieties of them are best processed by civilians rather than the military. The present Regulations permit it and I would resolve any ambiguities in favor of the procedure most protective of the rights of conscience involved here.

I therefore dissent from affirmance of the judgment below.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

On September 15, 1969, I entered a stay in the case of *Jones* v. *Lemond,* 396 U. S. 1227. Jones was in the United States Navy and his claim to discharge as a conscientious objector arose five months after his enlistment. According to the allegation he had made many attempts over a period of some 37 days to file an application to be discharged as a conscientious objector. He was unable to make a filing or obtain a hearing. He went AWOL on that account and later surrendered himself and with the help of legal advice pressed for processing of his conscientious objector claim.

I did not reach the merits of that controversy, but in view of the representations made I restrained the Navy from confining Jones in the brig at Treasure Island, which according to the affidavits presented to me had become a house of horror.

"After sitting in the room approximately 45 minutes, I heard Mr. Foreman say, 'He is an escape risk and is to be sentenced for 5 months—he is not to be allowed to phone anyone.' Immediately after I heard Mr. Foreman speak, a Marine Sergeant opened the door and said to me 'empty your pockets, f---er.' I began to empty my pockets to which the Sergeant said, 'hurry up, Goddamnit.' When I had finished emptying my pockets

the Sergeant said, 'up against the wall—spread your arms and legs.' I spread my arms out against the wall and placed my feet approximately 3½ feet apart. The Sergeant kicked my legs several times and said, 'Move them further.' I then stretched them as far as possible, so the Sergeant kicked me a couple of more times to make sure they were spread as far as possible. He then frisked me, which involved slapping and shoving me against the wall. When he finished his so-called frisk, he handcuffed my hands behind me and said, 'Alright, let's go—one f--k-up and I'll bust your f--kin head open.'

"I was then taken to the Brig and told to stand in front of the fence with my nose on the canvas. I stood at attention with my nose on the canvas and the Sergeant went into the main control room.

"About 5 minutes later the Sergeant came out with another Sergeant. The Sergeant said 'empty your pockets.' I took out a pen and chow pass and offered them to the second Sergeant. He said, 'don't point at me f--ker, put that s--t in your hat.' I emptied my pockets and put everything into my hat. The Sergeant said, 'put it on the ground.' The Sergeant said to the other Sergeant, 'he's still pretty salty—I got him when I picked him up, but he still thinks he's tough.' The reply was, 'don't worry, he won't be so tough, I know what to do with him.' He said, 'spread your arms and legs turd.' I spread out against the canvas. He started kicking me and yelling, 'spread out a--hole.' He kept kicking me and yelling until I fell down and then said, 'what's wrong with you pussy can't you stand up—get up.' I stood up and he said 'spread out Goddamnit.' He started kicking me again. When I fell to my knees against the canvas he stopped and said, 'can't you stand up squid?' This time I got up and spread out hands on the canvas before he could say so. He then pushed my face into the canvas, slapped my neck and arms,

punched me in the sides, yanked the crotch of my dungarees painfully between my legs, slapped and pinched my legs and said, 'alright now stand at attention.' He had now finished frisking me so they both went back into the control room taking with them the contents of my pockets in my hat.

"After much verbal harassment, I was taken to my cell.

"A couple of hours later I heard the orange badges march in. They live in the Annex in 6′ x 6′ x 8′ cells, 3 men per cell. I heard a Corporal yelling at an orange badge for not running fast enough during the physical exercise period. He then made the orange badge do push-ups until he collapsed. Then I could hear the Corporal hitting the man and the man crying and screaming for him to stop. When the Corporal stopped they took the man back out into the compound to run and that was the last I heard of him.

"Dinner was brought to my cell and I ate it on the floor as I did with all the rest of my meals.

"Early in the evening a Corporal started harassing a confinee who was locked in the suicide risk cell. Suicide risks have to sit in the cells, which I found to be very cold with my clothes on, in nothing but a pair of underwear. The Corporal kept antagonizing the man until he started screaming and crying. Once the Corporal succeeded in breaking the confinee he started laughing, at which time the other Corporal said, 'why don't you kick his ass for making so much noise?'

"The next day I was taken for a haircut. Another confinee cut my hair and while doing so he dropped a clip but couldn't find it. I told him where it was and he said, 'don't let them catch you talking to me, they'll kick your ass.' I kept quiet.

"After much more harrassment, I went back to my cell and I heard a man coughing and then a Corporal yelling at him to shut up. Two other Corporals joined in harrassing the man and when he couldn't stop cough-

ing they pulled him out of the cell and made him dive on a cup on the floor pretending it was a grenade. They got several other men out of their cells and had them all diving on the cup with the coughing man on the bottom each time.

"It wasn't long after the grenade drills when the turnkey came to my cell and let me out. He had me fold up my blanket and pick up my locker and pulled me out to the control office. In the office there were 4 or 5 Sergeants and a Staff Sergeant yelling and screaming all types of phrases, such as, 'you'll be back, f--ker and then you'll really get it.' I now was told to stand holding my footlocker with my arms extended and they seemed to forget me for a moment.

"Then they began talking among themselves and I realized that my lawyer, Don Jelinek and Loren Basham, a member of the Resistance, were outside the Brig in a car and they apparently insisted on remaining there until I was released. The Sergeant said 'This guy (Jelinek) just pissed me off because he just charged in here and slapped this order down and said "get this man out."' Then the Sergeant said, 'I have a psychiatrist over here (pointing to the medical building right behind us), who will back me up saying I am not responsible for anything I do.' He then added, 'In a minute I am going to go out and blow their heads off.'

"Then the Sergeant seemed to gain control of himself. The MP then turned to me and said, 'Just try and run boy, I would love to blow your head right off.'

"I was then allowed outside the Brig where I saw my Lawyer who spoke to me, but I was afraid to answer him for the fear they would beat or shoot us.

"I know they worked me over because of anger because the Military Court of Appeals gave me an order keeping me out of the Brig. Now that a second Court Order has gotten me out of the Brig, I feel they will kill me if I have to go back in again."

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

Selective Service Regulation 1625.2, 32 CFR § 1625.2 (1971), relieves a local board of its general obligation to consider a registrant's claim for deferment whenever the claim is received after the notice to report for induction has been mailed "unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The Court of Appeals held that this regulation relieved the local board of the necessity of considering any claim that a registrant's conscientious objection to war had crystallized after receipt of an induction notice because, in the court's view, registrants have control over such changes in their beliefs. 422 F. 2d 332 (CA9 1970). The Court here finds it unnecessary to come to grips with this holding and consider whether a conscientious objection claim comes within the terms of this regulation, since it finds the interpretation of the regulation controlled by "a reasonable, consistently applied administrative interpretation." *Ante,* at 105.

I cannot defer to an interpretation I cannot discover. All of the cases cited by the Court make clear that judicial interpretation of an ambiguous regulation is to be informed by reference to *administrative practice* in interpreting and applying a regulation, not by reference to positions taken for the purpose of litigation. See cases cited, *ante,* at 105. Cf. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 419 (1971). The national Selective Service office has apparently made no national administrative interpretation of the regulation. The only other information presently before us indicates that state Selective Service headquarters in North Carolina and California have interpreted the regulation to require local boards to consider "late crystallization" claims and

to consider whether the registrant's conscientious objection was a change occurring after receipt of his induction notice over which he had no control. Brief for Petitioner 28 n. 53. If anything, this suggests that petitioner's interpretation should prevail. On this state of the record, however, I hardly think administrative practice can properly form the basis of decision.

Moreover, I do not find the regulation to be ambiguous. In the context of a blanket Selective Service regulation applicable to all claims for deferment and exemption, the reference to "circumstances" must be taken to refer to any conditions relevant to eligibility for a deferment or exemption. Since conscientious objection to war is the basis for a deferment, it must constitute a "circumstance" within the plain meaning of the regulation. The question, therefore, is whether that circumstance can be one "over which the registrant had no control." On that score, I fully agree with the dissent of Judge Merrill below:

> "One simply cannot order his conscience to be still or make himself believe what he does not believe and I must reject the implication that it is right and proper that one should suffer loss of status for having failed to bring his conscience to heel.
>
> "Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained." 422 F. 2d, at 339.

In sum, I think the regulation means that late-crystallization claims asserted prior to induction should be processed by civilian personnel of the local boards, who have been designated by the Congress as the appropriate decisionmakers in these cases, rather than by military personnel during in-service processing. I dissent.

Syllabus

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL. *v.* JAVA ET AL.

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

No. 507. Argued February 24, 1971—Decided April 26, 1971

Section 303 (a)(1) of the Social Security Act requires a method of administration "reasonably calculated to insure full payment of unemployment compensation when due." In light of the intent of Congress to make payments available at the earliest stage of unemployment as is administratively feasible, in order to provide a substitute for wages, the language "when due" must be construed to mean when benefits are allowed as a result of a hearing of which both parties have notice and at which they are permitted to present their respective positions. California's initial interview provides such a hearing and accordingly enforcement of § 1335 of the California Unemployment Insurance Code, providing for the withholding of insurance benefits upon an employer's appeal from the initial eligibility determination, must be enjoined because it conflicts with the requirement of § 303 (a)(1) of the Social Security Act. Pp. 124–135.

317 F. Supp. 875, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court. DOUGLAS, J., filed a concurring opinion, *post*, p. 135.

Asher Rubin, Deputy Attorney General of California, argued the cause for appellants. With him on the brief was *Thomas C. Lynch,* Attorney General.

Stephen P. Berzon argued the cause for appellees *pro hac vice.* With him on the brief was *Kenneth F. Phillips.*

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Gray, Robert V. Zener,* and *Peter G. Nash* for the United States; by *Duke W. Dunbar,* Attorney General, *John P.*

Moore, Deputy Attorney General, and *Robert L. Harris,* Assistant Attorney General, for the State of Colorado; by *Robert M. Robson,* Attorney General, and *R. LaVar Marsh,* Assistant Attorney General, for the State of Idaho; by *Francis B. Burch,* Attorney General, and *Louis B. Price,* Special Assistant Attorney General, for the State of Maryland, joined by the State of Illinois; by *Warren B. Rudman,* Attorney General, and *William F. Cann,* Deputy Attorney General, for the State of New Hampshire, joined by *David M. Pack,* Attorney General, and *Lance D. Evans,* Assistant Attorney General, for the State of Tennessee; by *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, for the State of New York; by *Paul W. Brown,* Attorney General, and *Franklin R. Wright,* Assistant Attorney General, for the State of Ohio; and by *Willard Z. Carr, Jr.,* for the Southern California Edison Co. et al.

Briefs of *amici curiae* urging affirmance were filed by *C. Lyonel Jones, Ed J. Polk, Don B. Kates, Jr.,* and *Joseph A. Matera* for California Rural Legal Assistance et al.; by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for American Federation of Labor and Congress of Industrial Organizations; by *Stephen I. Schlossberg, John A. Fillion,* and *Jordan Rossen* for the International Union, UAW; and by the Employment Project, Center on Social Welfare Policy and Law.

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

This case raises the issue of whether a State may, consistent with § 303 (a)(1) of the Social Security Act, suspend or withhold unemployment compensation benefits from a claimant, when an employer takes an appeal from an initial determination of eligibility. Section

303 (a)(1) of the Social Security Act, 49 Stat. 626, as amended, 42 U. S. C. § 503 (a)(1), provides that benefits must be paid "when due."

In late summer 1969, appellees Judith Java and Carroll Hudson, having been discharged from employment, applied for unemployment insurance benefits under the California Unemployment Insurance Program. Appellees were given an eligibility interview at which the employer did not appear, although such an appearance was permitted. As a result of that interview both employees were ruled eligible for benefits. Payments began immediately. In each case the former employer filed an appeal after learning of the grant of benefits, contending that benefits should be denied because the claimants were discharged for cause. In accordance with the practice of the agency and pursuant to § 1335 of the California Unemployment Insurance Code [1] payments automatically stopped. At the subsequent hearings before an Appeals Board Referee, which stage is essentially an appeal from the preliminary determination under

---

[1] Section 1335 of the California Unemployment Insurance Code provides:

"*If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision,* except that:

"(a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issues set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or

"(b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.

"If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination." (Emphasis added.)

419-882 O - 72 - 13

California Unemployment Insurance Code §§ 1328, 1334, appellee Hudson's eligibility was affirmed, but appellee Java was ruled ineligible and the initial determination was reversed.

Prior to the hearings before the Referee, appellees commenced a class action in the United States District Court on behalf of themselves and other claimants similarly situated. They sought a declaration that § 1335 of the California Unemployment Insurance Code is unconstitutional and inconsistent with the requirements of § 303 (a)(1) of the Social Security Act, and an order enjoining the operation of § 1335.

A three-judge court was convened, and it concluded that § 1335 is defective on both constitutional and statutory grounds. The District Court held that by not providing for a pretermination hearing, the California procedure constitutes a denial of procedural due process, relying on *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). It further held that the application of § 1335, so as to result in a median seven-week delay in payments to claimants who have been found eligible for benefits, constituted a failure to pay unemployment compensation "when due" within the meaning of § 303 (a)(1) of the Social Security Act. The court granted appellees' motion for a preliminary injunction, ordering the State of California not to suspend unemployment benefits pursuant to § 1335 because an eligibility determination has been appealed.

(1)

We agree with the conclusion of the District Court that § 1335 of the California Unemployment Insurance Code conflicts with the requirements of § 303 (a)(1) of the Social Security Act. This holding makes it unnecessary to reach the constitutional issue involved in *Goldberg* v. *Kelly, supra,* on which the District Court relied.

(2)

The importance of this case to workers is obvious. Because an understanding and the resolution of the basic issue depends on familiarity with a series of detailed procedures, we set out fully the administrative scheme.

All federal-state cooperative unemployment insurance programs are financed in part by grants from the United States pursuant to the Social Security Act, 42 U. S. C. §§ 501–503. No grant may be made to a State for a fiscal year unless the Secretary of Labor certifies the amount to be paid, 42 U. S. C. § 502 (a). The Secretary of Labor may not certify payment of federal funds unless he first finds that the State's program conforms to federal requirements. In particular, § 303 (a)(1) of the Act requires that state methods of administration be found "to be reasonably calculated to insure full payment of unemployment compensation when due." [2]

The California Unemployment Insurance Compensation Program, certified by the Secretary of Labor under § 303 of the Act, provides for payment of insurance benefits, over an extended period of time, to persons who find themselves unemployed through no fault of

---

[2] Section 303 (a)(1) of the Social Security Act, 42 U. S. C. § 503 (a)(1), provides in part:

"(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

"(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be *reasonably calculated to insure full payment of unemployment compensation when due.*" (Emphasis added.)

their own. Cal. Unemp. Ins. Code § 1251 *et seq.* In order to be eligible for benefits a claimant is required to have earned a specified amount of wages during his base period. *Id.,* §1281. Benefits are paid from the State Unemployment Fund, which consists of funds collected from private employers, *id.,* § 976 *et seq.,* and money credited to the State's account in the federal Unemployment Trust Fund pursuant to 42 U. S. C. §§ 501–503, 1101–1105. The amount of money an employer is required to pay into the State Fund is based on benefits paid to terminated employees which are charged to its reserve account and disbursements from the State Unemployment Fund. Cal. Unemp. Ins. Code §§ 1025–1032, 976–978.

A claimant, appearing at an unemployment insurance office to assert a claim initially is asked to fill out forms which, taken together, indicate the basis of the claim, the name of the claimant's previous employer, the reason for his unemployment, his work experience, etc. The claimant is asked to return to the office three weeks later for the purpose of receiving an Eligibility Benefits Rights Interview. The issue most frequently disputed, the claimant's reason for termination of employment, is answered on Form DE 1101, and the Department immediately sends copies of this form to the affected employer for verification. Meanwhile the employer is asked to furnish, within 10 days, "any facts then known which may affect the claimant's eligibility for benefits." Cal. Unemp. Ins. Code §§ 1327, 1030. If the employer challenges eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job. The interviewer has, according to the Local Office Manual (L. O. M.) used in California, the "responsibility to seek from any source the facts required to make a prompt and proper determination of eligibility." L. O. M.

§ 1400.3 (2). "Whenever information submitted is not clearly adequate to substantiate a decision, the Department has an obligation to seek the necessary information." L. O. M. § 1400.5 (1)(a). This clearly contemplates inquiry to the latest employer, among others.

The claimant then appears for his interview. At the interview, the eligibility interviewer reviews available documents, makes certain that required forms have been completed, and clarifies or verifies any questionable statements. If there are inconsistent facts or questions as to eligibility, the claimant is asked to explain and offer his version of the facts. The interviewer is instructed to make telephone contact with other parties, including the latest employer, at the time of the interview, if possible. L. O. M. § 1404.4 (20). Interested persons, including the employer, are allowed to confirm, contradict, explain, or present any relevant evidence. L. O. M. § 1404.4 (21).

The eligibility interviewer must then consider all the evidence and make a determination as to eligibility. Normally, the determination is made at the conclusion of the interview. L. O. M. § 1404.6 (2). However, if necessary to obtain information by mail from any source, the determination may be placed in suspense for 10 days after the date of interview, or, if no response is received, no later than claimant's next report day. L. O. M. § 1400.3 (2) (a).

From the foregoing it can be seen that the interview for the determination of eligibility is the critical point in the California procedure.[3] In the Department's own terms, it is "the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that . . . [b]enefits

[3] Of the 226,066 claimants ruled ineligible in 1968, only 2,602 (1%) were found ineligible by a state referee upon an employer's appeal.

are paid promptly if claimant is eligible." L. O. M. § 1400.1 (1) (emphasis added). If the initial determination is favorable to the claimant,[4] payments begin immediately, and for 95–98% of the claims, former employers do not appear or seek a hearing;[5] no further problem arises as to initial eligibility. The Department sends out a notice to the employer informing him that the claimant has been found eligible, and that the employer may appeal within 10 days. Cal. Unemp. Ins. Code § 1328. The 10-day period may be extended for "good cause." *Ibid.*

If the employer appeals, payment of the claimant's benefits is stopped pending determination on appeal before an Appeals Board Referee. *Id.*, § 1335; see L. O. M. § 1474. The automatic suspension of benefits upon the employer's appeal, after an initial determination of eligibility, is the aspect of the California procedure challenged here. By that time the claimant may have received one or perhaps two payments. When the employer appeals, a hearing is then scheduled at which both the parties may appear and be represented, call witnesses, and present evidence. "A referee after affording a reasonable opportunity for fair hearing, shall, unless such appeal is withdrawn, affirm, reverse, or modify any determination which is appealed . . . ." Cal. Unemp. Ins. Code § 1334. The appeal affords a *de novo* consideration. Generally, processing of the employer's appeal takes between six and seven weeks, between the date of filing the appeal and the date of mailing the decision or dismissal.[6]

If upon appeal the Referee finds the claimant eligible,

[4] Of 667,993 determinations on eligibility in 1968, 441,927 were favorable to the claimant.

[5] In 1968 there were only 5,526 decisions on appeals filed by employers.

[6] In 1968 the period was 49 days; in 1969 it was 40.5 days.

payments are reinstated at once and continue even if the employer exercises his right to appeal further to the Appeals Board. Cal. Unemp. Ins. Code § 1335 (b). Meanwhile as much as seven to 10 weeks may have elapsed. The record indicates that employers are successful in less than 50% of their appeals from initial determinations of eligibility.[7] The Referee's decision is final unless within 10 days further appeal is initiated to the Appeals Board. Cal. Unemp. Ins. Code §§ 1334, 1336. The Appeals Board must render a decision within 60 days after the filing of an appeal to it, unless it requires the taking of further evidence. *Id.*, § 1337. If the claimant is successful on appeal, he receives a lump sum payment for weeks of unemployment prior to the Referee's decision. *Id.*, § 1338. If the employer is successful on appeal, his reserve account is immediately credited with all monies that have been paid his former employee. He has no responsibility for recoupment. *Id.*, §§ 1335, 1380.[8]

(3)

The dispositive issue is the determination of whether § 1335 of the California Unemployment Insurance Code violates the command of 42 U. S. C. § 503 (a)(1) that state unemployment compensation programs must "be

[7] Of 4,159 appeals filed by an employer between January 1, 1969, and September 30, 1969, 2,023 resulted in decisions favorable to the employer. (During the same period there were 14,768 appeals filed by claimants, 4,838 of which were successful.) In 1968 there were 5,526 decisions on appeals filed by employers, resulting in 2,602 decisions favorable to the employer, and 2,924 favorable to the claimant.

[8] Counsel informed the Court that recoupment is effected by the Department as to approximately 65% of the amounts erroneously paid; this is generally accomplished by way of offset against benefits subsequently granted in a later unemployment claim. The Department may also file a civil action for recovery. See Cal. Unemp. Ins. Code § 2739.

reasonably calculated to insure full payment of unemployment compensation when due." The purpose of the federal statutory scheme must be examined in order to reconcile the apparent conflict between the provision of the California statute and § 303 (a)(1) of the Social Security Act.

It is true, as appellants argue, that the unemployment compensation insurance program was not based on need in the sense underlying the various welfare programs that had their genesis in the same period of economic stress a generation ago. A kind of "need" is present in the statutory scheme for insurance, however, to the extent that any "salary replacement" insurance fulfills a need caused by lost employment. The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee. Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible this must be regarded as what Congress was trying to accomplish. The circumstances surrounding the enactment of the statute confirm this.

The Social Security Act received its impetus from the Report of the Committee on Economic Security,[9] which was established by executive order of President Franklin D. Roosevelt to study the whole problem of financial insecurity due to unemployment, old age, disability, and health. In its report, transmitted to Congress by the President on January 17, 1935, the Committee recommended a program of unemployment insurance compen-

[9] Report of the Committee on Economic Security, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1311 (1935); see generally Larson & Murray, The Development of Unemployment Insurance in the United States, 8 Vand. L. Rev. 181 (1955); Witte, Development of Unemployment Compensation, 55 Yale L. J. 21, 29–34 (1945).

sation as a "first line of defense for . . . [a worker] ordinarily steadily employed . . . for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means test. . . . It will carry workers over most, if not all, periods of unemployment in normal times without resort to any other form of assistance." [10] Estimates of possible amounts and duration of unemployment benefits were made by the actuarial staff of the Committee. On the basis of 1922–1933 statistics, it was estimated that 12 weeks of benefits could be paid with a two-week waiting period at a 4% employer contribution rate.[11] The longest waiting period entering into the estimates was four weeks, indicating an intent that payments should begin promptly after the expiration of a short waiting period.

Other evidence in the legislative history of the Act and the commentary upon it supports the conclusion that "when due" was intended to mean at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard. The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers "to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief." [12] Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend," [13] serving to maintain the

---

[10] Report of the Committee on Economic Security, *supra,* n. 9, at 1321–1322. See Note, Charity versus Social Insurance in Unemployment Compensation Laws, 73 Yale L. J. 357 (1963).

[11] Hearings, *supra,* n. 9, at 1321, 1319.

[12] H. R. Rep. No. 615, 74th Cong., 1st Sess., 7 (1935).

[13] Statement of the Secretary of Labor, Hearings, *supra,* n. 9, at 119. Cf. *Nash* v. *Florida Industrial Comm'n,* 389 U. S. 235, 239 (1967).

recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for "security during the period following unemployment" [14] was thought to be a means of assisting a worker to find substantially equivalent employment. The Federal Relief Administrator testified that the Act "covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job." [15] Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. "Their only distinguishing feature is that they will be specially earmarked for the use of the unemployed at the very times when it is best for business that they should be so used." [16] Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services. The following extract from the testimony of the Secretary of Labor, in support of the Act, describes the stabilization mechanism contemplated:

> "I think that the importance of providing purchasing power for these people, even though temporary, is of very great significance in the beginning of a depression. I really believe that putting purchasing power in the form of unemployment-insurance benefits in the hands of the people at the moment when the depression begins and when the first groups begin to be laid off is bound to have a beneficial effect.

---

[14] See S. Rep. No. 628, 74th Cong., 1st Sess., 12 (1935).

[15] Statement of Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 214 (1935).

[16] Statement of Sen. Robert F. Wagner, Hearings, *supra,* n. 9, at 3.

> Not only will you stabilize their purchases, but through stabilization of their purchases you will keep other industries from going downward, and immediately you spread work by that very device." [17]

We conclude that the word "due" in § 303 (a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore that the California procedure, which suspends payments for a median period of seven weeks pending appeal, after an initial determination of eligibility has been made, is not "reasonably calculated to insure full payment of unemployment compensation when due." [18]

(4)

We are not persuaded by appellants' suggestion that the initial determination is clouded with sufficient uncertainty as to warrant withholding benefits until the appeal is decided to protect the interests of the State or of employers. The California procedure for initial determinations is effective in insuring that benefits are limited to legally eligible claimants. From 95%–98% of ineligible

---

[17] Statement of the Secretary of Labor, Hearings, *supra*, n. 15, at 182. See Clague, The Economics of Unemployment Compensation, 55 Yale L. J. 53, 69 (1945).

[18] It was uncontested in argument before the District Court that the average period of unemployment in California is approximately nine weeks.

claimants are screened out at this stage. The primary inquiry at the preliminary interview is to examine the claimant's basic eligibility under the California statute. It is an occasion when the claims of both the employer and the employee can be heard, however. The regulations contemplate that the interviewer shall make inquiries of the employer informally. This may not always flush out objections based on discharge for cause, as this case illustrates. Nonetheless, if the employer has notice of the time and place of the preliminary interview, as was the case here, it is his responsibility to present sufficient data to make clear his objections to the claim for benefits and put the interviewer in a position to broaden the inquiry if necessary. Any procedure or regulation that fails to give notice to the employer would, of course, be violative of the statutory scheme as we construe it.

Although the eligibility interview is informal and does not contemplate taking evidence in the traditional judicial sense, it has adversary characteristics and the minimum obligation of an employer is to inform the interviewer and the claimant of any disqualifying factors. So informed, the interviewer can direct the initial inquiry to identifying a frivolous or dilatory contention by either party.

It would frustrate one of the Act's basic purposes—providing a "substitute" for wages—to permit an employer to ignore the initial interview or fail to assert and document a claimed defense, and then effectuate cessation of payments by asserting a defense to the claim by way of appeal. If the employer fails to present any evidence, he has in effect defaulted, and neither he nor the State can with justification complain if, on a *prima facie* showing, benefits are allowed. If the employer's defenses are not accepted and the claim is allowed, that also constitutes a determination that the benefits are "due."

As we have noted, this construction of the statutory scheme vindicates the congressional objective; California's approach tends to frustrate it. Our reading of the statute imposes no hardship on either the State or the employer [19] and gives effect to the congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible. That is what the Unemployment Insurance program was all about.

For the reasons stated enforcement of § 1335 must be enjoined because it is inconsistent with § 303 (a)(1) of the Social Security Act. See *King* v. *Smith,* 392 U. S. 309, 333 (1968); *Rosado* v. *Wyman,* 397 U. S. 397, 420–421 (1970).

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

While I agree with the opinion of the Court, I add a few words.

The argument of California in this case is surprisingly disingenuous. First it seeks to distinguish *Goldberg* v. *Kelly,* 397 U. S. 254, on the ground that "welfare is based on need; unemployment insurance is not." But that simply is not true, for the history makes clear that the thrust of the scheme for unemployment benefits was to take care of the need of displaced workers, pending a search for other employment. Second, California argues that delay in payment of benefits until the employer's appeal is ended is necessary in terms of due process because "it is

---

[19] For example, an employer's reserve account is not charged if a claimant is ruled ineligible because of voluntary termination or discharge for cause, unless the employer fails to furnish the information required. Cal. Unemp. Ins. Code §§ 1032, 1030.

In disposing of the prayer for a permanent injunction, it may be appropriate to join the Secretary of Labor as a party in order that complete relief may be accorded.

the employer's money which is used to pay the claimant," his account being "charged" and his experience rating "adversely affected" each time an employee is paid benefits. It is true that the amount of taxes contributed by each employer to the unemployment fund varies directly with the number of his former employees who qualify for unemployment benefits. Under the California scheme, however, an employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is *not* charged with any benefits paid to his former employee pending his appeal. Cal. Unemp. Ins. Code §§ 1335, 1380. He has *no* responsibility for recoupment. Thus, regardless of whether benefits to his former employees are suspended pending his appeal, an employer is assured of a complete opportunity to be heard *before* effective action is taken against him.

Therefore here, as in *Goldberg,* the requirements of procedural due process protect the payment of benefits owing the displaced employee and the employer has notice and hearing before his account is charged.

Whether due process would require the latter is a question we do not reach.*

---

*Cf. *Labor Board* v. *Gullett Gin Co.,* 340 U. S. 361. Though that case involved a question whether the Labor Board must deduct unemployment insurance payments from back-pay awards, we said:

"Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, *the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.*" *Id.,* at 364. (Italics added.)

Syllabus

JAMES ET AL. *v.* VALTIERRA ET AL.

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

No. 154. Argued March 3–4, 1971—Decided April 26, 1971*

Appellees, who are eligible for low-cost public housing, challenged the requirement of Art. XXXIV of the California Constitution that no low-rent housing project be developed, constructed, or acquired by any state public body without the approval of a majority of those voting at a community election, as violative of the Supremacy, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution. A three-judge District Court enjoined the enforcement of the referendum provision on the ground that it denied appellees equal protection of the laws, relying chiefly on *Hunter* v. *Erickson,* 393 U. S. 385. *Held:* The California procedure for mandatory referendums, which is not limited to proposals involving low-cost public housing, ensures democratic decisionmaking, and does not violate the Equal Protection Clause. *Hunter* v. *Erickson, supra,* distinguished. Pp. 140–143.

313 F. Supp. 1, reversed and remanded.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and WHITE, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post,* p. 143. DOUGLAS, J., took no part in the consideration or decision of the cases.

Donald C. Atkinson argued the cause and filed a brief for appellants in No. 154. *Moses Lasky* argued the cause for appellant in No. 226. With him on the briefs was *Malcolm T. Dungan.*

Archibald Cox argued the cause for appellees in both cases. On the brief were *Lois P. Sheinfeld* and *Anthony G. Amsterdam.* *Warren Christopher* and *Donald M. Wessling* filed a brief for appellee Housing Authority of the city of San Jose in both cases.

*Together with No. 226, *Shaffer* v. *Valtierra et al.,* also on appeal from the same court, argued March 4, 1971.

Briefs of *amici curiae* urging affirmance in both cases were filed by *Solicitor General Griswold, Assistant Attorney General Leonard,* and *Lawrence G. Wallace* for the United States, and by *Louis J. Lefkowitz,* Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *George D. Zuckerman, Dominick J. Tuminaro,* and *Lloyd G. Milliken,* Assistant Attorneys General, for the Attorney General of the State of New York.

MR. JUSTICE BLACK delivered the opinion of the Court.

These cases raise but a single issue. It grows out of the United States Housing Act of 1937, 50 Stat. 888, as amended, 42 U. S. C. § 1401 *et seq.,* which established a federal housing agency authorized to make loans and grants to state agencies for slum clearance and low-rent housing projects. In response, the California Legislature created in each county and city a public housing authority to take advantage of the financing made available by the federal Housing Act. See Cal. Health & Safety Code § 34240. At the time the federal legislation was passed the California Constitution had for many years reserved to the State's people the power to initiate legislation and to reject or approve by referendum any Act passed by the state legislature. Cal. Const., Art. IV, § 1. The same section reserved to the electors of counties and cities the power of initiative and referendum over acts of local government bodies. In 1950, however, the State Supreme Court held that local authorities' decisions on seeking federal aid for public housing projects were "executive" and "administrative," not "legislative," and therefore the state constitution's referendum provisions did not apply to these actions.[1] Within six months of

[1] *Housing Authority* v. *Superior Court,* 35 Cal. 2d 550, 557–558, 219 P. 2d 457, 460–461 (1950).

that decision the California voters adopted Article XXXIV of the state constitution to bring public housing decisions under the State's referendum policy. The Article provided that no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election.[2]

The present suits were brought by citizens of San Jose, California, and San Mateo County, localities where housing authorities could not apply for federal funds because low-cost housing proposals had been defeated in referendums. The plaintiffs, who are eligible for low-cost public housing, sought a declaration that Article XXXIV was unconstitutional because its referendum requirement violated: (1) the Supremacy Clause of the United States Constitution; (2) the Privileges and Immunities Clause; and (3) the Equal Protection Clause. A three-judge court held that Article XXXIV denied the plaintiffs

---

[2] "Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. . . .

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

419-882 O - 72 - 14

equal protection of the laws and it enjoined its enforcement. 313 F. Supp. 1 (ND Cal. 1970). Two appeals were taken from the judgment, one by the San Jose City Council, and the other by a single member of the council. We noted probable jurisdiction of both appeals. 398 U. S. 949 (1970); 399 U. S. 925 (1970). For the reasons that follow, we reverse.

The three-judge court found the Supremacy Clause argument unpersuasive, and we agree. By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted. We also find the privileges and immunities argument without merit.

While the District Court cited several cases of this Court, its chief reliance plainly rested on *Hunter* v. *Erickson*, 393 U. S. 385 (1969). The first paragraph in the District Court's decision stated simply: "We hold Article XXXIV to be unconstitutional. *See* Hunter v. Erickson . . . ." The court below erred in relying on *Hunter* to invalidate Article XXXIV. Unlike the case before us, *Hunter* rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." *Id.*, at 391. In *Hunter* the citizens of Akron had amended the city charter to require that any ordinance regulating real estate on the basis of race, color, religion, or national origin could not take effect without approval by a majority of those voting in a city election. The Court held that the amendment created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while

other housing ordinances took effect without any such special election. The opinion noted:

> "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, [citing a group of racial discrimination cases] racial classifications are 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny.' . . . They 'bear a far heavier burden of justification' than other classifications." *Id.,* at 391–392.

The Court concluded that Akron had advanced no sufficient reasons to justify this racial classification and hence that it was unconstitutional under the Fourteenth Amendment.

Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." *Id.,* at 391. The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. Cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). The present case could be affirmed only by extending *Hunter,* and this we decline to do.

California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy. A referendum provision was included in the first state constitution, Cal. Const. of 1849, Art. VIII, and referendums have been a commonplace occurrence in the State's active political life.[3] Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice. Nonetheless, appellees

[3] See, *e. g.,* W. Crouch, The Initiative and Referendum in California (1950).

contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative. They suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

Furthermore, an examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle. Mandatory referendums are required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations. See Cal. Const., Art. XVIII; Art. XIII, § 40; Art. XI, § 2 (b). California statute books contain much legislation first enacted by voter initiative, and no such law can be repealed or amended except by referendum. Cal. Const., Art. IV, § 24 (c). Some California cities have wisely provided that their public parks may not be alienated without mandatory referendums, see, *e. g.*, San Jose Charter § 1700.

The people of California have also decided by their

own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues.[4] It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws."

The judgment of the three-judge court is reversed and the cases are remanded for dismissal of the complaint.

Reversed and remanded.

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

MR. JUSTICE MARSHALL, whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

By its very terms, the mandatory prior referendum provision of Art. XXXIV applies solely to

> "any development composed of urban or rural dwellings, apartments or other living accommodations for

[4] Public low-rent housing projects are financed through bonds issued by the local housing authority. To be sure, the Federal Government contracts to make contributions sufficient to cover interest and principal, but the local government body must agree to provide all municipal services for the units and to waive all taxes on the property. The local services to be provided include schools, police, and fire protection, sewers, streets, drains, and lighting. Some of the cost is defrayed by the local governing body's receipt of 10% of the housing project rentals, but of course the rentals are set artificially low. Both appellants and appellees agree that the building of federally financed low-cost housing entails costs to the local community. Appellant Shaffer's Brief 34–35. Appellees' Brief 47. See also 42 U. S. C. §§ 1401–1430.

> persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise."

Persons of low income are defined as

> "persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

The article explicitly singles out low-income persons to bear its burden. Publicly assisted housing developments designed to accommodate the aged, veterans, state employees, persons of moderate income, or any class of citizens other than the poor, need not be approved by prior referenda.*

In my view, Art. XXXIV on its face constitutes invidious discrimination which the Equal Protection Clause of the Fourteenth Amendment plainly prohibits. "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws." *Douglas* v. *California,* 372 U. S. 353, 361 (1963) (HARLAN, J., dissenting). Article XXXIV is neither "a law of general applicability that may affect the poor more harshly than it does the rich," *ibid.,* nor an "effort to redress economic imbalances," *ibid.* It is rather an explicit

---

*California law authorizes the formation of Renewal Area Agencies whose purposes include the construction of "low-income, middle-income and normal-market housing," Cal. Health & Safety Code § 33701 *et seq.* Only low-income housing programs are subject to the mandatory referendum provision of Art. XXXIV even though all of the agencies' programs may receive substantial governmental assistance.

classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny, see *McDonald* v. *Board of Election,* 394 U. S. 802, 807 (1969); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Douglas* v. *California, supra.*

The Court, however, chooses to subject the article to no scrutiny whatsoever and treats the provision as if it contained a totally benign, technical economic classification. Both the appellees and the Solicitor General of the United States as *amicus curiae* have strenuously argued, and the court below found, that Art. XXXIV, by imposing a substantial burden solely on the poor, violates the Fourteenth Amendment. Yet after observing that the article does not discriminate on the basis of race, the Court's only response to the real question in these cases is the unresponsive assertion that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.

I respectfully dissent.

PEREZ *v.* UNITED STATES

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

No. 600. Argued March 22, 1971—Decided April 26, 1971

Petitioner was convicted of "loan sharking" activities, *i. e.*, unlawfully using extortionate means in collecting and attempting to collect an extension of credit, in violation of Title II of the Consumer Credit Protection Act, and his conviction was affirmed on appeal. He challenges the constitutionality of the statute on the ground that Congress has no power to control the local activity of loan sharking. *Held:* Title II of the Consumer Credit Protection Act is within Congress' power under the Commerce Clause to control activities affecting interstate commerce and Congress' findings are adequate to support its conclusion that loan sharks who use extortionate means to collect payments on loans are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Pp. 149–157.

426 F. 2d 1073, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 157.

Albert J. Krieger argued the cause for petitioner. With him on the briefs was *Joel M. Finkelstein.*

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Marshall Tamor Golding.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether Title II of the Consumer Credit Protection Act, 82 Stat. 159, 18 U. S. C. § 891 *et seq.* (1964 ed., Supp. V), as construed and applied to petitioner, is a permissible exercise by Congress of its powers under the Commerce Clause of the Consti-

tution. Petitioner's conviction after trial by jury and his sentence were affirmed by the Court of Appeals, one judge dissenting. 426 F. 2d 1073. We granted the petition for a writ of certiorari because of the importance of the question presented. 400 U. S. 915. We affirm that judgment.

Petitioner is one of the species commonly known as "loan sharks" which Congress found are in large part under the control of "organized crime." [1] "Extortionate credit transactions" are defined as those characterized by the use or threat of the use of "violence or other criminal means" in enforcement.[2] There was ample evidence showing petitioner was a "loan shark" who used the threat of violence as a method of collection. He loaned

---

[1] Section 201 (a) of Title II contains the following findings by Congress:

"(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

"(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

"(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."

[2] Section 891 of 18 U. S. C. (1964 ed., Supp. V) provides in part:

"(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or

money to one Miranda, owner of a new butcher shop, making a $1,000 advance to be repaid in installments of $105 per week for 14 weeks. After paying at this rate for six or eight weeks, petitioner increased the weekly payment to $130. In two months Miranda asked for an additional loan of $2,000 which was made, the agreement being that Miranda was to pay $205 a week. In a few weeks petitioner increased the weekly payment to $330. When Miranda objected, petitioner told him about a customer who refused to pay and ended up in a hospital. So Miranda paid. In a few months petitioner increased his demands to $500 weekly which Miranda paid, only to be advised that at the end of the week petitioner would need $1,000. Miranda made that payment by not paying his suppliers; but, faced with a $1,000 payment the next week, he sold his butcher shop. Petitioner pursued Miranda, first making threats to Miranda's wife and then telling Miranda he could have him castrated. When Miranda did not make more payments, petitioner said he was turning over his collections to people who would not be nice but who would put him in the hospital if he did not pay. Negotiations went on, Miranda finally saying he could only pay $25 a week. Petitioner said that was not enough, that Miranda should steal or sell drugs if necessary to get the money to pay the loan, and that if he went to jail it would be better than going to a hospital with a broken back or legs. He added, "I could have sent you to the hospital, you and your family, any moment I want with my people."

Petitioner's arrest followed. Miranda, his wife, and an employee gave the evidence against petitioner who did

---

other criminal means to cause harm to the person, reputation, or property of any person.

"(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

not testify or call any witnesses. Petitioner's attack was on the constitutionality of the Act, starting with a motion to dismiss the indictment.

The constitutional question is a substantial one.

Two "loan shark" amendments to the bill that became this Act were proposed in the House—one by Congressman Poff of Virginia, 114 Cong. Rec. 1605–1606 and another one by Congressman McDade of Pennsylvania. *Id.,* at 1609–1610.

The House debates include a long article from the New York Times Magazine for January 28, 1968, on the connection between the "loan shark" and organized crime. *Id.,* at 1428–1431. The gruesome and stirring episodes related have the following as a prelude:

> "The loan shark, then, is the indispensable 'money-mover' of the underworld. He takes 'black' money tainted by its derivation from the gambling or narcotics rackets and turns it 'white' by funneling it into channels of legitimate trade. In so doing, he exacts usurious interest that doubles the black-white money in no time; and, by his special decrees, by his imposition of impossible penalties, he greases the way for the underworld takeover of entire businesses." *Id.,* at 1429.

There were objections on constitutional grounds. Congressman Eckhardt of Texas said:

> "Should it become law, the amendment would take a long stride by the Federal Government toward occupying the field of general criminal law and toward exercising a general Federal police power; and it would permit prosecution in Federal as well as State courts of a typically State offense.
>
> . . . . . .
>
> "I believe that Alexander Hamilton, though a federalist, would be astonished that such a deep entrenchment on the rights of the States in performing

their most fundamental function should come from the more conservative quarter of the House." *Id.*, at 1610.

Senator Proxmire presented to the Senate the Conference Report approving essentially the "loan shark" provision suggested by Congressman McDade, saying:

> "Once again these provisions raised serious questions of Federal-State responsibilities. Nonetheless, because of the importance of the problem, the Senate conferees agreed to the House provision. Organized crime operates on a national scale. One of the principal sources of revenue of organized crime comes from loan sharking. If we are to win the battle against organized crime we must strike at their source of revenue and give the Justice Department additional tools to deal with the problem. The problem simply cannot be solved by the States alone. We must bring into play the full resources of the Federal Government." *Id.*, at 14490.

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (18 U. S. C. §§ 2312–2315) or of persons who have been kidnaped (18 U. S. C. § 1201). Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft (18 U. S. C. § 32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U. S. C. § 659). Third, those activities affecting commerce. It is with this last category that we are here concerned.

Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, said:

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to

> those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

Decisions which followed departed from that view; but by the time of *United States* v. *Darby,* 312 U. S. 100, and *Wickard* v. *Filburn,* 317 U. S. 111, the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored. Chief Justice Stone wrote for a unanimous Court in 1942 that Congress could provide for the regulation of the price of intrastate milk, the sale of which, in competition with interstate milk, affects the price structure and federal regulation of the latter. *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110. The commerce power, he said, "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Id.,* at 119.

Wickard v. *Filburn,* 317 U. S. 111, soon followed in which a unanimous Court held that wheat grown wholly for home consumption was constitutionally within the scope of federal regulation of wheat production because, though never marketed interstate, it supplied the need of the grower which otherwise would be satisfied by his purchases in the open market.[3] We said:

> "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still,

[3] That decision has been followed: *Beckman* v. *Mall,* 317 U. S. 597; *Bender* v. *Wickard,* 319 U. S. 731; *United States* v. *Haley,* 358 U. S. 644; *United States* v. *Ohio,* 385 U. S. 9.

> whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' " 317 U. S., at 125.

In *United States* v. *Darby,* 312 U. S. 100, the decision sustaining an Act of Congress which prohibited the employment of workers in the production of goods "for interstate commerce" at other than prescribed wages and hours, *a class of activities* was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce. A unanimous Court said:

> "Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the *class* last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." (Italics added.) *Id.,* at 120–121.

That case is particularly relevant here because it involved a criminal prosecution, a unanimous Court hold-

ing that the Act was "sufficiently definite to meet constitutional demands." *Id.*, at 125. Petitioner is clearly *a member of the class* which engages in "extortionate credit transactions" as defined by Congress [4] and the description of that class has the required definiteness.

It was the "class of activities" test which we employed in *Atlanta Motel* v. *United States,* 379 U. S. 241, to sustain an Act of Congress requiring hotel or motel accommodations for Negro guests. The Act declared that " 'any inn, hotel, motel, or other establishment which provides lodging to transient guests' affects commerce *per se.*" *Id.*, at 247. That exercise of power under the Commerce Clause was sustained.

> "[O]ur people have become increasingly mobile with millions of people of all races traveling from State to State; . . . Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; . . . often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight . . . and . . . these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook. . . ." *Id.*, at 252–253.

In a companion case, *Katzenbach* v. *McClung,* 379 U. S. 294, we ruled on the constitutionality of the restaurant provision of the same Civil Rights Act which regulated the restaurant "if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." *Id.*, at 298. Apart from the effect on the flow of food in commerce to restaurants, we spoke of the restrictive

---

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

effect of the exclusion of Negroes from restaurants on interstate travel by Negroes.

> "[T]here was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there." *Id.*, at 300.

In emphasis of our position that it was the *class of activities* regulated that was the measure, we acknowledged that Congress appropriately considered the "total incidence" of the practice on commerce. *Id.*, at 301.

Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. *Maryland* v. *Wirtz*, 392 U. S. 183, 193.

Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. In an analogous situation, Mr. Justice Holmes, speaking for a unanimous Court, said: "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." *Westfall* v. *United States*, 274 U. S. 256, 259. In that case an officer of a state bank which was a member of the Federal Reserve System

issued a fraudulent certificate of deposit and paid it from the funds of the state bank. It was argued that there was no loss to the Reserve Bank. Mr. Justice Holmes replied, "But every fraud like the one before us weakens the member bank and therefore weakens the System." *Id.*, at 259. In the setting of the present case there is a tie-in between local loan sharks and interstate crime.

The findings by Congress are quite adequate on that ground. The McDade Amendment in the House, as already noted, was the one ultimately adopted. As stated by Congressman McDade it grew out of a "profound study of organized crime, its ramifications and its implications" undertaken by some 22 Congressmen in 1966–1967. 114 Cong. Rec. 14391. The results of that study were included in a report, The Urban Poor and Organized Crime, submitted to the House on August 29, 1967, which revealed that "organized crime takes over $350 million a year from America's poor through loan-sharking alone." See 113 Cong. Rec. 24460–24464. Congressman McDade also relied on The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice (February 1967) which stated that loan sharking was "the second largest source of revenue for organized crime," *id.*, at 189, and is one way by which the underworld obtains control of legitimate businesses. *Id.*, at 190.

The Congress also knew about New York's Report, An Investigation of the Loan Shark Racket (1965). See 114 Cong. Rec. 1428–1431. That report shows the loan shark racket is controlled by organized criminal syndicates, either directly or in partnership with independent operators; that in most instances the racket is organized into three echelons, with the top underworld "bosses" providing the money to their principal "lieutenants,"

419-882 O - 72 - 15

who in turn distribute the money to the "operators" who make the actual individual loans; that loan sharks serve as a source of funds to bookmakers, narcotics dealers, and other racketeers; that victims of the racket include all classes, rich and poor, businessmen and laborers; that the victims are often coerced into the commission of criminal acts in order to repay their loans; that through loan sharking the organized underworld has obtained control of legitimate businesses, including securities brokerages and banks which are then exploited; and that "[e]ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." [5]

Shortly before the Conference bill was adopted by Congress a Senate Committee had held hearings on loan sharking and that testimony was made available to members of the House. See 114 Cong. Rec. 14390.

The essence of all these reports and hearings was summarized and embodied in formal congressional findings. They supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses. See generally 114 Cong. Rec. 14391, 14392, 14395, 14396.

We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate. We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan

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

sharking is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

Affirmed.

MR. JUSTICE STEWART, dissenting.

Congress surely has power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those intrastate activities that have a demonstrably substantial effect on interstate commerce. But under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.

In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from

almost all criminal activity, be it shoplifting or violence in the streets.

Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.

UNITED STATES *v.* SOUTHERN UTE TRIBE OR BAND OF INDIANS

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 515. Argued March 1, 1971—Decided April 26, 1971

Respondent's claims for compensation and accounting are barred by *res judicata* since they relate to land "formerly owned or claimed by [the Confederated Bands of Utes] in western Colorado, ceded to [the United States] by the Act of June 15, 1880" and thus were subject to a final settlement reduced to a consent judgment, to which respondent was a party, made in 1950. Pp. 161–174.

191 Ct. Cl. 1, 423 F. 2d 346, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 174.

Lawrence G. Wallace argued the cause for the United States. On the briefs were *Solicitor General Griswold, Assistant Attorney General Kashiwa, Peter L. Strauss,* and *Edmund B. Clark.*

Glen A. Wilkinson argued the cause for respondent. With him on the brief was *Richard A. Baenen.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In 1951 the Southern Ute Tribe or Band of Indians, a part of the Confederated Bands of Utes, brought this claim before the Indian Claims Commission.[1] The claim asserted that the United States had violated its fiduciary duty to respondent by (1) disposing of 220,000 acres of land as "free homesteads" although obligated by 21 Stat.

[1] The claim was filed pursuant to the Indian Claims Commission Act, 25 U. S. C. § 70a. See also 25 U. S. C. § 70k.

203–204 (1880) and 28 Stat. 678 (1895) to sell the acreage for the respondent's benefit; and (2) by failing to account for the proceeds of 82,000 acres of land, which proceeds were, under the same Acts, to be held for the respondent's benefit. The Government's basic defense was *res judicata* by reason of Court of Claims consent judgments entered in 1950 between the United States and the Confederated Bands of Utes, including the respondent.[2] *Confederated Bands of Ute Indians* v. *United States,* 117 Ct. Cl. 433 (1950). The Indian Claims Commission rejected the defense, 17 Ind. Cl. Comm. 28 (1966); but the Court of Claims, in an unpublished order, App. 57–58, remanded for the taking of additional evidence. On remand the Commission again rejected the defense, 21 Ind. Cl. Comm. 268 (1969), and the Court of Claims affirmed, two judges dissenting. 191 Ct. Cl. 1, 423 F. 2d 346 (1970). We granted certiorari. 400 U. S. 915 (1970). We reverse.

The consent judgment entered in the Court of Claims gave effect to a settlement agreement which recited a stipulation of the parties that:

> "[A] judgment . . . shall be entered in this cause as full settlement and payment for the complete extinguishment of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado *ceded by plaintiffs to defendant by the Act of June 15, 1880* (21 Stat. 199), which (a) the United States sold

[2] The 1950 cases were brought under the Jurisdictional Act of 1938, 52 Stat. 1209. The settlement reduced to consent judgment principally relied upon by the Government is that in Case No. 46640, 117 Ct. Cl. 433, 436 (1950). Related stipulations are reported at 117 Ct. Cl., at 434, 438, 440. The aggregate amount of the settlements exceeded $31 million. The United States also unsuccessfully asserted below defenses of failure to state a claim and failure to join all necessary parties. Those questions are not before us.

> for cash . . . (b) disposed of as free homesteads . . . and (c) set aside for public purposes [between 1910 and 1938]. . . . There is filed herewith and made a part of this stipulation Schedule 1, which contains the legal descriptions of [lands] . . . disposed of by defendant as free homesteads and the remaining . . . acres . . . set aside by the defendant for public purposes. . . . However, the judgment to be entered in this case is *res judicata,* not only as to the land described in Schedule 1, but . . . also *as to any land* formerly owned or claimed by the plaintiffs in western Colorado, *ceded to defendant by the Act of June 15, 1880* . . . ." 117 Ct. Cl., at 436–437 (emphasis added).

The lands involved in the present suit were not included in Schedule 1; rather, the Government relies upon the clause that the consent judgment was "*res judicata* . . . also as to any land . . . ceded to defendant by the Act of June 15, 1880 . . . ."

Both the Indian Claims Commission and the Court of Claims rejected the Government's *res judicata* defense on the ground that the claim concerning the lands involved in this action was not compromised by the 1950 settlement because those lands were not among the lands "ceded to defendant by the Act of June 15, 1880."

Decision of this case turns, then, upon the proper interpretation of the agreement, embodied in the Act of 1880, between the United States and the Ute Indians as it relates to the settlement agreement, reduced to judgment in 1950, between the same parties. The determination of that interpretation requires a somewhat lengthy factual recitation.

In the latter half of the 19th century, what is now the Confederated Bands of Utes, composed of the Uncompahgre Utes, the White River Utes, and the Southern

Utes, exchanged their aboriginal lands in New Mexico, Utah, and Colorado for a reservation of approximately 15.7 million acres lying wholly within Colorado. 13 Stat. 673 (1864); 15 Stat. 619 (1868). Although the acreage was undivided, the White River Utes lived in the northern portion of the reservation, the Uncompahgre Utes inhabited the central part, and the Southern Utes occupied the southern region. The reservation, however, survived little longer than a decade in this form. In 1874 the Utes approved the Brunot Cession of 3.7 million acres of the east-central portion of the reservation after valuable mineral deposits had been discovered there. 18 Stat. 36 (1874).[3] The result of the cession was almost to sever the reservation, leaving the Southern Utes wedged between the southern boundary line of the Brunot Cession and the New Mexico border, at the southernmost part of the reservation on a strip of land 15 miles wide and 110 miles long. This strip, which includes the lands at issue here, is referred to by the parties as Royce Area 617, and the remainder of the reservation after the Brunot Cession is referred to as Royce Area 616.[4]

Within eight years, only the Southern Utes remained in Colorado: the White River Utes and the Uncompahgre Utes departed for Utah before 1882 as a consequence of the massacre in 1879 of Indian Agent Meeker and others at White River station. The public outcry over this incident led to negotiations with the Confederated Bands which produced the Act of 1880.

---

[3] The United States admits that the stated consideration was not promptly paid. Brief for Petitioner 5. See also J. Dunn, Massacres of the Mountains 583–587 (1958).

[4] These derive from a map of Indian land cessions, Pl. CXVI, drawn by Charles Royce in connection with a published study, Indian Land Cessions, 18th Ann. Rep., Bur. of Amer. Ethnology, pt. 2 (1896–1897).

The central feature of the Act of 1880 was the termination of tribal ownership in the reservation lands, and the limitation of Indian ownership to such lands as might be allotted in severalty to individual Indians. The purposes of that provision were to destroy the tribal structure and to change the nomadic ways of the Utes by forcibly converting them from a pastoral to an agricultural people. See 10 Cong. Rec. 2059, 2066 (1880). The Act recited that it was enacted to accept "the agreement submitted by the confederated bands of Ute Indians in Colorado, for the sale of their reservation in said State . . . ." 21 Stat. 199 (1880). Thus, it was provided that the Confederated Bands "cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement." 21 Stat. 200 (1880). The settlement provisions stipulated that the White River Utes would leave Colorado "and settle upon agricultural lands on the Uintah Reservation in Utah," *ibid.*, and that "[t]he Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado," *ibid.*, or if insufficient agricultural land was found there, go to Utah (which they soon did). The Southern Utes were to "remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico." *Ibid.* Finally, it was provided that "all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United

States and subject to disposal," but only for the financial benefit of the Utes. 21 Stat. 203–204 (1880).

The plain wording of the Act cedes to the United States all of the nonallotted acreage of the reservation, including that in the 15-mile strip (Royce Area 617) occupied by the Southern Utes. The Court of Claims' opinion acknowledges this, stating that:

> "The most significant aspects to be gleaned from this [1880] Act . . . is that the Confederated Bands (Southern Utes included) seemed to cede their *entire* Colorado reservation—Royce Area 616 *and* 617—and moreover promised to accept allotments in severalty in various sectors within and beyond reservation boundaries. As sole consideration for these promises, the Bands were to receive shares in the proceeds of unallotted land sales remaining after certain Government reimbursements. The Southern Utes were apportioned a one-third share and like their confederates understood that such monies would be held by defendant in trust for their benefit." 191 Ct. Cl., at 10, 423 F. 2d, at 350 (1970) (emphasis in original).

Thus, if inquiry were to end with the wording of the 1880 Act, the consent judgment barred respondent's claim.

The Commission and the Court of Claims did not, however, end their inquiry with the wording of the Act of 1880. Both of those tribunals considered the conduct of the United States in relation to respondent tribe in the years subsequent to passage of the Act of 1880. Even so, the basis of their rejection of the *res judicata* defense does not emerge from their opinions with complete clarity. The Court of Claims read the Commission's first opinion, 17 Ind. Cl. Comm. 28 (1966), as holding that the Southern Utes expressly withheld the southern strip from the lands ceded by the 1880 Act: "The Commission found that the Act of 1880 'reserved' Royce Area 617 for the Southern

Utes." 191 Ct. Cl., at 10, 423 F. 2d, at 350. Some language at that point of the opinion suggested that the Court of Claims was in agreement with that view—"the following sequence of events . . . support the conclusion that plaintiffs at any rate did not cede their reservation (Royce Area 617) under the agreement of 1880." *Ibid.* However, the opinion later turns the decision on a different theory:

> "The more tenable theory, in our estimation, is that Congress recognized that by its protracted acquiescence in the Southern Ute occupation, Government rights to the land had somehow lapsed, or the agreement not being executed for so long a time, was rescinded and dead. It may be that the obligation to deal justly and honorably with the Indian wards did not allow insistence on full implementation of the apparent terms of the 1880 agreement. On the other hand, the Southern Utes obviously did not see themselves as mere squatters. The Congress therefore decided that if the land was going to be acquired free and clear new consideration was necessary. Hence we find section 5 of the 1895 agreement to be an explicit waiver of the Government's rights created in the 1880 agreement, whatever they were. It follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880." *Id.*, at 19–20, 423 F. 2d, at 356.

This reasoning implies that the holding that the lands in suit were not ceded in 1880 rests upon application of the doctrines of estoppel, or waiver, or a compound of those doctrines. We disagree that the history relied on supports any of those bases for decision, even assuming (and we have serious doubts) that the plain words of the Act of 1880 can thus be varied to except the lands in suit from the phrase "any land . . . ceded" in the consent

judgment. We turn, then, seriatim to the events relied upon below.

Even before 1880 the Southern Utes had experienced hardship in living on the southern strip. Essentially, they were a pastoral people and the strip was so narrow that it was difficult to keep their animals within it. In addition, the white population to the north and south of the strip was increasing and the resulting lines of commerce cut across the strip.

> "The Indian Bureau, realizing that this strip, by reason of its narrowness and of its remoteness from the other portion of the reservation, was entirely unsuited to the use of the Indians, suggested that negotiations be entered into with them for the cession of that strip. In accordance with this, in 1878, Congress passed an act authorizing such negotiations (U. S. Stat. L., vol. 20, p. 48), and under this authority a commission . . . was appointed, and during the same year they negotiated an agreement with the Indians whereby they agreed to exchange this strip for another reservation." S. Rep. No. 279, 53d Cong., 2d Sess., 1 (1894).

But before the bill was acted upon by Congress, the Meeker Massacre occurred.[5] The outcry following that incident caused Congress to adopt the solution in the Act of 1880 affecting all of the Ute tribes. Contrary to the apparent view of the Commission and Court of Claims, this segment of history does not show an inten-

[5] While apparently the "massacre" involved only the White River Utes, all Utes were blamed. See exchange of correspondence during the uprising among the Indian agents, Secretary of the Interior, Governor of Colorado, and others printed in S. Exec. Doc. No. 31, 46th Cong., 2d Sess. (1880). See also J. Dunn, Massacres of the Mountains (1958), and U. S. Army, Military Division of the Missouri (Gen. P. Sheridan, Commanding), Record of Engagements with Hostile Indians 88–91 (1882).

tion to treat the Southern Utes differently from the other Utes; rather, it demonstrates a congressional decision to treat the Southern Utes as the White River and Uncompahgre Utes were being treated, save that the White River Utes were being completely banished from Colorado.

The Act of 1880 provided that "a commission shall be sent to superintend the removal and settlement of the Utes, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support . . . ." 21 Stat. 201 (1880). The Commission visited the Southern Utes to carry out that mandate and in 1881 its chairman reported to Congress:

> "During my stay on the reservation I took occasion . . . to talk to the leading men . . . on the subject of their location in severalty. In these conversations I called their attention to the fact that the work the surveyors were doing was the preliminary step to such location [in severalty] . . . . I did not find one who desired a house, or would agree to dwell in one if built for him on his own land. It will take time and careful management to induce these Indians to abandon their present [way of living] and adopt the new mode of life contemplated by the agreement.
>
> "In the mean time, and while the change is going on, they must be protected from annoyance. . . . To prevent intrusion and guarantee proper order and protection, I can see no other way than to so modify the [1880] agreement . . . as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and preserve all the land within these lines for an indefinite period as an Indian reservation . . . . Then the land selected, and upon which the Indians are to be located, can be kept free

from intruders." H. R. Exec. Doc. No. 1, pt. 5, Vol. 2, 47th Cong., 1st Sess., 393 (1882).

But Congress did not create the recommended reservation. Instead, Congress took action consistent with adherence to the plan of the Act of 1880. There had been great pressure to open Royce Areas 616 and 617 to homesteading after the Act of 1880 had resulted in the removal of the Uncompahgre and White River Utes. The Southern Utes were, however, still occupying the southern strip, Royce Area 617. The apparent result was the Act of July 28, 1882, 22 Stat. 178, which declared that all of the northern portions of the reservation formerly occupied by the Uncompahgre and White River Utes, Royce Area 616, were now public lands to be disposed of for the benefit of the Utes in accordance with the Act of 1880. Section 2 of that statute provided that the Secretary of the Interior "shall, at the earliest practicable day, ascertain and establish the line between" the two Royce Areas. 22 Stat. 178 (1882). We find nothing in the legislative history of that statute to support a finding that it evidenced a congressional conclusion that the southern strip had not been ceded by the Act of 1880. On the contrary, the thrust of the legislative history is that the line was drawn to assure that there would be no interference with the land in Royce Area 617 available for allotment to the Southern Utes under the Act of 1880. H. R. Rep. No. 799, 53d Cong., 2d Sess., 2 (1894); S. Rep. No. 279, 53d Cong., 2d Sess., 2, 3–4 (1894).[6]

---

[6] The Court of Claims found proof that "the Interior Department at least was already viewing the Southern Ute territory as a permanent reservation not ceded under the terms of the 1880 cession," 191 Ct. Cl., at 13, 423 F. 2d, at 352, in a description of the line in an 1882 letter to the district land offices. We find nothing in the letter to that effect, and in any event, it could hardly be the basis for disregarding the congressionally expressed design.

The Court of Claims also found support for its conclusion in what was said to a congressional committee by a Ute spokesman for the Southern Utes at a meeting in the District of Columbia in 1886. The spokesman stated that the delegation had come "to see if we cannot exchange our reservation for another. . . . The present reservation is narrow and long, and we want to go west and see if we can't sell it." S. Rep. No. 836, 49th Cong., 1st Sess., 1 (1886). The Court of Claims viewed this as demonstrating that "the Southern Utes were still in possession of their part of their old reservation under claim of right." 191 Ct. Cl., at 14, 423 F. 2d, at 353. We do not doubt that the Southern Utes regarded the lands they occupied as "our reservation," but we fail to see how this nullifies the conveyance of the strip made by the Act of 1880. On the contrary, there is cogent evidence that the United States totally rejected the Indians' claim that the strip was "our reservation." After two bills to effectuate the removal of the Southern Utes failed to pass, Congress enacted 25 Stat. 133 (1888) empowering "[t]he Secretary of the Interior . . . to appoint a commission . . . with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians and the Secretary of the Interior . . . ." *Ibid.* Despite the reference to "their reservation," the premise of this statute was obviously that amelioration of the plight of the Southern Utes would require "modification of their treaty and other rights" as they had been fixed in the Act of 1880. Even the Court of Claims thought the Act of 1888 little support for the respondents' contention:

> "Although the language of this act tends to favor plaintiffs' position it is by no means conclusive. It

> merely authorized the establishment of a commission to engage the Southern Utes in negotiations for the purpose of persuading them to do belatedly what the Uncompahgre and White River Utes had done some years earlier, namely, to vacate their reservation and move elsewhere. A reasonable explanation for the act's exclusive terms is that the Southern Utes were the only band of the confederation as to whom the 1880 agreement was still executory." 191 Ct. Cl., at 15, 423 F. 2d, at 353–354.

The Commission formed pursuant to the Act of 1888 did succeed in negotiating an agreement with the Southern Utes, under which the Southern Utes would have been moved to a reservation in San Juan County, Utah. The Court of Claims observed that in such case "[p]resumably, their evacuated reservation lands would then be sold in accordance with the Act of 1880 and the proceeds would be held for the collective benefit of the Confederated Bands in the prescribed proportions, that is, the consideration visualized in the 1880 agreement as accruing to the Southern Utes would still accrue." 191 Ct. Cl., at 16, 423 F. 2d, at 354. In other words, the treatment of the Southern Utes would be precisely that accorded the Uncompahgre and White River Utes when they left Colorado. But this event only serves to furnish still more proof that the Government remained firm in its position that the strip was ceded by the Act of 1880.

This is confirmed by the congressional reaction when the agreement was submitted for approval—nothing happened for six years and the agreement was again introduced in 1894. The opinion of the Court of Claims depicts the situation:

> "Conceding the 'anomalous position [of the Southern Utes] of having ceded their reservation and yet remaining on it', the Senate Committee on Indian Affairs favored ratification (Sen. Rep. No. 279, 53d

> Cong., 2d Sess. 2–3 (1894)). Its House counterpart, although concurring in the view that the Southern Utes presented an anomalous situation, did not assent to ratification (H. R. Rep. No. 799, 53d Cong., 2d Sess. 2–3 (1894)). It believed that the proposed reservation was too large for the Southern Utes and hence would encourage their nomadic ways. Therefore, instead, the House Committee recommended enactment of a pending bill which was eventually passed as the Act of February 20, 1895 (28 Stat. 677). The stated purpose of this Act was to annul the agreement of 1888 and enforce the treaty of 1880 which sought to settle the Indians in severalty." 191 Ct. Cl., at 16, 423 F. 2d, at 354.

This recital refutes, rather than supports, the notion that the United States followed a pattern or course of conduct after 1880 that regarded the Southern Utes rather than the United States as the owners of Royce Area 617.

Finally, we cannot agree with the Court of Claims that § 5 of the Act of 1895 is "an explicit waiver of the Government's rights created in the 1880 agreement, whatever they were." 191 Ct. Cl., at 19–20, 423 F. 2d, at 356. The Act of 1895, in addition to annulling the 1888 agreement, expressly confirmed the Act of 1880 and directed the Secretary of the Interior to proceed with allotments in severalty to the Southern Utes "in accordance with the provisions of the Act of [1880]." 28 Stat. 677 (1895). It went on to settle the grievances of those Southern Utes who wanted their own reservation rather than allotments in severalty by providing that "there shall be . . . set apart and reserved all that portion of their present reservation lying west of" a defined line in the strip. *Id.*, at 678. We do not see how the United States could have "set apart and reserved" a portion of the strip for a reservation unless the strip belonged to it. The remainder of the strip to the east of the new reservation

419-882 O - 72 - 16

was to be available for allotments in severalty to individual Southern Utes and the land not allotted was to "be and become a part of the public domain" to be sold for the benefit of said Utes. *Ibid.* Section 5 allocated the proceeds from sales of the land opened to public settlement. We look in vain for anything in that section to support the conclusion of the Court of Claims that it contains an "explicit waiver" by the United States of its rights under the Act of 1880 and that "[i]t follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880." 191 Ct. Cl., at 20, 423 F. 2d, at 356. The Senate Report recommending passage of the Act of 1895 belies that conclusion. The report repeats, once again, the previously stated position of the Congress that "[o]n March 6, 1880, [the Utes] . . . ceded the whole of their reservation in Colorado to the United States, except such lands, if any, as might be allotted to them in severalty." S. Rep. No. 279, *supra,* at 2. We discern nothing in § 5 save some revision of the formula for allocation of the proceeds of the sales of the unallotted lands in the portion of the strip east of the reservation.[7] We find ab-

[7] Section 5 of the Act of 1895 provides in pertinent part:

"That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars, as follows: Five thousand dollars annually for ten years . . . to be equally divided among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; [certain allotments also made to specific chiefs and headmen] . . . that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon." 28 Stat. 678 (1895).

solutely no language that the Southern Utes made any cession thereby, and, indeed, we are convinced that the wording is consistent only with the fact that they had no land to cede.[8] The Act of 1895 simply resolved the impasse over the allotments in severalty which had existed for 15 years because of the Southern Utes' reluctance to accept them. The United States created a new reservation for them, while still permitting allotments to those Southern Utes willing and qualified to engage in farming. This plan was clearly constructed in reliance

[8] The Court of Claims also seems to have placed some reliance upon the following words in an order of the Acting Secretary of the Interior in 1938 which restored to the Southern Utes that portion of Royce Area 617 yet undisposed of:

"[P]ursuant to the provisions of the Act of February 20, 1895 (28 Stat. L., 677), the Southern Ute Band of Indians in Colorado ceded to the United States a large area of their reservation in the State of Colorado established expressly for their benefit under the treaty of June 15, 1880 (21 Stat. L., 199)," S. Doc. No. 194, 76th Cong., 3d Sess., 659 (1941) (compiled by C. Kappler).

The Court of Claims suggested that these words demonstrated that "[petitioner's] officials . . . not only concede that the lands were ceded in 1895, but they also enlighten us as to the status it retrospectively applied to the 1880 agreement." 191 Ct. Cl., at 20, 423 F. 2d, at 356.

As we have said in this opinion, we find no creation of a reservation for the Southern Utes in the Act of 1880, nor can we find any words of cession in the Act of 1895. In addition, rather than attaching the significance suggested by the Court of Claims, the quoted words are more properly to be treated as careless draftsmanship: the time of cession, whether 1880 or 1895, was of absolutely no consequence to the act of restoration of undisposed lands in 1938. Finally, the quoted words do not support the application here of the principle that courts should give weight to a consistent reading of an ambiguous document by the agency charged with its enforcement. As our opinion shows, we do not find either the Act of 1880 or that of 1895 ambiguous. Moreover, what consistency the parties have shown in the enforcement of those acts, cuts against the contention of the respondent.

upon, not in derogation of, the cession made under the Act of 1880.

We therefore hold that the claim in this case is *res judicata* under the 1950 consent judgment enforcing the settlement agreement "as to any land . . . ceded to defendant by the Act of June 15, 1880." [9]

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

Though the facts of this case are complex, they present but one major question, whether the lands in question were "ceded to defendant by the Act of June 15, 1880," and included in a consent judgment entered by the Court of Claims in 1950.

More precisely, what was the status of these lands (Royce Area 617) between 1880 and 1895? Were they ceded in 1880, yet not released by the Indians until 1895? How can it be said that Royce Area 617 was ceded in 1880 yet retained until 1895, since, as the Court of Claims stated, "the Southern Utes were allowed to remain on their surveyed reservation for 15 years after the purported cession, and the right to remove them without their further consent was not asserted or exercised." 191 Ct. Cl. 1, 19, 423 F. 2d 346, 356.

---

[9] The Court of Claims' unreported order remanded the case to the Commission "for the hearing of additional evidence and the making of findings of fact with respect to the intention of the parties to the stipulation upon which a final judgment was entered in Court of Claims Case No. 46640 (117 Ct. Cl. 436) on July 13, 1950." App. 57. The Commission's supplemental findings after the hearing on remand are reported in 21 Ind. Cl. Comm. 268. We question the propriety of the remand, see *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127, 140–141 (1904); *United States* v. *William Cramp & Sons Ship & Engine Building Co.*, 206 U. S. 118, 128 (1907), but do not decide the question since it does not appear that the decision of the Court of Claims turned on any evidence of the intention of the parties to the stipulation.

Twice the facts have been considered, once by the Indian Claims Commission and once by the Court of Claims. And both have resolved the question presented in favor of the respondent, Southern Utes. That result below is amply supported by the record.

As of 1880, the Confederated Bands of Ute Indians occupied a reservation of 12,000,000 acres in western Colorado. The White River Utes and the Uncompahgre Utes occupied the northern portion (Royce Area 616), and the Southern Utes occupied an almost separated southern section (Royce Area 617). In 1880, the Utes entered into a treaty with the United States. It provided that the chiefs would persuade their people

> "to cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.
>
> "The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico." Act of June 15, 1880, 21 Stat. 200.

The cession of the territory was on the express condition:

> "That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians in severalty . . . ." *Id.*, at 200–201.

The Secretary of the Interior was authorized to have the land surveyed for allotment. Commissioners were to make the allotments,

> "and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands

> of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States . . . ." *Id.*, at 203.

The Ute Commission was formed. In 1881 it reported to Congress. The Uncompahgre and White River Utes had been moved, but the Southern Utes were still on their reservation. The Chairman of the Commission had decided that it would be unwise to move them.[1] The allotments, a condition of the cession, were not made. In 1882, Congress declared Royce Area 616 to be public land (22 Stat. 178). It provided that a line be established between Royce Area 616 and Royce Area 617. § 2. The Secretary of the Interior ordered the line to be drawn "[c]ommencing *at* the southwest corner of the Ute *ceded* lands; thence extending the south *boundary*

---

[1] It has been suggested that the Indians refused to take the allotments or were stalling. This appears inconsistent with the report of Mr. Manypenny, the Chairman of the Ute Commission. The white settlers were dissatisfied on learning that the Indians might be allowed to settle in certain valleys which the settlers desired. The allotment, and sale of the residue to whites, would leave the Indians in "close proximity to the white settlements [and] will subject the Utes . . . to constant annoyance by evil-disposed persons." The Indians had to be protected from this.

"To prevent intrusion and guarantee proper order and protection, I can see no other way than to so modify the [1880] agreement, so far as these Indians are concerned, as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and preserve all the land within these lines for an indefinite period as an Indian reservation, and let the United States laws in relation to Indian reservations have full force therein. Then the land selected, and upon which the Indians are to be located, can be kept free from intruders." (H. R. Exec. Doc. No. 1, pt. 5, Vol. 2, 47th Cong., 1st Sess., 383, 393 (1881)). He did indicate that the Indians did not want to live in houses, but not that they would not accept the allotments.

of the Ute *ceded* lands to the western boundary of the State of Colorado." [2] (Emphasis supplied.)

As of this time it appears that neither the Southern Utes nor officials of the United States thought that Royce Area 617 had been ceded by the Act of 1880. The Southern Utes still considered it their reservation [3] and the Commissioner of Indian Affairs apparently felt likewise [4]—all of which is inconsistent with the theory that there had been a cession of it in 1880.

In 1888, Congress authorized the Secretary of the Interior to appoint a commission to negotiate with the Southern Utes. They agreed to settle in Utah, but Congress would not approve the agreement. Congress then passed the Act of 1895, 28 Stat. 677:

> "That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out

---

[2] "From this description it would seem that the Interior Department at least was already viewing the Southern Ute territory as a permanent reservation not ceded under the terms of the 1880 cession. Specifically, the letter states that the survey line commence *at*, not *in*, the southwest corner of the ceded Ute land. Adhering to defendant's contention that *all* lands were ceded in 1880, a literal interpretation of this letter would lead to an anomalous result. If the starting point was placed *at* the southwestern corner of Ute ceded land, the point would coincide with the converging point of the New Mexico, Colorado and Utah borders. The line could not extend to the western boundary of Colorado because it would start there." 191 Ct. Cl., at 13, 423 F. 2d, at 352.

[3] The Southern Utes came to Washington in 1886 to negotiate for an exchange of their reservation for one to the west. See S. Rep. No. 836, 49th Cong., 1st Sess., 1–2 (1886).

[4] On April 5, 1886, he reported to the Secretary of the Interior, "[W]e are bound by solemn treaty stipulations with these Indians to prevent white people from entering upon or crossing said reservation." *Id.*, at 3.

> of the agricultural lands embraced in *their present reservation* in Colorado, such allotments to be made in accordance with the provisions of the Act of [1880] . . . and the amendments thereto . . . ." § 2.
>
> "That at the expiration of six months from the passage of this Act the President . . . shall issue his proclamation declaring the lands embraced within *the present reservation* of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of *this Act,* open to occupancy and settlement." § 4, 28 Stat. 678. (Emphasis supplied.)

The money realized from the sale of the lands set aside was to be held for the sole benefit of the Southern Ute Indians. Section 6 declared that the provisions of the Act were not to take effect until accepted by a majority of the male adult Indians. A majority did accept.

Some of the Southern Utes took allotments in severalty. The Weeminuche Utes, now the Ute Mountain Utes, elected, however, to settle on a tract at the west end of their "present reservation." § 3.

A substantial amount of land in Royce Area 617 was settled by whites, and disposed of by the United States Government. The subject of the present suit before the Indian Claims Commission includes, *inter alia,* the proceeds from land sold and damages for land given away in violation of the Act of 1895.

In 1934, Congress allowed restoration of all land in Royce Area 617 not disposed of under the Act of 1895. (48 Stat. 984.) The Secretary of the Interior restored all such land to the tribal sovereignty of the Southern Utes. That order began:

> "[P]ursuant to the provisions of the Act of February 20, *1895* . . . the Southern Ute Band of Indians in Colorado *ceded* to the United States a large area of

> their reservation in the State of Colorado *established expressly for their benefit under the treaty of June 15, 1880* . . . ." (Order of Restoration, September 14, 1938, S. Doc. No. 194, 76th Cong., 3d Sess., 659 (1941) (compiled by C. Kappler).) (Emphasis supplied.)

The Confederated Bands have sued the United States in the past for damages arising out of breaches of the 1880 treaty. One such suit was settled in 1950, and judgment was entered pursuant to a stipulation of the parties. A schedule of all land covered by the judgment was included, but omissions were provided for:

> "So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside. However, the judgment to be entered in this case is *res judicata,* not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 . . . ." 117 Ct. Cl. 433, 437.

None of the land in Royce Area 617 (360 sections or 21.8% of the total area which had been wrongly disposed of) was therefore included.

The Indian Claims Commission found that the United States had acknowledged by its actions that the Southern Ute Reservation was not ceded by the 1880 Agreement. Therefore, any accounting which included Southern Ute lands in Case No. 30360, 45 Ct. Cl. 440 (1910), was erroneous and beyond the jurisdiction of the Court of Claims to enter. The Court of Claims remanded this case to the Commission for a determination of the intention of the parties in entering into the 1950 stipulation. Plaintiffs produced evidence that they never intended Royce Area 617 to be covered. The broad language of the stipulation was to insure that minor omissions were covered.

"Diligence" would not have permitted the exclusion of 360 sections of land. The Government refused to produce any documents which might have disclosed the intent of its signatories, claiming this was the "work product." The Commission found no intent to include land in Royce Area 617 in the stipulation.

The Court of Claims found that the language of the Act of 1880 *appeared* to be inconsistent with the findings of the Commission, but that the events from 1880 to 1895 supported its conclusion, *i. e.,* the decision to postpone issuing allotments and to preserve the reservation, the separation of Royce Area 617 by the Act of 1882, the description of the dividing line by the Secretary of the Interior, the negotiations with the Southern Utes to move, the belief by the Commissioner of Indian Affairs of a duty to keep white people off the "reservation," [5] the Act of 1888, and the Act of 1895 providing additional compensation for the Southern Utes [6] and requiring their approval.[7] The evidence weighed "substantially in favor of the Commission's interpretation." The Government's conduct, the Court of Claims said, evidenced a recognition that "by its protracted acquiescence in the Southern Ute occupation, Government rights to the land had somehow lapsed, or the agreement not being executed for so long a time, was rescinded and dead." 191 Ct. Cl., at 19, 423 F. 2d, at 356.

> "Hence we find section 5 of the 1895 agreement to be an explicit waiver of the Government's rights

[5] N. 4, *supra.*

[6] The treaty of 1880 required that the proceeds from sales of *all* land ceded under that agreement had to be credited to the benefit of all Utes. To credit the money received only to the account of Southern Utes would have been a violation of the treaty if the land had been ceded in 1880.

[7] If the land had been ceded under the 1880 agreement, acceptance of the Act of 1895 was completely unnecessary.

> created in the 1880 agreement, whatever they were. It follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880." 191 Ct. Cl., at 19–20, 423 F. 2d, at 356.

This holding was supported also by the language employed by the Secretary of the Interior in the Restoration of 1938.[8]

Since the Southern Ute land was not ceded in 1880, any claims involving that land were beyond the mandate of the Jurisdictional Act of 1909, 35 Stat. 781, and improvidently heard in 1910. Likewise the 1950 judgment was no bar. Neither party had intended it to apply to Royce Area 617. If the intention of the parties was irrelevant, the stipulation on its face would not apply to "areas not *effectively* ceded." 191 Ct. Cl., at 22, 423 F. 2d, at 358.

This Court now reviews those findings and reverses. In doing so it simply remarshals the evidence for the new result, ignoring the limits of this Court's appellate jurisdiction over the Court of Claims. The question present is either a question of fact or, at best, a mixed question of law and fact and the determination of the Court of Claims is binding on this Court if it is supported by *substantial* evidence. *United States* v. *Swift & Co.*, 270 U. S. 124, 138; *United States* v. *Omaha Tribe of Indians,* 253 U. S. 275, 281. The result below is clearly supported. It is not the function of this Court to conduct a trial *de novo* on the issues. *United States* v. *Felin & Co.,* 334 U. S. 624, 650 (Jackson, J., dissenting); *United States* v. *Penn Mfg. Co.,* 337 U. S. 198, 207 n. 4.

I would affirm the judgment of the Court of Claims.

---

[8] "Thus, defendant's officials do not only concede that the lands were ceded in 1895, but they also enlighten us as to the status it retrospectively applied to the 1880 agreement. Such a statement by an executive agency bearing on the meaning of a treaty must be accorded great weight." 191 Ct. Cl., at 20, 423 F. 2d, at 356.

Per Curiam

KEYES *v.* SCHOOL DISTRICT NO. 1

ON MOTION TO VACATE STAY

Decided April 26, 1971

Court of Appeals' stay of District Court's desegregation order pending issuance of this Court's decisions in *Swann* v. *Board of Education, ante,* p. 1, and related cases, vacated now that the opinions in those cases have been issued.

Vacated.

PER CURIAM.

The sole basis for the Tenth Circuit's action in granting the stay of the District Court's order in this case was the view "that it would be unfair to the School District to compel it to take further steps in the implementation of the total plan until [the Tenth Circuit] and the party litigants have the benefit of the United States Supreme Court decisions in the *Swann* and combined desegregation cases . . . ."

The decisions in those cases having now been announced, it is proper to vacate the stay and remit the matter to the Court of Appeals freed of its earlier speculation as to the bearing of our decision in *Swann* and related cases.

We, of course, intimate no views upon the merits of the underlying issues.

McGAUTHA *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 203. Argued November 9, 1970—Decided May 3, 1971*

Petitioner in No. 203 was convicted of first-degree murder in California, and was sentenced to death. The penalty was left to the jury's absolute discretion, and punishment was determined in a separate proceeding following the trial on the issue of guilt. Petitioner in No. 204 was convicted of first-degree murder, and was sentenced to death in Ohio, where the jury, which also had absolute penalty discretion, determined guilt and penalty after a single trial and in a single verdict. Certiorari was granted to consider whether petitioners' rights were infringed by permitting the death penalty without standards to govern its imposition, and in No. 204, to consider the constitutionality of a single guilt and punishment proceeding. *Held:*

1. In light of history, experience, and the limitations of human knowledge in establishing definitive standards, it is impossible to say that leaving to the untrammeled discretion of the jury the power to pronounce life or death in capital cases violates any provision of the Constitution. Pp. 196–208.

2. The Constitution does not prohibit the States from considering that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment resolved in a single trial than by focusing the jury's attention solely on punishment after guilt has been determined. Pp. 208–222.

(a) Petitioner in No. 204 has failed to show that his unitary trial violated the Constitution by forcing "the making of difficult judgments" in his decision whether to remain silent on the issue of guilt at the cost of surrendering his chance to plead his case on the punishment issue. *Simmons* v. *United States,* 390 U. S. 377, distinguished. Pp. 210–213.

(b) The policies of the privilege against self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt. Pp. 213–217.

---

*Together with No. 204, *Crampton* v. *Ohio,* on certiorari to the Supreme Court of Ohio.

(c) Ohio does provide for the common-law ritual of allocution, but the State need not provide petitioner an opportunity to speak to the jury free from any adverse consequences on the issue of guilt. Pp. 217–220.

No. 203, 70 Cal. 2d 770, 452 P. 2d 650; and No. 204, 18 Ohio St. 2d 182, 248 N. E. 2d 614, affirmed.

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., filed a separate opinion, *post*, p. 225. DOUGLAS, J., filed an opinion dissenting in No. 204, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 226. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 248.

Herman F. Selvin, by appointment of the Court, 400 U. S. 885, argued the cause and filed briefs for petitioner in No. 203. *John J. Callahan*, by appointment of the Court, 399 U. S. 924, argued the cause for petitioner in No. 204. With him on the brief were *Dan H. McCullough, William T. Burgess, William D. Driscoll,* and *Gerald S. Lubitsky.*

Ronald M. George, Deputy Attorney General of California, argued the cause for respondent in No. 203. With him on the brief were *Thomas C. Lynch,* Attorney General, and *William E. James,* Assistant Attorney General. *Melvin L. Resnick* argued the cause for respondent in No. 204. With him on the brief were *Harry Friberg* and *Alice L. Robie Resnick.*

Solicitor General Griswold argued the cause for the United States as *amicus curiae* urging affirmance in both cases. With him on the brief was *Philip A. Lacovara.*

Jack Greenberg, James M. Nabrit III, Michael Meltsner, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae* in both cases. *Luke McKissack* filed a brief as *amicus curiae* in No. 203. Briefs of *amici curiae* in No. 204 were filed by *Richard F. Stevens* for the Attor-

ney General of Ohio; by *Elmer Gertz* and *Willard J. Lassers* for the American Civil Liberties Union, Illinois Division, et al.; and by *Messrs. Lassers, Gertz, Alex Elson,* and *Marvin Braiterman* for the American Friends Service Committee et al.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners McGautha and Crampton were convicted of murder in the first degree in the courts of California and Ohio respectively and sentenced to death pursuant to the statutes of those States. In each case the decision whether the defendant should live or die was left to the absolute discretion of the jury. In McGautha's case the jury, in accordance with California law, determined punishment in a separate proceeding following the trial on the issue of guilt. In Crampton's case, in accordance with Ohio law, the jury determined guilt and punishment after a single trial and in a single verdict. We granted certiorari in the *McGautha* case limited to the question whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards. 398 U. S. 936 (1970). We granted certiorari in the *Crampton* case limited to that same question and to the further question whether the jury's imposition of the death sentence in the same proceeding and verdict as determined the issue of guilt was constitutionally permissible. *Ibid.*[1] For the reasons

[1] The same two questions were included in our grant of certiorari in *Maxwell* v. *Bishop,* 393 U. S. 997 (1968), two Terms ago. After twice hearing argument in that case, see 395 U. S. 918 (1969), we remanded the case to the District Court for consideration of possible violations of the rule of *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968). 398 U. S. 262 (1970). In taking that course we at the same time granted certiorari in the *McGautha* and *Crampton* cases to consider the two questions thus pretermitted in *Maxwell.* See *id.,* at 267 n. 4.

that follow, we find no constitutional infirmity in the conviction of either petitioner, and we affirm in both cases.

I

It will put the constitutional issues in clearer focus to begin by setting out the course which each trial took.

A. McGautha's Guilt Trial

McGautha and his codefendant Wilkinson were charged with committing two armed robberies and a murder on February 14, 1967.[2] In accordance with California procedure in capital cases, the trial was in two stages, a guilt stage and a punishment stage.[3] At the guilt trial the

[2] The information also alleged that McGautha had four prior felony convictions: felonious theft, robbery, murder without malice, and robbery by assault. The most recent of these convictions occurred in 1952. In a proceeding in chambers McGautha admitted the convictions, and the jury did not learn of them at the guilt stage of the trial.

[3] Cal. Penal Code § 190.1 (1970) provides:

"The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was

evidence tended to show that the defendants, armed with pistols, entered the market of Mrs. Pon Lock early in the afternoon of the murder. While Wilkinson kept a customer under guard, McGautha trained his gun on Mrs. Lock and took almost $300. Roughly three hours later, McGautha and Wilkinson held up another store, this one owned by Mrs. Benjamin Smetana and operated by her with her husband's assistance. While one defendant forcibly restrained a customer, the other struck Mrs. Smetana on the head. A shot was fired, fatally wounding Mr. Smetana. Wilkinson's former girl friend testified that shortly after the robbery McGautha told her he had shot a man and showed her an empty cartridge in the cylinder of his gun. Other evidence at the guilt stage was inconclusive on the issue as to who fired the fatal shot. The jury found both defendants guilty of two counts of armed robbery and one count of first-degree murder as charged.

B. McGautha's Penalty Trial

At the penalty trial, which took place on the following day but before the same jury, the State waived its opening, presented evidence of McGautha's prior felony convictions and sentences, see n. 2, *supra,* and then rested. Wilkinson testified in his own behalf, relating his unhappy childhood in Mississippi as the son of a white

---

convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

"In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."

419-882 O - 72 - 17

father and a Negro mother, his honorable discharge from the Army on the score of his low intelligence, his regular attendance at church, and his good record for holding jobs and supporting his mother and siblings up to the time he was shot in the back in an unprovoked assault by a street gang. Thereafter, he testified, he had difficulty obtaining or holding employment. About a year later he fell in with McGautha and his companions, and when they found themselves short of funds, one of the group suggested that they "knock over somebody." This was the first time, Wilkinson said, that he had ever had any thoughts of committing a robbery. He admitted participating in the two robberies but said he had not known that the stores were to be held up until McGautha drew his gun. He testified that it had been McGautha who struck Mrs. Smetana and shot Mr. Smetana.

Wilkinson called several witnesses in his behalf. An undercover narcotics agent testified that he had seen the murder weapon in McGautha's possession and had seen McGautha demonstrating his quick draw. A minister with whom Wilkinson had boarded testified to Wilkinson's church attendance and good reputation. He also stated that before trial Wilkinson had expressed his horror at what had happened and requested the minister's prayers on his behalf. A former fellow employee testified that Wilkinson had a good reputation and was honest and peaceable.

McGautha also testified in his own behalf at the penalty hearing. He admitted that the murder weapon was his, but testified that he and Wilkinson had traded guns, and that it was Wilkinson who had struck Mrs. Smetana and killed her husband. McGautha testified that he came from a broken home and that he had been wounded during World War II. He related his employment record, medical condition, and remorse. He admitted his criminal record, see n. 2, *supra,* but testified that he had

been a mere accomplice in two of those robberies and that his prior conviction for murder had resulted from a slaying in self-defense. McGautha also admitted to a 1964 guilty plea to a charge of carrying a concealed weapon. He called no witnesses in his behalf.

The jury was instructed in the following language:

> "in this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.
>
> "The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now, in arriving at this determination you should consider all of the evidence received here in court presented by the People and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand.
>
> . . . . . .
>
> ". . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience,

and absolute discretion. That verdict must express the individual opinion of each juror.

"Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed." App. 221–223.[4]

---

[4] The penalty jury interrupted its deliberations to ask whether a sentence of life imprisonment meant that there was no possibility of parole. The trial judge responded as follows:

"A sentence of life imprisonment means that the prisoner may be paroled at some time during his lifetime or that he may spend the remainder of his natural life in prison. An agency known as the Adult Authority is empowered by statute to determine if and when a prisoner is to be paroled, and under the statute no prisoner can be paroled unless the Adult Authority is of the opinion that the prisoner when released will assume a proper place in society and that his release is not contrary to the welfare of society. A prisoner released on parole may remain on parole for the balance of his life and if he violates the terms of the parole he may be returned to prison to serve the life sentence.

"So that you will have no misunderstandings relating to a sentence of life imprisonment, you have been informed as to the general scheme of our parole system. You are now instructed, however, that the matter of parole is not to be considered by you in determining the punishment for either defendant, and you may not speculate as to if, or when, parole would or would not be granted. It is not your function to decide now whether these men will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether these men shall suffer the death penalty or whether they shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment is the proper sentence, you must assume that those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that they will not parole a defendant unless he can be safely released into society. It

Deliberations began in the early afternoon of August 24, 1967. In response to jury requests the testimony of Mrs. Smetana and of three other witnesses was reread. Late in the afternoon of August 25 the jury returned verdicts fixing Wilkinson's punishment at life imprisonment and McGautha's punishment at death.

The trial judge ordered a probation report on McGautha. Having received it, he overruled McGautha's motions for a new trial or for a modification of the penalty verdict, and pronounced the death sentence.[5] McGautha's conviction was unanimously affirmed by the California Supreme Court. 70 Cal. 2d 770, 452 P. 2d 650 (1969). His contention that standardless jury sentencing is unconstitutional was rejected on the authority of an earlier case, *In re Anderson,* 69 Cal. 2d 613, 447 P. 2d 117 (1968), in which that court had divided narrowly on the issue.

C. Crampton's Trial

Petitioner Crampton was indicted for the murder of his wife, Wilma Jean, purposely and with premeditated malice. He pleaded not guilty and not guilty by reason of insanity.[6] In accordance with the Ohio practice which

---

would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Adult Authority will properly carry out its responsibilities." App. 224–225.

[5] Under California law the trial judge has power to reduce the penalty to life if he concludes that the jury's verdict is not supported by the weight of the evidence. Cal. Penal Code § 1181 (7). See *In re Anderson,* 69 Cal. 2d 613, 623, 447 P. 2d 117, 124 (1968). The California Supreme Court, to which appeal is automatic in capital cases, Cal. Penal Code § 1239 (b), has no such power. *People* v. *Lookadoo,* 66 Cal. 2d 307, 327, 425 P. 2d 208, 221 (1967).

[6] Pursuant to Ohio law, Ohio Rev. Code Ann. § 2945.40 (1954), Crampton was committed to a state mental hospital for a month of observation. After a hearing on the psychiatric report the trial court determined that Crampton was competent to stand trial.

he challenges, his guilt and punishment were determined in a single unitary proceeding.

At trial the State's case was as follows. The Cramptons had been married about four months at the time of the murder. Two months before the slaying Crampton was allowed to leave the state mental hospital, where he was undergoing observation and treatment for alcoholism and drug addiction, to attend the funeral of his wife's father. On this occasion he stole a knife from the house of his late father-in-law and ran away. He called the house several times and talked to his wife, greatly upsetting her. When she pleaded with him to return to the hospital and stated that she would have to call the police, he threatened to kill her if she did. Wilma and her brother nevertheless did notify the authorities, who picked Crampton up later the same evening. There was testimony of other threats Crampton had made on his wife's life, and it was revealed that about 10 days before the murder Mrs. Crampton's fear of her husband had caused her to request and receive police protection.

The State's main witness to the facts surrounding the murder was one William Collins, a convicted felon who had first met Crampton when they, along with Crampton's brother Jack, were in the State Prison in Michigan. On January 14, 1967, three days before the murder, Collins and Crampton met at Jack Crampton's house in Pontiac, Michigan. During those three days Collins and Crampton roamed the upper Midwest, committing a series of petty thefts and obtaining amphetamines, to which both were addicted, by theft and forged prescriptions.

About nine o'clock on the evening of January 16, Crampton called his wife from St. Joseph, Michigan; after the call he told Collins that he had to get back to Toledo, where his wife was, as fast as possible. They arrived in the early morning hours of January 17. After

Crampton had stopped by his wife's home and sent Collins to the door with a purported message for her, the two went to the home of Crampton's mother-in-law, which Crampton knew to be empty, to obtain some guns. They broke in and stole a rifle, ammunition, and some handguns, including the .45 automatic which was later identified as the murder weapon. Crampton kept this gun with him. He indicated to Collins that he believed his wife was having an affair. He fired the .45 in the air, with a remark to the effect that "a slug of that type would do quite a bit of damage," and said that if he found his wife with the man he suspected he would kill them both.

That evening Crampton called his wife's home and learned that she was present. He quickly drove out to the house, and told Collins, "Leave me off right here in front of the house and you take the car and go back to the parking lot and if I'm not there by six o'clock in the morning you're on your own."

About 11:20 that evening Crampton was arrested for driving a stolen car. The murder weapon was found between the seats of the car.

Mrs. Crampton's body was found the next morning. She had been shot in the face at close range while she was using the toilet. A .45-caliber shell casing was near the body. A jacket which Crampton had stolen a few days earlier was found in the living room. The coroner, who examined the body at 11:30 p. m. on January 18, testified that in his opinion death had occurred 24 hours earlier, plus or minus four hours.

The defense called Crampton's mother as a witness. She testified about Crampton's background, including a serious concussion received at age nine, his good grades in junior high school, his stepfather's jealousy of him, his leaving home at age 14 to live with various relatives, his enlistment in the Navy at age 17, his marriage to a girl named Sandra, the birth of a son, a divorce, then a

remarriage to Sandra and another divorce shortly after, and finally his marriage to Wilma. Mrs. Crampton also testified to Crampton's drug addiction, to his brushes with the law as a youth and as an adult, and to his undesirable discharge from the Navy.

Crampton's attorney also introduced into evidence a series of hospital reports which contained further information on Crampton's background, including his criminal record, which was substantial, his court-martial conviction and undesirable discharge from the Navy, and the absence of any significant employment record. They also contained his claim that the shooting was accidental; that he had been gathering up guns around the house and had just removed the clip from an automatic when his wife asked to see it; that as he handed it to her it went off accidentally and killed her. All the reports concluded that Crampton was sane in both the legal and the medical senses. He was diagnosed as having a sociopathic personality disorder, along with alcohol and drug addiction. Crampton himself did not testify.

The jury was instructed that:

> "If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life." App. 70.

The jury was given no other instructions specifically addressed to the decision whether to recommend mercy, but was told in connection with its verdict generally:

> "You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict.

> "Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy, or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried." App. 71–72.

The jury deliberated for over four hours and returned a verdict of guilty, with no recommendation for mercy. Sentence was imposed about two weeks later. As Ohio law requires, Ohio Rev. Code Ann. § 2947.05 (1954), Crampton was informed of the verdict and asked whether he had anything to say as to why judgment should not be pronounced against him. He replied:

> "Please the Court, I don't believe I received a fair and impartial trial because the jury was prejudiced by my past record and the fact I had been a drug addict, and I just believe I didn't receive a fair and impartial trial. That's all I have to say."

This statement was found insufficient to justify not pronouncing sentence upon him, and the court imposed the death sentence.[7] Crampton's appeals through the Ohio courts were unavailing. 18 Ohio St. 2d 182, 248 N. E. 2d 614 (1969).

II

Before proceeding to a consideration of the issues before us, it is important to recognize and underscore the nature of our responsibilities in judging them. Our function is not to impose on the States, *ex cathedra,* what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures of these two

---

[7] Under Ohio law, a jury's death verdict may not be reduced as excessive by either the trial or the appellate court. *Turner* v. *State,* 21 Ohio Law Abs. 276, 279–280 (Ct. App. 1936); *State* v. *Klumpp,* 15 Ohio Op. 2d 461, 468, 175 N. E. 2d 767, 775–776 (Ct. App.), appeal dismissed, 171 Ohio St. 62, 167 N. E. 2d 778 (1960).

States in such cases. In assessing the validity of the conclusions reached in this opinion, that basic factor should be kept constantly in mind.

III

We consider first McGautha's and Crampton's common claim: that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law. Despite the undeniable surface appeal of the proposition, we conclude that the courts below correctly rejected it.[8]

---

[8] The lower courts thus placed themselves in accord with all other American jurisdictions which have considered the issue. See, *e. g., In re Ernst,* 294 F. 2d 556 (CA3 1961); *Florida ex rel. Thomas* v. *Culver,* 253 F. 2d 507 (CA5 1958); *Maxwell* v. *Bishop,* 398 F. 2d 138 (CA8 1968), vacated on other grounds, 398 U. S. 262 (1970); *Sims* v. *Eyman,* 405 F. 2d 439 (CA9 1969); *Segura* v. *Patterson,* 402 F. 2d 249 (CA10 1968); *McCants* v. *State,* 282 Ala. 397, 211 So. 2d 877 (1968); *Bagley* v. *State,* 247 Ark. 113, 444 S. W. 2d 567 (1969); *State* v. *Walters,* 145 Conn. 60, 138 A. 2d 786, appeal dismissed, 358 U. S. 46 (1958); *Wilson* v. *State,* 225 So. 2d 321 (Fla. 1969); *Miller* v. *State,* 224 Ga. 627, 163 S. E. 2d 730 (1968); *State* v. *Latham,* 190 Kan. 411, 375 P. 2d 788 (1962); *Duisen* v. *State,* 441 S. W. 2d 688 (Mo. 1969); *State* v. *Johnson,* 34 N. J. 212, 168 A. 2d 1, appeal dismissed, 368 U. S. 145 (1961); *People* v. *Fitzpatrick,* 61 Misc. 2d 1043, 308 N. Y. S. 2d 18 (1970); *State* v. *Roseboro,* 276 N. C. 185, 171 S. E. 2d 886 (1970); *Hunter* v. *State,* 222 Tenn. 672, 440 S. W. 2d 1 (1969); *State* v. *Kelbach,* 23 Utah 2d 231, 461 P. 2d 297 (1969); *Johnson* v. *Commonwealth,* 208 Va. 481, 158 S. E. 2d 725 (1968); *State* v. *Smith,* 74 Wash. 2d 744, 446 P. 2d 571 (1968).

A

In order to see petitioners' claim in perspective, it is useful to call to mind the salient features of the history of capital punishment for homicides under the common law in England, and subsequent statutory developments in this country. This history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die. Thus, the laws of Alfred, echoing Exodus 21: 12–13, provided: "Let the man who slayeth another wilfully perish by death. Let him who slayeth another of necessity or unwillingly, or unwilfully, as God may have sent him into his hands, and for whom he has not lain in wait be worthy of his life and of lawful bot if he seek an asylum." Quoted in 3 J. Stephen, History of the Criminal Law of England 24 (1883). In the 13th century, Bracton set it down that a man was responsible for all homicides except those which happened by pure accident or inevitable necessity, although he did not explain the consequences of such responsibility. *Id.,* at 35. The Statute of Gloucester, 6 Edw. 1, c. 9 (1278), provided that in cases of self-defense or misadventure the jury should neither convict nor acquit, but should find the fact specially, so that the King could decide whether to pardon the accused. It appears that in time such pardons—which may not have prevented forfeiture of goods—came to issue as of course. 3 Stephen, *supra,* at 36–42.

During all this time there was no clear distinction in terminology or consequences among the various kinds of criminal homicide. All were *prima facie* capital, but all were subject to the benefit of clergy, which after 1350 came to be available to almost any man who could read. Although originally those entitled to benefit of clergy were simply delivered to the bishop for ecclesiastical proceedings, with the possibility of degradation from orders,

incarceration, and corporal punishment for those found guilty, during the 15th and 16th centuries the maximum penalty for clergyable offenses became branding on the thumb, imprisonment for not more than one year, and forfeiture of goods. 1 Stephen, *supra,* at 459–464. By the statutes of 23 Hen. 8, c. 1, §§ 3, 4 (1531), and 1 Edw. 6, c. 12, § 10 (1547), benefit of clergy was taken away in all cases of "murder of malice prepensed." 1 Stephen, *supra,* at 464–465; 3 *id.,* at 44. During the next century and a half, however, "malice prepense" or "malice aforethought" came to be divorced from actual ill will and inferred without more from the act of killing. Correspondingly, manslaughter, which was initially restricted to cases of "chance medley," came to include homicides where the existence of adequate provocation rebutted the inference of malice. 3 *id.,* at 46–73.

The growth of the law continued in this country, where there was rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers. Thus, in 1794, Pennsylvania attempted to reduce the rigors of the law by abolishing capital punishment except for "murder of the first degree," defined to include all "willful, deliberate and premeditated" killings, for which the death penalty remained mandatory. Pa. Laws 1794, c. 1777. This reform was soon copied by Virginia and thereafter by many other States.

This new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of "malice aforethought." Within a year the distinction between the degrees of murder was practically obliterated in Pennsylvania. See Keedy, History of the Pennsylvania Statute Creating Degrees of Murder, 97 U. Pa. L. Rev. 759, 773–777 (1949). Other States had similar experiences. Wechsler & Michael, A Rationale of the Law of Homicide: I, 37 Col. L. Rev. 701,

707–709 (1937). The result was characterized in this way by Chief Judge Cardozo, as he then was:

> "What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words." What Medicine Can Do For Law, in Law and Literature 70, 100 (1931).[9]

At the same time, jurors on occasion took the law into their own hands in cases which were "willful, deliberate, and premeditated" in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense. See Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶¶ 27–29 (1953); *Andres* v. *United States,* 333 U. S. 740, 753 (1948) (Frankfurter, J., concurring); cf. H. Kalven & H. Zeisel, The American Jury 306–312 (1966).

In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact. See Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099, 1102 and n. 18 (1953); Note, The Two-Trial System in Capital Cases, 39 N. Y. U. L. Rev. 50,

---

[9] In context the emphasis is on the confusing distinction between degrees of murder, not the desirability of juries' sentencing discretion. It may also be noted that the former New York definitions of first- and second-degree murder were somewhat unusual. See Wechsler & Michael, 37 Col. L. Rev., at 704 n. 13, 709 n. 26.

52 (1964). Tennessee was the first State to give juries sentencing discretion in capital cases,[10] Tenn. Laws 1837–1838, c. 29, but other States followed suit, as did the Federal Government in 1897.[11] Act of Jan. 15, 1897, c. 29, § 1, 29 Stat. 487. Shortly thereafter, in *Winston* v. *United States,* 172 U. S. 303 (1899), this Court dealt with the federal statute for the first time.[12] The Court reversed a murder conviction in which the trial judge instructed the jury that it should not return a recommendation of mercy unless it found the existence of mitigating circumstances. The Court found this instruction to interfere with the scheme of the Act to commit the whole question of capital punishment "to the judgment and the consciences of the jury." *Id.,* at 313.

> "How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocable-

---

[10] The practice of jury sentencing arose in this country during the colonial period for cases not involving capital punishment. It has been suggested that this was a "reaction to harsh penalties imposed by judges appointed and controlled by the Crown" and a result of "the early distrust of governmental power." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 26 (1967).

[11] California and Ohio, the two States involved in these cases, abolished mandatory death penalties in favor of jury discretion in 1874 and 1898. Act of Mar. 28, 1874, c. 508, Cal. Amendatory Acts 1873–1874, p. 457; Ohio Laws 1898, p. 223. Except for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases. None of these statutes have provided standards for the choice between death and life imprisonment. See Brief for the United States as Amicus Curiae 128–137.

[12] See also *Calton* v. *Utah,* 130 U. S. 83 (1889), in which the Court reversed a conviction under the statutes of Utah Territory in which the jury had not been informed of its right under the territorial code to recommend a sentence of imprisonment for life at hard labor instead of death.

> ness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone." *Ibid.*

This Court subsequently had occasion to pass on the correctness of instructions to the jury with respect to recommendations of mercy in *Andres* v. *United States,* 333 U. S. 740 (1948). The Court approved, as consistent with the governing statute, an instruction that:

> "This power [to recommend mercy] is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment." *Id.,* at 743 n. 4.

The case was reversed, however, on the ground that other instructions on the power to recommend mercy might have been interpreted by the jury as requiring them to return an unqualified verdict of guilty unless they unanimously agreed that mercy should be extended. The Court determined that the proper construction was to require a unanimous decision to withhold mercy as well, on the ground among others that the latter construction was "more consonant with the general humanitarian purpose of the statute." *Id.,* at 749. The only other significant discussion of standardless jury sentencing in capital cases in our decisions is found in *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968). In reaching its conclusion that persons with conscientious scruples against the death penalty could not be automatically excluded from sentencing juries in capital cases, the Court relied heavily

on the fact that such juries "do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Id.*, at 519 (footnote omitted). The Court noted that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.*, at 519 n. 15. The inner quotation is from the opinion of Mr. Chief Justice Warren for four members of the Court in *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958).

In recent years academic and professional sources have suggested that jury sentencing discretion should be controlled by standards of some sort. The American Law Institute first published such a recommendation in 1959.[13] Several States have enacted new criminal codes

[13] Model Penal Code § 201.6 (Tent. Draft No. 9, 1959). The criteria were revised and approved by the Institute in 1962 and now appear in § 210.6 of the Proposed Official Draft of the Model Penal Code. As revised they appear in the Appendix to this opinion. More recently the National Commission on Reform of Federal Criminal Laws published a Study Draft of a New Federal Criminal Code (1970). Section 3605 contained standards virtually identical to those of the Model Penal Code. The statement of the Chairman of the Commission, submitting the Study Draft for public comment, described it as "something more than a staff report and less than a commitment by the Commission or any of its members to every aspect of the Draft." Study Draft xx. The primary differences between the procedural provisions for capital sentencing in the Model Penal Code and those in the Study Draft are that the Code provides that the court and jury "shall" take the criteria into account, while the Study Draft provided that they "may" do so; and the Model Penal Code forbids imposition of the death penalty where no aggravating circumstances are found, while the Study Draft showed this only as an alternative provision. The latter feature is affected by the fact that only a very few murders were

in the intervening 12 years, some adopting features of the Model Penal Code.[14] Other States have modified their laws with respect to murder and the death penalty in other ways.[15] None of these States have followed the Model Penal Code and adopted statutory criteria for imposition of the death penalty. In recent years, challenges to standardless jury sentencing have been presented to many state and federal appellate courts. No court has held the challenge good. See n. 8, *supra.* As petitioners recognize, it requires a strong showing to upset this settled practice of the Nation on constitutional grounds. See *Walz* v. *Tax Commission,* 397 U. S. 664, 678 (1970); *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31 (1922); cf. *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937).

B

Petitioners seek to avoid the impact of this history by the observation that jury sentencing discretion in capital cases was introduced as a mechanism for dispensing mercy—a means for dealing with the rare case in which the death penalty was thought to be unjustified. Now, they assert, the death penalty is imposed on far fewer than half the defendants found guilty of capital crimes. The state and federal legislatures which provide for jury discretion in capital sentencing have, it is said, implicitly

---

to be made capital. See *id.,* at 307. In its Final Report (1971), the Commission recommended abolition of the death penalty for federal crimes. An alternate version, said to represent a "substantial body of opinion in the Commission," *id.,* comment to provisional § 3601, provided for retention of capital punishment for murder and treason with procedural provisions which did not significantly differ from those in the Study Draft.

[14] See, *e. g.,* N. Y. Penal Law § 65.00 (1967) (criteria for judges in deciding on probation).

[15] *E. g.,* N. M. Stat. Ann. §§ 40A–29–2.1, 40A–29–2.2 (Supp. 1969), reducing the class of capital crimes.

419-882 O - 72 - 18

determined that some—indeed, the greater portion—of those guilty of capital crimes should be permitted to live. But having made that determination, petitioners argue, they have stopped short—the legislatures have not only failed to provide a rational basis for distinguishing the one group from the other, cf. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942), but they have failed even to suggest any basis at all. Whatever the merits of providing such a mechanism to take account of the unforeseeable case calling for mercy, as was the original purpose, petitioners contend the mechanism is constitutionally intolerable as a means of selecting the extraordinary cases calling for the death penalty, which is its present-day function.

In our view, such force as this argument has derives largely from its generality. Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

Thus the British Home Office, which before the recent abolition of capital punishment in that country had the responsibility for selecting the cases from England and Wales which should receive the benefit of the Royal Prerogative of Mercy, observed:

> "The difficulty of defining by any statutory provision the types of murder which ought or ought not to be punished by death may be illustrated by reference to the many diverse considerations to which the Home Secretary has regard in deciding whether to recommend clemency. No simple formula can take account of the innumerable degrees of culpability,

> and no formula which fails to do so can claim to be just or satisfy public opinion." 1–2 Royal Commission on Capital Punishment, Minutes of Evidence 13 (1949).

The Royal Commission accepted this view, and although it recommended a change in British practice to provide for discretionary power in the jury to find "extenuating circumstances," that term was to be left undefined; "[t]he decision of the jury would be within their unfettered discretion and in no sense governed by the principles of law." Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 553 (*b*). The Commission went on to say, in substantial confirmation of the views of the Home Office:

> "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished. This conclusion is borne out by American experience: there the experiment of degrees of murder, introduced long ago, has had to be supplemented by giving to the courts a discretion that in effect supersedes it." *Id.*, at ¶ 595.

The draftsmen of the Model Penal Code expressly agreed with the conclusion of the Royal Commission that "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . ." Report ¶ 498, quoted in Model Penal Code, § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959). The draftsmen did think, however, "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are

presented in a concrete case." *Ibid.* The circumstances the draftsmen selected, set out in the Appendix to this opinion, were not intended to be exclusive. The Code provides simply that the sentencing authority should "take into account the aggravating and mitigating circumstances enumerated . . . and any other facts that it deems relevant," and that the court should so instruct when the issue was submitted to the jury. *Id.*, at § 210.6 (2) (Proposed Official Draft, 1962).[16] The Final Report of the National Commission on Reform of Federal Criminal Laws (1971) recommended entire abolition of the death penalty in federal cases. In a provisional chapter, prepared for the contingency that Congress might decide to retain the death penalty, the Report contains a set of criteria virtually identical with the aggravating and mitigating circumstances listed by the Model Penal Code. With respect to the use to be made of the criteria, the Report provides that: "[i]n deciding whether a sentence of death should be imposed, the court and the jury, if any, *may* consider the mitigating and aggravating circumstances set forth in the subsections below." *Id.*, at provisional § 3604 (1) (emphasis added).

---

[16] The Model Penal Code provides that the jury should not fix punishment at death unless it found at least one of the aggravating circumstances and no sufficiently substantial mitigating circumstances. Model Penal Code § 210.6 (2) (Proposed Official Draft, 1962). As the reporter's comment recognized, there is no fundamental distinction between this procedure and a redefinition of the class of potentially capital murders. Model Penal Code § 201.6, Comment 3, pp. 71–72 (Tent. Draft No. 9, 1959). As we understand these petitioners' contentions, they seek standards for guiding the sentencing authority's discretion, not a greater strictness in the definition of the class of cases in which the discretion exists. If we are mistaken in this, and petitioners contend that Ohio's and California's definitions of first-degree murder are too broad, we consider their position constitutionally untenable.

It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations.[17] And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of "standards" which the history of capital punishment has from the beginning reflected. Thus, they indeed caution against this Court's undertaking to establish such standards itself, or to pronounce at large that standards in this realm are constitutionally required.

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.[18] The

---

[17] The issue whether a defendant is entitled to an instruction that certain factors such as race are not to be taken into consideration is not before us, as the juries were told not to base their decisions on "prejudice," and no more specific instructions were requested. Cf. *Griffin* v. *California,* 380 U. S. 609, 614–615 and n. 6 (1965).

[18] *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966), does not point to a contrary result. In *Giaccio* the Court held invalid on its face a Pennsylvania statute which authorized criminal juries to assess costs against defendants whose conduct, although not amounting to the crime with which they were charged, was nevertheless found to be "reprehensible." The Court concluded that the statute was no more sound than one which simply made it a crime to engage

States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.

IV

As we noted at the outset of this opinion, McGautha's trial was in two stages, with the jury considering the issue of guilt before the presentation of evidence and argument on the issue of punishment. Such a procedure is required by the laws of California and of five other States.[19] Petitioner Crampton, whose guilt and punishment were determined at a single trial, contends

---

in "reprehensible conduct" and consequently that it was unconstitutionally vague. The Court there stated:

"In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." *Id.*, at 405 n. 8.

[19] Cal. Penal Code § 190.1 (1970); Conn. Gen. Stat. Rev. § 53a–46 (Supp. 1969); Act of Mar. 27, 1970, No. 1333, Ga. Laws 1970, p. 949; N. Y. Penal Law §§ 125.30 (Supp. 1970–1971), 125.35 (1967); Pa. Stat. Ann., Tit. 18, § 4701 (1963); Tex. Code Crim. Proc., Art. 37.07 (2)(b) (Supp. 1970–1971). See also Model Penal Code § 210.6 (2) (Proposed Official Draft, 1962); National Commission on Reform of Federal Criminal Laws, Final Report, provisional § 3602 (1971); Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶¶ 551–595.

that a procedure like California's is compelled by the Constitution as well.

This Court has twice had occasion to rule on separate penalty proceedings in the context of a capital case. In *United States* v. *Jackson,* 390 U. S. 570 (1968), we held unconstitutional the penalty provisions of the Federal Kidnaping Act, which we construed to mean that a defendant demanding a jury trial risked the death penalty while one pleading guilty or agreeing to a bench trial faced a maximum punishment of life imprisonment. The Government had contended that in order to mitigate this discrimination we should adopt an alternative construction, authorizing the trial judge accepting a guilty plea or jury waiver to convene a special penalty jury empowered to recommend the death sentence. *Id.,* at 572. Our rejection of this contention was not based solely on the fact that it appeared to run counter to the language and legislative history of the Act. "[E]ven on the assumption that the failure of Congress to [provide for the convening of a penalty jury] was wholly inadvertent, it would hardly be the province of the courts to fashion a remedy. Any attempt to do so would be fraught with the gravest difficulties . . . ." *Id.,* at 578–579. We therefore declined "to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." *Id.,* at 580. *Jackson,* however, did not consider the possibility that such a procedure might be constitutionally required in capital cases.

Substantially this result had been sought by the petitioners in *Spencer* v. *Texas,* 385 U. S. 554 (1967). Like Crampton, Spencer had been tried in a unitary proceeding before a jury which fixed punishment at death. Also like Crampton, Spencer contended that the Due Process

Clause of the Fourteenth Amendment required a bifurcated trial so that evidence relevant solely to the issue of punishment would not prejudice his case on guilt. We rejected this contention, in the following language:

> "To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure. With recidivism the major problem that it is, substantial changes in trial procedure in countless local courts around the country would be required were this Court to sustain the contentions made by these petitioners. This we are unwilling to do. To take such a step would be quite beyond the pale of this Court's proper function in our federal system." *Id.*, at 567–568 (footnotes omitted).

Spencer considered the bifurcation issue in connection with the State's introduction of evidence of prior crimes; we now consider the issue in connection with a defendant's choice whether to testify in his own behalf. But even though this case cannot be said to be controlled by *Spencer*, our opinion there provides a significant guide to decision here.

A

Crampton's argument for bifurcation runs as follows. Under *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and *Griffin* v. *California*, 380 U. S. 609 (1965), he enjoyed a constitutional right not to be compelled to be a witness

against himself. Yet under the Ohio single-trial procedure, he could remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment. He contends that under the Due Process Clause of the Fourteenth Amendment, as elaborated in, *e. g., Townsend* v. *Burke,* 334 U. S. 736 (1948); *Specht* v. *Patterson,* 386 U. S. 605 (1967); and *Mempa* v. *Rhay,* 389 U. S. 128 (1967), he had a right to be heard on the issue of punishment and a right not to have his sentence fixed without the benefit of all the relevant evidence. Therefore, he argues, the Ohio procedure possesses the flaw we condemned in *Simmons* v. *United States,* 390 U. S. 377, 394 (1968); it creates an intolerable tension between constitutional rights. Since this tension can be largely avoided by a bifurcated trial, petitioner contends that there is no legitimate state interest in putting him to the election, and that the single-verdict trial should be held invalid in capital cases.

Simmons, however, dealt with a very different situation from the one which confronted petitioner Crampton, and not everything said in that opinion can be carried over to this case without circumspection. In *Simmons* we held it unconstitutional for the Federal Government to use at trial the defendant's testimony given on an unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment. We concluded that to permit such use created an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior. This was surely an analytically sufficient basis for decision. However, we went on to observe that the penalty thus imposed on the good-faith assertion of Fourth Amendment rights was "of a kind to which this Court has always been peculiarly

sensitive," 390 U. S., at 393, for it involved the incrimination of the defendant out of his own mouth.

We found it not a little difficult to support this invocation of the Fifth Amendment privilege. We recognized that "[a]s an abstract matter" the testimony might be voluntary, and that testimony to secure a benefit from the Government is not *ipso facto* "compelled" within the meaning of the Self-Incrimination Clause. The distinguishing feature in Simmons' case, we said, was that "the 'benefit' to be gained is that afforded by another provision of the Bill of Rights." *Id.*, at 393–394. Thus the only real basis for holding that Fifth Amendment policies were involved was the colorable Fourth Amendment claim with which we had begun.

The insubstantiality of the purely Fifth Amendment interests involved in *Simmons* was illustrated last Term by the trilogy of cases involving guilty pleas: *Brady* v. *United States,* 397 U. S. 742 (1970); *McMann* v. *Richardson,* 397 U. S. 759 (1970); *Parker* v. *North Carolina,* 397 U. S. 790 (1970). While in *Simmons* we relieved the defendant of his "waiver" of Fifth Amendment rights made in order to obtain a benefit to which he was ultimately found not constitutionally entitled, in the trilogy we held the defendants bound by "waivers" of rights under the Fifth, Sixth, and Fourteenth Amendments made in order to avoid burdens which, it was ultimately determined, could not constitutionally have been imposed. In terms solely of Fifth Amendment policies, it is apparent that Simmons had a far weaker claim to be relieved of his ill-advised "waiver" than did the defendants in the guilty-plea trilogy. While we have no occasion to question the soundness of the result in *Simmons* and do not do so, to the extent that its rationale was based on a "tension" between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question, and it certainly cannot be

given the broad thrust which is attributed to it by Crampton in the present case.

The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. *McMann* v. *Richardson,* 397 U. S., at 769. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved. Analysis of this case in such terms leads to the conclusion that petitioner has failed to make out his claim of a constitutional violation in requiring him to undergo a unitary trial.

B

We turn first to the privilege against compelled self-incrimination. The contention is that where guilt and punishment are to be determined by a jury at a single trial the desire to address the jury on punishment unduly encourages waiver of the defendant's privilege to remain silent on the issue of guilt, or, to put the matter another way, that the single-verdict procedure unlawfully compels the defendant to become a witness against himself on the issue of guilt by the threat of sentencing him to death without having heard from him. It is not contended, nor could it be successfully, that the mere force of evidence is compulsion of the sort forbidden by the privilege. See *Williams* v. *Florida,* 399 U. S. 78, 83–85 (1970). It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case. See *Spencer* v. *Texas,* 385 U. S., at 561 and n. 7; cf. *Michelson* v. *United States,* 335 U. S. 469 (1948). The narrow question left open is whether it is con-

sistent with the privilege for the State to provide no means whereby a defendant wishing to present evidence or testimony on the issue of punishment may limit the force of his evidence (and the State's rebuttal) to that issue. We see nothing in the history, policies, or precedents relating to the privilege which requires such means to be available.

So far as the history of the privilege is concerned, it suffices to say that it sheds no light whatever on the subject, unless indeed that which is adverse, resulting from the contrast between the dilemma of which petitioner complains and the historical excesses which gave rise to the privilege. See generally 8 J. Wigmore, Evidence § 2250 (McNaughton rev. ed. 1961); L. Levy, Origins of the Fifth Amendment (1968). Inasmuch as at the time of framing of the Fifth Amendment and for many years thereafter the accused in criminal cases was not allowed to testify in his own behalf, nothing approaching Crampton's dilemma could arise.

The policies of the privilege likewise are remote support for the proposition that defendants should be permitted to limit the effects of their evidence to the issue of punishment. The policies behind the privilege are varied, and not all are implicated in any given application of the privilege. See *Murphy* v. *Waterfront Commission,* 378 U. S. 52, 55 (1964); see generally 8 J. Wigmore, *supra,* at § 2251, and sources cited therein, n. 2. It can safely be said, however, that to the extent these policies provide any guide to decision, see McKay, Book Review, 35 N. Y. U. L. Rev. 1097, 1100–1101 (1960), the only one affected to any appreciable degree is that of "cruelty."

It is undeniably hard to require a defendant on trial for his life and desirous of testifying on the issue of punishment to make nice calculations of the effect of his testimony on the jury's determination of guilt. The issue of cruelty thus arising, however, is less closely akin

to "the cruel trilemma of self-accusation, perjury or contempt," *Murphy* v. *Waterfront Commission,* 378 U. S., at 55, than to the fundamental requirements of fairness and decency embodied in the Due Process Clauses. Whichever label is preferred, appraising such considerations is inevitably a matter of judgment as to which individuals may differ; however, a guide to decision is furnished by the clear validity of analogous choices with which criminal defendants and their attorneys are quite routinely faced.

It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. See, *e. g., Brown* v. *Walker,* 161 U. S. 591, 597–598 (1896); *Fitzpatrick* v. *United States,* 178 U. S. 304, 314–316 (1900); *Brown* v. *United States,* 356 U. S. 148 (1958). It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. See *Spencer* v. *Texas,* 385 U. S., at 561; cf. *Michelson* v. *United States,* 335 U. S. 469 (1948); but cf. *Luck* v. *United States,* 121 U. S. App. D. C. 151, 348 F. 2d 763 (1965); *United States* v. *Palumbo,* 401 F. 2d 270 (CA2 1968). Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.

Further, a defendant whose motion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense, with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty.

E. g., United States v. *Calderon,* 348 U. S. 160, 164 and n. 1 (1954); 2 C. Wright, Federal Practice and Procedure § 463 (1969); cf. American Bar Association, Project on Standards for Criminal Justice, Trial by Jury 107–108 (Approved Draft, 1968). But see Comment, The Motion for Acquittal: A Neglected Safeguard, 70 Yale L. J. 1151 (1961); cf. *Cephus* v. *United States,* 117 U. S. App. D. C. 15, 324 F. 2d 893 (1963). Finally, only last Term in *Williams* v. *Florida,* 399 U. S. 78 (1970), we had occasion to consider a Florida "notice-of-alibi" rule which put the petitioner in that case to the choice of either abandoning his alibi defense or giving the State both an opportunity to prepare a rebuttal and leads from which to start. We rejected the contention that the rule unconstitutionally compelled the defendant to incriminate himself. The pressures which might lead the defendant to furnish this arguably "testimonial" and "incriminating" information arose simply from

> "the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments." *Id.,* at 85.

We are thus constrained to reject the suggestion that a desire to speak to one's sentencer unlawfully compels a defendant in a single-verdict capital case to incriminate himself, unless there is something which serves to distinguish sentencing—or at least capital sentencing—from the situations given above. Such a distinguishing factor can only be the peculiar poignancy of the position of a man whose life is at stake, coupled with the imponderables of the decision which the jury is called upon to make. We do not think that the fact that a defendant's sentence, rather than his guilt, is at issue creates a constitutionally sufficient difference from the sorts of situa-

tions we have described. While we recognize the truth of Mr. Justice Frankfurter's insight in *Green* v. *United States,* 365 U. S. 301, 304 (1961) (plurality opinion), as to the peculiar immediacy of a personal plea by the defendant for leniency in sentencing, it is also true that the testimony of an accused denying the case against him has considerably more force than counsel's argument that the prosecution's case has not been proved. The relevant differences between sentencing and determination of guilt or innocence are not so great as to call for a difference in constitutional result. Nor does the fact that capital, as opposed to any other, sentencing is in issue seem to us to distinguish this case. See *Williams* v. *New York,* 337 U. S. 241, 251–252 (1949). Even in noncapital sentencing the sciences of penology, sociology, and psychology have not advanced to the point that sentencing is wholly a matter of scientific calculation from objectively verifiable facts.

We conclude that the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt. We therefore turn to the converse situation, in which a defendant remains silent on the issue of guilt and thereby loses any opportunity to address the jury personally on punishment.

C

It is important to identify with particularity the interests which are involved. Petitioner speaks broadly of a right of allocution. This right, of immemorial origin, arose in a context very different from that which confronted petitioner Crampton.[20] See generally Barrett,

[20] For instance, the accused was not permitted to have the assistance of counsel, was not permitted to testify in his own behalf, was not entitled to put on evidence in his behalf, and had almost no

Allocution (pts. 1–2), 9 Mo. L. Rev. 115, 232 (1944). It has been preserved in its original form in Ohio and in many other States.[21] What petitioner seeks, to be sure for purposes not wholly unrelated to those served by the right of allocution in former times, see *Green* v. *United States,* 365 U. S., at 304 (opinion of Frankfurter, J.), is nevertheless a very different procedure occurring in a radically different framework of criminal justice.

Leaving aside the term "allocution," it also appears that petitioner is not claiming the right simply to be heard on the issue of punishment. This Court has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so.[22] Assuming, without de-

---

possibility of review of his conviction. See, *e. g.,* G. Williams, The Proof of Guilt 4–12 (3d ed. 1963); 1 J. Stephen, A History of the Criminal Law of England 308–311, 350 (1883).

[21] Ohio Rev. Code Ann. § 2947.05 (1954) provides:

"Before sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say as to why judgment should not be pronounced against him."

[22] In *Williams* v. *New York,* 337 U. S. 241 (1949), a trial judge had disregarded a jury recommendation of mercy and imposed the death sentence, in part because of a presentence report based on hearsay. The Court held that the Due Process Clause did not require a State to choose between prohibiting the use of such reports and holding an adversary hearing at which the defendant could cross-examine the sources of the information contained therein. In *Specht* v. *Patterson,* 386 U. S. 605, 606 (1967), the Court characterized *Williams* broadly as holding that the Fourteenth Amendment "did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed." The Court stated that it adhered to *Williams,* but declined to extend it to a separate determination whether a convicted person should be committed to an institution for treatment under the Colorado Sex

ciding, that the Constitution does require such an opportunity, there was no denial of such a right in Crampton's case. The Ohio Constitution guarantees defendants the right to have their counsel argue in summation for mercy as well as for acquittal. *Shelton* v. *State,* 102 Ohio St. 376, 131 N. E. 704 (1921). The extent to which evidence going solely to the issue of punishment is admissible under Ohio law is unclear, see *Ashbrook* v. *State,* 49 Ohio App. 298, 197 N. E. 214 (1935), but in any event it seems apparent that Ohio judges, as one would expect, take a lenient view of the admissibility of evidence offered by a defendant on trial for his life. As the present case illustrates, an accused can put before the jury a great deal of background evidence with at best a tenuous connection to the issue of guilt. The record in Crampton's case does not reveal that any evidence offered on the part of the defendant was excluded on the ground that it was relevant solely to the issue of punishment.

On the other hand, petitioner is not seeking vindication for his interest in making a personal plea for mercy.[23]

Offenders Act. *Id.,* at 608. See also *Mempa* v. *Rhay,* 389 U. S. 128 (1967).

In *Green* v. *United States,* 365 U. S. 301, 304 (1961), Mr. Justice Frankfurter, in an opinion for four members of the Court, spoke eloquently of the desirability of permitting a defendant's personal plea for mercy, but in *Hill* v. *United States,* 368 U. S. 424 (1962), the Court held that the failure of a sentencing judge to ask a defendant represented by counsel whether he personally had anything to say, though a violation of Fed. Rule Crim. Proc. 32 (a), was not an error of constitutional dimensions. The Court reserved the issue whether silencing a defendant who wished to speak would rise to that level. *Id.,* at 429. We have not since had occasion to deal with this or related problems at length.

[23] It may be noted in passing that petitioner at no point requested an opportunity to address the jury personally on the issue of punishment. Compare the Georgia practice of permitting the defendant to make an unsworn statement on which he is not subject to cross-

419-882 O - 72 - 19

Even in a bifurcated trial, the defendant could be restricted to the giving of evidence, with argument to be made by counsel only. Petitioner's contention therefore comes down to the fact that the Ohio single-verdict trial may deter the defendant from bringing to the jury's attention evidence peculiarly within his own knowledge, and it may mean that the death verdict will be returned by a jury which never heard the sound of his voice. We do not think that the possibility of the former is sufficiently great to sustain petitioner's claim that the single-verdict trial may deprive the jury of a rational basis for fixing sentence. Assuming that in this case there was relevant information solely within petitioner's knowledge, we do not think the Constitution forbids a requirement that such evidence be available to the jury on all issues to which it is relevant or not at all. As to the largely symbolic value represented by the latter interest, Ohio has provided for retention of the ritual of allocution, albeit only in its common-law form, precisely to avoid the possibility that a person might be tried, convicted, and sentenced to death in complete silence. We have held that failure to ensure such personal participation in the criminal process is not necessarily a constitutional flaw in the conviction. *Hill* v. *United States,* 368 U. S. 424 (1962). We do not think that Ohio was required to provide an opportunity for petitioner to speak to the jury free from any adverse consequences on the issue of guilt. We therefore reject this branch of petitioner's argument as well.

V

Before we conclude this opinion, it is appropriate for us to make a broader observation than the issues raised by

---

examination, and the deprecating view of this opportunity taken by those familiar with it, all discussed in *Ferguson* v. *Georgia,* 365 U. S. 570 (1961).

these cases strictly call for. It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. See *Spencer* v. *Texas,* 385 U. S. 554 (1967). The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected. From a constitutional standpoint we cannot conclude that it is impermissible for a State to consider that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury's attention solely on punishment after the issue of guilt has been determined.

Certainly the facts of these gruesome murders bespeak no miscarriage of justice. The ability of juries, unassisted by standards, to distinguish between those defendants for whom the death penalty is appropriate punishment and those for whom imprisonment is sufficient is indeed illustrated by the discriminating verdict of the jury in McGautha's case, finding Wilkinson the less culpable of the two defendants and sparing his life.

The procedures which petitioners challenge are those by which most capital trials in this country are conducted, and by which all were conducted until a few years ago. We have determined that these procedures are consistent with the rights to which petitioners were constitutionally entitled, and that their trials were entirely fair. Having

reached these conclusions we have performed our task of measuring the States' process by federal constitutional standards, and accordingly the judgment in each of these cases is

Affirmed.

APPENDIX TO OPINION OF THE COURT

Model Penal Code § 210.6 (Proposed Official Draft, 1962, and changes of July 30, 1962):

(1) *Death Sentence Excluded.* When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(2) *Determination by Court or by Court and Jury.* Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone

if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any

other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

[Alternative version of Subsection (2), providing for determination of sentence by the Court in all cases, omitted.]

(3) *Aggravating Circumstances.*

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) *Mitigating Circumstances.*

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

Separate opinion of MR. JUSTICE BLACK.

I concur in the Court's judgments and in substantially all of its opinion. However, in my view, this Court's task is not to determine whether the petitioners' trials were "fairly conducted." *Ante,* at 221. The Constitution grants this Court no power to reverse convictions because of our personal beliefs that state criminal procedures are "unfair," "arbitrary," "capricious," "unreasonable," or "shocking to our conscience." See, *e. g., Rochin* v. *California,* 342 U. S. 165, 174 (1952) (BLACK, J., concurring); *United States* v. *Wade,* 388 U. S. 218, 243 (1967) (BLACK, J., concurring and dissenting). Our

responsibility is rather to determine whether petitioners have been denied rights expressly or impliedly guaranteed by the Federal Constitution as written. I agree with the Court's conclusions that the procedures employed by California and Ohio to determine whether capital punishment shall be imposed do not offend the Due Process Clause of the Fourteenth Amendment. Likewise, I do not believe that petitioners have been deprived of any other right explicitly or impliedly guaranteed by the other provisions of the Bill of Rights. The Eighth Amendment forbids "cruel and unusual punishments." In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment. Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power. See *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 670 (1966) (BLACK, J., dissenting).

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting in No. 204.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural Due Process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Ohio Rev. Code Ann. § 2901.01. Petitioner

was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment, and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

> "You must not be influenced by any consideration *of sympathy or prejudice.* It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict.
>
> "Consider all the evidence and make your finding with intelligence and impartiality, and *without bias, sympathy, or prejudice,* so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried. . . ." (Emphasis added.)

He was found guilty of murder in the first degree without a recommendation of mercy and the court sentenced him to death. The Supreme Court of Ohio sustained the single-verdict procedure and the absolute discretion of the jury in the matter of punishment. 18 Ohio St. 2d 182, 248 N. E. 2d 614.

On the issue of guilt the State was required to produce evidence to establish it. On the issue of insanity the burden was on petitioner to prove it by a preponderance of the evidence, *State* v. *Austin,* 71 Ohio St. 317, 73

N. E. 218. On the issue of mercy, *viz.*, life imprisonment rather than death, petitioner under Ohio law was banned from offering any specific evidence directed only toward a claim of mercy. *Ashbrook* v. *State,* 49 Ohio App. 298, 197 N. E. 214.

If a defendant wishes to testify in support of the defense of insanity or in mitigation of what he is charged with doing, he can do so only if he surrenders his right to be free from self-incrimination. Once he takes the stand he can be cross-examined not only as respects the crime charged but also on other misdeeds. In Ohio impeachment covers a wide range of subjects: prior convictions for felonies and statutory misdemeanors,[1] pending indictments,[2] prior convictions in military service, and dishonorable discharges.[3] Once he testifies he can be recalled for cross-examination in the State's case in rebuttal.[4]

While the defendant in Ohio has the right of allocution, that right even in first-degree murder cases occurs only after the jury's verdict has been rendered. Unless there is prejudicial error vitiating the conviction or insufficient evidence [5] to convict, the jury's verdict stands and the judge must enter the verdict. Allocution, though mandatory,[6] is thus a ritual only.[7]

---

[1] *State* v. *Murdock,* 172 Ohio St. 221, 174 N. E. 2d 543. And see *State* v. *Pollard,* 21 Ohio St. 2d 171, 256 N. E. 2d 620.

[2] *State* v. *Hector,* 19 Ohio St. 2d 167, 249 N. E. 2d 912.

[3] *State* v. *Williams,* 85 Ohio App. 236, 88 N. E. 2d 420. Merely taking the stand puts credibility in issue. *Hamilton* v. *State,* 39 Ohio App. 153, 177 N. E. 221.

[4] *Johns* v. *State,* 42 Ohio App. 412, 182 N. E. 356.

[5] *State* v. *Frohner,* 150 Ohio St. 53, 80 N. E. 2d 868; *Hoppe* v. *State,* 29 Ohio App. 467, 163 N. E. 715.

[6] *Silsby* v. *State,* 119 Ohio St. 314, 164 N. E. 232.

[7] "At common law the defendant in a felony case had a right, called 'allocution,' to be asked formally whether he had 'any thing to offer why judgment should not be awarded against him.' . . . [S]ince

If the right to be heard were to be meaningful, it would have to accrue before sentencing; yet, except for allocution, any attempt on the part of the accused during the trial to say why the judgment of death should not be pronounced against him entails a surrender of his right against self-incrimination. It therefore seems plain that the single-verdict procedure is a burden on the exer-

---

the common law judge generally had no discretion as to the quantum of punishment in felony cases, the point of his question to the defendant was not to elicit mitigating evidence or a plea for leniency, but to give the defendant a formal opportunity to present one of the strictly defined legal reasons which required the avoidance or delay of sentencing: he was not the person convicted, he had benefit of clergy or a pardon, he was insane, or if a woman, she was pregnant." Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821, 832–833.

"The common law right of the defendant to be asked if he wishes to make a statement on his own behalf at the time of sentencing would appear still to be recognized in more than half of the American jurisdictions, although it finds expression in many forms and comes from many sources. In at least one state, the right rises to a constitutional level. See R. I. Const. art. I, § 10; Robalewski v. Superior Court, 197 A. 2d 751 (R. I. 1964). In many more states the right is guaranteed by statute. For a representative sample, see Cal. Penal Code §§ 1200, 1201 (1956); Iowa Code Ann. § 789.6 (1950); Kan. Gen. Stat. Ann. § 62–1510 (1964); Mo. Rev. Stat. §§ 546.570, 546.580 (1953); N. Y. Code Crim. Proc. § 480 (1958); Okla. Stat. Ann. tit. 22, § 970 (1958); Tex. Code Crim. Proc. art. 42.07 (1966); Wash. Rev. Code Ann. § 10.64.040 (1961). See also 48 Iowa L. Rev. 172, 173–74 n. 11 (1962). In a few more jurisdictions, the right is secured by rules of court. See, *e. g.,* N. J. Crim. Prac. Rules, Superior and County Courts, Rule 3:7–10 (d) (1967); Fed. Rule Crim. Proc. 32 (a)(1). See also 39 F. R. D. 192–193 (1966); Hill v. United States, 368 U. S. 424 (1962); Green v. United States, 365 U. S. 301 (1961). In other jurisdictions, case law is the only source of the defendant's right. See Barrett, *Allocution,* 9 Mo. L. Rev. 115, 126–40 (1944)." American Bar Association, Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures 254–255 (Approved Draft, 1968).

cise of the right to be free of compulsion as respects self-incrimination. For he can testify on the issue of insanity or on other matters in extenuation of the crime charged only at the price of surrendering the protection of the Self-Incrimination Clause of the Fifth Amendment made applicable to the States by the Fourteenth.

On the question of insanity and punishment the accused should be under no restraints when it comes to putting before the court and the jury all the relevant facts. Yet he cannot have that freedom where these issues are tied to the question of guilt. For on that issue he often dare not speak lest he in substance be tried not for this particular offense but for all the sins he ever committed.

Petitioner also had to surrender much of his right to a fair hearing on the issue of punishment to assert his defense of insanity. To support his insanity plea he had to submit his hospital records, both of which contained information about his convictions and imprisonment for prior crimes and about his use of drugs as well.

Of course, a defendant's character witnesses can be examined respecting the defendant's other crimes. *Michelson* v. *United States,* 335 U. S. 469. But that is an effort to weigh the credibility of the proffered testimony as to character. "Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans." *Id.,* at 479. It is a far cry, however, to let hospital records tendered on an issue of insanity color a jury's judgment on the wholly different issue of guilt.

The greatest comfort the majority has is this Court's recent decision in *Spencer* v. *Texas,* 385 U. S. 554, holding that a two-stage trial is not required when a State

under a habitual-offender statute seeks to introduce on the issue of guilt in a unitary trial evidence of a defendant's prior convictions. Yet *Spencer* was a five-to-four decision which meant it barely passed muster as a constitutional procedure. The dissent of Mr. Chief Justice Warren, in which three other Justices joined, will have, I think, endurance beyond the majority view.

That dissent, *id.*, at 569 *et seq.*, points out the prejudice to an accused if, prior to a finding of guilt, earlier convictions are admissible in evidence. There is mounting evidence shown in court decisions (*id.*, at 585) and in modern state procedures that that practice does not comport with fairness implicit in due process. Mr. Chief Justice Warren said: "In England, the prejudice which results from proof of prior crimes before a finding of guilt has been recognized for more than a century, and the rule has been that a finding as to prior crimes is made in a separate hearing after the finding of guilt." *Id.*, at 586.

We should not square with due process the practice which receives impetus in Ohio where reports on a man's insanity contain references to his criminal record which most assuredly prejudice his trial on the issue of guilt.[8]

---

[8] As Mr. Chief Justice Warren said:

"Whether or not a State has recidivist statutes on its books, it is well established that evidence of prior convictions may not be used by the State to show that the accused has a criminal disposition and that the probability that he committed the crime currently charged is increased. While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." *Spencer* v. *Texas*, 385 U. S., at 572–574.

We have already traveled part of the distance required for reversal in the present case. In *Jackson* v. *Denno,* 378 U. S. 368, we held that whether on controverted facts a confession was voluntary must be tried by a State in a separate proceeding. We pointed out the vice in allowing the jury that determines guilt also to determine whether the confession was voluntary. We said:

> "It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true. But the New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined." *Id.,* at 389.

Yet the risk of prejudice in *Jackson* v. *Denno* seems minor compared with the risk of prejudice in a unitary trial where the issues of guilt, insanity, and punishment are combined, submitted to one jury with evidence of prior convictions coming in under cover of hospital records pertinent to insanity, and certainly likely to be prejudicial on the issue of guilt. I see no way to make this unitary trial fair in the sense of procedural due process unless the issue of insanity is segregated and tried to a separate jury.

As noted, evidence as to whether the jury should show mercy to him is excluded from consideration, and the jury is admonished not to show any "sympathy" to the accused.

Under Ohio law the determination of whether to grant or withhold mercy is exclusively for the jury and cannot

be reviewed by either the trial court [9] or an appellate court.[10] The first time that specific mention of mercy to the jury is permissible is during closing argument where the defendant is permitted "to argue to the jury the desirability, advisability or wisdom of recommending mercy." [11] While there was not a specific instruction on mercy in the instant case (beyond the instruction to make findings without bias, sympathy, or prejudice), the Ohio courts have approved instructions "to consider and determine whether or not in view of all the circumstances and facts leading up to, and attending the alleged homicide as disclosed by the evidence, you should or should not make such recommendation [of mercy]." *Howell* v. *State,* 102 Ohio St. 411, 413, 131 N. E. 706–707. This instruction means that while the jury may not consider general sociological or environmental data, it may consider any such factors which have specifically been admitted into evidence in the case for other purposes. *State* v. *Caldwell,* 135 Ohio St. 424, 21 N. E. 2d 343.[12]

---

[9] *Turner* v. *State,* 21 Ohio Law Abs. 276; *State* v. *Klumpp,* 15 Ohio Op. 2d 461, 175 N. E. 2d 767.

[10] *State* v. *Ames,* 50 Ohio Law Abs. 311, 80 N. E. 2d 168. The result is the same if the sentencing decision is based on a guilty plea or a jury waiver. *State* v. *Lucear,* 93 Ohio App. 281, 109 N. E. 2d 39; *State* v. *Ferguson,* 175 Ohio St. 390, 195 N. E. 2d 794.

[11] *Shelton* v. *State,* 102 Ohio St. 376, 131 N. E. 704 (syllabus).

[12] In *Caldwell* the jury was initially instructed: "[W]hether you recommend or withhold mercy is a matter solely within your discretion, calling for the exercise of your very best and most profound judgment, not motivated by considerations of sympathy or as a means of escaping a hard or disagreeable duty, but must be considered by you in the light of all the circumstances of the case with respect to the evidence submitted to you and the other circumstances surrounding this defendant." Following some deliberation the jury returned for special instructions and the following occurred:

Court: "You should determine whether or not in your discretion

Ashbrook v. *State, supra,* holds that evidence "directed specifically toward a claim for mercy" cannot be introduced. Yet *Howell, Caldwell,* and *Ashbrook* show that once evidence is admitted for other purposes the jury is free to consider it for any purpose. In *Caldwell* the objection of the court was to going *outside the record* for evidence in considering sociological and environmental matters.

This background evidence often comes in through character witnesses. In one case a defendant presented 12 witnesses who testified to his reputation as a peaceful and law-abiding citizen of good character.[13] And even in the instant case petitioner's mother testified concerning his childhood, education, and background.

---

mercy should be granted from a consideration of the evidence, the character of the crime and the attending circumstances."

Foreman: "What are extenuating circumstances? Are they something which we can determine in our own judgment alone?"

Court: "No, if there are any, you must determine them from the evidence."

Foreman: "Well, then, may we consider sociological matters and environment in determining this question of granting mercy?"

Court: "No—they have nothing whatever to do with this case."

At this point defense counsel requested the following instruction:

"In determining whether or not in your discretion you shall grant mercy to the defendant, you may consider environmental factors and sociological conditions, and in determining whether or not these factors exist you shall consider all the evidence permitted to go to you in this case, and all reasonable inferences to be derived therefrom. You may also consider, in making up your mind on the question of mercy, the appearance, demeanor and actions of the defendant as you have seen him here in open court."

The Ohio Supreme Court held it was not error to refuse to give this instruction because it was "substantially identical with those contained in the answers of the court to the jury, and its subject-matter was covered in the general charge. There was no occasion for repetition." 135 Ohio St., at 425–428, 21 N. E. 2d, at 344–345.

[13] *State* v. *Lucear, supra,* n. 10.

But the right of allocution is at best partial and incomplete when the accused himself is barred from testifying on the question of sentencing, and when the only evidence admissible comes from other people or is introduced for different and more limited purposes.

The line between the legislative function and the judicial function is clear. The State can make criminal such conduct as it pleases, save as it is limited by the Constitution itself, as for example by the ban on *ex post facto* laws in Art. I, § 10, or by the Fourteenth Amendment, as where religious exercises or freedom of speech or of the press is involved. It can punish such conduct by such penalties as it chooses, save as its sanctions run afoul of the ban in Art. I, § 10, against bills of attainder or the prohibition against cruel and unusual punishments contained in the Eighth Amendment. The Court is not concerned with the wisdom of state policies, only with the constitutional barriers to state action. Procedural due process [14] is one of those barriers, as revealed over and over again in our decisions. Some of its requirements are explicit in the Bill of Rights—a speedy trial, *Klopfer* v. *North Carolina,* 386 U. S. 213; a trial by jury, *Duncan* v. *Louisiana,* 391 U. S. 145; the right to counsel, *Gideon* v. *Wainwright,* 372 U. S. 335; the right to confrontation, *Pointer* v. *Texas,* 380 U. S. 400—all as made applicable to the States by reason of the Fourteenth Amendment.

Other requirements of procedural due process are only implied, not expressed; their inclusion or exclusion turns on the basic question of fairness. In that category are notice and the right to be heard. *Schroeder* v. *City of*

[14] There have been recurring demands that the Due Process Clause be abolished. See Clark, Some Recent Proposals for Constitutional Amendment, 12 Wis. L. Rev. 313, 324–326 (1937). Others have suggested that due process—apart from the specifics in the Bill of Rights—should mean only such notice, procedures, hearings, or trials

419-882 O - 72 - 20

New York, 371 U. S. 208; *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337. It is a phase of that right to be heard that looms large here.

Crampton had the constitutional right as a matter of procedural due process to be heard on the issue of punishment. We emphasized in *Townsend* v. *Burke,* 334 U. S. 736, 741, how the right to be heard through counsel might be crucial to avoid sentencing on a foundation "extensively and materially false." But the right to be heard is broader than that; it includes the right to speak for one's self. As was said in *Green* v. *United States,* 365 U. S. 301, 304 (opinion of Frankfurter, J.):

> "We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century—the sharp decrease in the number of crimes which were punishable by death, the right of the defendant to testify on his own behalf, and the right to counsel. But we see

---

as are prescribed by Congress or the States. See Burns, The Death of E Pluribus Unum, 19 DePaul L. Rev. 651, 682 (1970).

The critics of the existing regime have been numerous. Mr. Justice Frankfurter once said: "[T]he ultimate justification for nullifying or saying that what Congress did, what the President did, what the legislature of Massachusetts or New York or any other state did was beyond its power, is that provision of the Constitution which protects liberty against infringement without due process of law. There are times, I can assure you—more times than once or twice—when I sit in this chair and wonder whether that isn't too great a power to give to any nine men, no matter how wise, how well disciplined, how disinterested. It covers the whole gamut of political, social, and economic activities." Of Law and Life and Other Things That Matter 129 (1965).

Yet none of us, I dare say, would conclude that (apart from constitutional specifics) any notice, any procedure, any form of hearings, any type of trial prescribed by any legislature would pass muster under procedural due process. Our present disagreement relates to what is essential for a fair trial, if the conventional, historic standards of procedural due process are to apply.

> no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."

The right to be heard, explicit in Rule 32 (a) of the Federal Rules of Criminal Procedure, may at times be denied, absent a showing of "aggravating circumstances" or of a claim that the defendant would have anything to say. See *Hill* v. *United States,* 368 U. S. 424. But where the opportunity to be heard on the sentence is denied both counsel and the defendant, the denial reaches constitutional proportions. See *United States* v. *Johnson,* 315 F. 2d 714, 717.

Whether the voice speaking for the defendant be counsel's voice or the defendant's, the right to be heard is often vital at the sentencing stage before the law decides the punishment of the person found guilty. *Mempa* v. *Rhay,* 389 U. S. 128, 135. The hearing, whether on guilt or punishment, is governed by the requirements of due process. We said in *Specht* v. *Patterson,* 386 U. S. 605, 610:

> "Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own."

If one insists, as in *Hill,* that there be "aggravating circumstances" to raise this right to be heard to a constitutional level, all must agree that no one can ever show more "aggravating" circumstances than the fact

that he stands on the verge of receiving the death sentence.

At least then, the right of allocution becomes a constitutional right—the right to speak to the issues touching on sentencing before one's fate is sealed. Yet where the trial is a unitary one, the right of allocution even in a capital case is theoretical, not real, as the Ohio procedure demonstrates. Petitioner also had the protection of the Self-Incrimination Clause of the Fifth Amendment. To obtain the benefit of the former he would have to surrender the latter. MR. JUSTICE HARLAN, speaking for the Court, said in *Simmons* v. *United States,* 390 U. S. 377, 394: "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."

We made that statement in the context of a case where an accused testified on a motion to suppress evidence in order to protect his Fourth Amendment rights but later discovered that the testimony would be used by the prosecution as "a strong piece of evidence against him." *Id.,* at 391. We held that the protection of his Fourth Amendment rights did not warrant surrender or dilution of his Fifth Amendment rights.

In *United States* v. *Jackson,* 390 U. S. 570, we held unenforceable a federal statute which made the death penalty applicable only to those who contested their guilt before a jury. In that case the "undeniable tension" was between Fifth Amendment rights and Sixth Amendment rights. MR. JUSTICE STEWART speaking for the Court said: "The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those

who choose to exercise them, then it would be patently unconstitutional." *Id.*, at 581.

That "undeniable tension" between two constitutional rights, which led to that result in *Jackson* and to a reversal in *Simmons*, should lead to a reversal here. For the unitary trial or single-verdict trial in practical effect allows the right to be heard on the issue of punishment only by surrendering the protection of the Self-Incrimination Clause of the Fifth Amendment.

The Court of Appeals for the Second Circuit indicated in *United States* v. *Branker*, 418 F. 2d 378, 380, that *Simmons* prevented an accused's testimony at a hearing on his application to proceed *in forma pauperis* and for appointment of counsel to be used by the prosecution as part of its direct case against him:

> "The defendant should enjoy his constitutional rights to counsel and to appeal and the means of supporting his assertion of these rights by his own testimony without running the risk that thereby he may be incriminating himself with respect to the charges pending against him."

The same result was reached by the Court of Appeals for the District of Columbia Circuit in *Melson* v. *Sard*, 131 U. S. App. D. C. 102, 402 F. 2d 653, which held that a parolee who testifies on a hearing in revocation of his parole may give testimony that may not be used in a subsequent criminal trial in violation of the Self-Incrimination Clause of the Fifth Amendment:

> "If a parolee is not given the full and free ability to testify in his own behalf and present his case against revocation, his right to a hearing before the Board would be meaningless. Furthermore, his Fifth Amendment rights must not be conditioned 'by the exaction of a price.'" *Id.*, at 104, 402 F. 2d, at 655.

The words "by the exaction of a price" are from *Garrity* v. *New Jersey,* 385 U. S. 493, 500, where we held that the threat of discharge of a policeman cannot be used to secure incriminatory evidence against him. We said:

> "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. . . . Resort to the federal courts in diversity of citizenship cases is another. . . . Assertion of a First Amendment right is still another. . . . The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. . . . We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Ibid.*

Melson v. *Sard* involved protection of a statutory right to a hearing. *Garrity* involved only employment rights. In the same category is *Thomas* v. *United States,* 368 F. 2d 941, where the Court of Appeals for the Fifth Circuit held a convicted man may not receive a harsher penalty than he would have received if he had waived his Fifth Amendment right. And the Court of Appeals for the District of Columbia Circuit expressed the same view in *Scott* v. *United States,* 135 U. S. App. D. C. 377, 419 F. 2d 264.

If exaction of a constitutional right may not be made for assertion of a statutory right (such as the right to a hearing on parole revocation or the right to appeal), it follows *a fortiori* that the constitutional right to be free from the compulsion of self-incrimination may not be

exacted as a condition to the constitutional right to be heard on the issue of punishment.

The truth is, as MR. JUSTICE BRENNAN points out in his dissent in these cases, that the wooden position of the Court, reflected in today's decision, cannot be reconciled with the evolving gloss of civilized standards which this Court, long before the time of those who now sit here, has been reading into the protective procedural due process safeguards of the Bill of Rights. It is as though a dam had suddenly been placed across the stream of the law on procedural due process, a stream which has grown larger with the passing years.

The Court has history on its side—but history alone. Though nations have been killing men for centuries, felony crimes increase. The vestiges of law enshrined today have roots in barbaric procedures. Barbaric procedures such as ordeal by battle that became imbedded in the law were difficult to dislodge.[15] Though torture was used to exact confessions, felonies mounted. Once it was thought that "sanity" was determined by ascertaining whether a person knew the difference between "right" and "wrong." Once it was a capital offense to steal from the person something "above the value of a shilling." [16]

Insight and understanding have increased with the years, though the springs of crime remain in large part unknown. But our own Federal Bureau of Investigation teaches that brains, not muscle, solve crimes. Coerced confessions are not only offensive to civilized standards but not responsive to the modern needs of criminal investigation. Psychiatry has shown that blind faith in rightness and wrongness is no reliable measure of human

---

[15] See 4 W. Blackstone, Commentaries *347–349. Ordeal by battle was finally abolished in 1819 in England. 59 Geo. 3, c. 46.

[16] 1 J. Stephen, History of the Criminal Law of England 467 (1883).

responsibility. The convergence of new technology for criminal investigation and of new insight into mental disorders has made many ancient legal procedures seem utterly unfair.

Who today would say it was not "cruel and unusual punishment" within the meaning of the Eighth Amendment to impose the death sentence on a man who stole a loaf of bread, or in modern parlance, a sheet of food stamps? Who today would say that trial by battle satisfies the requirements of procedural due process?

We need not read procedural due process as designed to satisfy man's deep-seated sadistic instincts. We need not in deference to those sadistic instincts say we are bound by history from defining procedural due process so as to deny men fair trials. Yet that is what the Court does today. The whole evolution of procedural due process has been in the direction of insisting on fair procedures. As the Court said in *Hebert* v. *Louisiana,* 272 U. S. 312, 316–317:

> "[S]tate action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the States and do not depend upon or vary with local legislation."

One basic application of that test was made in *Moore* v. *Dempsey,* 261 U. S. 86, 91:

> "[I]f the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and

> counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."

To allow a defendant in a state trial to be convicted by confessions "extorted by officers of the State by brutality and violence" was said by Mr. Chief Justice Hughes to be "revolting to the sense of justice" and "a clear denial of due process." *Brown* v. *Mississippi,* 297 U. S. 278, 286.

In 1884 the Court in *Hurtado* v. *California,* 110 U. S. 516, 529, said that due process was not frozen in content as of one point of time: "[T]o hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

The Court went on to point out that though due process has its roots in Magna Carta, the latter contained words that changed with meaning as the centuries passed. *Ibid.* The Court noted that "[t]his flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Id.,* at 530. And it went on to say that the generalities of our Constitution should be treated in the same way:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. . . . There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every

age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Id.*, at 530–531.

The Court pointed out that in England Magna Carta served merely as a restraint on the executive and as a guide to the House of Commons, the keeper of the Constitution. In this Nation, however, the Constitution serves a different function.

> "It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property." *Id.*, at 532.

In more recent times the issue was forcefully stated by MR. JUSTICE BLACK in *Chambers* v. *Florida*, 309 U. S. 227, 236–237:

> "Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed,

> who would not conform and who resisted tyranny. . . . [A] liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

That is all that is involved in this case. It is a mystery how in this day and age a unitary trial that requires an accused to give up one constitutional guarantee to save another constitutional guarantee can be brought within the rubric of procedural due process. It can be done only by a *tour de force* by a majority that stops the growth and evolution of procedural due process at a wholly arbitrary line or harkens to the passions of men. What a great regression it is when the end result is to approve a procedure that makes the killing of people charged with crime turn on the whim or caprice of one man or of 12!

By standards of a fair trial, the resolution of the question of punishment requires rules and procedures different from those pertaining to guilt. Mr. Justice

Butler, speaking for the Court in *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55, said:

> "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him."

Justice [17]—in the sense of procedural due process—is denied where a State makes inadmissible evidence designed to educate the jury on the character and propensities of the accused. Ohio does just that.

We noted in *Williams* v. *New York*, 337 U. S. 241, 249–252, that the States have leeway in making available to judges probation reports "to guide them in the intelligent imposition of sentences" without submitting those reports to open court testimony with cross-examination. We said, "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id.*, at 251. But so far as I can ascertain we never have intimated that a State can, consistently with procedural due process, close the door to evidence relevant to the "intelligent imposition of sentences" either by

---

[17] It is commonly overlooked that justice is one of the goals of our people as expressed in the Preamble of the Constitution:

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

judges or by juries. Cf. *Specht* v. *Patterson, supra,* at 608–609.

It is indeed too late to say that, absent a constitutional amendment, procedural due process has no applicability to the determination of the sentence which is imposed. In *Townsend* v. *Burke, supra,* at 741, we held a state sentence imposed "on the basis of assumptions" concerning the defendant's criminal record "which were materially untrue" was "inconsistent with due process of law" whether the result was caused by "carelessness or design." *A fortiori* it would seem to follow that a procedure, which is designed to bar an opportunity to present evidence showing why "mercy" should be extended to an accused in a death case, lacks that fairness which is implicit in due process.

The unitary trial is certainly not "mercy" oriented. That is, however, not its defect. It has a constitutional infirmity because it is not neutral on the awesome issue of capital punishment. The rules are stacked in favor of death. It is one thing if the legislature decides that the death penalty attaches to defined crimes. It is quite another to leave to judge or jury the discretion to sentence an accused to death or to show mercy under procedures that make the trial death oriented. Then the law becomes a mere pretense, lacking the procedural integrity that would likely result in a fair resolution of the issues. In Ohio, the deficiency in the procedure is compounded by the unreviewability of the failure to grant mercy.[18]

We stated in *Witherspoon* v. *Illinois,* 391 U. S. 510, 521, that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." In that case veniremen had been excluded from a jury for cause "simply because

[18] *Hoppe* v. *State,* 29 Ohio App. 467, 163 N. E. 715.

they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, at 522. We concluded that no defendant "can constitutionally be put to death at the hands of a tribunal so selected." *Id.*, at 522–523.

The tribunal selected by Ohio to choose between death and life imprisoment in first-degree murder cases is not palpably "organized to return a verdict of death" in the *Witherspoon* sense. But the rules governing and restricting its administration of the unitary trial system, place the weights on the side of man's sadistic drive. The exclusion of evidence relevant to the issue of "mercy" is conspicuous proof of that lopsided procedure; and the hazards to an accused resulting from mingling the issues of guilt, insanity, and punishment in one unitary proceeding are multiplied. Whether this procedure would satisfy due process when dealing with lesser offenses may be debated. But with all deference I see no grounds for debate where the stake is life itself.

I would reverse this judgment of conviction.

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

These cases test the viability of principles whose roots draw strength from the very core of the Due Process Clause. The question that petitioners present for our decision is whether the rule of law, basic to our society and binding upon the States by virtue of the Due Process Clause of the Fourteenth Amendment, is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice. The Court does not, however, come to grips with that fundamental question. Instead, the Court misappre-

hends petitioners' argument and deals with the cases as if petitioners contend that due process requires capital sentencing to be carried out under predetermined standards so precise as to be capable of purely mechanical application, entirely eliminating any vestiges of flexibility or discretion in their use. This misapprehended question is then treated in the context of the Court's assumption that the legislatures of Ohio and California are incompetent to express with clarity the bases upon which they have determined that some persons guilty of some crimes should be killed, while others should live—an assumption that, significantly, finds no support in the arguments made by those States in these cases. With the issue so polarized, the Court is led to conclude that the rule of law and the power of the States to kill are in irreconcilable conflict. This conflict the Court resolves in favor of the States' power to kill.

In my view the Court errs at all points from its premises to its conclusions. Unlike the Court, I do not believe that the legislatures of the 50 States are so devoid of wisdom and the power of rational thought that they are unable to face the problem of capital punishment directly, and to determine for themselves the criteria under which convicted capital felons should be chosen to live or die. We are thus not, in my view, faced by the dilemma perceived by the Court, for cases in this Court have for almost a century and a half approved a multiplicity of imaginative procedures designed by the state and federal legislatures to assure evenhanded treatment and ultimate legislative control regarding matters that the legislatures have deemed either too complex or otherwise inapposite for regulation under predetermined rules capable of automatic application in every case. Finally, even if I shared the Court's view that the rule of law and the power of the States to kill are in irreconcilable

conflict, I would have no hesitation in concluding that the rule of law must prevail.

Except where it incorporates specific substantive constitutional guarantees against state infringement, the Due Process Clause of the Fourteenth Amendment does not limit the power of the States to choose among competing social and economic theories in the ordering of life within their respective jurisdictions. But it does require that, if state power is to be exerted, these choices must be made by a responsible organ of state government. For if they are not, the very best that may be hoped for is that state power will be exercised, not upon the basis of any social choice made by the people of the State, but instead merely on the basis of social choices made at the whim of the particular state official wielding the power. If there is no effective supervision of this process to insure consistency of decision, it can amount to nothing more than government by whim. But ours has been "termed a government of laws, and not of men." *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803). Government by whim is the very antithesis of due process.

It is not a mere historical accident that "[t]he history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States,* 318 U. S. 332, 347 (1943) (Frankfurter, J.). The range of permissible state choice among competing social and economic theories is so broad that almost any arbitrary or otherwise impermissible discrimination among individuals may mask itself as nothing more than such a permissible exercise of choice unless procedures are devised which adequately insure that the relevant choice is actually made. Such procedures may take a variety of forms. The decisionmaker may be provided with a set of guidelines to apply in rendering judgment. His decision may be required to rest upon the presence or absence

of specific factors. If the legislature concludes that the range of variation to be dealt with precludes adequate treatment under inflexible, predetermined standards it may adopt more imaginative procedures. The specificity of standards may be relaxed, directing the decisionmaker's attention to the basic policy determinations underlying the statute without binding his action with regard to matters of important but unforeseen detail. He may be instructed to consider a list of factors—either illustrative or exhaustive—intended to illuminate the question presented without setting a fixed balance. The process may draw upon the genius of the common law, and direct itself toward the refinement of understanding through case-by-case development. In such cases decision may be left almost entirely in the hands of the body to which it is delegated, with ultimate legislative supervision on questions of basic policy afforded by requiring the decisionmakers to explain their actions, and evenhanded treatment enhanced by requiring disputed factual issues to be resolved and providing for some form of subsequent review. Creative legislatures may devise yet other procedures. Depending upon the nature and importance of the issues to be decided, the kind of tribunal rendering judgment, the number and frequency of decisions to be made, and the number of separate tribunals involved in the process, these techniques may be applied singly or in combination.

It is of critical importance in the present cases to emphasize that we are not called upon to determine the adequacy or inadequacy of any particular legislative procedure designed to give rationality to the capital sentencing process. For the plain fact is that the legislatures of California and Ohio, whence come these cases, have sought no solution at all. We are not presented with a State's attempt to provide standards, attacked as

419-882 O - 72 - 21

impermissible or inadequate. We are not presented with a legislative attempt to draw wisdom from experience through a process looking toward growth in understanding through the accumulation of a variety of experiences. We are not presented with the slightest attempt to bring the power of reason to bear on the considerations relevant to capital sentencing. We are faced with nothing more than stark legislative abdication. Not once in the history of this Court, until today, have we sustained against a due process challenge such an unguided, unbridled, unreviewable exercise of naked power. Almost a century ago, we found an almost identical California procedure constitutionally inadequate to license a laundry. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 366–367, 369–370 (1886). Today we hold it adequate to license a life. I would reverse petitioners' sentences of death.

I

"Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on *ad hoc* notions of what is right or wrong in a particular case." J. Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, in The Evolution of a Judicial Philosophy 289, 291–292 (D. Shapiro ed., 1969).[1] The dangers inherent in any grant of governmental power without procedural safeguards upon its exercise were known to English law long long before the Constitution was established. See, *e. g.,* 8 How. St. Tr. 55–58, n. The principle that our Government shall be of laws and not of men is so strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the

[1] My Brother HARLAN continues: "The stability and flexibility that our constitutional system at once possesses is largely due to our having carried over into constitutional adjudication the common-law approach to legal development." *Id.,* at 292.

Constitution.[2] And this principle has been central to the decisions of this Court giving content to the Due Process Clause.[3] As we said in *Hurtado* v. *California,* 110 U. S. 516, 535–536 (1884):

> "[I]t is not to be supposed that . . . the amendment prescribing due process of law is too vague and

---

[2] The prohibition against bills of attainder, Art. I, § 9, cl. 3 (federal), § 10, cl. 1 (state), protects individuals or groups against being singled out for legislative instead of judicial trial. See *United States* v. *Brown,* 381 U. S. 437, 442–446 (1965); *id.,* at 462 (dissent); *Cummings* v. *Missouri,* 4 Wall. 277, 322–325 (1867). The prohibition against *ex post facto* laws, joined in the Constitution to the ban on bills of attainder, prevents legislatures from achieving similar ends by indirection, either by making criminal acts that were innocent when performed, *Cummings* v. *Missouri, supra,* at 325–326; *Calder* v. *Bull,* 3 Dall. 386, 390 (1798) (Chase, J.), or by increasing the punishment imposed upon admittedly criminal acts that have already been committed. *In re Medley,* 134 U. S. 160, 166–173 (1890); *Calder* v. *Bull, supra.* The constitutional limitation of federal legislative power to the Congress has been applied to require that fundamental policy choices be made, not by private individuals—or even public officers—acting pursuant to an unguided and unsupervised delegation of legislative authority, but by the Nation as a whole acting through Congress. See, *e. g., FCC* v. *RCA Communications, Inc.,* 346 U. S. 86, 90 (1953); *Lichter* v. *United States,* 334 U. S. 742, 766, 769–773, 778 (1948); *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 529–530, 537–539 (1935); *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 414–430 (1935); *id.,* at 434, 435 (Cardozo, J., dissenting). Finally, the requirement of evenhanded treatment imposed upon the States and their agents by the Equal Protection Clause, see *Cooper* v. *Aaron,* 358 U. S. 1, 16–17 (1958); *McFarland* v. *American Sugar Co.,* 241 U. S. 79, 86–87 (1916) (Holmes, J.), has been applied to the Federal Government as well through the Fifth Amendment's Due Process Clause. *E. g., Shapiro* v. *Thompson,* 394 U. S. 618, 641–642 (1969); *Schneider* v. *Rusk,* 377 U. S. 163, 168–169 (1964); *Bolling* v. *Sharpe,* 347 U. S. 497 (1954).

[3] Thus, although recognizing that the explicit constitutional prohibition against *ex post facto* laws applies only to legislative action, we held in *Bouie* v. *City of Columbia,* 378 U. S. 347, 353–354 (1964),

> indefinite to operate as a practical restraint. . . . Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but . . . 'the general law . . .' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation . . . and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

The principal function of the Due Process Clause is to insure that state power is exercised only pursuant to procedures adequate to vindicate individual rights.[4]

---

that due process was violated by like action on the part of a state court. Significantly, the dissenting Justices in *Bouie* took issue only with the Court's conclusion that the interpretation of the statute in question by the State Supreme Court was not foreshadowed by prior state law. See *id.*, at 366–367. Similarly, although we have held the States not bound, as is the Federal Government, by the doctrine of separation of powers, *Dreyer* v. *Illinois,* 187 U. S. 71, 83–84 (1902); *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255 (1957), we have nevertheless held that state delegation of legislative authority without guideline or check violates due process. *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 120–122 (1928); *Eubank* v. *Richmond,* 226 U. S. 137, 143–144 (1912); cf. *Browning* v. *Hooper,* 269 U. S. 396, 405–406 (1926). See the discussion *infra,* at 271–273. Finally, in *Hurtado* v. *California,* 110 U. S. 516, 535–536 (1884), quoted in the text immediately above, we noted as an example of a clear violation of due process the passage by a legislature of a bill of attainder. Cf. n. 2, *supra,* and cases cited.

[4] We have, of course, applied specific substantive protections of the Bill of Rights to limit state power under the Due Process Clause. *E. g., Near* v. *Minnesota,* 283 U. S. 697 (1931) (First Amendment);

While we have, on rare occasions, held that due process requires specific procedural devices not explicitly commanded by the Bill of Rights,[5] we have generally either indicated one acceptable procedure and left the States free to devise others,[6] or else merely ruled upon the validity or invalidity of a particular procedure without attempting to limit or even guide state choice of procedural mechanisms beyond stating the obvious proposition that inadequate mechanisms may not be employed.[7] Several principles, however, have until today been consistently employed to guide determinations of the adequacy of any given state procedure. "When the Government exacts . . . much, the importance of fair, even-

---

Robinson v. *California,* 370 U. S. 660 (1962) (Eighth Amendment); *Griswold* v. *Connecticut,* 381 U. S. 479, 481–486 (1965) (First, Third, Fourth, Fifth, and Ninth Amendments). Conversely, we have held at least some aspects of the Fourteenth Amendment's Equal Protection Clause applicable to limit federal power under the Due Process Clause of the Fifth Amendment. See *Shapiro* v. *Thompson,* 394 U. S., at 641–642, and cases cited. Finally, we have, of course, held that due process forbids a State from punishing the assertion of federally guaranteed rights whether procedural or otherwise. *North Carolina* v. *Pearce,* 395 U. S. 711, 723–725 (1969); *Spevack* v. *Klein,* 385 U. S. 511 (1967); cf. *Ex parte Hull,* 312 U. S. 546 (1941). But we have long rejected the view, typified by, *e. g., Adkins* v. *Children's Hospital,* 261 U. S. 525 (1923), overruled in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937), that the Due Process Clause vests judges with a roving commission to impose their own notions of wise social policy upon the States. *Ferguson* v. *Skrupa,* 372 U. S. 726, 730–731 (1963).

[5] *E. g., North Carolina* v. *Pearce, supra,* at 725–726 (1969); *Boykin* v. *Alabama,* 395 U. S. 238, 242–244 (1969); see also *Goldberg* v. *Kelly,* 397 U. S. 254, 269–271 (1970).

[6] *E. g., United States* v. *Wade,* 388 U. S. 218, 236–239 (1967); *Miranda* v. *Arizona,* 384 U. S. 436, 467–473 (1966); *Jackson* v. *Denno,* 378 U. S. 368, 377–391 (1964).

[7] *E. g., Johnson* v. *Avery,* 393 U. S. 483, 488–490 (1969); *In re Murchison,* 349 U. S. 133 (1955); *Seattle Trust Co.* v. *Roberge, supra.*

handed, and uniform decisionmaking is obviously intensified." *Gillette* v. *United States,* 401 U. S. 437, 455 (1971). Procedures adequate to determine a welfare claim may not suffice to try a felony charge. Compare *Goldberg* v. *Kelly,* 397 U. S. 254, 270–271 (1970), with *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). Second, even where the only rights to be adjudicated are those created and protected by state law, due process requires that state procedures be adequate to allow all those concerned a fair hearing of their state-law claims. *Boddie* v. *Connecticut,* 401 U. S. 371 (1971); *Covey* v. *Town of Somers,* 351 U. S. 141 (1956); *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306 (1950). Third, where federally protected rights are involved, due process commands not only that state procedure be adequate to assure a fair hearing of federal claims, *In re Gault,* 387 U. S. 1 (1967), but also that it provide adequate opportunity for review of those federal claims where such review is otherwise available. *Goldberg* v. *Kelly,* 397 U. S., at 271; *Boykin* v. *Alabama,* 395 U. S. 238, 242–244 (1969); *Jackson* v. *Denno,* 378 U. S. 368, 387 (1964); cf. *North Carolina* v. *Pearce,* 395 U. S. 711, 725–726 (1969); *In re Murchison,* 349 U. S. 133, 136 (1955). Finally, and closely related to the previous point, due process requires that procedures for the exercise of state power be structured in such a way that, ultimately at least, fundamental choices among competing state policies are resolved by a responsible organ of state government. *Louisiana* v. *United States,* 380 U. S. 145, 152–153 (1965) (BLACK, J.); *FCC* v. *RCA Communications, Inc.,* 346 U. S. 86, 90 (1953); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *United States* v. *Rock Royal Co-op,* 307 U. S. 533, 574, 575 (1939); *Currin* v. *Wallace,* 306 U. S. 1, 15 (1939); *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Browning* v. *Hooper,* 269 U. S. 396, 405–406 (1926); *McKinley* v. *United States,* 249 U. S. 397, 399 (1919); *Eubank* v.

Richmond, 226 U. S. 137, 143–144 (1912); *Yick Wo* v. *Hopkins,* 118 U. S., at 366–367, 369–370. The damage that today's holding, if followed, would do to our constitutional fabric can only be understood from a closer examination of our cases than is contained in the Court's opinion. I therefore turn to those cases.

A

Analysis may usefully begin with this Court's cases applying what has come to be known as the "void-for-vagueness" doctrine. It is sometimes suggested that in holding a statute void for vagueness, this Court is merely applying one of two separate doctrines: first, that a criminal statute must give fair notice of the conduct that it forbids, *e. g., Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Construction Co.,* 269 U. S. 385, 391 (1926); and second, that a statute may not constitutionally be enforced if it indiscriminately sweeps within its ambit conduct that may not be the subject of criminal sanctions as well as conduct that may. *E. g., Baggett* v. *Bullitt,* 377 U. S. 360 (1964); *Dombrowski* v. *Pfister,* 380 U. S. 479, 492–496 (1965). To this is often added the observation that both doctrines apply with particular vigor to state regulation of conduct at or near the boundaries of the First Amendment. See *United States* v. *National Dairy Corp.,* 372 U. S. 29, 36 (1963); *Smith* v. *California,* 361 U. S. 147, 150–152 (1959).[8] But unless it be assumed that our decisions in such matters have shown an almost unparalleled inconsistency, these factors may not be taken as more than a partial explanation of the doctrine.

[8] For analysis in substantially these terms, see, *e. g.,* Collings, Unconstitutional Uncertainty—An Appraisal, 40 Cornell L. Q. 195 (1955); Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533 (1951); Comment, 53 Mich. L. Rev. 264 (1954).

To begin with, we have never treated claims of unconstitutional statutory vagueness in terms of the statute as written or as construed prior to the time of the conduct in question. Instead, we have invariably dealt with the statute as glossed by the courts below at the time of decision here. *E. g., Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966); *Winters* v. *New York,* 333 U. S. 507 (1948); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941). In *Musser* v. *Utah,* 333 U. S. 95 (1948), we even remanded a criminal case to the Utah Supreme Court for a construction of the statute so that its possible vagueness could be analyzed. In dealing with vagueness attacks on federal statutes, we have not hesitated to construe the statute to avoid vagueness problems and, having so construed it, apply it to the case at hand. See *United States* v. *Vuitch, ante,* p. 62 (1971); *Dennis* v. *United States,* 341 U. S. 494, 502 (1951); *Kay* v. *United States,* 303 U. S. 1 (1938). If the vagueness doctrine were fundamentally premised upon a concept of fair notice, such treatment would simply make no sense: a citizen cannot be expected to foresee subsequent construction of a statute by this or any other court. See Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 540–542 (1951). But if, as I believe, the doctrine of vagueness is premised upon the fundamental notion that due process requires governments to make explicit their choices among competing social policies, see *infra,* at 259–265, the inconsistency between theory and practice disappears. Of course such a choice, once made, is not irrevocable: statutes may be amended and statutory construction overruled. Nevertheless, an explicit state choice among possible statutory constructions substantially reduces the likelihood that subsequent convictions under the statute will be based on impermissible

factors.[9] It also renders more effective the available mechanisms for judicial review, by increasing the likelihood that impermissible factors, if relied upon, will be discernible from the record. Thus in *Thompson* v. *Louisville,* 362 U. S. 199 (1960), we were faced with the application of a specific vagrancy statute to conduct—dancing in a public bar—that there is no reason to believe could not have been constitutionally prohibited had the State chosen to do so. We were, however, able to examine the record and conclude that there was in fact no evidence that could support a conviction under the statute. Cf. *Bachellar* v. *Maryland,* 397 U. S. 564 (1970) (impossible to determine whether verdict rested upon permissible or impermissible grounds).

Second, in dealing with statutes that are unconstitutionally overbroad, we have consistently indicated that "once an acceptable limiting construction is obtained, [such a statute] may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants." *Dombrowski* v. *Pfister,* 380 U. S., at 491 n. 7 (citations omitted);[10] see, *e. g., Poulos* v. *New Hampshire,* 345 U. S. 395 (1953). That is, an unconstitutionally overbroad statute may not be enforced *at all* until an acceptable construction has been obtained, *e. g., Thornhill* v. *Alabama,*

[9] A vague statute may be applied one way to one person and a different way to another. Aside from the fact that this in itself would constitute a denial of equal protection, *Niemotko* v. *Maryland,* 340 U. S. 268, 272 (1951), cf. H. Black, A Constitutional Faith 31–32 (1969), the reasons underlying different applications to different individuals may in themselves be constitutionally impermissible. Cf. *Schacht* v. *United States,* 398 U. S. 58 (1970) (applicability of statute determined by political views); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) (application of statute on racial basis).

[10] *Younger* v. *Harris,* 401 U. S. 37 (1971), and its companions cast no shadow upon the sentence quoted.

310 U. S. 88 (1940); but once such a construction has been made, the statute as construed may be applied to conduct occurring prior to the limiting construction. If notice and overbreadth were the only components of the vagueness doctrine, this treatment would, once again, be inexplicable. So far as notice is concerned, one who has engaged in certain conduct prior to the limiting construction of an overbroad statute has obviously not received from that construction any warning that would have enabled him to keep his conduct within the bounds of law. Similarly, if adequate notice has in fact been given by an overbroad statute that certain conduct was criminally punishable, it is hard to see how the doctrine of overbreadth is furthered by forbidding the State, on the one hand, to punish that conduct so long as an acceptable limiting construction has not been obtained, but permitting it to punish the same, prior conduct once the statute has been acceptably construed. Once again, however, our actions are not at all inexplicable if examined in the terms articulated here. Once an acceptable limiting construction has in fact been obtained, there is by that very fact an assurance that a responsible organ of state power has made an explicit choice among possible alternative policies: for it should not be forgotten that the States possess constitutional *power* to make criminal much conduct that they may not wish to forbid, or may even desire to encourage. If a vague or overbroad statute is applied before it has been acceptably construed, there remains the danger that an individual whose conduct is admittedly clearly within the scope of the statute on its face will be punished for actions which in fact the State does not desire to make generally punishable—conduct which, if engaged in by another person, would not be subject to criminal liability. *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 91–92 (1965). Allowing a vague or overbroad statute to be enforced if, and only if, an acceptable con-

struction has been obtained forces the State to make explicit its social choices and prevents discrimination through the application of one policy to one person and another policy to others.[11]

---

[11] A closely related proposition may be derived from a separate line of cases. In *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25 (1959), we upheld abstention by a federal district court in a diversity action from decision whether, under a state statute never construed by the Louisiana courts, cities in the State possessed the power to take local gas and electric companies by eminent domain. The same day, in *Allegheny County* v. *Frank Mashuda Co.,* 360 U. S. 185 (1959), we upheld the action of another district court in refusing to abstain from decision whether, under state law allowing takings for public but not for private use, Allegheny County possessed the power to take a particular property for a particular use. Are the decisions irreconcilable? As we have often remarked, the basis of diversity jurisdiction is "the supposition that, possibly, the state tribunal[s] might not be impartial between their own citizens and foreigners." *Pease* v. *Peck,* 18 How. 595, 599 (1856). The question of state law presented in *Thibodaux* was a broad one having substantial ramifications beyond the lawsuit at hand. Any prejudice against the out-of-state company involved in that case could have been given effect in state courts only at the cost of a possibly incorrect decision that would have significant adverse effect upon state citizens as well as the particular outsider involved in the suit. In *Mashuda,* on the other hand, decision one way or another would have little or no effect beyond the case in question: any possible state bias against out-of-Staters could be given full effect without hampering any significant state policy. Taken together, then, *Thibodaux* and *Mashuda* may stand for the proposition that the possibility of bias that stands at the foundation of federal diversity jurisdiction may nevertheless be discounted if that bias could be given effect only through a decision that will have inevitable repercussions on a matter of fundamental state policy. Put another way, *Thibodaux* and *Mashuda* may serve to illustrate in another context the principle that necessarily underlies many of this Court's "vagueness" decisions: the due process requirement that States make explicit their choice among competing views on questions of fundamental state policy serves to enforce the requirement of evenhanded treatment that due process commands.

Particularly relevant to the present case is our decision in *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966). That case involved a statute whereby Pennsylvania attempted to mitigate the harshness of its common-law rule requiring criminal defendants to pay the costs of prosecution in all cases [12] by committing the matter to the discretion of the jury in cases where the defendant was found not guilty.[13] Two members of this Court, concurring in the result, would have held that due process forbade the imposition of costs upon an acquitted defendant. 382 U. S., at 405. We refused, however, to base our decision on that ground. In an opinion by my Brother BLACK, we said:

> "We agree with the trial court . . . that the 1860 Act is invalid under the Due Process Clause because of vagueness and the *absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs.*
>
> . . . . . .
>
> ". . . It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or *leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.* This 1860 Pennsylvania Act contains no standards at all . . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the

---

[12] See Brief for Appellee in *Giaccio,* No. 47, O. T. 1965, pp. 8–10; *Commonwealth* v. *Tilghman,* 4 S. & R. 127 (Pa. Sup. Ct. 1818); Act of March 20, 1797, 3 Smith's Laws 281 (Pa.).

[13] Some standards were provided to guide the jury's decision. See 382 U. S., at 403–404. See App. 30–32 in *Giaccio* for the charge given in that case.

> Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that *the law must be one that carries an understandable meaning with legal standards that courts must enforce.* . . .
>
> ". . . The State contends that . . . state court interpretations have provided standards and guides that cure the . . . constitutional deficiencies. We do not agree. . . . In this case the trial judge instructed the jury that it might place the costs of prosecution on the appellant, though found not guilty of the crime charged, if the jury found that 'he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction [and] . . . his misconduct has given rise to the prosecution.'
>
> "It may possibly be that the trial court's charge comes nearer to *giving a guide to the jury* than those that preceded it, but it still falls short of the kind of legal standard due process requires. . . ." 382 U. S., at 402–404 (emphasis added) (citations omitted).[14]

Several features of *Giaccio* are especially pertinent in the present context. First, there were no First Amendment implications in either the conduct charged or that in which Giaccio claimed to have engaged: the State's evidence was to the effect that Giaccio had wantonly discharged a firearm at another, in violation of Pa. Stat.

[14] We did in *Giaccio* say that "we intend to cast no doubt whatever on the constitutionality of the settled practice of many States" prescribing jury sentencing. 382 U. S., at 405 n. 8. Insofar as jury sentencing *in general* is concerned, *Giaccio* is by no means necessarily inconsistent with the practice. See *infra,* at 311.

Ann., Tit. 18, § 4716 (1963), and Giaccio's defense was that "the firearm he had discharged was a starter pistol which only fired blanks." 382 U. S., at 400. Second, we were not presented with a defendant who had been convicted for conduct he could not have known was unlawful. Whether or not Giaccio's actions fell within § 4716, his conduct was unquestionably punishable under other state laws, *e. g.*, Pa. Stat. Ann., Tit. 18, § 4406 (1963). Finally, it is worthy of note that in *Giaccio* two members of this Court explicitly sought to base the result upon the ground that, as a matter of substantive due process, the States were forbidden to impose the costs of prosecution upon an acquitted defendant. 382 U. S., at 405 (concurring opinions of STEWART and Fortas, JJ.). Yet we refused to place decision on any such ground. We held instead, consistently with our prior decisions, that the procedure for determining Giaccio's punishment lacked the safeguards against arbitrary action that are required by due process of law.[15]

---

[15] I find little short of bewildering the Court's treatment of *Giaccio*. The Court appears to read that case as standing for the proposition that due process forbids a jury to impose punishment upon defendants for conduct which, "although not amounting to the crime with which they were charged, was nevertheless found to be 'reprehensible.'" *Ante*, at 207 n. 18. Of course, the procedures under review permit precisely the same action, without providing even the minimal safeguards found insufficient in *Giaccio*. See Part III, *infra*. If there is a difference between *Giaccio* and the present cases, it is that the procedures now under review apply, not to acquitted defendants, but only to those who have already been found guilty of some crime. But the Court elsewhere in its opinion has concluded that the "relevant differences between sentencing and determination of guilt or innocence are not so great as to call for a difference in constitutional result." *Ante*, at 217. I think it is fair to say that nowhere in its treatment of *Giaccio* does the Court even attempt to explain why the unspecified "relevant differences" that it finds *do* call for "a difference in constitutional result."

Our decisions applying the Due Process Clause through the doctrine of unconstitutional vagueness, then, lead to the following conclusions. First, the protection against arbitrary and discriminatory action embodied in the Due Process Clause requires that state power be exerted only through mechanisms that assure that fundamental choices among competing state policies be explicitly made by some responsible organ of the State.[16] Second, the cases suggest that due process requires as well that state procedures for decision of questions that may have adverse consequences for an individual neither leave room for the deprivation *sub silentio* of the individual's federally protected rights nor unduly frustrate the federal judicial review provided for the vindication of those rights. This second point is explicitly made in a not unrelated line of cases, to which I now turn.

---

[16] This same point may be made another way. We have consistently held that the Due Process Clause protects individuals against arbitrary governmental action. Despite sharp conflict among the members of this Court over the standards to be applied in determining whether governmental action is in fact "arbitrary," see, *e. g., Griswold* v. *Connecticut,* 381 U. S. 479, 499 (1965) (HARLAN, J., concurring in judgment); *id.,* at 507 (BLACK, J., dissenting), all members of this Court have agreed that the phrase has some content. *E. g., Giaccio* v. *Pennsylvania,* 382 U. S., at 402 (BLACK, J.) (due process requires defendants to be protected "against arbitrary and discriminatory" punishment). Our vagueness cases suggest that state action is arbitrary and therefore violative of due process not only if it is (a) based upon distinctions which the State is specifically forbidden to make, *e. g., Loving* v. *Virginia,* 388 U. S. 1, 12 (1967); or (b) designed to, or has the effect of, punishing an individual for the assertion of federally protected rights, *e. g., North Carolina* v. *Pearce,* 395 U. S. 711, 723–725 (1969); *id.,* at 739 (BLACK, J.), but also if it is (c) based upon a permissible state policy choice which could be, but has never been, explicitly made by any responsible organ of the State.

B

Whether through its own force or only through the application of other, specific constitutional guarantees, the Due Process Clause of the Fourteenth Amendment protects individuals from a narrow class of impermissible exertions of power by the States. As applied to the procedures whereby admittedly permissible state power is exerted, however, the Due Process Clause has consistently been given a wider scope. "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison,* 349 U. S. 133, 136 (1955). Thus, we have never suggested that every judge who has been the target of contemptuous, personal attacks by litigants or their attorneys is *incapable* of rendering a fair decision on the merits of a contempt charge against such persons; but we have consistently held that, excepting only cases of urgent necessity, due process requires that contempt charges in such cases be heard by a different judge. *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971); *In re Murchison, supra.* And in *Tumey* v. *Ohio,* 273 U. S. 510 (1927), we did not suggest that every judgment rendered by an official who had a financial stake in the outcome was *ipso facto* the product of bias. Proceeding from a directly contrary assumption,[17] we nevertheless held that due process was violated by any "procedure which would offer a possible temptation to the average man . . . not to hold the balance nice, clear and true between the State and the accused." *Id.,* at 532. In *Jackson* v. *Denno,* 378 U. S. 368 (1964), one of the two grounds on which we struck down a New York procedure that required a jury to determine the

[17] "There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it . . . ." 273 U. S., at 532.

voluntariness of a confession at the same time that it determined his guilt of the crime charged was that the procedure created an impermissible—and virtually unreviewable—risk that the jury would not be able to disregard a confession that it felt was both involuntary and true. *Id.*, at 388–391. Similarly, in a long line of cases beginning with *Lovell* v. *Griffin,* 303 U. S. 444 (1938), we have repeatedly held that due process is violated by state procedures for the administration of permit systems regulating the public exercise of First Amendment rights if the procedure allows a permit to be denied for impermissible reasons, whether or not an individual can actually demonstrate that he was denied a permit for activity which the State could not lawfully prohibit. And only recently, in *Louisiana* v. *United States,* 380 U. S. 145 (1965), we were faced with a state procedure for determining voting qualifications that, in the State's own words, vested "discretion in the registrars of voters to determine the qualifications of applicants for registration," but imposed "no definite and objective standards upon registrars of voters for the administration of the interpretation test." *Id.*, at 152. After quoting, with apparent approval, an 1898 state criticism of a similar procedure on the ground that the "arbitrary power, lodged with the registration officer, practically places his decision beyond the pale of judicial review," *ibid.*, we noted and accepted the District Court's finding that "Louisiana . . . provides no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or redressed." *Ibid.* We continued:

> "The applicant facing a registrar in Louisiana thus has been compelled to leave his voting fate to that official's uncontrolled power to determine whether the applicant's understanding of the Federal or State Constitution is satisfactory. . . . The cherished

419-882 O - 72 - 22

> right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints." 380 U. S., at 152–153.

On that basis we held the Louisiana procedure for determining the qualifications of prospective voters to be a denial of due process. *Ibid.*[18]

Diverse as they are, these cases rest upon common ground. They all stand ineluctably for the proposition that due process requires more of the States than that they not exert state power in impermissible ways. Specifically, the rule of these cases is that state procedures are inadequate under the Due Process Clause unless they are designed to control arbitrary action and also to make meaningful the otherwise available mechanism for judicial review. We have elsewhere made this last point explicit. In *Specht* v. *Patterson,* 386 U. S. 605 (1967), we held that due process in commitment proceedings, "whether denominated civil or criminal," *id.,* at 608, requires "findings adequate to make meaningful any appeal that is allowed." *Id.,* at 610; see *Garner* v. *Louisiana,* 368 U. S. 157, 173 (1961). And in *Jackson* v. *Denno, supra,* the alternative ground on which we struck down a New York procedure for determining the voluntariness of a confession by submitting that question to the jury at the same time as the question of guilt was that the "admixture of reliability and voluntariness in the considerations of the jury would itself entitle a defendant to further proceedings in any case in which the essential

---

[18] We held, as an alternative ground, that the Louisiana procedure as applied had violated the Fifteenth Amendment. 380 U. S., at 152–153.

facts are disputed, for we cannot determine how the jury resolved these issues *and will not assume that they were reliably and properly resolved against the accused.*" 378 U. S., at 387 (emphasis added). In other words, due process forbids the States to adopt procedures that would defeat the institution of federal judicial review.[19]

The depth to which these principles are embedded in the concept of due process is evidenced by the fact that we have, on occasion, applied them not merely to rule that a particular state procedure is or is not permissible under the Due Process Clause, but that a particular, specific procedure is *required* by due process. We have repeatedly held, for example, that a guilty plea and its inevitably attendant waivers of federally guaranteed rights are valid only if they represent a "voluntary and intelligent choice" on the part of the defendant. *North Carolina* v. *Alford,* 400 U. S. 25, 31 (1970). The validity of a guilty plea may be tested on federal habeas corpus, where facts outside the record may be pleaded and proved. *Waley* v. *Johnston,* 316 U. S. 101 (1942). While recognizing the existence of such a remedy, we held in *Boykin* v. *Alabama,* 395 U. S. 238 (1969), that due process requires a record "adequate for any review that may be later sought," *id.,* at 244, and does not permit protection of the federally guaranteed rights to be relegated to "collateral proceedings that seek to probe murky memories." *Ibid.* Accordingly, we held that due process requires a State, in accepting a plea of guilty, to make a contemporaneous record adequate "to show that [the defendant] had intelligently and knowingly pleaded guilty." *Id.,* at 241. And only last Term, in *Goldberg*

[19] See also 378 U. S., at 392: "If this case were here upon direct review of Jackson's conviction, we could not proceed with review on the assumption that these disputes had been resolved in favor of the State for as we have held we are . . . unable to tell how the jury resolved these matters . . . ."

v. *Kelly,* 397 U. S. 254 (1970), we held that because a decision on the withdrawal of welfare benefits must "rest solely on the legal rules and evidence adduced at the hearing," *id.,* at 271, due process requires that the decision-maker "demonstrate compliance with this elementary requirement" by "stat[ing] the reasons for his determination and indicat[ing] the evidence he relied on." *Ibid.*

C

In my view, the cases discussed above establish beyond peradventure the following propositions. *First,* due process of law requires the States to protect individuals against the arbitrary exercise of state power by assuring that the fundamental policy choices underlying any exercise of state power are explicitly articulated by some responsible organ of state government. *Second,* due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected. *Third,* where federally protected rights are involved due process of law is denied by state procedures which render inefficacious the federal judicial machinery that has been established for the vindication of those rights. If there is any way in which these propositions must be qualified, it is only that in some circumstances the impossibility of certain procedures may be sufficient to permit state power to be exercised notwithstanding their absence. Cf. *Carroll* v. *President and Commissioners,* 393 U. S. 175, 182, 184–185 (1968). But the judgment that a procedural safeguard otherwise required by the Due Process Clause is impossible of application in particular circumstances is not one to be lightly made. This is all the more so when, as in the present cases, the argument of impossibility is not made by the parties before us, but only by this Court. Before we

conclude that capital sentencing is inevitably a matter of such complexity that it cannot be carried out in consonance with the fundamental requirements of due process, we should at the very least examine the mechanisms developed in not incomparable situations and previously approved by this Court. Therefore, before examining the specific capital sentencing procedures at issue in these cases in light of the Due Process Clause, I am compelled to discuss both the mechanisms available for the control of arbitrary action and the nature of the capital sentencing process.

II

A legislature that has determined that the State should kill some but not all of the persons whom it has convicted of certain crimes must inevitably determine how the State is to distinguish those who are to be killed from those who are not. Depending ultimately on the legislature's notion of wise penological policy, that distinction may be hard or easy to make.[20] But capital sentencing is not the only difficult question with which legislatures have ever been faced. At least since *Wayman* v. *Southard,* 10 Wheat. 1 (1825), we have recognized that the Constitution does not prohibit Congress from dealing with such questions by delegating to others the responsibility for their determination. It is not my purpose to trace in detail either the sources and scope of the delegation doctrine or the extent to which it is applicable to the States through the Due Process Clause.

[20] It is essential to bear in mind that the complexity of capital sentencing determinations is a function of the penological policy applied. A State might conclude, for example, that murderers should be sentenced to death if and only if they had committed more than one such crime. Application of such a criterion to the facts of any particular case would then be relatively simple.

It is sufficient to state that in my view, whatever the sources of the doctrine,[21] its application to the States as a matter of due process[22] is merely a reflection of the fundamental principles of due process already discussed: in my Brother HARLAN's words, the delegation doctrine

> "insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people [and] prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged." *Arizona* v.

---

[21] As applied to the Federal Government, the doctrine appears to have roots both in the constitutional requirement of separation of powers—not, of course, applicable itself to the States, *Dreyer* v. *Illinois*, 187 U. S., at 83–84; *Sweezy* v. *New Hampshire*, 354 U. S., at 255—and in the Due Process Clause of the Fifth Amendment. See, *e. g.*, *Wayman* v. *Southard*, 10 Wheat. 1, 13–14 (1825) (argument of counsel) (due process and separation of powers); *Field* v. *Clark*, 143 U. S. 649, 692 (1892) (separation of powers); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 310–312 (1936) (due process). The two doctrines are not unrelated: in the words of Mr. Justice Brandeis, "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." *Myers* v. *United States*, 272 U. S. 52, 293 (1926) (dissent).

[22] At least since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), we have indicated that due process places limits on the manner and extent to which a state legislature may delegate to others powers which the legislature might admittedly exercise itself. *E. g.*, *Eubank* v. *Richmond*, 226 U. S. 137 (1912); *Embree* v. *Kansas City Road District*, 240 U. S. 242 (1916); *Browning* v. *Hooper*, 269 U. S. 396 (1926); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 457, 465 (1927); *Miller* v. *Schoene*, 276 U. S. 272 (1928); *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116 (1928); *Louisiana* v. *United States*, 380 U. S. 145 (1965); *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966). See Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937).

California, 373 U. S. 546, 626 (1963) (dissenting in part).[23]

My intention here is merely to provide an admittedly brief sketch of the several mechanisms that Congress has employed to assure that even with regard to the most complex and intractable problems, delegation by Congress of the power to make law has been subject to controls that limit the possibility of arbitrary action and that assure that Congress retains the responsibility for ultimate decision of fundamental questions of national policy. With these mechanisms in mind, I intend briefly to discuss the considerations relevant to the problem of capital sentencing with an eye to the question whether it may responsibly be said that all of these mechanisms are impossible of application by the States to the capital sentencing process.

A

At the outset, candor compels recognition that our cases regarding the delegation by Congress of lawmaking power do not always say what they seem to mean. Kenneth Culp Davis has been instrumental in pointing out the "unreality" [24] of judicial language appearing to direct attention solely to the presence or absence of statutory "standards" [25] or an "intelligible principle" [26] by which delegated authority may be guided. See generally 1

---

[23] The passage quoted is explicitly an exegesis on the separation of powers. The point here is that, as discussed above, precisely the same functions are performed by the Due Process Clause. For a recent and original analysis to precisely the same effect, see K. Davis, Administrative Law Treatise §§ 2.00 to 2.00–6 (Supp. 1970).

[24] 1 K. Davis, Administrative Law Treatise § 2.03, at 82 (1958).

[25] *E. g., Yakus* v. *United States,* 321 U. S. 414, 423–424 (1944).

[26] The phrase is Mr. Chief Justice Taft's, from *Hampton & Co.* v. *United States,* 276 U. S. 394, 409 (1928).

K. Davis, Administrative Law Treatise §§ 2.01 to 2.05 (1958). In his words,

> "The difficulty and complexity of some types of policy determination requires that the legislative body should be allowed to provide for the administrative working out of basic policy through the use of specialized tribunals which use the common-law method of concentrating upon one particular, narrow, and concrete problem at a time. The protection of advance legislative guidance is of little or no consequence as compared with the protection that can and should be provided through adequate procedural safeguards, appropriate legislative supervision or reexamination, and the accustomed scope of judicial review.
>
> . . . . . .
>
> "The protection that comes from a hearing with a determination on the record, from specific findings and reasons, from opportunity for outside critics to compare one case with another, from critical supervision by the legislative authority . . . and from judicial review—all this is likely to be superior to protection afforded by definiteness of standards." *Id.*, §§ 2.05, at 98–99, 2.09, at 111 (1958).[27]

---

[27] Professor Davis has just recently suggested that, insofar as it presupposes a search for legislative standards, the doctrine prohibiting undue delegation of legislative power be explicitly abandoned. "The time has come for the courts to acknowledge that the nondelegation doctrine is unsatisfactory and to invent better ways to protect against arbitrary administrative power.

"The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards; its purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power. The focus . . . should be on the totality of

The point made by Professor Davis has, I think, often been recognized by Congress. It is not surprising, then, to see that in many instances Congress has focused its attention much less upon the definition of precise statutory standards than on the creation of other means adequate to assure that policy is set in accordance with congressional desires and that individuals are treated according to uniform principles rather than administrative whim. Viewed in this light, our cases may be considered as illustrating at least three legislative techniques.

First. In a number of instances, Congress has in fact undertaken to regulate even rather complex questions by the prescription of relatively specific standards. It is certainly an open question whether determining what conduct should be subject to criminal sanctions is any more difficult than determining what those sanctions should be; yet Congress and the state legislatures as well have regularly passed criminal codes embodying, in the main, statutes directed at specifically and narrowly defined conduct.[28] Similarly, the Congress resolved what was certainly one of the most delicate and complex questions before it in recent years—the extent, if any, to which the national interest warranted federal regulation of organizations, including political parties, infiltrated by, dominated by, or subject to foreign control—not by leaving the matter to anyone else but by defining with careful particularity the characteristics that were required before

---

protections against arbitrariness, including both safeguards and standards." Administrative Law Treatise, § 2.00, at 40 (Supp. 1970). Adoption of this approach, he suggests, would cause the delegation doctrine to "merge with the concept of due process." *Id.*, § 2.00–6, at 58.

[28] Of course, where Congress has intended only to provide criminal sanctions intended to further a regulatory scheme it has often simply made criminal the willful violation of administrative regulations rather than enacting statutes outlawing specific conduct. *E. g.*, 26 U. S. C. § 7203.

an organization could be subject to such regulation. See 50 U. S. C. §§ 782 (3), (4), (4A), (5) (1964 ed., Supp. V); *Communist Party* v. *SACB*, 367 U. S. 1 (1961). Congressional response to the complex and intractable problems of the depression era occasionally took a similar form. Thus the Act approved in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533 (1939), stated a congressional policy to restore parity prices in milk, defined the term, and delegated to the Secretary of Agriculture only the power to issue orders in terms themselves specified in the Act, commanding minimum prices to be determined in accordance with prescribed standards, to be applicable in areas where prices had fallen below the limit set by Congress. See *id.*, at 575–577.

Second. In other circumstances, Congress has granted to others the power to prescribe fixed rules to govern future activity and adjudications. Such delegations of power permit the legislature to declare the end sought and leave technical matters in the hands of experts,[29] or to leave to others the task of devising specific rules to carry out congressional policy in a variety of factual situations.[30] Where, as is often the case, even major policy decisions may turn on specialized knowledge and expertise beyond legislative ken, delegation of rulemaking power may be made under broad standards to a body chosen for familiarity with the subject matter to be regulated.[31] But entirely aside from whatever procedural

[29] *E. g., Buttfield* v. *Stranahan*, 192 U. S. 470 (1904) (congressional directive to prohibit importation of tea that is impure or unfit for consumption; standards of purity and fitness to be prescribed by administrator).

[30] *E. g., United States* v. *Grimaud*, 220 U. S. 506 (1911) (delegation of power to make regulations for use of national forests to "improve and protect" the forests).

[31] *E. g., Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969) ("fairness doctrine"); *NBC* v. *United States*, 319 U. S. 190 (1943) (regulation of network-station contracts).

protections may be afforded interested parties prior to the promulgation of administrative rules,[32] the very nature of the rulemaking process provides significant guarantees both of evenhanded treatment and of ultimate legislative supervision of fundamental policy questions. Significantly, we have upheld delegations of rulemaking power without standards to guide its exercise only in two narrowly limited classes of cases.[33] We have otherwise searched the statute, the legislative history, and the context in which the regulation was enacted in order to discern and articulate a legislative policy.[34] The point is not whether an intelligible legislative policy was or was not correctly inferred from the statute. The point is that such a policy, once expressly articulated, not only serves to guide subsequent administrative and judicial action but also provides a basis upon which the legislature may determine whether power is being exercised in ac-

---

[32] Most substantive exercises of federal rulemaking power are now governed by the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* (1964 ed., Supp. V).

[33] Ever since *Wayman* v. *Southard,* 10 Wheat. 1 (1825), we have regularly upheld congressional delegation to courts and agencies of the power to make their own rules of procedure. Cf. 5 U. S. C. § 553 (b)(3)(A) (1964 ed., Supp. V), excepting procedural rules from the requirements otherwise imposed on rulemaking procedures by the Administrative Procedure Act. Second, we have regularly upheld federal statutes that seek to further state policies by adopting or enforcing state law. *E. g., United States* v. *Howard,* 352 U. S. 212 (1957).

[34] *Fahey* v. *Mallonee,* 332 U. S. 245, 250, 253 (1947), found broad statutory standards drawing content from "accumulated experience" that "established well-defined practices." In *American Trucking Assns.* v. *United States,* 344 U. S. 298 (1953), we sustained an exercise of rulemaking power on the basis that the rules, which dealt with matters not explicitly mentioned in the statute, were reasonably necessary to prevent frustration of specific provisions of the Act. *Id.,* at 310–313.

cordance with its will.[35] Where no intelligible resolution of fundamental policy questions can be discerned from a statute or judicial decisions, the rulemaking process itself serves to make explicit the agency's resolution of these questions, thus allowing for meaningful legislative supervision,[36] as well as providing bases both for judicial review of agency action supposedly premised on the rule[37] and for refinement of an old rule in light of experience gained in its administration.

Third. Perhaps the most common legislative technique for dealing with complex questions that will arise in a myriad of factual contexts has been the delegation to another group of lawmaking power which may be exercised either through rulemaking or the adjudication of individual cases, with choice between the two left to the agency's judgment. Such schemes, while allowing broad flexibility for the working out of policy on a case-by-case basis, nevertheless have invariably provided substantial protections to insure against arbitrary action and to guarantee that underlying questions of policy are considered and resolved. As with the delegation simply of rulemaking power, we have often found substantial guidance in the language and history of the governing statute. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12 (1932); *Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266 (1933); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381 (1940). Agency action under such delegations must typically be premised upon an explanation of both the findings and reasons for a given

[35] Compare *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113 (1940), with 66 Stat. 308, 41 U. S. C. § 43a; compare *United States* v. *Wunderlich,* 342 U. S. 98 (1951), with 68 Stat. 81, 41 U. S. C. §§ 321, 322.

[36] See, *e. g.,* congressional revision of the Federal Trade Commission's rule regarding cigarette advertising, 29 Fed. Reg. 8325 (1964), in 79 Stat. 282 (1965).

[37] *Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954).

decision, *e. g.*, 5 U. S. C. § 557 (c)(3) (1964 ed., Supp. V), a requirement we have held to be far more than an empty formality. *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943); *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 196–197 (1941). The regular course of adjudication by a continuing body required to explain the reasoning upon which its decisions are based results in the accumulation of a body of precedent from which, over time, general principles may be deduced. See, *e. g.*, the history of the Federal Communications Commission's "fairness doctrine," traced in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 375–379 (1969). We have often noted the importance of administrative or judicial review in providing a check on the exercise of arbitrary power, *Mulford* v. *Smith*, 307 U. S. 38, 49 (1939); *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 105 (1946), and we have made clear that judicial review is designed to reinforce internal protections against arbitrary or unconsidered action while leaving questions of policy to the agency or the Congress. Thus we have withheld approval from agency action unsupported by an indication of the reasons for that action, *Phelps Dodge Corp.* v. *NLRB*, *supra;* where the reasons articulated were improper, *Sicurella* v. *United States*, 348 U. S. 385 (1955), even though the record might well support identical action taken for different reasons, *SEC* v. *Chenery Corp.*, *supra;* where administrative expertise relevant to the solution of a problem had never been brought to bear upon it, *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 91–92 (1953); where an apparent conflict in administrative rationales had never been explained by the agency, *Barrett Line, Inc.* v. *United States*, 326 U. S. 179 (1945); and where a change in agency policy had taken place after the particular adjudication concerned, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 615–616 (1969).

Combination of rulemaking and adjudicatory powers has proved a particularly useful tool in situations where prescription of detailed standards in the first instance has been difficult or impossible for the Congress, yet the variety of factual situations has rendered particularly important protection against random or arbitrary decisions. Thus in *Lichter* v. *United States,* 334 U. S. 742 (1948),[38] this Court dealt with the provisions of the original Renegotiation Act, passed in April 1942, which directed various administrative officials to proceed with compulsory "renegotiation" of contracts that had resulted in "excessive profits." The Act as originally passed attempted no definition of such profits; within four months, however, administrative practice had solidified about a list of six factors to be considered in determining whether profits were excessive; slightly more than two months later, these factors were adopted by Congress in an amendment to the Act. In upholding the original Act against a claim of excessive delegation, we stressed both the rapid development of generally applicable standards, *id.,* at 766, 769, 771, 773–774, 778, 783, and the availability of judicial review to check arbitrary or inconsistent administrative action. *Id.,* at 770, 771, 786–787.

B

The next question is whether there is anything inherent in the nature of capital sentencing that makes impossible the application of any or all of the means that have been elsewhere devised to check arbitrary action. I think it is fair to say that the Court has provided no explanation for its conclusion that capital sentencing is inherently incapable of rational treatment. Instead, it relies primarily on the Report of the [British] Royal Commission

[38] *Lichter* has been termed by Professor Davis "in some respects the greatest delegation upheld by the Supreme Court." 1 K. Davis, Administrative Law Treatise § 2.03, at 86 (1958).

on Capital Punishment, which reaches conclusions substantially identical with the following urged in 1785 by Archdeacon William Paley to justify England's "Bloody Code" of more than 250 capital crimes:

> "[T]he selection of proper objects for capital punishment principally depends upon circumstances, which, however easy to perceive in each particular case after the crime is committed, it is impossible to enumerate or define beforehand; or to ascertain, however, with that exactness, which is requisite in legal descriptions. Hence, although it be necessary to fix, by precise rules of law, the boundary on one side . . . yet the mitigation of punishment . . . may, without danger, be intrusted to the executive magistrate, whose discretion will operate upon those numerous, unforeseen, mutable and indefinite circumstances, both of the crime and the criminal, which constitute or qualify the malignity of each offence. . . . For if judgment of death were reserved for one or two species of crimes only . . . crimes might occur of the most dangerous example, and accompanied with circumstances of heinous aggravation, which did not fall within *any* description of offences that the laws had made capital, and which, consequently, could not receive the punishment their own malignity and the public safety required. . . .
>
> "The law of England is constructed upon a different and a better policy. By the number of statutes creating capital offences, it sweeps into the net every crime, which under any possible circumstances may merit the punishment of death: but, when the execution of this sentence comes to be deliberated upon, a small proportion of each class are singled out, the general character, or the peculiar aggravations of whose crimes, render them fit examples of public justice. . . . The wisdom and humanity of this design

> furnish a just excuse for the multiplicity of capital offences, which the laws of England are accused of creating beyond those of other countries." W. Paley, Principles of Moral and Political Philosophy 399–401 (6th Amer. ed. 1810).

Significantly, the Court neglects to mention that the recommendations of the Royal Commission on Capital Punishment found little more favor in England than Archdeacon Paley's. For the "British have been unwilling to empower either courts or juries to decide on life or death, insisting that death should be the sentence of the law and not of the tribunal." Symposium on Capital Punishment, 7 N. Y. L. F. 249, 253 (1961) (H. Wechsler). Beyond the Royal Commission's Report, the Court supports its conclusions only by referring to the standards proposed in the Model Penal Code [39] and judging them less than perfect. The Court neglects to explain why the impossibility of perfect standards justifies making no attempt whatsoever to control lawless action. In this context the words of Mr. Justice Frankfurter are instructive:

> "It is not for this Court to formulate with particularity the [standards] which would satisfy the Fourteenth Amendment. No doubt, finding a want of such standards presupposes some conception of what is necessary to meet the constitutional requirement we draw from the Fourteenth Amendment. But many a decision of this Court rests on some inarticulate major premise and is none the worse for it. A standard may be found inadequate without the necessity of explicit delineation of the standards that would be adequate, just as doggerel may be felt not to be poetry without the need of writing an essay

[39] And, as the Court notes, substantially adopted in one proposal of the National Commission on Reform of the Federal Criminal Laws.

on what poetry is." *Niemotko* v. *Maryland,* 340 U. S., at 285 (concurring in result).

But, although I find the Court's discussion inadequate, there remains the question whether capital sentencing is inherently incapable of being carried out under procedures that provide the safeguards necessary to protect against arbitrary determinations. I think not. I reach this conclusion for the following reasons.

First. It is important at the outset to recognize that two separate questions are involved. The first question is what ends any given State seeks to achieve by imposing the death penalty. The second question is whether those ends will or will not be served in any given case. The first question requires determination of the penological policy adopted by the State in choosing to kill some of its convicted criminals.[40] The second question requires that the relevant facts in any particular case be determined, and that the State's penological policy be applied to those facts.

Second. It is likewise important to bear in mind that the complexity of capital sentencing in any particular jurisdiction is inevitably a function of the penological policy to be applied. It is not, inherently, a difficult question. Thus, if a State should determine to kill those first-degree murderers who have been previously convicted of murder, and only those persons, the sentencing determination would ordinarily be a rather simple one.[41] On the other hand, if a State should determine to exclude only those first-degree murderers who cannot be rehabili-

[40] I do not mean to imply, of course, that any State has or is compelled to have a single, uniform penological policy applicable to all crimes. Presumably a State may, for example, seek to rehabilitate burglars but pursue only deterrence in sentencing parking violators.

[41] Of course, on occasion difficult problems of identity or the validity of prior convictions might arise.

419-882 O - 72 - 23

tated, it is probably safe to assume that the question of proper sentencing under such a policy would be a complex one indeed. It should be borne in mind that either of these policies—or a host of others—may have been applied in the cases before us.[42]

Third. This is neither the time nor the place for an essay on the purposes of criminal punishment. Yet some discussion must be ventured. Without indicating any judgment as to their propriety—and without intending to suggest that no others may exist—it is apposite to note that the interests most often discussed in connection with a State's capital sentencing policy are four.[43] A State may seek to inflict retribution on a wrongdoer, inflicting punishment strictly in proportion to the offense committed. It may seek, by the infliction of punishment, to deter others from committing similar crimes. It may consider at least some wrongdoers likely to commit other crimes, and therefore seek to prevent these hypothetical future acts by removing such persons from society. It may seek to rehabilitate most offenders, reserving capital punishment only for those cases where it judges the likelihood of rehabilitation to be less than a certain amount. I may assume that many if not all States choosing to kill some convicted criminals intend thereby to further more than one of the ends listed above; and I need not doubt that some States may consider other policies as well relevant to the decision. But I can see no reason whatsoever that a State may be excused from declaring what policies it seeks to further by the infliction of capital punishment merely because it may be difficult to determine how those policies should be applied in any particular case. If anything, it would seem that the difficulty of decision in particular cases would support rather

[42] See Part III, *infra*.

[43] The literature is surveyed in H. Packer, The Limits of the Criminal Sanction (1968), reviewed, 79 Yale L. J. 1388 (1970).

than weaken the point that uniform decisionmaking requires that state policy be explicitly articulated. Yet the Court seems somehow to assume that jurors will be most likely to fulfill their function and correctly apply a uniform state policy if they are never told what that policy is. If this assumption finds support anywhere this side of the Looking-Glass World, I am unaware of it.

Fourth. This is not to say, of course, that there may be no room whatsoever for the exercise of discretion in the capital sentencing process. But discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. Otherwise, in Lord Camden's words, it is "the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends upon constitution, temper, passion.—In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable." *Hindson and Kersey,* cited in 8 How. St. Tr. 57 n. It may well be that any given State's notions of proper penological policy are such that the precise amount of weight to be given to any one factor in any particular case where death is a possible penalty is incapable of determination beforehand. But that is no excuse for refusing to tell the decisionmaker whether he should consider a particular factor *at all.* Particularly where decisions are made, not by a continuing body of persons, but by groups selected to make a single decision and dispersed immediately after the event, the likelihood of any consistency whatsoever is vanishingly small. "Perfection may not be demanded of law, but the capacity to counteract inevitable . . . frailties is the mark of a civilized legal mechanism." *Rosenberg* v. *United States,* 346 U. S. 273, 310 (1953) (Frankfurter, J., dissenting). The point is that even if a State's notion of wise capital sentencing policy is such that the policy cannot be implemented through a formula capable of mechanical appli-

cation—something which, incidentally, cannot be known unless and until the State makes explicit precisely what that policy is—there is no reason that it should not give some guidance to those called upon to render decision.

Fifth. As I have already indicated, typical legislative response to problems deemed of sufficient urgency that some solution must be implemented immediately, yet at the same time of sufficient difficulty as to be incapable of explicit statutory solution, has been to provide a means whereby the law may be usefully developed on a case-by-case basis: systems are devised whereby each case may be decided upon its facts, with consistency and the development of more general principles left to the wisdom that comes from experience. I am speaking, of course, of the administrative process, where the basis and reasons for any given decision are explained and subject to review. I see no reason that capital sentencing is *ipso facto* unsuited to such treatment. To begin with, if a legislature should deem its present knowledge insufficient to create proper standards, it is hard indeed to see why its solution should not be one that could ultimately lead to the development of such standards. Cf. *Lichter* v. *United States,* 334 U. S. 742 (1948). I see no reason that juries which have determined that a given person should be killed by the State should be unable to explain why they reached that decision, and the facts upon which it was based. Persons dubious about the ability of juries to explain their findings should consult *Fletcher* v. *Peck,* 6 Cranch 87, 95–114 (1810) (findings of trial jury). Cf. Fed. Rule Civ. Proc. 49. Even if it be assumed that juries are incapable of making such explanations, we have already held that such inability does not excuse the State from providing a sentencing process that provides reasons for the decisions reached if those reasons are otherwise required. *North Carolina* v. *Pearce,* 395 U. S. 711, 726 (1969).

In sum, I see no reason whatsoever to believe that the nature of capital sentencing is such that it cannot be surrounded with the protections ordinarily available to check arbitrary and lawless action. That it has not been is, of course, no reason to believe that it cannot be:

> "As to impossibility, all I can say is that nothing is more true of [the legal] profession than that the most eminent among them, for 100 years, have testified with complete confidence that something is impossible which, once it is introduced, is found to be very easy of administration. The history of legal procedure is the history of rejection of reasonable and civilised standards in the administration of law by most eminent judges and leading practitioners. . . . Every effort to effect improving changes is resisted on the assumption that man's ultimate wisdom is to be found in the legal system as at the date at which you try to make a change." F. Frankfurter, The Problem of Capital Punishment, in Of Law and Men 77, 86 (1956).

III

I have explained above the reasons for my belief that the Due Process Clause of the Fourteenth Amendment compels the States to make explicit the fundamental policy choices upon which any exertion of state power is based, and to exercise such power only under procedures that both limit the possibility of merely arbitrary action and provide a record adequate to render meaningful the institution of federal judicial review. I have also explained why, in my view, there is nothing inherent in the nature of capital sentencing that makes application of such procedures impossible. There remains, then, only the question whether the two state procedures under review today provide the necessary safeguards.

A

In Ohio, if a capital defendant elects trial by jury the questions whether he is guilty of the crime charged and, if so, whether he should be killed are simultaneously submitted to the jury. Jury trial may, however, be waived as of right in capital cases, *State* v. *Smith,* 123 Ohio St. 237, 174 N. E. 768 (1931),[44] or a defendant may, with the permission of the court, enter a plea of guilty. *State* v. *Ferranto,* 112 Ohio St. 667, 148 N. E. 362 (1925). In the absence of jury trial the sentencing decision is made by a three-judge court. Ohio Rev. Code Ann. § 2945.06 (1954).

A defendant who exercises his right to jury trial may introduce only evidence relevant to the question of guilt. No evidence may "be introduced directed specifically toward a claim for mercy," *Ashbrook* v. *State,* 49 Ohio App. 298, 302, 197 N. E. 214, 216 (1935), for that "is a matter vested fully and exclusively in the discretion of the jury," *State* v. *Ellis,* 98 Ohio St. 21, 120 N. E. 218 (court's syllabus) (1918), and therefore, under Ohio law, is "not an issue in the case." *Ashbrook* v. *State, supra.* A defendant who can present no evidence on the question of guilt may not, therefore, present any evidence whatsoever to the sentencing jury.

A defendant who waives jury trial, however, is in a somewhat different situation. Presumably, of course, the same rules of evidence apply at a bench trial or at a trial upon a plea of guilty.[45] Where the sentencing

[44] Such waiver is apparently not a matter of right when the trial court, either from representation by defense counsel or from other information that has come to its attention, has reason to believe that the defendant is presently insane. See *State* v. *Smith, supra.*

[45] Apparently there is no such thing in Ohio as a plea of guilty to first-degree murder. Ohio Rev. Code Ann. § 2945.06 (1954) provides that if a defendant "pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pronounce sentence accordingly."

determination is made by the court, however, two additional factors apply. First, the defendant has an absolute right to address the court before sentence is imposed, Ohio Rev. Code Ann. § 2947.05 (1954), denial of which is a ground for resentencing. *Silsby* v. *State,* 119 Ohio St. 314, 164 N. E. 232 (1928). Since the jury's decision that a defendant should be killed is unreviewable by any court, *State* v. *Klumpp,* 15 Ohio Op. 2d 461, 468, 175 N. E. 2d 767, 775–776, appeal dismissed, 171 Ohio St. 62, 167 N. E. 2d 778 (1960) (trial court); *State* v. *Reed,* 85 Ohio App. 36, 84 N. E. 2d 620 (1948), exercise of this right can have no effect on the sentencing determination in jury cases. But the trial court may modify its own sentence during the same term of court, see *Lee* v. *State,* 32 Ohio St. 113 (1877), and may therefore be swayed by the defendant's personal plea. Moreover, Ohio Rev. Code Ann. § 2947.06 (Supp. 1970) expressly permits a trial court to "hear testimony of mitigation of a sentence at the term of conviction or plea." If this statute is applicable to capital cases,[46] defendants pleading guilty or waiving jury trial may introduce additional information on the question of sentence. Again, however, the unreviewability of a jury sentence means that it can have no effect in cases tried to a jury. Finally, a death sentence imposed by a three-judge court may not be reviewed or modified on appeal. *State* v. *Ferguson,* 175 Ohio St. 390, 195 N. E. 2d 794 (1964); *State* v. *Stewart,* 176 Ohio St. 156, 198 N. E. 2d 439 (1964).

The standard instruction given capital juries on the question of punishment appears in *State* v. *Caldwell,* 135 Ohio St. 424, 425, 21 N. E. 2d 343, 344 (1939):

> "[Y]ou will determine whether or not you will extend or withhold mercy. . . . In that connection

[46] The statute is not limited by its terms to any particular class of cases, and the question appears never to have been discussed in the reported opinions.

> whether you recommend or withhold mercy is a matter solely within your discretion, calling for the exercise of your very best and most profound judgment, not motivated by considerations of sympathy or as a means of escaping a hard or disagreeable duty, but must be considered by you in the light of all the circumstances of the case with respect to the evidence submitted to you and the other circumstances surrounding this defendant."

The jury may be instructed that "sociological matters and environment" have "nothing whatever to do with [the] case," *id.*, at 428, 21 N. E. 2d, at 344, but it appears that this instruction is not generally given. Likewise, the trial court may, but is not compelled to, inform the jury about matters such as parole from a sentence to life imprisonment. *State* v. *Meyer,* 163 Ohio St. 279, 126 N. E. 2d 585 (1955); *State* v. *Henley,* 15 Ohio St. 2d 86, 238 N. E. 2d 773 (1968). In petitioner Crampton's case, the jury was instructed generally that it should not be "influenced by any consideration of sympathy or prejudice." On the question of punishment, it was told only that "[i]f you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life." The jury was also handed a verdict form with a "line which you must fill in. We—blank—recommend mercy and you will put in that line, we do, or, we do not, according to your finding." Except for a supplementary instruction informing the jury that its recommendation had to be unanimous, no further instructions on the question of punishment were given the jury.

There is in my view no way that this Ohio capital sentencing procedure can be thought to pass muster under the Due Process Clause.

First. Nothing whatsoever in the process either sets forth the basic policy considerations that Ohio believes relevant to capital sentencing, or leads towards elucidation of these considerations in the light of accumulated experience. The standard jury instruction contains at best an obscure hint.[47] The instructions given in the present case contain none whatsoever. So far as they are concerned, the jury could have decided to impose the death penalty as a matter of simple vengeance for what it considered an atrocious crime; because it felt that imposition of the death penalty would deter other potential murderers; or because it felt that petitioner, if not himself killed, might kill or commit some other wrong in the future. The jury may have been influenced by any, all, or none of these considerations. If it is beyond the present ability of the Ohio Legislature to "identify before the fact those characteristics of criminal homicides and their perpetrators which"—*in the judgment of the State of Ohio*—"call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority," *ante,* at 204, the Ohio procedure is hardly designed to improve that ability. It contains no element of the proudest tradition of the common law—the ability to grow with time by slowly deriving principles of general applicability from careful consideration of the myriad facts of a multitude of particular cases. Neither we nor the State of Ohio can know the reasoning by which this jury determined to impose the death penalty, or the facts upon which that reasoning was based. All we know is that the jury did not appear to find the question a particularly difficult one. For the jury determined that James Edward Crampton had murdered his wife, that he had done so while legally sane, and that he should be killed—in less than five hours.

[47] See *infra,* at 292–293.

Second. The policies applied by the State of Ohio to determine that James Edward Crampton should die were neither articulated to nor explained by the jury that made that decision. Nor have they been elsewhere set forth. The standard jury instructions, quoted *supra,* at 289–290, do tell the jury to reach its determination "in the light of all the circumstances of the case with respect to the evidence submitted to you and the other circumstances surrounding this defendant." A perceptive jury might conclude that this instruction indicates that Ohio considers the relative severity of the crime a factor of substantial importance in the determination of sentence. How the jury is to determine the severity of the crime before it in relation to others is, however, something of a mystery, since Ohio law simultaneously demands that the sentencing determination be based strictly upon the evidence adduced in the case at hand, *Howell* v. *State,* 102 Ohio St. 411, 131 N. E. 706 (1921), and forbids the defendant to introduce evidence of other crimes or other judgments to aid the jury in determining whether the murder he has committed is more or less severe than other murders. *Ashbrook* v. *State, supra.* Similarly, by directing the jury's attention to "the other circumstances surrounding this defendant" it might be thought that Ohio was suggesting consideration of environmental factors that might make the defendant's actions, if no more justifiable, less a reflection of personal blameworthiness. Yet any such reading of the instruction is condemned by *State* v. *Caldwell, supra,* which approved a jury charge that environmental factors have "nothing whatever to do" with the sentencing decision. It also might be thought that directing juries to consider "other circumstances surrounding this defendant" is an indication, albeit a rather backhanded one, that Ohio desires capital sentencing juries to take into account the likelihood that a particular de-

fendant may be rehabilitated. Certainly this indication is reinforced in cases where the jury is instructed with regard to the possibility of parole from a life sentence. But instructions on parole are optional with the trial court, *State* v. *Henley, supra; State* v. *Meyer, supra,* and unless it be assumed that every jury not so instructed is nevertheless aware of the possibility of parole (and likewise that, despite instructions to base its verdict on the evidence in the case, it will nevertheless rely upon its own knowledge of the possibility of parole), failure to instruct all juries with regard to parole must mean either that a state policy with regard to rehabilitation is not in fact implied by such instructions, or else that such a state policy is consciously applied only in some capital cases. Finally, one Ohio case may be explicable only on a basis suggested nowhere else in Ohio law: that the capital sentencing decision rests upon factors that vary depending upon which of two simultaneously applicable capital statutes is used to support punishment. In *State* v. *Ferguson,* 175 Ohio St. 390, 195 N. E. 2d 794 (1964), the defendant had been convicted on guilty pleas entered to charges of premeditated murder and felony murder, both growing out of the murder, during the course of a robbery, of a single individual. The three-judge court that heard evidence to fix the penalty on both charges at the same time sentenced him to life imprisonment on the premeditated murder charge, and to death on the charge of felony murder. The Ohio Supreme Court affirmed the sentence of death. In light of these cases, I think it fair to say that Ohio law has nowhere purported to set forth the considerations of state policy intended to underlie a sentence of death.

Third. Even if it be assumed that Ohio sentencing judges and juries act upon shared, although unarticulated and unarticulable, notions of proper capital sentencing

policy, the capital sentencing process in Ohio contains elements that render difficult if not impossible any consistency in result. Presumably all judges, and certainly some juries (*i. e.*, those who are specifically so instructed) will be cognizant of the possibility of parole from a sentence to life imprisonment. Other juries will not. If this is an irrelevant factor, it is hard to understand why some juries may be given this information. If it is a relevant factor, it is equally hard to understand why other juries are not. And if it *is* a relevant factor, the inevitable consequence of presenting the information, for no explicable reason, to some but not all capital sentencing juries, is that consistency in decisionmaking is impossible. Similarly, as I have already noted,[48] there is a substantial difference between the evidence that may be considered by a jury and that which may be considered by a sentencing panel of judges. For although the defendant may, in a jury trial, testify on the question of guilt if he is willing to forgo his privilege against self-incrimination, he may not even then present evidence relevant solely to the question of penalty. A defendant who is to be sentenced by a panel of judges, on the other hand, has an absolute right before the sentencing decision becomes final to address the sentencers on any subject he may choose.[49] And such a defendant appears as well to have at least a chance to present evidence from other sources relevant solely to the sentencing determination before that determination becomes final.[50] Yet such information may not be presented to a jury, whether the jury desires it or not. The point, again, is that consistent decisionmaking is impossible when one decisionmaker may consider information forbidden to another.

---

[48] See *supra*, at 288–289.

[49] See Ohio Rev. Code § 2947.05 (1954); *supra*, at 288–289.

[50] See Ohio Rev. Code § 2947.06 (Supp. 1970); *supra*, at 289.

And where, as here, no basis whatsoever is presented to justify the difference, it is inexcusable.[51]

Fourth. There is, moreover, no reason to believe that Ohio capital sentencing judges and juries do in fact share common notions of the considerations relevant to capital sentencing. I have already pointed out that no state policy has ever been articulated. And whatever may be the case with judges, capital sentencing juries are drawn essentially at random [52] and called upon to decide one case and one case only.[53] Whatever value there may be in the notion that arbitrary decisionmaking may be controlled by committing difficult questions to a continuing body which can at least maintain consistency of principle until it changes its views on the questions to be decided, is entirely absent from the capital jury sentencing process

---

[51] In addition, the evidence before the sentencing authority—and therefore the possible bases for its decision—will vary substantially with a number of factors, such as the presence or absence of an insanity defense, the willingness *vel non* of a defendant to waive the privilege against self-incrimination, and so forth. In this context the irrational nature of a unitary trial is particularly conspicuous. A jury that considered recidivism relevant to its sentencing determination could obtain information with respect to that point only if the defendant should testify, or if evidence of other crimes should be relevant (for reasons such as motive, identity, and so forth) to the question of guilt.

[52] Ohio does exclude jurors with conscientious scruples against capital punishment, *State* v. *Carter*, 21 Ohio St. 2d 212, 256 N. E. 2d 714 (1970).

[53] Of course, codefendants may be tried by the same jury, and some jurors may at some time have sat on another capital case. Nothing suggests, however, that the latter class of jurors is anything but an insubstantial one. In light of the fact that first-degree murder convictions in the period 1959–1968 never exceeded 58 per year, evidence that a significant number of jurors were involved in more than one capital sentencing determination would seem to raise substantial questions about the randomness of the jury selection procedures.

presently under review. For capital sentencing juries in Ohio are *not* continuing bodies, and no jury may be told what another jury has done in similar (or different) cases. Likewise, the procedure under review cannot gain uniformity from judicial review, for under Ohio law no such review is permitted.

Fifth. Although the Due Process Clause does not forbid a State from imposing "a different punishment for the same offence . . . under particular circumstances," *Moore* v. *Missouri,* 159 U. S. 673, 678 (1895), it does command that punishment be "dealt out to all alike who are similarly situated." *Ibid.; Leeper* v. *Texas,* 139 U. S. 462, 468 (1891); *Missouri* v. *Lewis,* 101 U. S. 22, 31 (1880). Even granting the State the fullest conceivable room for judgment as to what are and are not "particular circumstances" justifying different treatment, this means at the least that the State must itself apply the same fundamental policies to all in making that judgment. The institution of federal judicial review is designed to vindicate this (and other [54]) federally guaranteed rights. Yet the procedure before us renders the possibility of such review entirely chimerical. There is no way of determining what policies were applied by the State in reaching judgment. There is no way of inferring what policies were applied by an examination of the facts, for we have no idea what facts were relied on by the sentencers. Nor may this void be filled in any way by presumptions based on the result of their actions, for they were neither given direction in the exercise of judgment nor asked to explain the conclusion they reached. There

---

[54] No matter how broad the scope of state power to determine when the death penalty should be inflicted, it cannot be seriously questioned that its infliction for *some* reasons is constitutionally impermissible. Yet nothing in the Ohio procedure before us prevents a jury from relying upon impermissible reasons, or allows anyone to determine whether this is what the jury has done.

is simply no way that this or any other court can determine whether petitioner Crampton was condemned to die for reasons that Ohio would be willing to apply in any other case—or for reasons that Ohio would, if they were explicitly set forth, just as explicitly reject.

In sum, the Ohio capital sentencing procedure presently before us raises fundamental questions of state policy which have never been explicitly decided by any responsible organ of the State. Nothing in the procedure looks towards the gradual development of a uniform state policy through accumulation of a body of precedent. No protection whatsoever appears against the possibility of merely arbitrary or willful decisionmaking; moreover, some features of the process appear to make inconsistent action not merely possible but inevitable. And finally, the record provided by the Ohio capital sentencing process makes virtually impossible the redress of any violations of federally guaranteed rights through the institution of federal judicial review. I can see no possible basis for holding such a capital sentencing procedure permissible under the Due Process Clause, and I would therefore reverse petitioner Crampton's sentence of death.

B

The procedures whereby the State of California determines which convicted criminals to kill differ in a number of respects from those used by Ohio. Following conviction of a possibly capital crime,[55] the question of penalty

[55] Cal. Penal Code § 4500 (1970) defines the mandatory capital crime of assault with malice aforethought with means likely to cause great bodily injury by a prisoner under sentence of life imprisonment, where the person assaulted is not a fellow inmate, and dies within a year and a day. *Amici* N. A. A. C. P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent, represent without contradiction elsewhere that this is the only mandatory capital statute presently in active use in the United States. See Brief *amici curiae* 15 n. 19.

is determined in a separate proceeding.[56] Except where the defendant has, with the prosecution's consent,[57] waived trial by jury, the sentencing determination is made by a jury whether conviction was on a plea of guilty or not guilty. A defendant who waives jury trial on the issue of guilt may not have his sentence determined by a jury. *People* v. *Golston,* 58 Cal. 2d 535, 375 P. 2d 51 (1962). Notwithstanding the statutory language,[58] it appears possible for a defendant whose guilt is de-

---

[56] Cal. Penal Code § 190.1 (1970) provides, in pertinent part:

"If [a] person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. . . .

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

"In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."

[57] See Cal. Const., Art. I, § 7; *People* v. *King,* 1 Cal. 3d 791, 463 P. 2d 753 (1970).

[58] See n. 56, *supra.*

termined by a jury to have his sentence determined by a judge. See *People* v. *Sosa,* 251 Cal. App. 2d 9, 58 Cal. Rptr. 912 (1967). If a jury is waived, identical sentencing power will be exercised by a single judge. *People* v. *Langdon,* 52 Cal. 2d 425, 341 P. 2d 303 (1959); *People* v. *Jones,* 52 Cal. 2d 636, 343 P. 2d 577 (1959). A jury determination to impose a death sentence may be set aside by the judge presiding at the trial, Cal. Penal Code § 1181 (7) (1970), construed in *People* v. *Hill,* 66 Cal. 2d 536, 426 P. 2d 908 (1967). It may not be otherwise reviewed, whether fixed by a judge or jury. *People* v. *Welch,* 58 Cal. 2d 271, 373 P. 2d 427 (1962) (judge); *In re Anderson,* 69 Cal. 2d 613, 447 P. 2d 117 (1968).[59]

The range of evidence that may be introduced at the penalty trial is broad. Ordinary rules of competence, hearsay, etc., apply, *e. g., People* v. *Hines,* 61 Cal. 2d 164, 174–175, 390 P. 2d 398, 405 (1964), and a few issues are excluded. Exclusion, however, appears to be not on the basis that the issues are irrelevant, but rather that they are either unduly inflammatory or impractical to litigate. Thus, evidence or argument is prohibited concerning the likelihood of parole from a life sentence, *People* v. *Morse,* 60 Cal. 2d 631, 388 P. 2d 33 (1964);[60] concerning the deterrent effects of capital punishment, *People* v. *Purvis,* 60 Cal. 2d 323, 341, 384 P. 2d 424, 435–436 (1963); *People* v. *Love,* 56 Cal. 2d 720, 366 P. 2d 33 (1961); *People* v. *Kidd,* 56 Cal. 2d 759, 366 P. 2d

[59] The proceedings leading to that determination are, as indicated in the text immediately following, reviewable.

[60] *Morse* noted that "[w]hen we opened the door a slight crack to allow an instruction, and to admit an evidentiary showing, as to the realistic consequence of a sentence of life imprisonment, we had in mind a limited and legitimate objective. But various maneuvers have pushed the door so widely ajar that too many confusing elements have entered the courtroom." 60 Cal. 2d, at 639, 388 P. 2d, at 38.

419-882 O - 72 - 24

49 (1961),[61] although some reference to the matter may (as in the present case, see App. 199) be made by the prosecution and be treated under the harmless-error doctrine, *People* v. *Garner,* 57 Cal. 2d 135, 367 P. 2d 680 (1961), especially if trial is to the court, *People* v. *Welch,* 58 Cal. 2d 271, 274, 373 P. 2d 427, 429 (1962); concerning whether capital punishment should ever be imposed, *People* v. *Moya,* 53 Cal. 2d 819, 350 P. 2d 112 (1960); [62] or concerning physical suffering of the victim unintended by the defendant, *People* v. *Love,* 53 Cal. 2d 843, 350 P. 2d 705 (1960).[63] Except for these limitations, however, virtually any matter may be explored. *People* v. *Terry,* 61 Cal. 2d 137, 142–153, 390 P. 2d 381, 385–392 (1964).

Following the arguments of counsel,[64] the jury is instructed on its function in determining the penalty to be imposed. A standard instruction on the subject exists [65]

---

[61] *Kidd* held that a defendant could not submit evidence that capital punishment was an ineffective deterrent because "[i]nnumerable witnesses could be produced to testify on both sides of the question" and because, quoting *Love,* "[j]uries in capital cases cannot become legislatures *ad hoc.*" 56 Cal. 2d, at 770, 366 P. 2d, at 56. *Love* held argument of counsel impermissible because evidence on the question was impermissible. 56 Cal. 2d, at 731, 366 P. 2d, at 39.

[62] The basis for this ruling is that the issue has been foreclosed by the statute allowing capital punishment to be imposed.

[63] This rule is based, apparently, upon the notion that such evidence would be unduly inflammatory. See *People* v. *Floyd,* 1 Cal. 3d 694, 464 P. 2d 64 (1970).

[64] *People* v. *Bandhauer,* 66 Cal. 2d 524, 426 P. 2d 900 (1967), struck down prospectively the earlier practice of allowing the prosecution to open and close the arguments as inconsistent with the legislature's "strict neutrality" concerning the choice of life or death. *Id.,* at 531, 426 P. 2d, at 905.

[65] California Jury Instructions, Criminal, ¶ 8.80 (3d rev. ed., 1970).

but is not mandatory; it is, essentially, the instruction given in the present case:

> "The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now, in arriving at this determination you should consider all of the evidence received here in court presented by the People and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand.
>
> . . . . . .
>
> "It is the law of this state that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury. If you should fix the penalty as confinement for life, you will so indicate in your verdict. If you should fix the penalty as death, you will so indicate in your verdict. Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. That verdict must express the individual opinion of each juror.
>
> "Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the

> guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed." [66]

Substantially more elaborate versions of this instruction may, if the trial court desires, be given. *People* v. *Harrison,* 59 Cal. 2d 622, 381 P. 2d 665 (1963). In addition, the trial court is supposed to instruct the jury that a defendant serving a life sentence may be paroled, but that it should not presume that the California Adult Authority will release a prisoner until it is safe to do so, and that it should not take the possibility of parole into account. *People* v. *McGautha,* 70 Cal. 2d 770, 452 P. 2d 650 (1969). Finally, under California law it is error to charge that the jury's verdict should express the conscience of the community; the jury should be told, instead, that the verdict must "express the individual conscience of each juror." *People* v. *Harrison, supra,* at 633, 381 P. 2d, at 671.[67]

---

[66] The elided paragraph, not included in the standard instruction referred to, instructed the jury that it could not consider evidence of other crimes against a defendant unless the other crimes were proved beyond a reasonable doubt. The jury below was also instructed that "the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants." App. 221–222.

[67] The jury was so instructed in the present case; see *supra,* at 301–302. In light of this it is mystifying to find the Court relying, *ante,* at 201–202, on the following quotation from *Witherspoon* v. *Illinois,* 391 U. S. 510, 519 (1968), to sustain the California procedure: "[capital sentencing juries] do little more—*and must do nothing less*—than express the conscience of the community on the ultimate question of life or death." (Emphasis added; footnote omitted.)

A substantial number of subsidiary instructions may but need not be given to the jury; the governing principle is that the instructions must make clear to the jury that its decision whether or not a convicted defendant is to be killed is to take place in a "legal vacuum." *People* v. *Terry,* 61 Cal. 2d, at 154, 390 P. 2d, at 392; see *People* v. *Friend,* 47 Cal. 2d 749, 306 P. 2d 463 (1957). A trial judge may, should he desire, "aid the jury by stating the kinds of factors that may be considered, thereby setting the tone for the jury's deliberation," *People* v. *Polk,* 63 Cal. 2d 443, 451, 406 P. 2d 641, 646 (1965), so long as this is done in a manner that indicates to the jury that it is free not to consider any of the factors listed by the judge, and to consider anything else it may desire, *People* v. *Friend, supra.* It is not, however, error to refuse such an instruction. *People* v. *Polk, supra.* Similarly, although a trial judge may instruct the jury that it may be moved by sympathy for the defendant, *People* v. *Anderson,* 64 Cal. 2d 633, 414 P. 2d 366 (1966), he may refuse to give such an instruction at defense request, *People* v. *Hillery,* 65 Cal. 2d 795, 423 P. 2d 208 (1967), although it is error to instruct the jury that it may *not* be so moved. *People* v. *Polk, supra; People* v. *Bandhauer,* 1 Cal. 3d 609, 463 P. 2d 408 (1970). It is error to instruct the jury that it may *not* consider doubts about the defendant's guilt as mitigating circumstances, *People* v. *Terry, supra,* but it is not error to refuse to charge that such doubt *may* be a mitigating factor, *People* v. *Washington,* 71 Cal. 2d 1061, 458 P. 2d 479 (1969), although the trial judge may give such a charge if he desires, *People* v. *Polk, supra; People* v. *Terry, supra.*

Finally, a jury determination to impose the death sentence may not be reviewed by any court. It may, however, be set aside by the judge presiding at the trial. The

basis upon which the California Supreme Court has made this distinction, of some importance in the present case, is not entirely clear. The trial judge's power to reduce a sentence of death to one of life imprisonment is based on Cal. Penal Code § 1181 (7) (1970), which provides, in pertinent part, that "in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed." The California Supreme Court has construed this statute to empower the trial court to set aside a jury verdict of death, *People* v. *Moore,* 53 Cal. 2d 451, 454, 348 P. 2d 584, 586 (1960), but *not* to give any such power to an appellate court, *People* v. *Green,* 47 Cal. 2d 209, 235, 302 P. 2d 307, 324–325 (1956); *In re Anderson,* 69 Cal. 2d 613, 447 P. 2d 117 (1968). This is said to be because "the trier of fact is vested with exclusive discretion to determine punishment." *People* v. *Green, supra,* at 235, 302 P. 2d, at 325. What this means is that the trial court does not *review* the jury's determination that a convicted defendant should be killed; based upon its "own independent view of the evidence," *People* v. *Love,* 56 Cal. 2d, at 728, 366 P. 2d 33, 36, quoting *People* v. *Moore, supra,* at 454, 348 P. 2d, at 586 (1960), the trial court is to determine itself whether the defendant should be killed, apparently on exactly the same basis and in exactly the same way as it would if the issue had never been submitted to a jury.[68] See *People* v. *Moore, supra; People* v. *Hill,* 66 Cal. 2d 536, 426 P. 2d 908 (1967); *People* v. *Love, supra; In re Anderson, supra.*

[68] That is, the court is to exercise the same unlimited power given to the jury.

In short, no defendant sentenced to die may obtain judicial review of that decision, but one sentenced to die by a jury gets a second bite at the apple: he is "entitled to two decisions on the evidence." *People* v. *Ketchel,* 59 Cal. 2d 503, 546, 381 P. 2d 394, 417 (1963).

I find this procedure likewise defective under the Due Process Clause. Although it differs in some not insignificant respects from the procedure used in Ohio, it nevertheless is entirely bare of the fundamental safeguards required by due process.

First. Both procedures contain at their heart the same basic vice. Like Ohio, California fails to provide any means whereby the fundamental questions of state policy with regard to capital sentencing may be authoritatively resolved. They have not been resolved by the state legislature, which has committed the matter entirely to whatever judge or jury may exercise sentencing authority in any particular case. But they cannot be authoritatively resolved by the sentencing authority, not only because the California Supreme Court has expressly ruled that that is not part of the sentencing function, *People* v. *Kidd,* 56 Cal. 2d, at 770, 366 P., at 56, but also because any such resolution is binding for one case and one case only. There are simply no means to assure that "truly fundamental issues [will ultimately] be resolved by the Legislature," *Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control,* 65 Cal. 2d 349, 369, 420 P. 2d 735, 748 (1966). Nothing whatsoever anywhere in the process gives any assurance that one defendant will be sentenced upon notions of California penological policy even vaguely resembling those applied to the next.

Second. If the question before us were what procedure would produce the fewest number of death sentences, the power of a trial judge to set aside a jury's verdict might be of substantial importance. But that, of course, is not

the question. Except insofar as it incorporates the Eighth Amendment's prohibition against cruel and unusual punishments—not an issue in these cases—the Due Process Clause gives us no warrant to interfere with a State's decision to make certain crimes punishable by death. The Due Process Clause commands us, however, to make certain that no State takes one man's life for reasons that it would not apply to another. And even if it be assumed that trial judges obey the California Supreme Court's direction to exercise their own, independent judgment on the propriety of a jury-imposed death penalty,[69] the existence of the trial court's power to set aside such verdicts adds little to the likelihood of evenhanded treatment. For this power is to be exercised in precisely the same way as the jury's—without guideline or check, without review, without any explanation of reasons or findings of fact, without any opportunity for ultimate legislative acceptance or rejection of the policies applied. It is true that trial judges are in a sense "professional sentencers"; presumably any given judge, to the extent that he actually does exercise independent judgment on the question,[70] will do his best to avoid conscious inconsistency. But there remains a multiplicity of sentencing judges, all of whom have been expressly told by the Supreme Court of California not to seek guidance for their decision from the statute, from that court's opinions, or indeed from any source outside their own, individual opinions. See *supra,* at 304–305.

[69] Apparently the trial judge did not do so in this case: denying petitioner McGautha's motion for reduction of penalty, he said: "[C]ertainly this Court, I do not think, except in most unusual circumstances, is justified in placing the Court's judgment over and above that of the 12 people who have carefully deliberated upon this case and decided that the proper penalty in this case should not be life imprisonment." App. 243.

[70] See n. 69, *supra.*

In such circumstances, the possibility of consistent decisionmaking is nonexistent. "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Local 776,* 346 U. S. 485, 490–491 (1953).

Third. Like its Ohio counterpart, the California procedure before us inevitably operates to frustrate the institution of federal judicial review. We do not and cannot know what facts the jury relied upon in determining that petitioner McGautha should be killed, or the reasons upon which it based that decision. We do not know—and cannot know—the basis upon which the State of California determined that he was not "fit to live," *People* v. *Morse,* 60 Cal. 2d, at 647, 388 P. 2d, at 43. We do know that the prosecutor, in her closing argument, strongly urged to the jury that Dennis Councle McGautha should be killed because he had the unregenerate bad taste to insist that he had once pleaded guilty to a crime he did not commit.[71] Cf. *North Carolina* v. *Alford,* 400 U. S., at 32–39. We also know

[71] "[McGautha] has three robberies. He has over ten years in prison, and he has another killing, and you will have all those documents in front of you in the jury room about his prior record, and the thing about his prior record is the way in which he minimizes his involvement. Can you imagine that the first prior I think we had on him was a robbery, and he has the nerve to sit up there on the witness stand and tell people who he is asking not to kill him—he has the nerve to tell those people, 'I pleaded guilty to robbery, but I didn't really do that robbery,' and then he tells them about the second robbery. The friends whom he was giving a ride were involved in that second robbery. He didn't commit that robbery, but he pleaded guilty to it. He got sentenced to 10 years and he served six years.

"What kind of person do we have here who, having spent all that time in prison, still is unwilling to acknowledge his participation in crime?" App. 204–205.

that nothing in the instructions given the jury contained the slightest hint that this could not be the sole basis for its decision. See *supra,* at 301–302. And, finally, we also know that whatever factors the State of California relied upon to sentence petitioner McGautha to death—factors permissible or impermissible, applied by the State to every convicted capital criminal or to him alone—there is no way whatsoever that petitioner can demonstrate that those factors were relied upon and obtain review of their propriety. In short, the procedure before us in this case simultaneously invites sentencers to flout the Constitution of the United States and promises them that, should they do so, their action is immune from federal judicial review.[72] Astoundingly, the Court in upholding the procedure explicitly commends this very feature. See *ante,* at 207–208.[73] I do not think that such a proce-

[72] A peculiarity of California law raises another, more subtle, point. Juries, as noted, are not required to base their decision on any particular findings of fact. But if a given jury should determine to impose the death sentence *only* if it found particular facts that it thought relevant, it still would not be required to find those facts by even a preponderance of the evidence. *People* v. *Hines,* 61 Cal. 2d 164, 173, 390 P. 2d 398, 404 (1964). I do not suggest that due process requires such facts to be found beyond a reasonable doubt, or that we could reverse on due process grounds a conviction or sentence that we believed contrary to the weight of the evidence. But there is in my mind a serious question whether a State may constitutionally allow *its chosen trier of fact* to base a determination to kill any person on facts that the *trier of fact himself* does not believe are supported by the weight of the evidence. Cf. *In re Winship,* 397 U. S. 358, 370, 371–373 (1970) (HARLAN, J., concurring) (standard of proof required by due process depends upon the "consequences of an erroneous factual determination").

[73] The Court, to be sure, refers only to jury consideration of arguments suggested by "defense counsel." I do not, however, understand the Court to imply that the arguments of counsel for the State are given any less consideration.

dure is consistent with the Due Process Clause, and I would accordingly reverse petitioner McGautha's sentence of death.

C

I have indicated above the reasons why, in my judgment, the procedures adopted by Ohio and California to sentence convicted defendants to die are inconsistent with the most basic and fundamental principles of due process. But even if I thought these procedures adequate to try a welfare claim—which they are not, *Goldberg* v. *Kelly,* 397 U. S. 254 (1970)—I would have little hesitation in finding them inadequate where life itself is at stake. For we have long recognized that the degree of procedural regularity required by the Due Process Clause increases with the importance of the interests at stake. See *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895–896 (1961); *id.,* at 900–901 (dissent). Where First Amendment interests have been involved we have held the States to stringent procedural requirements indeed. See, *e. g., Stanley* v. *Georgia,* 394 U. S. 557 (1969); *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *A Quantity of Books* v. *Kansas,* 378 U. S. 205 (1964); *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961); *Speiser* v. *Randall,* 357 U. S. 513 (1958). Of course the First Amendment is "an interest of transcending value," *id.,* at 525, but so is life itself. Yet the Court's opinion turns the law on its head to conclude, apparently, that *because* a decision to take someone's life is of such tremendous import, those who make such decisions need not be "inhibit[ed]" by the safeguards otherwise required by due process of law. *Ante,* at 208. My belief is to the contrary, and I would hold that no State which determines to take a human life is thereby exempted from the constitutional command that it do so only by "due process of law."

IV

Finally, a few words should be said about matters peripherally suggested by these cases. First, these cases do not in the slightest way draw into question the power of the States to determine whether or not to impose the death penalty itself, any more than *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966), involved the power of the State of Pennsylvania to impose criminal punishment on persons who should fire a pistol loaded with blanks at another. Second, these cases do not call upon us to determine whether petitioners' trials were "fairly conducted" in the way referred to by my Brother BLACK. *Ante,* at 225. What they do call upon us to determine is whether the Due Process Clause requires the States, in his words, "to make certain that men would be governed by *law,* not the arbitrary fiat of the man or men in power," *In re Winship,* 397 U. S. 358, 384 (1970) (dissent), and whether if a State, acting through its jury, applies one standard to determine that one convicted criminal should die, "the Due Process Clause commands that every trial in that jurisdiction must adhere to that standard." *Id.,* at 386. Third, we are not called upon to determine whether "the death penalty is appropriate punishment" for the petitioners before us. *Ante,* at 221. That determination is for the States.[74] The Court, however, apparently believes that the procedures before us are to be upheld because the results in the present cases comport with its own, unarticulated notions of capital sentencing policy. See *ibid.* This fundamental misapprehension of the judicial function pervades the Court's opinion, which after a single brief mention of the Due Process Clause entirely eschews dis-

[74] Except, of course, insofar as state power may be restricted by the Eighth Amendment, a question not involved in these cases.

cussion of the Constitution, and instead speaks only of the considerations upon which it believes the States should rest their capital sentencing policy. *Ante,* at 196–208.

Finally, I should add that for several reasons the present cases do not draw into question the power of the States that should so desire to commit their criminal sentencing powers to a jury. For one thing, I see no reason to believe that juries are not capable of explaining, in simple but possibly perceptive terms, what facts they have found and what reasons they have considered sufficient to take a human life. Second, I have already indicated why I believe that life itself is an interest of such transcendent importance that a decision to take a life may require procedural regularity far beyond a decision simply to set a sentence at one or another term of years. Third, where jury sentencing involves such a decision, determination of the ultimate question—how many years a defendant will actually serve—is generally placed very substantially in the hands of a parole board—a single, continuing board of professionals whose general supervision and accumulated wisdom can go far toward insuring consistency in sentencing. And finally, in most cases where juries are asked to fix a convicted defendant's sentence at one or another term of years, they must inevitably be aware that, no matter what they do, the defendant will eventually return to society. With this in mind, a jury should at the very least recognize that rehabilitation must be a factor of substantial weight in its deliberations. Of course, none of these cases are before us, and I do not mean to imply that any and every question other than the question of life or death may be submitted by a State to a jury to be determined in its unguided, unreviewed, and unreviewable discretion. But I cannot help concluding that the Court's opinion, at its

core, rests upon nothing more solid than its inability to imagine any regime of capital sentencing other than that which presently exists. I cannot assent to such a basis for decision. "If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

BLONDER-TONGUE LABORATORIES, INC. *v.* UNIVERSITY OF ILLINOIS FOUNDATION ET AL.

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

No. 338. Argued January 14, 1971—Decided May 3, 1971

This Court's holding in *Triplett* v. *Lowell*, 297 U. S. 638, that a determination of patent invalidity is not *res judicata* against the patentee in subsequent litigation against a different defendant overruled to the extent that it forecloses an estoppel plea by one facing a charge of infringement of a patent that has once been declared invalid, and in this infringement suit where because of *Triplett* petitioner did not plead estoppel and the patentee had no opportunity to challenge the appropriateness of such a plea the parties should be allowed to amend their pleadings and introduce evidence on the estoppel issue. Pp. 317–350.

422 F. 2d 769, vacated and remanded.

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

Robert H. Rines argued the cause for petitioner. With him on the brief were *Richard S. Phillips, Paul J. Foley,* and *Nelson H. Shapiro.*

William A. Marshall argued the cause for respondent University of Illinois Foundation. With him on the brief were *Charles J. Merriam* and *Basil P. Mann. Sidney G. Faber* argued the cause for respondent JFD Electronics Corp. With him on the brief were *Jerome M. Berliner, Robert C. Faber,* and *Myron C. Cass.*

Assistant Attorney General McLaren argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Gray, Peter L. Strauss, Howard E. Shapiro,* and *Walter H. Fleischer.*

Briefs of *amici curiae* were filed by *Donald R. Dunner, James B. Gambrell,* and *W. Brown Morton, Jr.,* for the American Patent Law Association; by *Theodore W. Anderson* for the Automatic Electric Co.; by *Harold F. McNenny, John F. Pearne,* and *Walther E. Wyss* for the Finney Co.; and by *Joseph B. Brennan* and *Richard D. Mason* for the Kawneer Co., Inc.

MR. JUSTICE WHITE delivered the opinion of the Court.

Respondent University of Illinois Foundation (hereafter Foundation) is the owner by assignment of U. S. Patent No. 3,210,767, issued to Dwight E. Isbell on October 5, 1965. The patent is for "Frequency Independent Unidirectional Antennas," and Isbell first filed his application May 3, 1960. The antennas covered are designed for transmission and reception of electromagnetic radio frequency signals used in many types of communications, including the broadcasting of radio and television signals.

The patent has been much litigated since it was granted, primarily because it claims a high quality television antenna for color reception.[1] One of the first infringement suits brought by the Foundation was filed in the Southern District of Iowa against the Winegard Co., an antenna manufacturer.[2] Trial was to the court, and after pursuing the inquiry mandated by *Graham* v. *John Deere Co.,* 383 U. S. 1, 17–18 (1966), Chief Judge Stephenson held the patent invalid since "it would have been obvious to one ordinarily skilled in the art and wishing to design a frequency independent unidirectional

[1] The Foundation has filed six infringement actions based on the Isbell patent. Foundation's Brief 22.

[2] The Foundation claimed that all of the Isbell patent's 15 claims except numbers 6, 7, and 8 were infringed by one or more of Winegard's 22 antenna models designed for receiving television signals.

antenna to combine these three old elements, all suggested by the prior art references previously discussed." *University of Illinois Foundation* v. *Winegard Co.*, 271 F. Supp. 412, 419 (SD Iowa 1967) (footnote omitted).[3] Accordingly, he entered judgment for the alleged infringer and against the patentee. On appeal, the Court of Appeals for the Eighth Circuit unanimously affirmed Judge Stephenson. 402 F. 2d 125 (1968). We denied the patentee's petition for certiorari. 394 U. S. 917 (1969).

In March 1966, well before Judge Stephenson had ruled in the *Winegard* case, the Foundation also filed suit in the Northern District of Illinois charging a Chicago customer of petitioner, Blonder-Tongue Laboratories, Inc. (hereafter B-T), with infringing two patents it owned by assignment: the Isbell patent and U. S. Patent No. Re. 25,740, reissued March 9, 1965, to P. E. Mayes et al. The Mayes patent was entitled "Log Periodic Backward Wave Antenna Array," and was, as indicated, a reissue of No. 3,108,280, applied for on September 30, 1960. B-T chose to subject itself to the jurisdiction of the court to

[3] The District Judge held:

"Those skilled in the art [of antenna design] at the time of the Isbell application knew (1) the log periodic method of designing frequency independent antennas, (2) that antenna arrays consisting of straight dipoles with progressively varied lengths and spacings exhibit greater broad band characteristics than those consisting of dipoles of equal length and spacing and, (3) that a dipole array type antenna having elements spaced less than ½ wavelength apart could be made unidirectional in radiation pattern by transposing the feeder line between elements and feeding the array at the end of the smallest element.

"It is the opinion of the Court that it would have been obvious to one ordinarily skilled in the art and wishing to design a frequency independent unidirectional antenna to combine these three old elements, all suggested by the prior art references previously discussed." 271 F. Supp., at 418–419.

419-882 O - 72 - 25

defend its customer, and it filed an answer and counterclaim against the Foundation and its licensee, respondent JFD Electronics Corp., charging: (1) that both the Isbell and Mayes patents were invalid; (2) that if those patents were valid, the B-T antennas did not infringe either of them; (3) that the Foundation and JFD were guilty of unfair competition; (4) that the Foundation and JFD had violated the "anti-trust laws of the United States, including the Sherman and Clayton Acts, as amended"; and (5) that certain JFD antenna models infringed B-T's patent No. 3,259,904, "Antenna Having Combined Support and Lead-In," issued July 5, 1966.

Trial was again to the court, and on June 27, 1968, Judge Hoffman held that the Foundation's patents were valid and infringed, dismissed the unfair competition and antitrust charges, and found claim 5 of the B-T patent obvious and invalid. Before discussing the Isbell patent in detail, Judge Hoffman noted that it had been held invalid as obvious by Judge Stephenson in the *Winegard* litigation. He stated:

> "This court is, of course, free to decide the case at bar on the basis of the evidence before it. *Triplett* v. *Lowell,* 297 U. S. 638, 642 (1936). Although a patent has been adjudged invalid in another patent infringement action against other defendants, patent owners cannot be deprived 'of the right to show, if they can, that, as against defendants who have not previously been in court, the patent is valid and infringed.' *Aghnides* v. *Holden,* 22[6] F. 2d 949, 951 (7th Cir. 1955). On the basis of the evidence before it, this court disagrees with the conclusion reached in the *Winegard* case and finds both the Isbell patent and the Mayes et al. patent valid and enforceable patents." App. 73.

B-T appealed, and the Court of Appeals for the Seventh Circuit affirmed: (1) the findings that the Isbell patent was both valid and infringed by B-T's products; (2) the dismissal of B-T's unfair competition and antitrust counterclaims; and (3) the finding that claim 5 of the B-T patent was obvious. However, the Court of Appeals reversed the judgment insofar as Judge Hoffman had found the Mayes patent valid and enforceable, enjoined infringement thereof, and provided damages for such infringement. 422 F. 2d 769 (1970).

B-T sought certiorari, assigning the conflict between the Courts of Appeals for the Seventh and Eighth Circuits as to the validity of the Isbell patent as a primary reason for granting the writ.[4] We granted certiorari, 400 U. S. 864 (1970), and subsequently requested the parties to discuss the following additional issues not raised in the petition for review:

> "1. Should the holding of *Triplett* v. *Lowell,* 297 U. S. 638, that a determination of patent invalidity is not res judicata as against the patentee in subsequent litigation against a different defendant, be adhered to?
>
> "2. If not, does the determination of invalidity in the *Winegard* litigation bind the respondents in this case?"

I

In *Triplett* v. *Lowell,* 297 U. S. 638 (1936), this Court held:

> "Neither reason nor authority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the same claims against a different defendant. While

[4] See Petition for Certiorari 13. The grant of certiorari was not limited to the validity *vel non* of the Isbell patent.

> the earlier decision may by comity be given great weight in a later litigation and thus persuade the court to render a like decree, it is not *res adjudicata* and may not be pleaded as a defense." 297 U. S., at 642.

The holding in *Triplett* has been at least gently criticized by some judges. In its opinion in the instant case, the Court of Appeals for the Seventh Circuit recognized the *Triplett* rule but nevertheless remarked that it "would seem sound judicial policy that the adjudication of [the question of the Isbell patent's validity] against the Foundation in one action where it was a party would provide a defense in any other action by the Foundation for infringement of the same patent." 422 F. 2d, at 772.[5]

---

[5] See also *Nickerson* v. *Kutschera,* 419 F. 2d 983, 984 (CA3 1969); *id.,* at 984–988 (Hastie, C. J., dissenting); *Nickerson* v. *Kutschera,* 390 F. 2d 812 (CA3 1968); *Tidewater Patent Development Co.* v. *Kitchen,* 371 F. 2d 1004, 1006 (CA4 1966); *Aghnides* v. *Holden,* 226 F. 2d 949, 951 (CA7 1955) (Schnackenberg, J., concurring); *Technograph Printed Circuits, Ltd.* v. *Packard Bell Electronics Corp.,* 290 F. Supp. 308, 317–319 (CD Cal. 1968) (holding that *Triplett* did not bar an infringement suit defendant's motion for summary judgment on *res judicata* grounds because (1) the statements as to mutuality of estoppel were dicta, and (2) the *Triplett* rule conflicted not only with more recent precedent in the estoppel area but also with the spirit of certain provisions of the Federal Rules of Civil Procedure, adopted six years after *Triplett* was decided); *Nickerson* v. *Pep Boys—Manny, Moe & Jack,* 247 F. Supp. 221 (Del. 1965). In the latter case, Judge Steel imposed an estoppel on facts somewhat similar to those before us. He analyzed the cases relied on in *Triplett, id.,* at 221–222, and concluded: "[f]rom the standpoint of the precedents [it cites], . . . Triplett v. Lowell does not rest upon too solid a foundation." *Id.,* at 222. Cf. *Technograph Printed Circuits, Ltd.* v. *United States,* 178 Ct. Cl. 543, 372 F. 2d 969 (1967); *Agrashell, Inc.* v. *Bernard Sirotta Co.,* 281 F. Supp. 704, 707–708 (EDNY 1968).

In its brief here, the Foundation urges that the rule of *Triplett* be maintained. Petitioner B-T's brief took the same position, stating that "[t]hough petitioners stand to gain by any such result, we cannot urge the destruction of a long-accepted safeguard for patentees merely for the expediency of victory." Brief for Petitioner 12. The Government, however, appearing as *amicus curiae,* urges that *Triplett* was based on uncritical acceptance of the doctrine of mutuality of estoppel, since limited significantly, and that the time has come to modify *Triplett* so that "claims of estoppel in patent cases [are] considered on a case by case basis, giving due weight to any factors which would point to an unfair or anomalous result from their allowance." Brief for the United States 7. The Government's position was spelled out in a brief filed more than a month after petitioner B-T filed its brief.

At oral argument the following colloquy occurred between the Court and counsel for B-T:

> "Q. You're not asking for Triplett to be overruled?
>
> "A. No, I'm not. I maintain that my brother here did have a right if there was a genuine new issue or some other interpretation of the [patent] claim or some interpretation of law in another circuit that's different than this Circuit, he had a right to try, under Triplett below, in another circuit.
>
> "In this particular case, where we're stuck with substantially the same documentary evidence, where we were not able to produce [in the Seventh Circuit] even that modicum of expert testimony that existed in the Eighth Circuit, we think there may be as suggested by the Solicitor General, some reason for modification of that document [*sic*] in a case such as this." Tr. of Oral Arg. 7–8.

In light of this change of attitude from the time petitioner's brief was filed, we consider that the question of modifying *Triplett* is properly before us.[6]

II

Triplett v. *Lowell* exemplified the judge-made doctrine of mutuality of estoppel, ordaining that unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as deter-

---

[6] In rebuttal, counsel for petitioner made it clear that he was urging a "modification" of *Triplett*.

"Q. Well, has Petitioner finally decided to forego any request for reconsidering Triplett, entirely, or in any part? I understood you previously to say you would welcome a modification of it to some extent.

"A. Well, Your Honor, I think that is correct. The question . . . that was asked of us in our brief by this Court was should Triplett be overruled. That we answered no.

"Now the question is should there be modification. I think in all of law, when somebody is abusing it, . . . there are exceptions, and I think the Solicitor [General] is very close to [using] the idea that if in fact this were the same trial and they had the opportunity to present their witnesses before, and they didn't do it, that it seriously ought to be considered whether there ought to be an estoppel in a situation such as this." Tr. of Oral Arg. 64–65.

Rule 23 (1)(c) of the Rules of this Court states that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." While this rule reflects many decisions stating that the Court is not required to decide questions not raised in a petition for certiorari, it does not limit our power to decide important questions not raised by the parties. The rule has certain well-recognized exceptions, particularly in cases arising in the federal courts. See R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 418 (R. Wolfson & P. Kurland ed. 1951); R. Stern & E. Gressman, Supreme Court Practice § 6.37 (4th ed. 1969).

The instant case is not one where the parties have not briefed or argued a question that the Court nevertheless finds controlling under its authority to notice plain error. See Rule 40 (1)(d)(2),

minative of an issue in the second action. *Triplett* was decided in 1936. The opinion stated that "the rules of the common law applicable to successive litigations concerning the same subject matter" did not preclude "relitigation of the validity of a patent claim previously held invalid in a suit against a different defendant." 297 U. S., at 644. In *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 127 (1912), the Court had stated that it was "a principle of general elementary law that the estoppel of a judgment must be mutual." [7] The same

---

Rules of the Supreme Court of the United States; *Silber* v. *United States*, 370 U. S. 717 (1962). Rather, given what transpired at oral argument, the case is like *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970). There, after granting certiorari, we asked the parties to brief and argue the continued validity of *The Harrisburg*, 119 U. S. 199 (1886). The petitioner, who would have stood to gain if *The Harrisburg* perished, argued that that decision should be overruled, but strongly maintained that it was unnecessary to do so in order to afford her relief. Respondent, of course, argued that *The Harrisburg* should be left intact. The United States, appearing as *amicus curiae*, urged the Court to overrule *The Harrisburg*, and that was the result.

Moreover, in a landmark decision involving an important question of judicial administration in the federal courts, this Court overruled a prior decision of many years' standing although the parties did not urge such a holding in their briefs. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 66, 68–69 (1938). See also R. Jackson, The Struggle for Judicial Supremacy 281–282 (1949). While the question here is hardly of comparable importance, it is a significant one, in the same general field, and it has been fully briefed and argued by the parties and *amici*. See *Moragne*, 398 U. S., at 378–380, n. 1; cf. *NLRB* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 661–662 (1949).

[7] See also 225 U. S., at 130–131; *Stone* v. *Farmers' Bank*, 174 U. S. 409 (1899); *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301, 317 (1894); *Litchfield* v. *Goodnow*, 123 U. S. 549, 552 (1887). *Bigelow* also spent some time discussing one of the many exceptions to the mutuality requirement, 225 U. S., at 127–128. These "exceptions" are described in Moore & Currier, Mutuality and Conclusiveness of Judgments, 35 Tul. L. Rev. 301, 311–329 (1961), and Note, 35 Geo. Wash. L. Rev. 1010, 1015–1017 (1967).

rule was reflected in the Restatement of Judgments. Restatement of Judgments § 93 (1942).[8]

But even at the time *Triplett* was decided, and certainly by the time the Restatement was published, the mutuality rule had been under fire. Courts had discarded the requirement of mutuality and held that only the party against whom the plea of estoppel was asserted had to have been in privity with a party in the prior action.[9] As Judge Friendly has noted, Bentham had at-

---

[8] Under the topic head "Persons not Parties or Privies," § 93 provides:

"General Rule. Except as stated in §§ 94–111, a person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered (a) cannot directly or collaterally attack the judgment, and (b) is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action."

Illustration 10 of the Restatement stated the essentials of the *Triplett* rule:

"A brings an action against B for infringement of a patent. B defends on the ground that the alleged patent was void and obtains judgment. A brings an action for infringement of the same patent against C who seeks to interpose the judgment in favor of B as res judicata, but setting up no relation with B. On demurrer, judgment should be for A."

[9] *Atkinson* v. *White,* 60 Me. 396, 398 (1872); *Jenkins* v. *Atlantic Coast Line R. Co.,* 89 S. C. 408, 71 S. E. 1010 (1911); *United States* v. *Wexler,* 8 F. 2d 880 (EDNY 1925); *Brobston* v. *Darby Borough,* 290 Pa. 331, 138 A. 849 (1927); *Eagle, Star & British Dominions Ins. Co.* v. *Heller,* 149 Va. 82, 140 S. E. 314 (1927); *Liberty Mutual Ins. Co.* v. *George Colon & Co.,* 260 N. Y. 305, 183 N. E. 506 (1932); *Coca Cola Co.* v. *Pepsi-Cola Co.,* 36 Del. 124, 172 A. 260 (Super. Ct. 1934); see also *Good Health Dairy Products Corp.* v. *Emery,* 275 N. Y. 14, 19, 9 N. E. 2d 758, 760 (1937). In the latter case, the New York Court of Appeals stated:

"It is true that [the owner of the automobile], not being a party to the earlier actions, and not having had a chance to litigate her rights and liabilities, is not bound by the judgments entered therein,

tacked the doctrine "as destitute of any semblance of reason, and as 'a maxim which one would suppose to have found its way from the gaming-table to the bench' . . . ." *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 954 (CA2 1964), cert. denied, 377 U. S. 934 (1964) (quoting 3 J. Bentham, Rationale of Judicial Evidence 579 (1827), reprinted in 7 Works of Jeremy Bentham 171 (J. Bowring ed. 1843)). There was also ferment in scholarly quarters.[10]

Building upon the authority cited above, the California Supreme Court, in *Bernhard* v. *Bank of America Nat. Trust & Savings Assn.*, 19 Cal. 2d 807, 122 P. 2d 892 (1942), unanimously rejected the doctrine of mutuality, stating that there was "no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation." *Id.*, at 812, 122 P. 2d, at 894. Justice Traynor's opinion, handed down the same year the Restatement was published, listed criteria since employed by many courts in many contexts:

> "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in

---

but, on the other hand, that is not a valid ground for allowing the plaintiffs to litigate anew the precise questions which were decided against them in a case in which they were parties."

[10] The principle was attacked in Cox, Res Adjudicata: Who Entitled to Plead, 9 Va. L. Rev. (n. s.) 241, 245–247 (1923); Comment, 35 Yale L. J. 607, 610 (1926); Comment, 29 Ill. L. Rev. 93, 94 (1934); Note, 18 N. Y. U. L. Q. Rev. 565, 570–573 (1941); Recent Decisions, 27 Va. L. Rev. 955 (1941); Recent Cases, 15 U. Cin. L. Rev. 349 (1941). Cf. von Moschzisker, Res Judicata, 38 Yale L. J. 299, 303 (1929); Comment, 23 Ore. L. Rev. 273 (1944); Recent Cases, 54 Harv. L. Rev. 889 (1941).

> privity with a party to the prior adjudication?" 19 Cal. 2d, at 813, 122 P. 2d, at 895.

Although the force of the mutuality rule had been diminished by exceptions and *Bernhard* itself might easily have been brought within one of the established exceptions, "Justice Traynor chose instead to extirpate the mutuality requirement and put it to the torch." Currie, Civil Procedure: The Tempest Brews, 53 Calif. L. Rev. 25, 26 (1965).

Bernhard had significant impact. Many state and federal courts rejected the mutuality requirement, especially where the prior judgment was invoked defensively in a second action against a plaintiff bringing suit on an issue he litigated and lost as plaintiff in a prior action.[11] The trend has been apparent in federal-question cases.[12] The federal courts found *Bernhard* persuasive. As Judge Hastie stated more than 20 years ago:

> "This second effort to prove negligence is comprehended by the generally accepted precept that a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that

---

[11] For discussion of the "offensive-defensive" distinction, see generally Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 43–76 (1964); Note, 35 Geo. Wash. L. Rev. 1010 (1967). See also Currie, Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281 (1957); Note, 68 Col. L. Rev. 1590 (1968); Note, 52 Cornell L. Q. 724 (1967).

[12] In federal-question cases, the law applied is federal law. This Court has noted, "It has been held in non-diversity cases, since *Erie R. Co.* v. *Tompkins,* that the federal courts will apply their own rule of *res judicata.*" *Heiser* v. *Woodruff,* 327 U. S. 726, 733 (1946). See also Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich. L. Rev. 1723, 1739, 1745 (1968); *id.,* cases cited at 1739–1740, nn. 62–64.

this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.

"The countervailing consideration urged here is lack of mutuality of estoppel. In the present suit [the plaintiff] would not have been permitted to take advantage of an earlier affirmative finding of negligence, had such finding been made in [his first suit against a different defendant]. For that reason he argues that he should not be bound by a contrary finding in that case. But a finding of negligence in the [plaintiff's first suit] would not have been binding against the [defendant in a second suit] because [that defendant] had no opportunity to contest the issue there. The finding of no negligence on the other hand was made after full opportunity to [plaintiff] on his own election to prove the very matter which he now urges a second time. Thus, no unfairness results here from estoppel which is not mutual. In reality the argument of [plaintiff] is merely that the application of *res judicata* in this case makes the law asymmetrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata.*" *Bruszewski* v. *United States,* 181 F. 2d 419, 421 (CA3 1950), cert. denied, 340 U. S. 865 (1950).

Many federal courts, exercising both federal question and diversity jurisdiction, are in accord unless in a diversity case bound to apply a conflicting state rule requiring mutuality.[13]

---

[13] See, *e. g., Lober* v. *Moore,* 135 U. S. App. D. C. 146, 417 F. 2d 714 (1969); *Provident Tradesmens Bank & Trust Co.* v. *Lumbermens Mutual Cas. Co.,* 411 F. 2d 88, 92–95 (CA3 1969); *Seguros Tepeyac, S. A., Compania Mexicana* v. *Jernigan,* 410 F. 2d 718,

Of course, transformation of estoppel law was neither instantaneous nor universal. As late as 1961, eminent authority stated that "[m]ost state courts recognize and apply the doctrine of mutuality, subject to certain exceptions . . . . And the same is true of federal courts, when free to apply their own doctrine." Moore & Currier, Mutuality and Conclusiveness of Judgments, 35 Tul. L. Rev. 301, 304 (1961) (footnotes omitted); see also, 1B J. Moore, Federal Practice ¶ 0.412 [1], pp. 1803–1804 (1965). However, in 1970 Professor Moore noted that "the trend in the federal courts is away from the rigid requirements of mutuality advocated herein." *Id.*, Supp. 1970, at 53. The same trend is evident in the state courts.[14]

726–728 (CA5 1969), cert. denied, 396 U. S. 905 (1969); *Cauefield* v. *Fidelity & Cas. Co. of New York,* 378 F. 2d 876, 878–879 (CA5), cert. denied, 389 U. S. 1009 (1967); *Graves* v. *Associated Transport, Inc.,* 344 F. 2d 894 (CA4 1965); *Kurlan* v. *Commissioner,* 343 F. 2d 625, 628–629 (CA2 1965); *United States* v. *United Air Lines,* 216 F. Supp. 709, 725–730 (ED Wash., Nev. 1962), aff'd as to *res judicata, sub nom. United Air Lines* v. *Wiener,* 335 F. 2d 379, 404–405 (CA9 1964); *Zdanok* v. *Glidden Co., supra,* at 954–956; *Davis* v. *McKinnon & Mooney,* 266 F. 2d 870, 872–873 (CA6 1959); *People* v. *Ohio Cas. Ins. Co.,* 232 F. 2d 474, 477 (CA10 1956); *Adriaanse* v. *United States,* 184 F. 2d 968 (CA2 1950), cert. denied, 340 U. S. 932 (1951); *Maryland* v. *Capital Airlines, Inc.,* 267 F. Supp. 298, 302–305 (Md. 1967); *Mathews* v. *New York Racing Assn., Inc.,* 193 F. Supp. 293 (SDNY 1961); *Eisel* v. *Columbia Packing Co.,* 181 F. Supp. 298 (Mass. 1960).

[14] See cases cited n. 9, *supra.* A more recent canvass of cases is presented in Note, 35 Geo. Wash. L. Rev. 1010 (1967).

The Supreme Court of Oregon was the most recent state court to adopt *Bernhard. Bahler* v. *Fletcher,* 257 Ore. 1, 474 P. 2d 329 (1970); see also *Pennington* v. *Snow,* 471 P. 2d 370, 376–377 (Alaska 1970); *Ellis* v. *Crockett,* 51 Haw. 45, 56, 451 P. 2d 814, 822 (1969); *Pat Perusse Realty Co.* v. *Lingo,* 249 Md. 33, 238 A. 2d 100 (1968); *Sanderson* v. *Balfour,* 109 N. H. 213, 247 A. 2d 185 (1968); *Home Owners Fed. Savings & Loan Assn.* v. *Northwestern Fire & Marine Ins. Co.,* 354 Mass. 448, 451–455, 238 N. E. 2d 55, 57–59 (1968) (approving use of *Bernhard* by a defendant against a previously

Undeniably, the court-produced doctrine of mutuality of estoppel is undergoing fundamental change in the common-law tradition. In its pristine formulation, an increasing number of courts have rejected the principle as unsound. Nor is it irrelevant that the abrogation of mutuality has been accompanied by other developments—such as expansion of the definition of "claim" in bar and merger contexts [15] and expansion of the preclusive effects afforded criminal judgments in civil litigation [16]—which enhance the capabilities of the courts to deal with some issues swiftly but fairly.

Obviously, these mutations in estoppel doctrine are not before us for wholesale approval or rejection. But at the very least they counsel us to re-examine whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid.[17]

---

losing plaintiff); *DeWitt, Inc.* v. *Hall,* 19 N. Y. 2d 141, 225 N. E. 2d 195 (1967); *Lustik* v. *Rankila,* 269 Minn. 515, 131 N. W. 2d 741 (1964); *Lucas* v. *Velikanje,* 2 Wash. App. 888, 471 P. 2d 103 (1970) (lower state appellate court held that State Supreme Court would follow *Bernhard* in an appropriate case); *Howell* v. *Vito's Trucking & Excavating Co.,* 20 Mich. App. 140, 173 N. W. 2d 777 (1969); *Desmond* v. *Kramer,* 96 N. J. Super. 96, 232 A. 2d 470 (1967); *Lynch* v. *Chicago Transit Authority,* 62 Ill. App. 2d 220, 210 N. E. 2d 792 (1965).

[15] See F. James, Civil Procedure 552–573 (1965); Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich. L. Rev. 1723, 1724 (1968).

[16] See *Moore* v. *United States,* 360 F. 2d 353 (CA4 1965); *Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd.,* 58 Cal. 2d 601, 375 P. 2d 439 (1962); *Eagle, Star & British Dominions Ins. Co.* v. *Heller,* 149 Va. 82, 140 S. E. 314 (1927); Vestal, *supra,* n. 15, at 1724; Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand. L. Rev. 683 (1966).

[17] We agree with the Government that Congress has not approved the *Triplett* rule, either by its failure to modify that rule over the years, see *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U. S. 235, 241–242 (1970); *Girouard* v. *United States,* 328 U. S. 61, 69–70

III

The cases and authorities discussed above connect erosion of the mutuality requirement to the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases. The courts have often discarded the rule while commenting on crowded dockets and long delays preceding trial. Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality,[18] but it is clear that more than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue. The question in these terms includes as part of the calculus the effect on judicial administration, but it also encompasses the concern exemplified by Bentham's reference to the gaming table in his attack on the principle of mutuality of estop-

---

(1946); *Helvering* v. *Hallock*, 309 U. S. 106, 119–120 (1940); by anything that transpired during the preparation for and accomplishment of the 1952 revision of the Patent Code; or because *in rem* invalidity provisions, see n. 34, *infra*, have disappeared from recent proposals for reform of the patent statute.

[18] Professors Moore and Currier point out that one of the underpinnings of the general concept of *res judicata* is the prevention of harassment of some litigants by the repeated assertion of the same or different claims against them by others, and that this problem is simply not present where the person asserting an estoppel was not a party (or privy to a party) in the earlier suit. They then argue that "the doctrine of judicial finality is not a catchpenny contrivance to dispose of cases merely for the sake of disposition and clear up dockets in that manner." Moore & Currier, *supra*, n. 7, at 308. On the other hand, Professor Vestal argues that "[j]udges, overwhelmed by docket loads, are looking for devices to expedite their work. Preclusion offers an opportunity to eliminate litigation which is not necessary or desirable." Vestal, *supra*, n. 15, at 1724.

pel. In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U. S. 180, 185 (1952). Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. See *Hansberry* v. *Lee,* 311 U. S. 32, 40 (1940); *Bernhard,* 19 Cal. 2d, at 811, 122 P. 2d, at 894. Also, the authorities have been more willing to permit a defendant in a second suit to invoke an estoppel against a plaintiff who lost on the same claim in an earlier suit than they have been to allow a plaintiff

in the second suit to use offensively a judgment obtained by a different plaintiff in a prior suit against the same defendant.[19] But the case before us involves neither due process nor "offensive use" questions. Rather, it depends on the considerations weighing for and against permitting a patent holder to sue on his patent after it has once been held invalid following opportunity for full and fair trial.

There are several components of the problem. First, we analyze the proposed abrogation or modification of the *Triplett* rule in terms of those considerations relevant to the patent system. Second, we deal broadly with the economic costs of continued adherence to *Triplett*. Finally, we explore the nature of the burden, if any, that permitting patentees to relitigate patents once held invalid imposes on the federal courts.

A

Starting with the premise that the statutes creating the patent system, expressly sanctioned by the Constitution,[20] represent an affirmative policy choice by Congress to reward inventors, respondents extrapolate a special public interest in sustaining "good" patents and characterize patent litigation as so technical and difficult as to present unusual potential for unsound adjudications. Although *Triplett* made no such argument in support of its holding, that rule, offering the unrestricted right to

---

[19] But see *United States* v. *United Air Lines, supra; Zdanok* v. *Glidden Co., supra;* Currie, Civil Procedure: The Tempest Brews, 53 Calif. L. Rev. 25, 28–37 (1965); Vestal, 50 Iowa L. Rev., at 55–59; cf. Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 Col. L. Rev. 1457 (1968); Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 448–454 (1960); Note, 35 Geo. Wash. L. Rev. 1010 (1967).

[20] U. S. Const., Art. I, § 8, cl. 8.

relitigate patent validity, is thus deemed an essential safeguard against improvident judgments of invalidity.[21]

We fully accept congressional judgment to reward inventors through the patent system. We are also aware that some courts have frankly stated that patent litigation can present issues so complex that legal minds, without appropriate grounding in science and technology, may have difficulty in reaching decision.[22] On the other hand, this Court has observed that issues of nonobviousness under 35 U. S. C. § 103 present difficulties "comparable to those encountered daily by the courts in such frames of reference as negligence and scienter, and should be amenable to a case-by-case development." *Graham* v. *John Deere Co.*, 383 U. S., at 18. But assuming a patent case so difficult as to provoke a frank admission of judicial uncertainty, one might ask what reason there is to expect that a second district judge or court of

[21] The Court of Claims has stated:

"For patent litigation there is a special reason why relitigation is not automatically banned as needless or redundant, and why error should not be perpetuated without inquiry. Patent validity raises issues significant to the public as well as to the named parties. *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327, 330 (1945). It is just as important that a good patent be ultimately upheld as that a bad one be definitively stricken. At the same time it must be remembered that the issue of patent validity is often 'as fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts. . . . If there be an issue more troublesome, or more apt for litigation than this, we are not aware of it.' *Harries* v. *Air King Products Co., supra,* 183 F. 2d at 162 (per L. Hand, C. J.). Because of the intrinsic nature of the subject, the first decision can be quite wrong, or derived from an insufficient record or presentation." *Technograph Printed Circuits,* 178 Ct. Cl., at 556, 372 F. 2d, at 977–978.

[22] See *Nyyssonen* v. *Bendix Corp.*, 342 F. 2d 531, 532 (CA1 1965); *Harries* v. *Air King Products Co.*, 183 F. 2d 158, 164 (CA2 1950); *Parke-Davis & Co.* v. *H. K. Mulford Co.*, 189 F. 95, 115 (SDNY 1911).

419-882 O - 72 - 26

appeals would be able to decide the issue more accurately. Moreover, as *Graham* also indicates, Congress has from the outset chosen to impose broad criteria of patentability while lodging in the federal courts final authority to decide that question. 383 U. S., at 10. In any event it cannot be sensibly contended that all issues concerning patent validity are so complex and unyielding. Nonobviousness itself is not always difficult to perceive and decide and other questions on which patentability depends are more often than not no more difficult than those encountered in the usual nonpatent case.[23]

Even conceding the extreme intricacy of some patent cases, we should keep firmly in mind that we are considering the situation where the patentee was plaintiff in the prior suit and chose to litigate at that time and place. Presumably he was prepared to litigate and to litigate to the finish against the defendant there involved. Patent litigation characteristically proceeds with some deliberation and, with the avenues for discovery available under the present rules of procedure, there is no reason to suppose that plaintiff patentees would face either surprise or unusual difficulties in getting all relevant and probative evidence before the court in the first litigation.

Moreover, we do not suggest, without legislative guidance, that a plea of estoppel by an infringement or

---

[23] The *Triplett* rule apparently operates to defeat a plea of estoppel where a patent has been declared invalid under provisions other than 35 U. S. C. § 103, the section defining nonobviousness of the subject matter as a prerequisite to patentability and giving rise to many technical issues which it is claimed courts are poorly equipped to judge. Under §§ 101 and 102 of the 1952 Act, patentability is also conditioned on novelty and utility. Some subsections of § 102—each of which can result in the loss of a patent—involve completely nontechnical issues. Yet the breadth of *Triplett* would force defendants in repetitious suits on a patent invalidated on one of these grounds to repeat proof that may be simple of understanding yet expensive to produce.

royalty suit defendant must automatically be accepted once the defendant in support of his plea identifies the issue in suit as the identical question finally decided against the patentee or one of his privies in previous litigation.[24] Rather, the patentee-plaintiff must be permitted to demonstrate, if he can, that he did not have "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time." *Eisel* v. *Columbia Packing Co.*, 181 F. Supp. 298, 301 (Mass. 1960). This element in the estoppel decision will comprehend, we believe, the important concerns about the complexity of patent litigation and the posited hazard that the prior proceedings were seriously defective.

Determining whether a patentee has had a full and fair chance to litigate the validity of his patent in an earlier case is of necessity not a simple matter. In addition to the considerations of choice of forum and incentive to litigate mentioned above,[25] certain other factors immediately emerge. For example, if the issue is nonobviousness, appropriate inquiries would be whether the first validity determination purported to employ the standards announced in *Graham* v. *John Deere Co., supra;* whether the opinions filed by the District Court and the reviewing court, if any, indicate that the prior case was one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit; and whether without fault of his own the patentee was deprived of crucial evidence or witnesses in the first litigation.[26] But as so often is the case, no one

[24] See nn. 34–35, *infra.*

[25] See *Zdanok* v. *Glidden Co.*, 327 F. 2d, at 956; *Teitelbaum Furs, Inc.*, 58 Cal. 2d, at 606–607, 375 P. 2d, at 441; cf. *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F. 2d 532, 540–541 (CA2 1965).

[26] It has been argued that one factor to be considered in deciding whether to allow a plea of estoppel in a second action is the possibility that the judgment in the first action was a compromise verdict

set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity.

We are not persuaded, therefore, that the *Triplett* rule, as it was formulated, is essential to effectuate the purposes of the patent system or is an indispensable or even an effective safeguard against faulty trials and judgments. Whatever legitimate concern there may be about the intricacies of some patent suits, it is insufficient in and of itself to justify patentees relitigating validity issues as long as new defendants are available. This is especially true if the court in the second litigation must decide in a principled way whether or not it is just and equitable to allow the plea of estoppel in the case before it.

B

An examination of the economic consequences of continued adherence to *Triplett* has two branches. Both, however, begin with the acknowledged fact that patent litigation is a very costly process. Judge Frank observed in 1942 that "the expense of defending a patent suit is often staggering to the small businessman." *Picard* v. *United Aircraft Corp.*, 128 F. 2d 632, 641 (CA2 1942) (concurring opinion). In *Lear, Inc.* v. *Adkins,* 395 U. S. 653, 669 (1969), we noted that one of the benefits accruing to a businessman accepting a license from a patentee who was threatening him with a suit was avoiding "the necessity of defending an expensive infringement action during the period when he may be least able to afford one." Similarly, in replying to claims by alleged

---

by a jury. This problem has not, however, been deemed sufficient to preclude abrogation of the mutuality principle in other contexts. Nor would it appear to be a significant consideration in deciding when to sustain a plea of estoppel in patent litigation, since most patent cases are tried to the court. See n. 30, *infra.*

infringers that they have been guilty of laches in suing on their patents, patentees have claimed that the expense of litigating forced them to postpone bringing legal action. See, *e. g., Baker Mfg. Co.* v. *Whitewater Mfg. Co.,* 430 F. 2d 1008, 1014–1015 (CA7 1970). In recent congressional hearings on revision of the patent laws, a lawyer-businessman discussing a proposal of the American Society of Inventors for government-sponsored insurance to provide funds for litigation to individual inventors holding nonassigned patents stated: "We are advised that the average cost for litigating a patent is about $50,000." [27]

This statement, and arguments such as the one made in *Baker Mfg., supra,* must be assessed in light of the fact that they are advanced by patentees contemplating action as plaintiffs, and patentees are heavily favored as a class of litigants by the patent statute. Section 282 of the Patent Code provides, in pertinent part:

> "A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it."

If a patentee's expense is high though he enjoys the benefits of the presumption of validity, the defendant in an infringement suit will have even higher costs as he both introduces proof to overcome the presumption and attempts to rebut whatever proof the patentee offers to bolster the claims. In testimony before the Senate subcommittee considering patent law revision in 1967, a member of the President's Commission on the Patent

---

[27] Hearings on Patent Law Revision before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 616 (1968) (statement of Henry J. Cappello, President, Space Recovery Research Center, Inc., and consultant on patent policy for the National Small Business Association) (hereafter 1968 Senate Hearings).

System discussed the financial burden looming before one charged as a defendant in a complex infringement action in terms of amounts that sometimes run to "hundreds of thousands of dollars." [28]

Statistics tend to bear this out. Patent suits constitute between 1% and 2% of the total number of civil cases filed each year in the District Courts.[29] Despite this relatively small figure, and notwithstanding the overwhelming tendency to try these suits without juries,[30]

---

[28] Hearings on Patent Law Revision before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 103 (1967) (statement of James W. Birkenstock, Vice President, I. B. M. Corp.) (hereafter 1967 Senate Hearings).

It is significant that the President's Commission identified as one of its primary objectives "reduc[ing] the expense of obtaining and litigating a patent." "To Promote the Progress of . . . Useful Arts" In an Age of Exploding Technology, Report of the President's Commission on the Patent System 4 (1966) (hereafter Commission Report). Judge Rich of the Court of Customs and Patent Appeals, whose public reaction to the Commission Report was mixed, did agree that "[l]itigation being as expensive as it is, no one embarks upon it lightly." Rich, The Proposed Patent Legislation: Some Comments, 35 Geo. Wash. L. Rev. 641, 644 (1967).

[29] In fiscal 1968, 71,449 civil actions were filed in the federal district courts, 857 of which were patent suits. In fiscal 1969, 77,193 civil suits were filed; 889 involved patents. In fiscal 1970, 87,321 civil suits were initiated, 1,023 of which involved patents. Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1968, Table C–2 (1969); Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1969, Table C–2 (1970); Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1970, Table C–2 (temp. ed. 1971) (hereafter Annual Report 1968, etc.).

[30] Most patent cases are tried to the court. In fiscal 1968, 1969, and 1970, the total number of patent cases going to trial and the number of patent cases going to juries were, respectively: 1968—131, 2; 1969—132, 8; and 1970—119, 3. Annual Reports 1968–1970, Table C–8.

patent cases that go to trial seem to take an inordinate amount of trial time.[31] While in 1961 a Senate staff report stated that the "typical patent trial, without a jury, was completed in 3 days or less," [32] recent figures indicate that this description of the time required is today

---

[31] The table below compares patent cases tried to the court during fiscal 1968, 1969, and 1970 with all nonjury civil cases tried during the same years. It reveals several facts: (1) something over 90% of all civil litigation is concluded within three full trial days, but less than half the patent cases are concluded in such a period of time; (2) whereas between 1.2% and 1.7% of civil nonjury trials in general require 10 or more trial days, between 14.7% and 19% of the patent cases tried to the court require 10 or more days to conclude; and (3), while the three-year trend in the district courts appears to be toward more expeditious handling of civil cases tried without a jury in terms of an annual increase in the percentage of cases concluded in three trial days or less and an overall decrease in the percentage of cases requiring 10 or more days, the trends in patent litigation are exactly contrary.

	Fiscal 1968	*Fiscal 1969*	*Fiscal 1970*
Total civil non-jury trials....	5,478	5,619	6,078
Total patent non-jury trials..	129	124	116
Approx. % of non-jury civil cases concluded in 3 trial days or less.....	92.2	92.8	93.1
Approx. % of non-jury patent cases concluded in 3 trial day or less.....	49.6	46.8	44.0
Approx. % of non-jury civil trials taking 10 or more trial days to conclude.....	1.7	1.2	1.3
Approx. % of non-jury patent trials taking 10 or more trial days to conclude.....	14.7	15.3	19

Source: Annual Reports 1968–1970, Table C–8.

[32] An Analysis of Patent Litigation Statistics, Staff Report of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 2 (1961) (Committee Print) (hereafter 1961 Staff Report).

inaccurate.[33] And time—particularly trial time—is unquestionably expensive.

As stated at the outset of this section, the expense of patent litigation has two principal consequences if the *Triplett* rule is maintained. First, assuming that a perfectly sound judgment of invalidity has been rendered in an earlier suit involving the patentee, a second infringement action raising the same issue and involving much of the same proof has a high cost to the individual parties. The patentee is expending funds on litigation to protect a patent which is by hypothesis invalid. These moneys could be put to better use, such as further research and development. The alleged infringer—operating as he must against the presumption of validity—is forced to divert substantial funds to litigation that is wasteful.

The second major economic consideration is far more significant. Under *Triplett,* only the comity restraints flowing from an adverse prior judgment operate to limit the patentee's right to sue different defendants on the same patent. In each successive suit the patentee enjoys the statutory presumption of validity, and so may easily put the alleged infringer to his expensive proof. As a consequence, prospective defendants will often decide that paying royalties under a license or other settlement is preferable to the costly burden of challenging the patent.

---

[33] See n. 31, *supra.* The 1961 Staff Report also noted that during the "fiscal years 1954–58 . . . nine [patent] trials consumed 20 or more days." *Id.,* at 2. Further examination of recent figures from the Administrative Office of the United States Courts indicates that this statement would also be of questionable validity today. In fiscal 1968, 38 civil trials that took 20 days or more to try were terminated. Of these, five, or about 13%, were patent cases. The comparable figures for fiscal 1969 are 28 civil trials requiring 20 or more days concluded, seven (25%) of which were patent cases. In fiscal 1970, 32 such civil cases were terminated; seven, or about 22%, of these suits were patent cases. Annual Reports, 1968–1970, Table C–9.

The problem has surfaced and drawn comment before. See, *e. g., Nickerson* v. *Kutschera,* 419 F. 2d 983, 988 n. 4 (CA3 1969) (dissenting opinion); *Picard* v. *United Aircraft Corp.,* 128 F. 2d, at 641–642 (concurring opinion). In 1961, the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights published a staff study of infringement and declaratory judgment actions terminated in the district courts and courts of appeals during 1949–1958; the report showed 62 actions commenced after an earlier determination that the patent in suit was not valid. It also noted that the "vast majority" of such suits were terminated without a second adjudication of validity. 1961 Staff Report 19. It is apparent that termination without a second adjudication of validity was the result of a licensing agreement or some other settlement between the parties to the second suit. It is also important to recognize that this study covered only cases *filed* and terminated; there were undoubtedly more suits that were threatened but not filed, because the threat alone was sufficient to forestall a challenge to the patent.

This is borne out by the observations of the President's Commission on the Patent System and recent testimony on proposals for changes in the patent laws. Motivated by the economic consequences of repetitious patent litigation, the Commission proposed:

> "A final federal judicial determination declaring a patent claim invalid shall be *in rem,* and the cancellation of such claim shall be indicated on all patent copies subsequently distributed by the Patent Office." Recommendation XXIII, Commission Report 38.

The Commission stressed the competitive disadvantage imposed on an alleged infringer who is unable or unwilling to defend a suit on the patent, stating also that a "patentee, having been afforded the opportunity to

exhaust his remedy of appeal from a holding of invalidity, has had his 'day in court' and should not be allowed to harass others on the basis of an invalid claim. There are few, if any, logical grounds for permitting him to clutter crowded court dockets and to subject others to costly litigation." *Id.*, at 39. The report provoked the introduction of several bills to effect broad changes in the patent system. Some bills contained provisions imposing an inflexible rule of *in rem* invalidity operating against a patentee regardless of the character of the litigation in which his patent was first declared invalid. See S. 1042, 90th Cong., 1st Sess., § 294 (1967), and H. R. 5924, 90th Cong., 1st Sess., § 294 (1967);[34] cf.

[34] "Estoppel and cancellation

"(a) In any action in a Federal court in which the issue of the validity or scope of a claim of a patent is properly before the court, and the owner of the patent as shown by the records of the Patent Office is a party or has been given notice as provided in subsection (c) of this section, a final adjudication, from which no appeal has been or can be taken, limiting the scope of the claim or holding it to be invalid, shall constitute an estoppel against the patentee, and those in privity with him, in any subsequent Federal action, and may constitute an estoppel in such other Federal actions as the latter court may determine, involving such patent. Within thirty days of such adjudication the clerk of the court shall transmit notice thereof to the Commissioner, who shall place the same in the public records of the Patent Office pertaining to such patent, and endorse notice on all copies of the patent thereafter distributed by the Patent Office that the patent is subject to such adjudication.

"(b) In any action as set forth in subsection (a) of this section, upon a final adjudication from which no appeal has been or can be taken that a claim of the patent is invalid, the court may order cancellation of such claim from the patent. Such order shall be included in the notice to the Commissioner specified in subsection (a) of this section, and the notice of cancellation of a claim shall be published by the Commissioner and endorsed on all copies of the patent thereafter distributed by the Patent Office.

"(c) In any action in a Federal court in which the validity or scope of a claim of a patent is drawn into question, the owner of the patent, as shown by the records of the Patent Office, shall

S. 3892, 90th Cong., 2d Sess., § 294 (1968).[35] Hearings were held in both Houses on these and other patent revision bills.[36]

---

have the unconditional right to intervene to defend the validity or scope of such claim. The party challenging the validity or scope of the claim shall serve upon the patent owner a copy of the earliest pleadings asserting such invalidity. If such owner cannot be served with such pleadings, after reasonable diligence is exercised, service may be made as provided for in the Federal Rules of Civil Procedure and, in addition, notice shall be transmitted to the Patent Office and shall be published in the Official Gazette."

[35] "Cancellation by court

"(a) In any action in a Federal court in which the issue of the validity of a claim of a patent is drawn into question, and the owner of the patent is shown by the records of the Patent Office is a party or has been given notice as provided in subsection (b) of this section, the court may, upon final adjudication, from which no appeal has been or can be taken, holding the claim to be invalid after such claim has previously been held invalid on the same ground by a court of competent jurisdiction from which no appeal has been or can be taken, order cancellation of such claim from the patent. Within thirty days of such order the clerk of the court shall transmit notice thereof to the Commissioner, who shall place the same in the public records of the Patent Office pertaining to such patent, and notice of cancellation of the claim shall be published by the Commissioner and endorsed on all copies of the patent thereafter distributed by the Patent Office.

"(b) In any action in a Federal court in which the validity of a claim of a patent is drawn into question, the owner of the patent, as shown by the records of the Patent Office, shall have the unconditional right to intervene to defend the validity of such claim. The party challenging the validity of the claim shall serve upon the patent owner a copy of the earliest pleadings asserting such invalidity. If such owner cannot be served with such pleadings, after reasonable diligence is exercised, service may be made as provided for in the Federal Rules of Civil Procedure and, in addition, notice shall be transmitted to the Patent Office and shall be published in the Official Gazette."

[36] See, *e. g.*, Hearings on General Revision of the Patent Laws before Subcommittee No. 3 of the House Committee on the Judiciary, 90th Cong., 1st and 2d Sess. (1967–1968); 1967 Senate Hearings,

In the Senate hearings, a member of the President's Commission remarked:

> "The businessman can be subjected to considerable harassment as an alleged infringer. Even in cases where he feels strongly that the patent would ultimately be held invalid, when he considers the hundreds of thousands of dollars in complex cases that could be involved in defending a suit, he may conclude that the best course of action is to settle for less to get rid of the problem. These nuisance settlements, although distasteful, are often, under the present system, justified on pure economics.
>
> . . . . . .
>
> "In many instances the very survival of the small businessman may be at stake. His cost of fully litigating a claim against him can seriously impair his ability to stay in business." 1967 Senate Hearings 103.[37]

The tendency of *Triplett* to multiply the opportunities for holders of invalid patents to exact licensing agreements or other settlements from alleged infringers must

---

supra, n. 28. In House Hearings, testimony on *in rem* invalidity provisions covered the full spectrum of opinion. The Patent Section of the American Bar Association was opposed. House Hearings 464–465. The Department of Justice favored it. *Id.,* at 622. The Judicial Conference of the United States approved the provision in principle. Report of the Proceedings of the Judicial Conference of the United States, Feb. and Sept. 1968, p. 81. Testimony in the Senate Hearings was also varied.

[37] Although these bills died in committee, it is noteworthy that by ascribing binding effect to the first federal declaration of invalidity, some of the proposed provisions went beyond mere abrogation of *Triplett*'s mutuality principle. Had the statutes been enacted as proposed, see nn. 34–35, *supra,* the question of whether the patentee had a full and fair opportunity to litigate the validity of his patent in the first suit would apparently have been irrelevant once it was shown that the patentee had received notice that the validity of his patent was in issue.

be considered in the context of other decisions of this Court. Although recognizing the patent system's desirable stimulus to invention, we have also viewed the patent as a monopoly which, although sanctioned by law, has the economic consequences attending other monopolies.[38] A patent yielding returns for a device that fails to meet the congressionally imposed criteria of patentability is anomalous.[39] This Court has observed:

> "A patent by its very nature is affected with a public interest. . . . [It] is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 816 (1945).

One obvious manifestation of this principle has been the series of decisions in which the Court has condemned attempts to broaden the physical or temporal scope of the patent monopoly. As stated in *Mercoid* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 666 (1944):

> "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent

---

[38] See generally *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 229–230 (1964); *Compco Corp.* v. *Day-Brite Lighting*, 376 U. S. 234 (1964); Kennedy, Patent and Antitrust Policy: The Search for a Unitary Theory, 35 Geo. Wash. L. Rev. 512 (1967).

[39] *United States* v. *Bell Telephone Co.*, 128 U. S. 315, 357, 370 (1888); see also *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394, 400–401 (1947); *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 92 (1941); *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147, 154–155 (1950) (concurring opinion).

> to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. *United States* v. *Masonite Corp.*, [316 U. S. 265,] 277 [(1942)]. The method by which the monopoly is sought to be extended is immaterial. *United States* v. *Univis Lens Co.*, [316 U. S. 241,] 251–252 [(1942)]. The patent is a privilege. But it is a privilege which is conditioned by a public purpose. It results from invention and is limited to the invention which it defines." [40]

A second group of authorities encourage authoritative testing of patent validity. In 1952, the Court indicated that a manufacturer of a device need not await the filing of an infringement action in order to test the validity of a competitor's patent, but may institute his own suit under the Declaratory Judgment Act. *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U. S., at 185–186.[41] Other

---

[40] See also *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *United States* v. *Gypsum Co.*, 333 U. S. 364, 389 (1948); *Scott Paper Co.* v. *Marcalus Co.*, 326 U. S. 249 (1945); *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, 491–492 (1942); *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 455–459 (1940); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27 (1931); *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502 (1917).

[41] In *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172 (1965), the defendant in an infringement action was permitted to counterclaim for treble damages under § 4 of the Clayton Act by asserting that the patent was invalid because procured or enforced with knowledge of fraud practiced on the Patent Office, "provided the other elements necessary to a [monopolization case under § 2 of the Sherman Act] are present." *Id.*, at 174.

decisions of this type involved removal of restrictions on those who would challenge the validity of patents.[42]

Two Terms ago in *Lear, Inc.* v. *Adkins,* 395 U. S. 653 (1969), we relied on both lines of authority to abrogate the doctrine that in a contract action for unpaid patent royalties the licensee of a patent is estopped from proving "that his licensor was demanding royalties for the use of an idea which was in reality a part of the public domain." 395 U. S., at 656. The principle that "federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent," 395 U. S., at 668, found support in *Sears* and *Compco* and the first line of cases discussed above.[43] The holding that licensee estoppel was no longer tenable was rooted in the second line of cases eliminating obstacles to suit by those disposed to challenge the validity of a patent. 395 U. S., at 663–668. Moreover, as indicated earlier, we relied on practical considerations that patent licensees "may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery." 395 U. S., at 670.

To be sure, *Lear* obviates to some extent the concern that *Triplett* prompts alleged infringers to pay royalties on patents previously declared invalid rather than to engage in costly litigation when infringement suits are

---

[42] See *MacGregor* v. *Westinghouse Electric & Mfg. Co.,* 329 U. S. 402, 407 (1947); *Katzinger Co.* v. *Chicago Mfg. Co.,* 329 U. S., at 398–401; *Scott Paper Co.* v. *Marcalus Co., supra; Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173 (1942); *Westinghouse Electric & Mfg. Co.* v. *Formica Insulation Co.,* 266 U. S. 342 (1924); *Pope Mfg. Co.* v. *Gormully,* 144 U. S. 224, 234 (1892).

[43] See *Sears,* 376 U. S., at 229–231; see also *Beckman Instruments, Inc.* v. *Technical Development Corp.,* 433 F. 2d 55, 58–59 (CA7 1970); *Kraly* v. *National Distillers & Chemical Corp.,* 319 F. Supp. 1349 (ND Ill. 1970).

threatened. *Lear* permits an accused infringer to accept a license, pay royalties for a time, and cease paying when financially able to litigate validity, secure in the knowledge that invalidity may be urged when the patentee-licensor sues for unpaid royalties. Nevertheless, if the claims are in fact invalid and are identical to those invalidated in a previous suit against another party, any royalties actually paid are an unjust increment to the alleged infringer's costs. Those payments put him at a competitive disadvantage *vis-à-vis* other alleged infringers who can afford to litigate or have successfully litigated the patent's validity.

This has several economic consequences. First, the alleged infringer who cannot afford to defend may absorb the royalty costs in order to compete with other manufacturers who have secured holdings that the patent is invalid, cutting the profitability of his business and perhaps assuring that he will never be in a financial position to challenge the patent in court. On the other hand, the manufacturer who has secured a judicial holding that the patent is invalid may be able to increase his market share substantially, and he may do so without coming close to the price levels that would prevail in a competitive market. Because he is free of royalty payments, the manufacturer with a judgment against the patent may price his products higher than competitive levels absent the invalid patent, yet just below the levels set by those manufacturers who must pay royalties. Third, consumers will pay higher prices for goods covered by the invalid patent than would be true had the initial ruling of invalidity had at least the potential for broader effect. And even if the alleged infringer can escape royalty obligations under *Lear* when he is able to bear the cost of litigation, any royalty payments passed on to consumers are as a practical matter unrecoverable by those who in fact paid them. Beyond all of this, the

rule of *Triplett* may permit invalid patents to serve almost as effectively as would valid patents as barriers to the entry of new firms—particularly small firms.

Economic consequences like these, to the extent that they can be avoided, weigh in favor of modification of the *Triplett* mutuality principle. Arguably, however, the availability of estoppel to one charged with infringement of a patent previously held invalid will merely shift the focus of litigation from the merits of the dispute to the question whether the party to be estopped had a full and fair opportunity to litigate his claim in the first action. Moore & Currier, *supra,* n. 7, at 309–310. It would seem sufficient answer to note that once it is determined that the issue in both actions was identical, it will be easier to decide whether there was a full opportunity to determine that issue in the first action than it would be to relitigate completely the question of validity. And, this does not in fact seem to have been a problem in other contexts, where strict mutuality of estoppel has been abandoned.

It has also been suggested that 35 U. S. C. § 285, which allows a court to award reasonable attorney's fees to a prevailing party "in exceptional cases,"[44] and 35 U. S. C. § 288, under which a patentee forfeits his right to recover costs even as to the valid claims of his patent if he does not disclaim invalid claims before bringing suit, work to inhibit repetitious suits on invalid patents. But neither of these provisions can operate until after litigation has occurred, and the outlay required to try a lawsuit presenting validity issues is the factor which undoubtedly forces many alleged infringers into ac-

[44] Including, apparently, a suit on a patent previously held invalid and as to which the second court can find no reasonable argument for validity. See *Tidewater Patent Development Co.* v. *Kitchen,* 371 F. 2d 1004, 1013 (CA4 1966); *Dole Valve Co.* v. *Perfection Bar Equipment, Inc.,* 318 F. Supp. 122 (ND Ill. 1970).

419-882 O - 72 - 27

cepting licenses rather than litigating. If concern about such license agreements is proper, as our cases indicate that it is, the accused infringer should have available an estoppel defense that can be pleaded affirmatively and determined on a pretrial motion for judgment on the pleadings or summary judgment. Fed. Rules Civ. Proc. 8 (c), 12 (c), and 56.

C

As the preceding discussion indicates, although patent trials are only a small portion of the total amount of litigation in the federal courts, they tend to be of disproportionate length.[45] Despite this, respondents urge that the burden on the federal courts from relitigation of patents once held invalid is *de minimis.* They rely on the figures presented in the 1961 Staff Report: during the period 1948–1959, 62 federal suits were terminated which involved relitigation of a patent previously held invalid, a figure constituting about 1% of the patent suits commenced during the same period. The same figures show that these 62 suits involved 27 patents, indicating that some patentees sue more than once after their patent has been invalidated. Respondents also urge that most of these 62 suits were settled without litigation. 1961 Staff Report 19. But, as we have suggested, this fact cuts both ways.

Even accepting respondents' characterization of these figures as *de minimis,* it is clear that abrogation of *Triplett* will save *some* judicial time if even a few relatively lengthy patent suits may be fairly disposed of on pleas of estoppel. More fundamentally, while the cases do discuss reduction in dockets as an effect of elimination of the mutuality requirement, they do not purport to hold that predictions about the actual amount of judicial time that will be saved under such a holding control de-

[45] See nn. 31–33, *supra,* and accompanying text.

cision of that question. Of course, we have no comparable figures for the past decade concerning suits begun after one declaration of invalidity, although a number of recent, significant examples of repeated litigation of the same patent have come to our attention.[46] Regardless of the magnitude of the figures, the economic consequences of continued adherence to *Triplett* are serious and any reduction of litigation in this context is by comparison an incidental matter in considering whether to abrogate the mutuality requirement.

D

It is clear that judicial decisions have tended to depart from the rigid requirements of mutuality. In accordance with this trend, there has been a corresponding development of the lower courts' ability and facility in dealing with questions of when it is appropriate and fair to impose an estoppel against a party who has already litigated an issue once and lost. As one commentator has stated:

> "Under the tests of time and subsequent developments, the *Bernhard* decision has proved its merit and the mettle of its author. The abrasive action of new factual configurations and of actual human controversies, disposed of in the common-law tradition by competent courts, far more than the commentaries of academicians, leaves the decision revealed for what it is, as it was written: a shining landmark of progress in justice and law administration." Currie, 53 Calif. L. Rev., at 37.

When these judicial developments are considered in the light of our consistent view—last presented in *Lear, Inc.* v. *Adkins*—that the holder of a patent should not be insulated from the assertion of defenses and thus allowed

[46] See, *e. g.,* cases cited n. 5, *supra;* Brief for Petitioner B–T 13–14; Brief for the United States as *amicus curiae* 28 and 32 n. 12.

to exact royalties for the use of an idea that is not in fact patentable or that is beyond the scope of the patent monopoly granted, it is apparent that the uncritical acceptance of the principle of mutuality of estoppel expressed in *Triplett* v. *Lowell* is today out of place. Thus, we conclude that *Triplett* should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid.

IV

Res judicata and collateral estoppel are affirmative defenses that must be pleaded. Fed. Rule Civ. Proc. 8 (c). The purpose of such pleading is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate. Because of *Triplett* v. *Lowell,* petitioner did not plead estoppel and respondents never had an opportunity to challenge the appropriateness of such a plea on the grounds set forth in Part III–A of this opinion. Therefore, given the partial overruling of *Triplett,* we remand the case. Petitioner should be allowed to amend its pleadings in the District Court to assert a plea of estoppel. Respondents must then be permitted to amend their pleadings, and to supplement the record with any evidence showing why an estoppel should not be imposed in this case. If necessary, petitioner may also supplement the record. In taking this action, we intimate no views on the other issues presented in this case. The judgment of the Court of Appeals is vacated and the cause is remanded to the District Court for further proceedings consistent with this opinion.

Syllabus

UNITED STATES *v.* REIDEL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 534. Argued January 20, 1971—
Decided May 3, 1971

Appellee, who had advertised in the newspaper the sale to persons over 21 years of age of a booklet entitled The True Facts About Imported Pornography, was indicted for mailing copies of the booklet in violation of 18 U. S. C. § 1461, which prohibits the knowing use of the mails for the delivery of obscene matter. Appellee moved to dismiss the indictment, contending that the statute was unconstitutional. Assuming, *arguendo,* that the booklets were obscene, the trial judge granted the motion to dismiss on the ground that appellee made a constitutionally protected delivery and that § 1461 was unconstitutional as applied to him. *Held:* Section 1461 is not unconstitutional as applied to the distribution of obscene materials to willing recipients who state that they are adults. *Roth* v. *United States,* 354 U. S. 476. The decision in *Stanley* v. *Georgia,* 394 U. S. 557, holding that a State's power to regulate obscenity does not extend to mere possession by an individual in the privacy of his own home, did not disturb *Roth, supra.* Pp. 353–356.

Reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, BRENNAN, STEWART, and BLACKMUN, JJ., joined. HARLAN, J., filed a concurring opinion, *post,* p. 357. MARSHALL, J., filed an opinion concurring in the judgment, *post,* p. 360. BLACK, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 379.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson* and *Roger A. Pauley.*

Sam Rosenwein argued the cause for appellee. With him on the brief was *Stanley Fleishman.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 1461 of Title 18, U. S. C., prohibits the knowing use of the mails for the delivery of obscene matter.[1] The issue presented by the jurisdictional statement in this case is whether § 1461 is constitutional as applied to the distribution of obscene materials to willing recipients who state that they are adults. The District Court held that it was not.[2] We disagree and reverse the judgment.

---

[1] The statute in pertinent part provides:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed . . . .

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

[2] The trial judge did not issue a written opinion but ruled orally from the bench.

I

On April 15, 1970, the appellee, Norman Reidel, was indicted on three counts, each count charging him with having mailed a single copy of an illustrated booklet entitled The True Facts About Imported Pornography. One of the copies had been mailed to a postal inspector stipulated to be over the age of 21, who had responded to a newspaper advertisement.[3] The other two copies had been seized during a search of appellee's business premises; both of them had been deposited in the mail by Reidel but had been returned to him in their original mailing envelopes bearing the mark "undelivered." As to these two booklets, the Government conceded that it had no evidence as to the identity or age of the addressees or as to their willingness to receive the booklets. Nor does the record indicate why the booklets were returned undelivered.

Reidel moved in the District Court before trial to dismiss the indictment, contending, among other things, that § 1461 was unconstitutional. Assuming for the purpose of the motion that the booklets were obscene, the trial judge granted the motion to dismiss on the ground that Reidel had made a constitutionally protected delivery and hence that § 1461 was unconstitutional as applied to him. The Government's direct appeal is here under 18 U. S. C. § 3731.

II

In *Roth* v. *United States,* 354 U. S. 476 (1957), Roth was convicted under § 1461 for mailing obscene circulars

[3] The advertisement was as follows:

"IMPORTED PORNOGRAPHY—learn the true facts before sending money abroad. Send $1.00 for our fully illustrated booklet. You must be 21 years of age and so state. Normax Press, P. O. Box 989, Fontana, California, 92335."

and advertising.[4] The Court affirmed the conviction, holding that "obscenity is not within the area of constitutionally protected speech or press," *id.*, at 485, and that § 1461, "applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Id.*, at 492. *Roth* has not been overruled. It remains the law in this Court and governs this case. Reidel, like Roth, was charged with using the mails for the distribution of obscene material. His conviction, if it occurs and the materials are found in fact to be obscene, would be no more vulnerable than was Roth's.

Stanley v. *Georgia,* 394 U. S. 557 (1969), compels no different result. There, pornographic films were found in Stanley's home and he was convicted under Georgia statutes for possessing obscene material. This Court reversed the conviction, holding that the mere private possession of obscene matter cannot constitutionally be made a crime. But it neither overruled nor disturbed the holding in *Roth.* Indeed, in the Court's view, the constitutionality of proscribing private possession of obscenity was a matter of first impression in this Court, a question neither involved nor decided in *Roth.* The Court made its point expressly: "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Id.*, at 568. Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned. Clearly the Court had

[4] *Roth* v. *United States* was heard and decided with *Alberts* v. *California,* in which the Court upheld the obscenity provisions of the California Penal Code.

no thought of questioning the validity of § 1461 as applied to those who, like Reidel, are routinely disseminating obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home. The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States District Court for the Northern District of Georgia rejecting claims that under *Stanley* v. *Georgia,* Georgia's obscenity statute could not be applied to book sellers. *Gable* v. *Jenkins,* 397 U. S. 592 (1970).

The District Court ignored both *Roth* and the express limitations on the reach of the *Stanley* decision. Relying on the statement in *Stanley* that "the Constitution protects the right to receive information and ideas . . . regardless of their social worth," 394 U. S., at 564, the trial judge reasoned that "if a person has the right to receive and possess this material, then someone must have the right to deliver it to him." He concluded that § 1461 could not be validly applied "where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults . . . ."

The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth,* the precise result that the *Stanley* opinion abjured. Whatever the scope of the "right to receive" referred to in *Stanley,* it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings that *Roth* held unprotected by the First Amendment.

The right Stanley asserted was "the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home."

394 U. S., at 565. The Court's response was that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Ibid.* The focus of this language was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials. The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution.

Reidel is in a wholly different position. He has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process. But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now.

III

A postscript is appropriate. *Roth* and like cases have interpreted the First Amendment not to insulate obscenity from statutory regulation. But the Amendment itself neither proscribes dealings in obscenity nor directs or suggests legislative oversight in this area. The relevant constitutional issues have arisen in the courts only because lawmakers having the exclusive legislative power have consistently insisted on making the distribution

of obscenity a crime or otherwise regulating such materials and because the laws they pass are challenged as unconstitutional invasions of free speech and press.

It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances. *Roth* and like cases pose no obstacle to such developments.

The judgment of the District Court is reversed.

So ordered.

[For dissenting opinion of MR. JUSTICE BLACK, see *post,* p. 379.]

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court which, as I understand it, holds that the Federal Government may prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene.* The Court today correctly rejects the contention that the recognition in *Stan-*

*Of course, the obscenity *vel non* of the materials is not presented at this juncture of the case.

ley v. *Georgia,* 394 U. S. 557 (1969), that private possession of obscene materials is constitutionally privileged under the First Amendment carries with it a "right to receive" such materials through any modes of distribution as long as adequate precautions are taken to prevent the dissemination to unconsenting adults and children. Appellee here contends, in effect, that the *Stanley* "right to receive" language, 394 U. S., at 564–565, constituted recognition that obscenity was constitutionally protected for its content. Governmental efforts to proscribe obscenity as such would, on this interpretation, not be constitutional; rather, the power of both the State and Federal Governments would now be restricted to the regulation of the constitutionally protected right to engage in this category of "speech" in light of otherwise permissible state interests, such as the protection of privacy or the protection of children.

That interpretation of *Stanley,* however, is flatly inconsistent with the square holding of *Roth* v. *United States,* 354 U. S. 476, 485 (1957):

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

Either *Roth* means that government may proscribe obscenity as such rather than merely regulate it with reference to other state interests, or *Roth* means nothing at all. And *Stanley,* far from overruling *Roth,* did not even purport to limit that case to its facts:

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. . . ." 394 U. S., at 568.

In view of *Stanley*'s explicit reaffirmance of *Roth,* I do not read the former case as limiting governmental power

to deal with obscenity to modes of regulation geared to public interests to be judicially assessed as legitimate or illegitimate in light of the nature of obscenity as a special category of constitutionally protected speech. Rather, I understand *Stanley* to rest in relevant part on the proposition that the power which *Roth* recognized in both State and Federal Governments to proscribe obscenity as constitutionally unprotected cannot be exercised to the exclusion of other constitutionally protected interests of the individual. That treatment of *Stanley* is consistent with the Court's approach to the problem of prior restraints in the obscenity area; if government chooses a system of prior restraints as an aid to its goal of proscribing obscenity, the system must be designed to minimize impact on speech which is constitutionally protected. *Blount* v. *Rizzi,* 400 U. S. 410, 416 (1971); *Marcus* v. *Search Warrant,* 367 U. S. 717, 731 (1961). See *Freedman* v. *Maryland,* 380 U. S. 51 (1965).

The analogous constitutionally protected interest in the *Stanley* situation which restricts governmental efforts to proscribe obscenity is the First Amendment right of the individual to be free from governmental programs of thought control, however such programs might be justified in terms of permissible state objectives. For me, at least, *Stanley* rests on the proposition that freedom from governmental manipulation of the content of a man's mind necessitates a ban on punishment for the mere possession of the memorabilia of a man's thoughts and dreams, unless that punishment can be related to a state interest of a stronger nature than the simple desire to proscribe obscenity as such. In other words, the "right to receive" recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing on the privacy of a man's thoughts; rather, it

is a right to a protective zone ensuring the freedom of a man's inner life, be it rich or sordid. Cf. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943).

MR. JUSTICE MARSHALL, dissenting in No. 133, *post,* p. 363, and concurring in the judgment in No. 534.

Only two years ago in *Stanley* v. *Georgia,* 394 U. S. 557 (1969), the Court fully canvassed the range of state interests that might possibly justify regulation of obscenity. That decision refused to legitimize the argument that obscene materials could be outlawed because the materials might somehow encourage antisocial conduct, and unequivocally rejected the outlandish notion that the State may police the thoughts of its citizenry. The Court did, however, approve the validity of regulatory action taken to protect children and unwilling adults from exposure to materials deemed to be obscene. The need for such protection of course arises when obscenity is distributed or displayed publicly; and the Court reaffirmed the principles of *Roth* v. *United States,* 354 U. S. 476 (1957), *Redrup* v. *New York,* 386 U. S. 767 (1967), and other decisions that involved the commercial distribution of obscene materials. Thus, *Stanley* turned on an assessment of which state interests may legitimately underpin governmental action, and it is disingenuous to contend that Stanley's conviction was reversed because his home, rather than his person or luggage, was the locus of a search.

I would employ a similar adjudicative approach in deciding the cases presently before the Court. In No. 133 the material in question was seized from claimant's luggage upon his return to the United States from a European trip. Although claimant stipulated that he intended to use some of the photographs to illustrate a book which would be later distributed commercially,

the seized items were then in his purely private possession and threatened neither children nor anyone else. In my view, the Government has ample opportunity to protect its valid interests if and when commercial distribution should take place. Since threats to these interests arise in the context of public or commercial distribution, the magnitude of the threats can best be assessed when distribution actually occurs; and it is always possible that claimant might include only some of the photographs in the final commercial product or might later abandon his intention to use any of them.* I find particularly troubling the plurality's suggestion that there is no need to scrutinize the Government's behavior because a "border search" is involved. While necessity may dictate some diminution of traditional constitutional safeguards at our Nation's borders, I should have thought that any such reduction would heighten the need jealously to protect those liberties that remain rather than justify the suspension of any and all safeguards.

No. 534 presents a different situation in which allegedly obscene materials were distributed through the mails. Plainly, any such mail order distribution poses the danger that obscenity will be sent to children, and although the appellee in No. 534 indicated his intent to sell only to adults who requested his wares, the sole safeguard designed to prevent the receipt of his merchandise by minors was his requirement that buyers declare their age. While the record does not reveal that any children actually received appellee's materials, I believe that distributors of purportedly obscene merchandise may be required to take more stringent steps to guard

*Moreover, the items seized in this case were only a component of a product which might ultimately be distributed, and viewing them in isolation is inconsistent with the principle that determinations of obscenity should focus on an entire work, see, *e. g., Roth* v. *United States,* 354 U. S. 476, 489 (1957).

against possible receipt by minors. This case comes to us without the benefit of a full trial, and, on this sparse record, I am not prepared to find that appellee's conduct was not within a constitutionally valid construction of the federal statute.

Accordingly, I dissent in No. 133 and concur in the judgment in No. 534.

Syllabus

UNITED STATES *v.* THIRTY-SEVEN (37) PHOTOGRAPHS (LUROS, CLAIMANT)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 133. Argued January 20, 1971—Decided May 3, 1971

Customs agents seized as obscene photographs possessed by claimant Luros when he returned to this country from Europe on October 24, 1969. Section 1305 (a) of 19 U. S. C., pursuant to which the agents acted, prohibits the importation of obscene material, provides for its seizure at any customs office and retention pending the judgment of the district court, and specifies that the collector of customs give information of the seizure to the district attorney, who shall institute forfeiture proceedings. The agents referred the matter to the United States Attorney, who brought forfeiture proceedings on November 6. Luros' answer denied that the photographs were obscene and counterclaimed that § 1305 (a) was unconstitutional. He asked for a three-judge court, which on November 20 was ordered to be convened. Following a hearing on January 9, 1970, the court on January 27 held § 1305 (a) unconstitutional on the grounds that the statute (1) failed to meet the procedural requirements of *Freedman* v. *Maryland,* 380 U. S. 51, and (2) was overly broad as including within its ban obscene material for private use, making it invalid under *Stanley* v. *Georgia,* 394 U. S. 557. *Held:* The judgment is reversed and the case remanded. Pp. 367–379.

309 F. Supp. 36, reversed and remanded.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded in Part I that § 1305 (a) can be construed as requiring administrative and judicial action within specified time limits that will avoid the constitutional issue that would otherwise be presented by *Freedman, supra.* Pp. 367–375.

(a) In *Freedman,* unlike the situation here, the statute failing to specify time limits was enacted pursuant to state authority and could not be given an authoritative construction by this Court to avoid the constitutional issue. P. 369.

(b) The reading into § 1305 (a) of the time limits required by *Freedman,* comports with the legislative purpose of the statute

419-882 O - 72 - 28

and furthers the policy of statutory construction to avoid a constitutional issue. Pp. 370–373.

(c) Section 1305 (a) may be constitutionally applied as construed to require intervals of no longer than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court (absent claimant-induced delays). Pp. 373–374.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN, concluded in Part II that Congress' constitutional power to remove obscene materials from the channels of commerce is unimpaired by this Court's decision in *Stanley, supra.* Cf. *United States* v. *Reidel, ante,* p. 351. Pp. 375–377.

MR. JUSTICE HARLAN concluded that Luros, who stipulated with the Government that the materials were imported for commercial purposes, lacked standing to challenge the statute for overbreadth on the ground that it applied to importation for private use. P. 378.

MR. JUSTICE STEWART, while agreeing that the First Amendment does not prevent the border seizure of obscene materials imported for commercial dissemination and that *Freedman* v. *Maryland,* 380 U. S. 51, imposes time limits for initiating forfeiture proceedings and completing the judicial obscenity determination, would not even intimate that the Government may lawfully seize literature intended for the importer's purely private use. P. 378.

WHITE, J., announced the Court's judgment and delivered an opinion in which (as to Part I) BURGER, C. J., and HARLAN, BRENNAN, STEWART, and BLACKMUN, JJ., joined, and in which (as to Part II), BURGER, C. J., and BRENNAN and BLACKMUN, JJ., joined. HARLAN, J., *post,* p. 377, and STEWART, J., *post,* p. 378, filed opinions concurring in the judgment and concurring in Part I of WHITE, J.'s opinion. BLACK, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 379. MARSHALL, J., filed a dissenting opinion, *ante,* p. 360.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson* and *Roger A. Pauley.*

Stanley Fleishman argued the cause for appellees. With him on the brief was *Sam Rosenwein.*

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN join.*

When Milton Luros returned to the United States from Europe on October 24, 1969, he brought with him in his luggage the 37 photographs here involved. United States customs agents, acting pursuant to § 305 of the Tariff Act of 1930, as amended, 46 Stat. 688, 19 U. S. C. § 1305 (a),[1]

*MR. JUSTICE HARLAN and MR. JUSTICE STEWART also join Part I of the opinion.

[1] 19 U. S. C. § 1305 (a) provides in pertinent part:

"All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided . . . . *Provided, further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

"Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter

seized the photographs as obscene. They referred the matter to the United States Attorney, who on November 6 instituted proceedings in the United States District Court for forfeiture of the material. Luros, as claimant, answered, denying the photographs were obscene and setting up a counterclaim alleging the unconstitutionality of § 1305 (a) on its face and as applied to him. He demanded that a three-judge court be convened to issue an injunction prayed for in the counterclaim. The parties stipulated a time for hearing the three-judge court motion. A formal order convening the court was entered on November 20. The parties then stipulated a briefing schedule expiring on December 16. The court ordered a hearing for January 9, 1970, also suggesting the parties stipulate facts, which they did. The stipulation revealed, among other things, that some or all of the 37 photographs were intended to be incorporated in a hard cover edition of The Kama Sutra of Vatsyayana, a widely distributed book candidly describing a large number of sexual positions. Hearing was held as scheduled on January 9, and on January 27 the three-judge court filed its judgment and opinion declaring § 1305 (a) unconstitutional and enjoining its enforcement against the 37 photographs, which were ordered returned to Luros. 309 F. Supp. 36 (CD Cal. 1970). The judgment of invalidity rested on two grounds: first, that the section failed to comply with the procedural requirements of

---

thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

"In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits."

Freedman v. *Maryland,* 380 U. S. 51 (1965), and second, that under *Stanley* v. *Georgia,* 394 U. S. 557 (1969), § 1305 (a) could not validly be applied to the seized material. We shall deal with each of these grounds separately.

I

In *Freedman* v. *Maryland, supra,* we struck down a state scheme for administrative licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U. S., at 58. To insure that a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship, we further held, (1) there must be assurance, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) "[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) "the procedure must also assure a prompt final judicial decision" to minimize the impact of possibly erroneous administrative action. *Id.,* at 58–59.

Subsequently, we invalidated Chicago's motion picture censorship ordinance because it permitted an unduly long administrative procedure before the invocation of judicial action and also because the ordinance, although requiring prompt resort to the courts after administrative decision and an early hearing, did not assure "a prompt judicial decision of the question of the alleged obscenity of the film." *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139, 141 (1968). So, too, in *Blount* v. *Rizzi,* 400 U. S. 410

(1971), we held unconstitutional certain provisions of the postal laws designed to control use of the mails for commerce in obscene materials. Under those laws an administrative order restricting use of the mails could become effective without judicial approval, the burden of obtaining prompt judicial review was placed upon the user of the mails rather than the Government, and the interim judicial order, which the Government was permitted, though not required, to obtain pending completion of administrative action, was not limited to preserving the status quo for the shortest fixed period compatible with sound judicial administration.

As enacted by Congress, § 1305 (a) does not contain explicit time limits of the sort required by *Freedman*, *Teitel*, and *Blount*.[2] These cases do not, however, require that we pass upon the constitutionality of § 1305 (a), for it is possible to construe the section to bring it in harmony with constitutional requirements.

---

[2] The United States urges that we find time limits in 19 U. S. C. §§ 1602 and 1604. Section 1602 provides that customs agents who seize goods must "report every such seizure immediately" to the collector of the district, while § 1604 provides that, once a case has been turned over to a United States Attorney, it shall be his duty "immediately to inquire into the facts" and "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay," if he concludes judicial proceedings are appropriate. We need not decide, however, whether §§ 1602 and 1604 can properly be applied to cure the invalidity of § 1305 (a), for even if they were applicable, they would not provide adequate time limits and would not cure its invalidity. The two sections contain no specific time limits, nor do they require the collector to act promptly in referring a matter to the United States Attorney for prosecution. Another flaw is that § 1604 requires that, if the United States Attorney declines to prosecute, he must report the facts to the Secretary of the Treasury for his direction, but the Secretary is under no duty to act with speed. The final flaw is that neither section requires the District Court in which a case is commenced to come promptly to a final decision.

It is true that we noted in *Blount* that "it is for Congress, not this Court, to rewrite the statute," 400 U. S., at 419, and that we similarly refused to rewrite Maryland's statute and Chicago's ordinance in *Freedman* and *Teitel*. On the other hand, we must remember that, "[w]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *e. g., Haynes* v. *United States*, 390 U. S. 85, 92 (1968) (dictum); *Schneider* v. *Smith*, 390 U. S. 17, 27 (1968); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). This cardinal principle did not govern *Freedman*, *Teitel*, and *Blount* only because the statutes there involved could not be construed so as to avoid all constitutional difficulties.

The obstacle in *Freedman* and *Teitel* was that the statutes were enacted pursuant to state rather than federal authority; while *Freedman* recognized that a statute failing to specify time limits could be saved by judicial construction, it held that such construction had to be "authoritative," 380 U. S., at 59, and we lack jurisdiction authoritatively to construe state legislation. Cf. *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335, 337 (1944). In *Blount*, we were dealing with a federal statute and thus had power to give it an authoritative construction; salvation of that statute, however, would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors. For the statute at issue in *Blount* not only failed to specify time limits within which judicial proceedings must be instituted and completed; it also failed to give any authorization at all to the administrative

agency, upon a determination that material was obscene, to seek judicial review. To have saved the statute we would thus have been required to give such authorization and to create mechanisms for carrying it into effect, and we would have had to do this in the face of legislative history indicating that the Postmaster General, when he had testified before Congress, had expressly sought to forestall judicial review pending completion of administrative proceedings. See 400 U. S., at 420 n. 8.

No such obstacles confront us in construing § 1305 (a). In fact, the reading into the section of the time limits required by *Freedman* is fully consistent with its legislative purpose. When the statute, which in its present form dates back to 1930, was first presented to the Senate, concern immediately arose that it did not provide for determinations of obscenity to be made by courts rather than administrative officers and that it did not require that judicial rulings be obtained promptly. In language strikingly parallel to that of the Court in *Freedman,* Senator Walsh protested against the "attempt to enact a law that would vest an administrative officer with power to take books and confiscate them and destroy them, because, in his judgment, they were obscene or indecent," and urged that the law "oblige him to go into court and file his information there . . . and have it determined in the usual way, the same as every other crime is determined." 72 Cong. Rec. 5419. Senator Wheeler likewise could not "conceive how any man" could "possibly object" to an amendment to the proposed legislation that required a customs officer, if he concluded material was obscene, to "tur[n] it over to the district attorney, and the district attorney prosecutes the man, and he has the right of trial by jury in that case." 71 Cong. Rec. 4466. Other Senators similarly indicated their aversion to censorship "by customs clerks and bureaucratic officials," *id.,* at 4437 (remarks of Sen.

Dill), preferring that determinations of obscenity should be left to courts and juries. See, *e. g., id.,* at 4433–4439, 4448, 4452–4459; 72 Cong. Rec. 5417–5423, 5492, 5497. Senators also expressed the concern later expressed in *Freedman* that judicial proceedings be commenced and concluded promptly. Speaking in favor of another amendment, Senator Pittman noted that a customs officer seizing obscene matter "should *immediately* report to the nearest United States district attorney having authority under the law to proceed to confiscate . . . ." *Id.,* at 5420 (emphasis added). Commenting on an early draft of another amendment that was ultimately adopted, Senator Swanson noted that officers would be required to go to court "immediately." *Id.,* at 5422. Then he added:

> "The *minute* there is a suspicion on the part of a revenue or customs officer that a certain book is improper to be admitted into this country, he presents the matter to the district court, and there will be a *prompt* determination of the matter by a decision of that court." *Id.,* at 5424 (emphasis added).

Before it finally emerged from Congress, § 1305 (a) was amended in response to objections of the sort voiced above: it thus reflects the same policy considerations that induced this Court to hold in *Freedman* that censors must resort to the courts "within a specified brief period" and that such resort must be followed by "a prompt final judicial decision . . . ." 380 U. S., at 59. Congress' sole omission was its failure to specify exact time limits within which resort to the courts must be had and judicial proceedings be completed. No one during the congressional debates ever suggested inclusion of such limits, perhaps because experience had not yet demonstrated a need for them. Since 1930, however, the need has become clear. Our researches have disclosed cases sanctioning delays of as long as 40 days and even six

months between seizure of obscene goods and commencement of judicial proceedings. See *United States* v. *77 Cartons of Magazines,* 300 F. Supp. 851 (ND Cal. 1969); *United States* v. *One Carton Positive Motion Picture Film Entitled "491,"* 247 F. Supp. 450 (SDNY 1965), rev'd on other grounds, 367 F. 2d 889 (CA2 1966). Similarly, we have found cases in which completion of judicial proceedings has taken as long as three, four, and even seven months. See *United States* v. *Ten Erotic Paintings,* 311 F. Supp. 884 (Md. 1970); *United States* v. *35 MM Color Motion Picture Film Entitled "Language of Love,"* 311 F. Supp. 108 (SDNY 1970); *United States* v. *One Carton Positive Motion Picture Film Entitled "491," supra.* We conclude that to sanction such delays would be clearly inconsistent with the concern for promptness that was so frequently articulated during the course of the Senate's debates, and that fidelity to Congress' purpose dictates that we read explicit time limits into the section. The only alternative would be to hold § 1305 (a) unconstitutional in its entirety, but Congress has explicitly directed that the section not be invalidated in its entirety merely because its application to some persons be adjudged unlawful. See 19 U. S. C. § 1652. Nor does the construction of § 1305 (a) to include specific time limits require us to decide issues of policy appropriately left to the Congress or raise other questions upon which Congress possesses special legislative expertise, for Congress has already set its course in favor of promptness and we possess as much expertise as Congress in determining the sole remaining question—that of the speed with which prosecutorial and judicial institutions can, as a practical matter, be expected to function in adjudicating § 1305 (a) matters. We accordingly see no reason for declining to specify the time limits which must be incorporated into § 1305 (a)—a specification that is fully consistent with congressional purpose and that will obviate the constitu-

tional objections raised by claimant. Indeed, we conclude that the legislative history of the section and the policy of giving legislation a saving construction in order to avoid decision of constitutional questions require that we undertake this task of statutory construction.

We begin by examining cases in the lower federal courts in which proceedings have been brought under § 1305 (a). That examination indicates that in many of the cases that have come to our attention the Government in fact instituted forfeiture proceedings within 14 days of the date of seizure of the allegedly obscene goods, see *United States* v. *Reliable Sales Co.*, 376 F. 2d 803 (CA4 1967); *United States* v. *1,000 Copies of a Magazine Entitled "Solis,"* 254 F. Supp. 595 (Md. 1966); *United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun,"* 253 F. Supp. 498 (Md. 1966), aff'd, 373 F. 2d 635 (CA4 1967); *United States* v. *392 Copies of a Magazine Entitled "Exclusive,"* 253 F. Supp. 485 (Md. 1966); and judicial proceedings were completed within 60 days of their commencement. See *United States* v. *Reliable Sales Co., supra; United States* v. *1,000 Copies of a Magazine Entitled "Solis," supra; United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun," supra; United States* v. *392 Copies of a Magazine Entitled "Exclusive," supra; United States* v. *127,295 Copies of Magazines, More or Less,* 295 F. Supp. 1186 (Md. 1968). Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305 (a) to require intervals of no more

than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court. No seizure or forfeiture will be invalidated for delay, however, where the claimant is responsible for extending either administrative action or judicial determination beyond the allowable time limits or where administrative or judicial proceedings are postponed pending the consideration of constitutional issues appropriate only for a three-judge court.

Of course, we do not now decide that these are the only constitutionally permissible time limits. We note, furthermore, that constitutionally permissible limits may vary in different contexts; in other contexts, such as a claim by a state censor that a movie is obscene, the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or between their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today. We do nothing in this case but construe § 1305 (a) in its present form, fully cognizant that Congress may re-enact it in a new form specifying new time limits, upon whose constitutionality we may then be required to pass.

So construed, § 1305 (a) may constitutionally be applied to the case before us. Seizure in the present case took place on October 24 and forfeiture proceedings were instituted on November 6—a mere 13 days after seizure. Moreover, decision on the obscenity of Luros' materials might well have been forthcoming within 60 days had claimant not challenged the validity of the statute and caused a three-judge court to be convened. We hold that proceedings of such brevity fully meet the constitutional standards set out in *Freedman, Teitel,* and

Blount. Section 1305 (a) accordingly may be applied to the 37 photographs, providing that on remand the obscenity issue is resolved in the District Court within 60 days, excluding any delays caused by Luros.

II

We next consider Luros' second claim, which is based upon *Stanley* v. *Georgia, supra.* On the authority of *Stanley,* Luros urged the trial court to construe the First Amendment as forbidding any restraints on obscenity except where necessary to protect children or where it intruded itself upon the sensitivity or privacy of an unwilling adult. Without rejecting this position, the trial court read *Stanley* as protecting, at the very least, the right to read obscene material in the privacy of one's own home and to receive it for that purpose. It therefore held that § 1305 (a), which bars the importation of obscenity for private use as well as for commercial distribution, is overbroad and hence unconstitutional.[3]

---

[3] The District Court's opinion is not entirely clear. The court may have reasoned that Luros had a right to import the 37 photographs in question for planned distribution to the general public, but our decision today in *United States* v. *Reidel, ante,* p. 351, makes it clear that such reasoning would have been in error. On the other hand, the District Court may have reasoned that, while Luros had no right to import the photographs for distribution, a person would have a right under *Stanley* to import them for his own private use and that § 1305 (a) was therefore void as overbroad because it prohibits both sorts of importation. If this was the court's reasoning, the proper approach, however, was not to invalidate the section in its entirety, but to construe it narrowly and hold it valid in its application to Luros. This was made clear in *Dombrowski* v. *Pfister,* 380 U. S. 479, 491–492 (1965), where the Court noted that, once the overbreadth of a statute has been sufficiently dealt with, it may be applied to prior conduct foreseeably within its valid sweep.

The trial court erred in reading *Stanley* as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use. In *United States* v. *Reidel, ante,* p. 351, we have today held that Congress may constitutionally prevent the mails from being used for distributing pornography. In this case, neither Luros nor his putative buyers have rights that are infringed by the exclusion of obscenity from incoming foreign commerce. By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Stanley*'s emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country. Whatever the scope of the right to receive obscenity adumbrated in *Stanley,* that right, as we said in *Reidel,* does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution. As we held in *Roth* v. *United States,* 354 U. S. 476 (1957), and reiterated today in *Reidel, supra,* obscenity is not within the scope of First Amendment protection. Hence Congress may

declare it contraband and prohibit its importation, as it has elected in § 1305 (a) to do.

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

It is so ordered.

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante,* p. 360.]

MR. JUSTICE HARLAN, concurring in the judgment and in Part I of MR. JUSTICE WHITE'S opinion.

I agree, for the reasons set forth in Part I of MR. JUSTICE WHITE'S opinion, that this statute may and should be construed as requiring administrative and judicial action within specified time limits that will avoid the constitutional issue that would otherwise be presented by *Freedman* v. *Maryland,* 380 U. S. 51 (1965). Our decision today in *United States* v. *Reidel, ante,* p. 351, forecloses Luros' claim that the Government may not prohibit the importation of obscene materials for commercial distribution.

Luros also attacked the statute on its face as overbroad because of its apparent prohibition of importation for private use. A statutory scheme purporting to proscribe only importation for commercial purposes would certainly be sufficiently clear to withstand a facial attack on the statute based on the notion that the line between commercial and private importation is so unclear as to inhibit the alleged right to import for private use. Cf. *Breard* v. *Alexandria,* 341 U. S. 622 (1951). It is incontestable that 19 U. S. C. § 1305 (a) is intended to cover at the very least importation of obscene materials for commercial purposes. See n. 1 of MR. JUSTICE WHITE'S opinion. Since the parties stipulated that the materials

were imported for commercial purposes, Luros cannot claim that his primary conduct was not intended to be within the statute's sweep. Cf. *Dombrowski* v. *Pfister,* 380 U. S. 479, 491–492 (1965). Finally, the statute includes a severability clause. 19 U. S. C. § 1652.

Thus it is apparent that we could only narrow the statute's sweep to commercial importation, were we to determine that importation for private use is constitutionally privileged. In these circumstances, the argument that Luros should be allowed to raise the question of constitutional privilege to import for private use, in order to protect the alleged First Amendment rights of private importers of obscenity from the "chilling effects" of the statute's presence on the books, seems to me to be clearly outweighed by the policy that the resolution of constitutional questions should be avoided where not necessary to the decision of the case at hand.

I would hold that Luros lacked standing to raise the overbreadth claim. See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 910 (1970).

On the foregoing premises I join Part I of the Court's opinion and as to Part II, concur in the judgment.*

MR. JUSTICE STEWART, concurring in the judgment and in Part I of MR. JUSTICE WHITE'S opinion.

I agree that the First Amendment does not prevent the border seizure of obscene materials sought to be imported for commercial dissemination. For the reasons expressed in Part I of MR. JUSTICE WHITE'S opinion, I also agree that *Freedman* v. *Maryland,* 380 U. S. 51, requires that there be time limits for the initiation of forfeiture proceedings and for the completion of the judicial determination of obscenity.

---

*Again, as in *United States* v. *Reidel, supra,* the obscenity *vel non* of the seized materials is not presented at this juncture of the case.

But I would not in this case decide, even by way of dicta, that the Government may lawfully seize literary material intended for the purely private use of the importer.[1] The terms of the statute appear to apply to an American tourist who, after exercising his constitutionally protected liberty to travel abroad,[2] returns home with a single book in his luggage, with no intention of selling it or otherwise using it, except to read it. If the Government can constitutionally take the book away from him as he passes through customs, then I do not understand the meaning of *Stanley* v. *Georgia,* 394 U. S. 557.

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

I

I dissent from the judgments of the Court for the reasons stated in many of my prior opinions. See, *e. g., Smith* v. *California,* 361 U. S. 147, 155 (1959) (BLACK, J., concurring); *Ginzburg* v. *United States,* 383 U. S. 463, 476 (1966) (BLACK, J., dissenting). In my view the First Amendment denies Congress the power to act as censor and determine what books our citizens may read and what pictures they may watch.

I particularly regret to see the Court revive the doctrine of *Roth* v. *United States,* 354 U. S. 476 (1957), that "obscenity" is speech for some reason unprotected by the First Amendment. As the Court's many decisions

[1] As MR. JUSTICE WHITE'S opinion correctly says, even if seizure of material for private use is unconstitutional, the statute can still stand in appropriately narrowed form, and the seizure in this case clearly falls within the valid sweep of such a narrowed statute. *Ante,* at 375, n. 3.

[2] *Aptheker* v. *Secretary of State,* 378 U. S. 500.

*[This opinion applies also to No. 534, *United States* v. *Reidel, ante,* p. 351.]

in this area demonstrate, it is extremely difficult for judges or any other citizens to agree on what is "obscene." Since the distinctions between protected speech and "obscenity" are so elusive and obscure, almost every "obscenity" case involves difficult constitutional issues. After *Roth* our docket and those of other courts have constantly been crowded with cases where judges are called upon to decide whether a particular book, magazine, or movie may be banned. I have expressed before my view that I can imagine no task for which this Court of lifetime judges is less equipped to deal. *Smith* v. *California, supra,* (BLACK, J., concurring).

In view of the difficulties with the *Roth* approach, it is not surprising that many recent decisions have at least implicitly suggested that it should be abandoned. See *Stanley* v. *Georgia,* 394 U. S. 557 (1969); *Redrup* v. *New York,* 386 U. S. 767 (1967). Despite the proved shortcomings of *Roth,* the majority in *Reidel* today reaffirms the validity of that dubious decision. Thus, for the foreseeable future this Court must sit as a Board of Supreme Censors, sifting through books and magazines and watching movies because some official fears they deal too explicitly with sex. I can imagine no more distasteful, useless, and time-consuming task for the members of this Court than perusing this material to determine whether it has "redeeming social value." This absurd spectacle could be avoided if we would adhere to the literal command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

II

Wholly aside from my own views of what the First Amendment demands, I do not see how the reasoning of MR. JUSTICE WHITE'S opinion today in *Thirty-Seven Photographs* can be reconciled with the holdings of

earlier cases. That opinion insists that the trial court erred in reading *Stanley* v. *Georgia, supra,* "as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use." *Ante,* at 376. But it is never satisfactorily explained just why the trial court's reading of *Stanley* was erroneous. It would seem to me that if a citizen had a right to possess "obscene" material in the privacy of his home he should have the right to receive it voluntarily through the mail. Certainly when a man legally purchases such material abroad he should be able to bring it with him through customs to read later in his home. The mere act of importation for private use can hardly be more offensive to others than is private perusal in one's home. The right to read and view any literature and pictures at home is hollow indeed if it does not include a right to carry that material privately in one's luggage when entering the country.

The plurality opinion seems to suggest that *Thirty-Seven Photographs* differs from *Stanley* because "Customs officers characteristically inspect luggage and their power to do so is not questioned in this case . . . ." *Ante,* at 376. But surely this observation does not distinguish *Stanley,* because police frequently search private homes as well, and their power to do so is unquestioned so long as the search is reasonable within the meaning of the Fourth Amendment.

Perhaps, however, the plurality reasons silently that a prohibition against importation of obscene materials for private use is constitutionally permissible because it is necessary to prevent ultimate commercial distribution of obscenity. It may feel that an importer's intent to distribute obscene materials commercially is so difficult to prove that all such importation may be outlawed without offending the First Amendment. A very similar argument was made by the State in *Stanley* when it urged

that enforcement of a possession law was necessary because of the difficulties of proving intent to distribute or actual distribution. However, the Court unequivocally rejected that argument because an individual's right to "read or observe what he pleases" is so "fundamental to our scheme of individual liberty." 394 U. S., at 568.

Furthermore, any argument that all importation may be banned to stop possible commercial distribution simply ignores numerous holdings of this Court that legislation touching on First Amendment freedoms must be precisely and narrowly drawn to avoid stifling the expression the Amendment was designed to protect. Certainly the Court has repeatedly applied the rule against overbreadth in past censorship cases, as in *Butler* v. *Michigan,* 352 U. S. 380 (1957), where we held that the State could not quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." *Id.,* at 383. Cf. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *United States* v. *Robel,* 389 U. S. 258 (1967).

Since the plurality opinion offers no plausible reason to distinguish private possession of "obscenity" from importation for private use, I can only conclude that at least four members of the Court would overrule *Stanley.* Or perhaps in the future that case will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.

The plurality opinion appears to concede that the customs obscenity statute is unconstitutional on its face after the Court's decision in *Freedman* v. *Maryland,* 380 U. S. 51 (1965), because this law specifies no time limits within which forfeiture proceedings must be started against seized books or pictures, and it does not require a prompt final judicial hearing on obscenity. *Ante,* at 368–369. Once the plurality has reached this determination, the proper course would be to affirm the lower court's de-

cision. But the plurality goes on to rewrite the statute by adding specific time limits. The plurality then notes that the Government here has conveniently stayed within these judicially manufactured limits by one day, and on that premise it concludes the statute may be enforced in this case. In my view the plurality's action in rewriting this statute represents a seizure of legislative power that we simply do not possess under the Constitution.

Certainly claimant Luros has standing to raise the claim that the customs statute's failure to provide for prompt judicial decision renders it unconstitutional. Our previous decisions make clear that such censorship statutes may be challenged on their face as a violation of First Amendment rights "whether or not [a defendant's] conduct could be proscribed by a properly drawn statute." *Freedman* v. *Maryland, supra,* at 56. This is true because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). Since this censorship statute is unconstitutional on its face, and claimant has standing to challenge it as such, that should end the case without further ado. But the plurality nimbly avoids this result by writing a new censorship statute.

I simply cannot understand how the plurality determines it has the power to substitute the new statute for the one that the duly elected representatives of the people have enacted. The plurality betrays its uneasiness when it concedes that we specifically refused to undertake any such legislative task in *Freedman, supra,* and in *Blount* v. *Rizzi,* 400 U. S. 410 (1971). After holding the Maryland movie censorship law unconstitutional in *Freedman,* the Court stated:

> "How or whether Maryland is to incorporate the required procedural safeguards in the statutory

> scheme is, of course, for the State to decide." 380 U. S., at 60.

With all deference, I would suggest that the decision whether and how the customs obscenity law should be rewritten is a task for the Congress, not this Court. Congress might decide to write an entirely different law, or even decide that the Nation can well live without such a statute.

The plurality claims to find power to rewrite the customs obscenity law in the statute's legislative history and in the rule that statutes should be construed to avoid constitutional questions. *Ante,* at 373. I agree, of course, that statutes should be construed to uphold their constitutionality when this can be done without misusing the legislative history and substituting a new statute for the one that Congress has passed. But this rule of construction does not justify the plurality's acting like a legislature or one of its committees and redrafting the statute in a manner not supported by the deliberations of Congress or by our previous decisions in censorship cases.

The plurality relies principally on statements made by Senators Swanson and Pittman when the customs obscenity legislation was under discussion on the Senate floor. The defect in the Court's reliance is that the Senators' statements did not refer to the version of the law that was passed by Congress. Senator Pittman, objecting to one of the very first drafts of the law, said:

> "Why would it not protect the public entirely if we were to provide for the seizure as now provided and that the property should be held by the officer seizing, and that he should immediately report to the nearest United States district attorney having authority under the law to proceed to confiscate . . . ." 72 Cong. Rec. 5240.

A few minutes later Senator Walsh of Montana announced he would propose an amendment "that would meet the suggestion made by the Senator from Nevada [Mr. Pittman] . . . ." *Id.*, at 5421. As Senator Walsh first presented his amendment it read:

> "Upon the appearance of any such book or other matter at any customs office the collector thereof shall *immediately* transmit information thereof to the district attorney of the district in which such port is situated, who shall *immediately* institute proceedings in the district court for the forfeiture and destruction of the same . . . ." *Ibid.* (Emphasis added.)

Senator Swanson was referring to this *first draft* of the Walsh amendment when he made the remarks cited by the plurality that officers would be required to go to court "immediately" and that there would be a "prompt" decision on the matter. *Id.*, at 5422, 5424. But just after Swanson's statement the Walsh amendment was changed on the Senate floor to read as follows:

> "Upon the seizure of such book or matter the *collector shall transmit* information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, *who shall institute* proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized." *Id.*, at 5424. (Emphasis added.)

Thus the requirement that officers go to court "immediately" was dropped in the second draft of the Walsh amendment, and the language of this second draft was enacted into law. The comments quoted and relied upon by the plurality were made with reference to an amendment draft that was not adopted by the Senate and is not now the law. This legislative history just referred

to provides no support that I can see for the Court's action today. To the extent that these debates tell us anything about the Senate's attitude toward prompt judicial review of censorship decisions they show simply that the issue was put before the Senate but that it did not choose to require prompt judicial review.

The plurality concedes that in previous censorship cases we have considered the validity of the statutes before us on their face, and we have refused to rewrite them. Although some of these cases did involve state statutes, in *Blount* v. *Rizzi,* 400 U. S. 410 (1971), we specifically declined to attempt to save a federal obscenity mail-blocking statute by redrafting it. The Court there plainly declared: "it is for Congress, not this Court, to rewrite the statute." *Id.,* at 419. The plurality in its opinion now seeks to distinguish *Blount* because saving the mail-blocking statute by requiring prompt judicial review "would have required its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors." *Ante,* at 369. But the only "expressed intention" cited by the plurality to support this argument is testimony by the Postmaster General that he wanted to forestall judicial review pending completion of administrative mail-blocking proceedings. *Ante,* at 370. That insignificant piece of legislative history would have posed no obstacle to the Court's saving the mail-blocking statute by requiring prompt judicial review *after* prompt administrative proceedings. Yet the Court in *Blount* properly refused to undertake such a legislative task, just as it did in the cases involving state censorship statutes.

The plurality also purports to justify its judicial legislation by pointing to the severability provisions contained in 19 U. S. C. § 1652. It is difficult to see how this distinguishes earlier cases, since the statutes struck down in *Freedman* v. *Maryland, supra,* and *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139 (1968), also contained

severability provisions. See Md. Ann. Code, Art. 66A, § 24 (1957), Municipal Code of Chicago § 155–7.4 (1961).

The plurality is not entirely clear whether the time limits it imposes stem from the legislative history of the customs law or from the demands of the First Amendment. At one point we are told that 14 days and 60 days are not the "only constitutionally permissible time limits," and that if Congress imposes new rules this would present a new constitutional question. *Ante,* at 374. This strongly suggests the time limits stem from the Court's power to "interpret" or "construe" federal statutes, not from the Constitution. But since the Court's action today has no support in the legislative history or the wording of the statute, it appears much more likely that the time limits are derived from the First Amendment itself. If the plurality is really drawing its rules from the First Amendment, I find the process of derivation both peculiar and disturbing. The rules are not derived by considering what the First Amendment demands, but by surveying previously litigated cases and then guessing what limits would not pose an "undue hardship" on the Government and the lower federal courts. *Ante,* at 373. Scant attention is given to the First Amendment rights of persons entering the country. Certainly it gives little comfort to an American bringing a book home to Colorado or Alabama for personal reading to be informed without explanation that a 74-day delay at New York harbor is not "undue." Faced with such lengthy legal proceedings and the need to hire a lawyer far from home, he is likely to be coerced into giving up his First Amendment rights. Thus the whims of customs clerks or the congestion of their business will determine what Americans may read.

I would simply leave this statute as the Congress wrote it and affirm the judgment of the District Court.

I do not understand why the plurality feels so free to abandon previous precedents protecting the cherished freedoms of press and speech. I cannot, of course, believe it is bowing to popular passions and what it perceives to be the temper of the times. As I have said before, "Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power." *Turner* v. *United States,* 396 U. S. 398, 426 (1970) (BLACK, J., dissenting). In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten. I hope, however, "that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." *Dennis* v. *United States,* 341 U. S. 494, 581 (1951) (BLACK, J., dissenting).

Syllabus

RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* PERALES

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

No. 108. Argued January 13, 1971—Decided May 3, 1971

Written reports by physicians who have examined claimant for disability insurance benefits under Social Security Act constitute "substantial evidence" supporting a nondisability finding within the standard of § 205 (g) of the Act, notwithstanding the reports' hearsay character, the absence of cross-examination (through claimant's failure to exercise his subpoena rights), and the directly opposing testimony by the claimant and his medical witness; and procedure followed under Act does not violate due process requirements. Pp. 399–410.

412 F. 2d 44 and 416 F. 2d 1250, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, WHITE, and MARSHALL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BLACK and BRENNAN, JJ., joined, *post*, p. 411.

Deputy Solicitor General Friedman argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Assistant Attorney General Gray, Lawrence G. Wallace, Kathryn H. Baldwin,* and *Michael C. Farrar.*

Richard Tinsman, by appointment of the Court, 398 U. S. 902, argued the cause and filed a brief for respondent.

Briefs of *amici curiae* were filed by *Franklin M. Schultz* and *John T. Miller, Jr.,* for the American Bar Association; by *Frank P. Christian, Harry B. Adams III,* and *Melvin N. Eichelbaum* for the Bexar County Legal Aid Association; and by *Jonathan Weiss* for the Appalachian Research and Defense Fund et al.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In 1966 Pedro Perales, a San Antonio truck driver, then aged 34, height 5′ 11″, weight about 220 pounds, filed a claim for disability insurance benefits under the Social Security Act. Sections 216 (i)(1), 68 Stat. 1080, and 223 (d)(1), 81 Stat. 868, of that Act, 42 U. S. C. § 416 (i)(1) and 42 U. S. C. § 423 (d)(1) (1964 ed., Supp. V), both provide that the term "disability" means "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . ." [1] Section 205 (g), 42 U. S. C. § 405 (g), relating to judicial review, states, "The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ."

The issue here is whether physicians' written reports of medical examinations they have made of a disability claimant may constitute "substantial evidence" supportive of a finding of nondisability, within the § 205 (g) standard, when the claimant objects to the admissibility of those reports and when the only live testimony is presented by his side and is contrary to the reports.

I

In his claim Perales asserted that on September 29, 1965, he became disabled as a result of an injury to his back sustained in lifting an object at work. He was seen by a neurosurgeon, Dr. Ralph A. Munslow, who first recommended conservative treatment. When this provided no relief, myelography was performed and surgery for a possible protruded intervertebral disc at L–5 was advised. The patient at first hesitated about surgery

[1] Not pertinent here are the durational aspects of disability specified in the statute's definition.

and appeared to improve. On recurrence of pain, however, he consented to the recommended procedure. Dr. Munslow operated on November 23. The surgical note is in the margin.[2] No disc protrusion or other definitive pathology was identified at surgery. The post-operative diagnosis was: "Nerve root compression syndrome, left." The patient was discharged from Dr. Munslow's care on January 25, 1966, with a final diagnosis of "Neuritis, lumbar, mild."

Mr. Perales continued to complain, but Dr. Munslow and Dr. Morris H. Lampert, a neurologist called in consultation, were still unable to find any objective neurological explanation for his complaints. Dr. Munslow advised that he return to work.

In April 1966 Perales consulted Dr. Max Morales, Jr., a general practitioner of San Antonio. Dr. Morales hospitalized the patient from April 15 to May 2. His final

---

[2] "Midline incision is made in upper border of the spine of L4 downward in the midline to the upper sacrum. Dissection is carried down and in the subperiosteal space exposing the interspaces at L4–5 and L5 S1. At each interspace, partial laminectomy is carried out on the left and of the bone adjacent to the interspace followed by resection of the intervening ligament in order that the interspace could be thoroughly explored both by inspection as well as by palpation. In each instance, there was no protrusion of the disc identified. Further resection downward over the sacrum is carried out in order that we do not overlook the fragment of disc that may have extruded extra-durally in this space but none is found.

"There seems to be more tightness of structures particularly of the roots in the dural sac and the lumbar area than one usually encountered. It is felt that this is the situation representing the root compression syndrome, the exact mechanics of which is not apparent. It is felt that for this reason that hemilaminectomy of the left L–5 would afford the patient additional decompression and this is carried out. After this had been done the dural sac bulges upward in a more normal position. Repeat inspection through the intact dura reveals no evidence of an intradural mass. Likewise the anterior aspect of the canal appears normal. . . ."

discharge diagnosis was: "Back sprain, lumbo-sacral spine."

Perales then filed his claim. As required by § 221 of the Act, 42 U. S. C. § 421, the claim was referred to the state agency for determination. The agency obtained the hospital records and a report from Dr. Morales. The report set forth no physical findings or laboratory studies, but the doctor again gave as his diagnosis: "Back sprain—lumbo-sacral spine," this time "moderately severe," with "Ruptured disk not ruled out." The agency arranged for a medical examination, at no cost to the patient, by Dr. John H. Langston, an orthopedic surgeon. This was done May 25.

Dr. Langston's ensuing report to the Division of Disability Determination was devastating from the claimant's standpoint. The doctor referred to Perales' being "on crutches or cane" since his injury. He noted a slightly edematous condition in the legs, attributed to "inactivity and sitting around"; slight tenderness in some of the muscles of the dorsal spine, thought to be due to poor posture; and "a very mild sprain [of those muscles] which would resolve were he actually to get a little exercise and move." Apart from this, and from the residuals of the pantopaque myelography and hemilaminectomy, Dr. Langston found no abnormalities of the lumbar spine. Otherwise, he described Perales as a "big physical healthy specimen . . . obviously holding back and limiting all of his motions, intentionally. . . . His upper extremities, though they are completely uninvolved by his injury, he holds very rigidly as though he were semiparalyzed. His reach and grasp are very limited but intentionally so. . . . Neurological examination is entirely normal to detailed sensory examination with pinwheel, vibratory sensations, and light touch. Reflexes are very active and there is no atrophy anywhere." The

orthopedist's summarization, impression, and prognosis are in the margin.[3]

The state agency denied the claim. Perales requested reconsideration. Dr. Morales submitted a further report to the agency and an opinion to the claimant's attorney. This outlined the surgery and hospitalizations and his own conservative and continuing treatment of the patient, the medicines prescribed, the administration of ultrasound therapy, and the patient's constant complaints. The doctor concluded that the patient had not made a complete recovery from his surgery, that he was not malingering, that his injury was permanent, and that he was totally and permanently disabled.[4] He recommended against any further surgery.

---

[3] "IMPRESSION: He may have a very mild chronic back sprain associated with the congenital anomalies as seen on x-ray, but it has been a long time since I have been so impressed with the obvious attempt of a patient to exaggerate his difficulties by simply just standing there and not moving—not even the uninvolved upper extremities. Thus, he has a tremendous psychological overlay to this illness, and I sincerely suggest that he be seen by a psychiatrist.

"PROGNOSIS: He should have intensive physio-therapy in the form of active exercise, including walking, bicycling, and an all out attempt at conservative rehabilitation. Were he to follow this program, and were it to be effective, I would estimate the time necessary at about three to six months. This is also considering that he does not have any serious psychiatric disease, though he obviously does have a tremendous psychological overlay to his illness."

[4] "Diagnosis in this case should be considered as crush injury to disc in the lumbo-sacral region of the spine resulting in either a ruptured disc or a slipped disc which was subsequently operated on by Dr. Ralph Munslow. Since the operation, the patient has not made a complete recovery; on the contrary, the patient continues to complain as bitterly now as he did prior to surgery.

"Since I started seeing this patient on April 13, I have had occasion to see and talk with him over 30 times. During this period and with this number of visits, I have become thoroughly convinced that this man is not malingering. I am completely convinced of his

The state agency then arranged for an examination by Dr. James M. Bailey, a board-certified psychiatrist with a subspecialty in neurology. Dr. Bailey's report to the agency on August 30, 1966, concluded with the following diagnosis:

> "Paranoid personality, manifested by hostility, feelings of persecution and long history of strained interpersonal relationships.
>
> "I do not feel that this patient has a separate psychiatric illness at this time. It appears that his personality is conducive to anger, frustrations, etc."

The agency again reviewed the file. The Bureau of Disability Insurance of the Social Security Administration made its independent review. The report and opinion of Dr. Morales, as the claimant's attending physician, were considered, as were those of the other examining physicians. The claim was again denied.

Perales requested a hearing before a hearing examiner. The agency then referred the claimant to Dr. Langston and to Dr. Richard H. Mattson for electromyography studies. Dr. Mattson's notes referred to "some chronic or past disturbance of function in the nerve supply" to the left and right anterior tibialis muscles and right

---

sincerity and of the genuine and truthful nature of his complaints. From my own observations and from physical examination, it is my considered opinion that this patient has indeed an injury to the lumbo-sacral region of the spine which has not been corrected by surgery. My opinion is that the injury sustained is of a permanent nature and that as things presently stand, the patient is totally, completely, and permanently disabled. It is my considered opinion that this patient in the condition in which he finds himself at this time would not be able to continue gainful employment as a common laborer. Inasmuch as this patient has had previous surgery to the affected area, I do not know that further surgery would have anything to offer him, and have told him that about the most I could offer him would be a support belt to help relieve the symptoms, by the use of a walking cane, and analgesics for relief of the symptoms."

extensor digitorium brevis muscles that was "strongly suggestive of lack of maximal effort" and was "the kind of finding that is typically associated with a functional or psychogenic component to weakness." There was no evidence of "any active process effecting [*sic*] the nerves at present." Dr. Langston advised the agency that Dr. Mattson's finding of "very poor effort" verified what Dr. Langston had found on the earlier physical examination.

The requested hearing was set for January 12, 1967, in San Antonio. Written notice thereof was given the claimant with a copy to his attorney. The notice contained a definition of disability, advised the claimant that he should bring all medical and other evidence not already presented, afforded him an opportunity to examine all documentary evidence on file prior to the hearing, and told him that he might bring his own physician or other witnesses and be represented at the hearing by a lawyer.

The hearing took place at the time designated. A supplemental hearing was held March 31. The claimant appeared at the first hearing with his attorney and with Dr. Morales. The attorney formally objected to the introduction of the several reports of Drs. Langston, Bailey, Mattson, and Lampert, and of the hospital records. Various grounds of objection were asserted, including hearsay, absence of an opportunity for cross-examination, absence of proof the physicians were licensed to practice in Texas, failure to demonstrate that the hospital records were proved under the Business Records Act, and the conclusory nature of the reports. These objections were overruled and the reports and hospital records were introduced. The reports of Dr. Morales and of Dr. Munslow were then submitted by the claimant's counsel and admitted.

At the two hearings oral testimony was submitted by claimant Perales, by Dr. Morales, by a former fellow

419-882 O - 72 - 30

employee of the claimant, by a vocational expert, and by Dr. Lewis A. Leavitt, a physician board-certified in physical medicine and rehabilitation, and chief of, and professor in, the Department of Physical Medicine at Baylor University College of Medicine. Dr. Leavitt was called by the hearing examiner as an independent "medical adviser," that is, as an expert who does not examine the claimant but who hears and reviews the medical evidence and who may offer an opinion. The adviser is paid a fee by the Government. The claimant, through his counsel, objected to any testimony by Dr. Leavitt not based upon examination or upon a hypothetical. Dr. Leavitt testified over this objection and was cross-examined by the claimant's attorney. He stated that the consensus of the various medical reports was that Perales had a mild low-back syndrome of musculo-ligamentous origin.

The hearing examiner, in reliance upon the several medical reports and the testimony of Dr. Leavitt, observed in his written decision, "There is objective medical evidence of impairment which the heavy preponderance of the evidence indicates to be of mild severity. . . . Taken altogether, the Hearing Examiner is of the conclusion that the claimant has not met the burden of proof." He specifically found that the claimant "is suffering from a low back syndrome of musculo-ligamentous origin, and of mild severity"; that while he "has an emotional overlay to his medical impairment it does not require psychiatric treatment and is of minimal contribution, if any, to his medical impairment or to his general ability to engage in substantial gainful activity"; that "[n]either his medical impairment nor his emotional overlay, singly or in combination, constitute a disability as defined" in the Act; and that the claimant is capable of engaging as a salesman in work in which he had previously engaged, of working as a watchman or

guard where strenuous activity is not required, or as a ticket-taker or janitor. The hearing examiner's decision, then, was that the claimant was not entitled to a period of disability or to disability insurance benefits.

It is to be noted at this point that § 205 (d) of the Act, 42 U. S. C. § 405 (d), provides that the Secretary has power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence and that the Secretary's regulations, authorized by § 205 (a), 42 U. S. C. § 405 (a), provide that a claimant may request the issuance of subpoenas, 20 CFR § 404.926. Perales, however, who was represented by counsel, did not request subpoenas for either of the two hearings.

The claimant then made a request for review by the Appeals Council and submitted as supplemental evidence a judgment dated June 2, 1967, in Perales' favor against an insurance company for workmen's compensation benefits aggregating $11,665.84, plus medical and related expenses, and a medical report letter dated December 28, 1966, by Dr. Coyle W. Williams, apparently written in support of a welfare claim made by Perales. In his letter the doctor noted an essentially negative neurological and physical examination except for tenderness in the lumbar area and limited straight leg raising. He observed, "I cannot explain all his symptoms on a physical basis. I would recommend he would re-condition himself and return to work. My estimation, he has a 15% permanent partial disability the body as a whole." The Appeals Council ruled that the decision of the hearing examiner was correct.

Upon this adverse ruling the claimant instituted the present action for review pursuant to § 205 (g). Each side moved for summary judgment on the administrative transcript. The District Court stated that it was reluctant to accept as substantial evidence the opinions of medical

experts submitted in the form of unsworn written reports, the admission of which would have the effect of denying the opposition an opportunity for cross-examination; that the opinion of a doctor who had never examined the claimant is entitled to little or no probative value, especially when opposed by substantial evidence including the oral testimony of an examining physician; and that what was before the court amounted to hearsay upon hearsay. The case was remanded for a new hearing before a different examiner. *Perales* v. *Secretary,* 288 F. Supp. 313 (WD Tex. 1968). On appeal the Fifth Circuit noted the absence of any request by the claimant for subpoenas and held that, having this right and not exercising it, he was not in a position to complain that he had been denied the rights of confrontation and of cross-examination. It held that the hearsay evidence in the case was admissible under the Act; that, specifically, the written reports of the physicians were admissible in the administrative hearing; that Dr. Leavitt's testimony also was admissible; but that all this evidence together did not constitute substantial evidence when it was objected to and when it was contradicted by evidence from the only live witnesses. *Cohen* v. *Perales,* 412 F. 2d 44 (1969).

On rehearing, the Court of Appeals observed that it did not mean by its opinion that uncorroborated hearsay could never be substantial evidence supportive of a hearing examiner's decision adverse to a claimant. It emphasized that its ruling that uncorroborated hearsay could not constitute substantial evidence was applicable only when the claimant had objected and when the hearsay was directly contradicted by the testimony of live medical witnesses and by the claimant in person. *Cohen* v. *Perales,* 416 F. 2d 1250 (1969). Certiorari was granted in order to review and resolve this important procedural due process issue. 397 U. S. 1035 (1970).

II

We therefore are presented with the not uncommon situation of conflicting medical evidence. The trier of fact has the duty to resolve that conflict. We have, on the one hand, an absence of objective findings, an expressed suspicion of only functional complaints, of malingering, and of the patient's unwillingness to do anything about remedying an unprovable situation. We have, on the other hand, the claimant's and his personal physician's earnest pleas that significant and disabling residuals from the mishap of September 1965 are indeed present.

The issue revolves, however, around a system which produces a mass of medical evidence in report form. May material of that kind ever be "substantial evidence" when it stands alone and is opposed by live medical evidence and the client's own contrary personal testimony? The courts below have held that it may not.

III

The Social Security Act has been with us since 1935. Act of August 14, 1935, 49 Stat. 620. It affects nearly all of us. The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. But, as the Government's brief here accurately pronounces, "Such a system must be fair—and it must work." [5]

Congress has provided that the Secretary

> "shall have full power and authority to make rules and regulations and to establish procedures . . . necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and

[5] Brief 14.

> regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder." § 205 (a), 42 U. S. C. § 405 (a).

Section 205 (b) directs the Secretary to make findings and decisions; on request to give reasonable notice and opportunity for a hearing; and in the course of any hearing to receive evidence. It then provides:

> "Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure."

In carrying out these statutory duties the Secretary has adopted regulations that state, among other things:

> "The hearing examiner shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. . . . The . . . procedure at the hearing generally . . . shall be in the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing." 20 CFR § 404.927.

From this it is apparent that (a) the Congress granted the Secretary the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the examiner's discretion. There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should

be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.

IV

With this background and this atmosphere in mind, we turn to the statutory standard of "substantial evidence" prescribed by § 205 (g). The Court has considered this very concept in other, yet similar, contexts. The National Labor Relations Act, § 10 (e), in its original form, provided that the NLRB's findings of fact "if supported by evidence, shall be conclusive." 49 Stat. 454. The Court said this meant "supported by substantial evidence" and that this was

> "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197, 229 (1938).

The Court has adhered to that definition in varying statutory situations. See *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 300 (1939); *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 477–487 (1951); *Consolo* v. *Federal Maritime Comm'n,* 383 U. S. 607, 619–620 (1966).

V

We may accept the propositions advanced by the claimant, some of them long established, that procedural due process is applicable to the adjudicative administrative proceeding involving "the differing rules of fair play, which through the years, have become associated with differing types of proceedings," *Hannah* v. *Larche,* 363 U. S. 420, 442 (1960); that "the 'right' to Social Security benefits is in one sense 'earned,' " *Flemming* v. *Nestor,* 363 U. S. 603, 610 (1960); and that the

> "extent to which procedural due process must be afforded the recipient is influenced by the extent to

> which he may be 'condemned to suffer grievous loss' . . . . Accordingly . . . 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'" *Goldberg* v. *Kelly,* 397 U. S. 254, 262–263 (1970).

The question, then, is as to what procedural due process requires with respect to examining physicians' reports in a social security disability claim hearing.

We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.

We are prompted to this conclusion by a number of factors that, we feel, assure underlying reliability and probative value:

1. The identity of the five reporting physicians is significant. Each report presented here was prepared by a practicing physician who had examined the claimant.[6] A majority (Drs. Langston, Bailey, and Mattson) were

---

[6] Although, as noted above, one stated ground of objection was the absence of proof of the physicians' Texas licensure, we do not understand that there is any serious issue as to the possession of Texas licenses by Drs. Munslow, Lampert, Langston, Bailey, and Mattson.

called into the case by the state agency. Although each received a fee, that fee is recompense for his time and talent otherwise devoted to private practice or other professional assignment. We cannot, and do not, ascribe bias to the work of these independent physicians, or any interest on their part in the outcome of the administrative proceeding beyond the professional curiosity a dedicated medical man possesses.

2. The vast workings of the social security administrative system make for reliability and impartiality in the consultant reports. We bear in mind that the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary. This is the congressional plan. We do not presume on this record to say that it works unfairly.[7]

3. One familiar with medical reports and the routine of the medical examination, general or specific, will recognize their elements of detail and of value. The particular reports of the physicians who examined claimant Perales were based on personal consultation and personal examination and rested on accepted medical procedures and tests. The operating neurosurgeon, Dr. Munslow, provided his pre-operative observations and diagnosis, his findings at surgery, his post-operative diagnosis, and his post-operative observations. Dr. Lampert, the neurologist, provided the history related to him by the patient, Perales' complaints, the physical examination and neurologic tests, and his professional impressions and recommendations. Dr. Langston, the orthopedist, did the same post-operatively, and described the orthopedic tests and

[7] We are advised by the Government's brief, p. 18, nn. 7 and 8, that in fiscal 1968, 515,938 disability claims were processed; that, of these, 343,628 (66.601%) were allowed prior to the hearing stage; that approximately one-third of the claims that went to hearing were allowed; and that 320,164 consultant examinations were obtained.

neurologic examination he performed, the results and his impressions and prognosis. Dr. Mattson, who did the post-operative electromyography, described the results of that test, and his impressions. And Dr. Bailey, the psychiatrist, related the history, the patient's complaints, and the psychiatric diagnosis that emerged from the typical psychiatric examination.

These are routine, standard, and unbiased medical reports by physician specialists concerning a subject whom they had seen. That the reports were adverse to Perales' claim is not in itself bias or an indication of nonprobative character.

4. The reports present the impressive range of examination to which Perales was subjected. A specialist in neurosurgery, one in neurology, one in psychiatry, one in orthopedics, and one in physical medicine and rehabilitation add up to definitive opinion in five medical specialties, all somewhat related, but different in their emphases. It is fair to say that the claimant received professional examination and opinion on a scale beyond the reach of most persons and that this case reveals a patient and careful endeavor by the state agency and the examiner to ascertain the truth.

5. So far as we can detect, there is no inconsistency whatsoever in the reports of the five specialists. Yet each result was reached by independent examination in the writer's field of specialized training.

6. Although the claimant complains of the lack of opportunity to cross-examine the reporting physicians, he did not take advantage of the opportunity afforded him under 20 CFR § 404.926 to request subpoenas for the physicians. The five-day period specified by the regulation for the issuance of the subpoenas surely afforded no real obstacle to this, for he was notified that the documentary evidence on file was available for examination before the hearing and, further, a supple-

mental hearing could be requested. In fact, in this very case there was a supplemental hearing more than two and a half months after the initial hearings. This inaction on the claimant's part supports the Court of Appeals' view, 412 F. 2d, at 50–51, that the claimant as a consequence is to be precluded from now complaining that he was denied the rights of confrontation and cross-examination.

7. Courts have recognized the reliability and probative worth of written medical reports even in formal trials and, while acknowledging their hearsay character, have admitted them as an exception to the hearsay rule. Notable is Judge Parker's well-known ruling in the war-risk insurance case of *Long* v. *United States,* 59 F. 2d 602, 603–604 (CA4 1932), which deserves quotation here, but which, because of its length, we do not reproduce. The Second Circuit has made a like ruling in *White* v. *Zutell,* 263 F. 2d 613, 615 (1959), and in so doing, relied on the Business Records Act, 28 U. S. C. § 1732.

8. Past treatment by reviewing courts of written medical reports in social security disability cases is revealing. Until the decision in this case, the courts of appeals, including the Fifth Circuit, with only an occasional criticism of the medical report practice,[8] uniformly recognized reliability and probative value in such reports. The courts have reviewed administrative determinations, and upheld many adverse ones, where the only supporting evidence has been reports of this kind, buttressed sometimes, but often not, by testimony of a medical adviser such as Dr. Leavitt.[9] In these cases admissibility was

[8] *Ratliff* v. *Celebrezze,* 338 F. 2d 978, 982 (CA6 1964); but see *Miracle* v. *Celebrezze,* 351 F. 2d 361, 365, 382–383 (CA6 1965).

[9] *Ber* v. *Celebrezze,* 332 F. 2d 293, 296–298 (CA2 1964); *Stancavage* v. *Celebrezze,* 323 F. 2d 373, 374 (CA3 1963); *Dupkunis* v. *Celebrezze,* 323 F. 2d 380, 382 (CA3 1963); *Cochran* v. *Celebrezze,* 325 F. 2d 137, 138 (CA4 1963); *Cuthrell* v. *Celebrezze,* 330 F. 2d

not contested, but the decisions do demonstrate traditional and ready acceptance of the written medical report in social security disability cases.

9. There is an additional and pragmatic factor which, although not controlling, deserves mention. This is what Chief Judge Brown has described as "[t]he sheer magnitude of that administrative burden," and the resulting necessity for written reports without "elaboration through the traditional facility of oral testimony." *Page* v. *Celebrezze,* 311 F. 2d 757, 760 (CA5 1963). With over 20,000 disability claim hearings annually, the cost of providing live medical testimony at those hearings, where need has not been demonstrated by a request for a subpoena, over and above the cost of the examinations requested by hearing examiners, would be a substantial drain on the trust fund and on the energy of physicians already in short supply.

VI

1. Perales relies heavily on the Court's holding and statements in *Goldberg* v. *Kelly, supra,* particularly the comment that due process requires notice "and an effective opportunity to defend by confronting any adverse witnesses . . . ." 397 U. S., at 267–268. *Kelly,* however,

---

48, 50–51 (CA4 1964); *Aldridge* v. *Celebrezze,* 339 F. 2d 190, 191 (CA5 1964); *Dodsworth* v. *Celebrezze,* 349 F. 2d 312, 313–314 (CA5 1965); *Bridges* v. *Gardner,* 368 F. 2d 86, 89 (CA5 1966); *Green* v. *Gardner,* 391 F. 2d 606 (CA5 1968); *Martin* v. *Finch,* 415 F. 2d 793, 794 (CA5 1969); *Breaux* v. *Finch,* 421 F. 2d 687, 689 (CA5 1970); *Phillips* v. *Celebrezze,* 330 F. 2d 687, 689 (CA6 1964); *Justice* v. *Gardner,* 360 F. 2d 998, 1000–1001 (CA6 1966); *Moon* v. *Celebrezze,* 340 F. 2d 926, 928 (CA7 1965); *Pierce* v. *Gardner,* 388 F. 2d 846, 847 (CA7 1967), cert. denied, 393 U. S. 885; *Celebrezze* v. *Sutton,* 338 F. 2d 417, 419–420 (CA8 1964); *Brasher* v. *Celebrezze,* 340 F. 2d 413, 414 (CA8 1965); *McMullen* v. *Celebrezze,* 335 F. 2d 811, 815 (CA9 1964), cert. denied, 382 U. S. 854; *Flake* v. *Gardner,* 399 F. 2d 532, 534 (CA9 1968); *Celebrezze* v. *Warren,* 339 F. 2d 833, 836 (CA10 1964); *McMillin* v. *Gardner,* 384 F. 2d 596, 597 (CA10 1967).

had to do with termination of AFDC benefits without prior notice. It also concerned a situation, the Court said, "where credibility and veracity are at issue, as they must be in many termination proceedings." 397 U. S., at 269.

The *Perales* proceeding is not the same. We are not concerned with termination of disability benefits once granted. Neither are we concerned with a change of status without notice. Notice was given to claimant Perales. The physicians' reports were on file and available for inspection by the claimant and his counsel. And the authors of those reports were known and were subject to subpoena and to the very cross-examination that the claimant asserts he has not enjoyed. Further, the specter of questionable credibility and veracity is not present; there is professional disagreement with the medical conclusions, to be sure, but there is no attack here upon the doctors' credibility or veracity. *Kelly* affords little comfort to the claimant.

2. Perales also, as the Court of Appeals stated, 412 F. 2d, at 53, 416 F. 2d, at 1251, would describe the medical reports in question as "mere uncorroborated hearsay" and would relate this to Mr. Chief Justice Hughes' sentence in *Consolidated Edison Co.* v. *NLRB,* 305 U. S., at 230: "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Although the reports are hearsay in the technical sense, because their content is not produced live before the hearing examiner, we feel that the claimant and the Court of Appeals read too much into the single sentence from *Consolidated Edison.* The contrast the Chief Justice was drawing, at the very page cited, was not with material that would be deemed formally inadmissible in judicial proceedings but with material "without a basis in evidence having rational probative force." This was not a blanket rejection by the Court of administrative

reliance on hearsay irrespective of reliability and probative value. The opposite was the case.

3. The claimant, the District Court, and the Court of Appeals also criticize the use of Dr. Leavitt as a medical adviser. 288 F. Supp., at 314, 412 F. 2d, at 53–54. See also *Mefford* v. *Gardner,* 383 F. 2d 748, 759–761 (CA6 1967). Inasmuch as medical advisers are used in approximately 13% of disability claim hearings, comment as to this practice is indicated. We see nothing "reprehensible" in the practice, as the claimant would describe it. The trial examiner is a layman; the medical adviser is a board-certified specialist. He is used primarily in complex cases for explanation of medical problems in terms understandable to the layman-examiner. He is a neutral adviser. This particular record discloses that Dr. Leavitt explained the technique and significance of electromyography. He did offer his own opinion on the claimant's condition. That opinion, however, did not differ from the medical reports. Dr. Leavitt did not vouch for the accuracy of the facts assumed in the reports. No one understood otherwise. See *Doe* v. *Department of Transportation,* 412 F. 2d 674, 678–680 (CA8 1969). We see nothing unconstitutional or improper in the medical adviser concept and in the presence of Dr. Leavitt in this administrative hearing.

4. Finally, the claimant complains of the system of processing disability claims. He suggests, and is joined in this by the briefs of *amici,* that the Administrative Procedure Act, rather than the Social Security Act, governs the processing of claims and specifically provides for cross-examination, 5 U. S. C. § 556 (d) (1964 ed., Supp. V). The claimant goes on to assert that in any event the hearing procedure is invalid on due process grounds. He says that the hearing examiner has the responsibility for gathering the evidence and "to make the

Government's case as strong as possible"; that naturally he leans toward a decision in favor of the evidence he has gathered; that justice must satisfy the appearance of justice, citing *Offutt* v. *United States,* 348 U. S. 11, 14 (1954), and *In re Murchison,* 349 U. S. 133, 136 (1955); and that an "independent hearing examiner such as in the" Longshoremen's and Harbor Workers' Compensation Act should be provided.

We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act. See Final Report of the Attorney General's Committee on Administrative Procedure, contained in Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., 157 (1941); see also the remarks of Senator McCarran, chairman of the Judiciary Committee of the Senate, 92 Cong. Rec. 2155. The cited § 556 (d) provides that any documentary evidence "may be received" subject to the exclusion of the irrelevant, the immaterial, and the unduly repetitious. It further provides that a "party is entitled to present his case or defense by oral or documentary evidence . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts" and in "determining claims for money or benefits . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

These provisions conform, and are consistent with, rather than differ from or supersede, the authority given the Secretary by the Social Security Act's §§ 205 (a) and (b) "to establish procedures," and "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in

order to establish the right to benefits," and to receive evidence "even though inadmissible under rules of evidence applicable to court procedure." Hearsay, under either Act, is thus admissible up to the point of relevancy.

The matter comes down to the question of the procedure's integrity and fundamental fairness. We see nothing that works in derogation of that integrity and of that fairness in the admission of consultants' reports, subject as they are to being material and to the use of the subpoena and consequent cross-examination. This precisely fits the statutorily prescribed "cross-examination as may be required for a full and true disclosure of the facts." That is the standard. It is clear and workable and does not fall short of procedural due process.

Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts. The 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits, M. Rock, An Evaluation of the SSA Appeals Process, Report No. 7, U. S. Department of HEW, p. 9 (1970), attests to the fairness of the system and refutes the implication of impropriety.

We therefore reverse and remand for further proceedings. We intimate no view as to the merits. It is for the District Court now to determine whether the Secretary's findings, in the light of all material proffered and admissible, are supported by "substantial evidence" within the command of § 205 (g).

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur, dissenting.

This claimant for social security disability benefits had a serious back injury. The doctor who examined him testified that he was permanently disabled. His case is defeated, however, by hearsay evidence of doctors and their medical reports about this claimant. Only one doctor who examined him testified at the hearing. Five other doctors who had once examined the claimant did not testify and were not subject to cross-examination. But their reports were admitted in evidence. Still another doctor testified on the hearsay in the documents of the other doctors. All of this hearsay may be received, as the Administrative Procedure Act (5 U. S. C. § 556 (d) (1964 ed., Supp. V)) provides that "[a]ny oral or documentary evidence may be received." But this hearsay evidence cannot by itself be the basis for an adverse ruling. The same section of the Act states that "[a] party is entitled . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts." [1]

---

[1] S. Rep. No. 752, 79th Cong., 1st Sess., 22–23.

"The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the subsection as well as to cases in which oral or documentary evidence is received in open hearing. . . . To the extent that cross-examination is necessary to bring out the truth, the party should have it. . . ."

The House Judiciary Committee expressed a like view.

"The provision on its face does not confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the 'full and true disclosure of the facts' stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required

419-882 O - 72 - 31

As a consequence the Court of Appeals said:

> "Our opinion holds, and we reaffirm, that mere uncorroborated hearsay evidence as to the physical condition of a claimant, standing alone and without more, in a social security disability case tried before a hearing examiner, as in our case, is not substantial evidence that will support a decision of the examiner adverse to the claimant, if the claimant objects to the hearsay evidence and if the hearsay evidence is directly contradicted by the testimony of live medical witnesses and by the claimant who [testifies] in person before the examiner, as was done in the case at bar." 416 F. 2d 1250, 1251.

Cross-examination of doctors in these physical injury cases is, I think, essential to a full and fair disclosure of the facts.[2]

The conclusion reached by the Court of Appeals that hearsay evidence alone is not "substantial" enough to sustain a judgment adverse to the claimant is supported not only by the Administrative Procedure Act but also by the Social Security Act itself. Although Congress provided in the Social Security Act that "[e]vidence may be received at any hearing before the Secretary even

---

'for a full and true disclosure of the facts.' . . . The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases in which oral or documentary evidence is received in open hearing. . . . To the extent that cross-examination is necessary to bring out the truth, the party must have it. . . ." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 37.

[2] While the Administrative Procedure Act allows statutory exceptions of procedures different from those in the Act, 5 U. S. C. § 556 (1964 ed., Supp. V), there is no explicit ban in the Social Security Act (42 U. S. C. § 405) against the right of cross-examination. And the Regulations of the Secretary provide that there must be "a reasonable opportunity for a fair hearing." 20 CFR § 404.927.

though inadmissible under rules of evidence applicable to court procedure," see 42 U. S. C. § 405 (b), Congress also provided that findings of the Secretary were to be conclusive only *"if supported by substantial evidence."* 42 U. S. C. § 405 (g). (Emphasis added.) Uncorroborated hearsay untested by cross-examination does not by itself constitute "substantial evidence." See *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197, 230 (1938). Particularly where, as in this case, a disability claimant appears and testifies as to the nature and extent of his injury and his family doctor testifies in his behalf supporting the fact of his disability, the Secretary should not be able to support an adverse determination on the basis of medical reports from doctors who did not testify or the testimony of an HEW employee who never even examined the claimant as a patient.

This case is minuscule in relation to the staggering problems of the Nation. But when a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone, for these days the average man can say: "There but for the grace of God go I."

One doctor whose word cast this claimant into limbo never saw him, never examined him, never took his vital statistics or saw him try to walk or bend or lift weights.

He was a "medical adviser" to HEW. The use of circuit-riding doctors who never see or examine claimants to defeat their claims should be beneath the dignity of a great nation. Three other doctors who were not subject to cross-examination were experts retained and paid by the Government. Some, we are told, who were subject to no cross-examination were employed by the workmen's compensation insurance company to defeat respondent's claim.

Judge Spears who first heard this case said that the way hearing officers parrot "almost word for word the conclusions" of the "medical adviser" produced "nausea" in him. Judge Spears added:

> "[H]earsay evidence in the nature of ex parte statements of doctors on the critical issue of a man's present physical condition is just a violation of the concept with which I am familiar and which bears upon the issue of fundamental fair play in a hearing.
>
> "Then, when you pyramid hearsay from a so-called medical advisor, who, himself, has never examined the man who claims benefits, then you just compound it—compound a situation that I simply cannot tolerate in my own mind, and I can't see why a hearing examiner wants to abrogate his duty and his responsibility and turn it over to some medical advisor."

Review of the evidence is of no value to us. The vice is in the procedure which allows it in without testing it by cross-examination. Those defending a claim look to defense-minded experts for their salvation. Those who press for recognition of a claim look to other experts. The problem of the law is to give advantage to neither, but to let trial by ordeal of cross-examination distill the truth.

The use by HEW of its stable of defense doctors without submitting them to cross-examination is the cutting of corners—a practice in which certainly the Government should not indulge. The practice is barred by the rules which Congress has provided; and we should enforce them in the spirit in which they were written.

I would affirm this judgment.

ORGANIZATION FOR A BETTER AUSTIN ET AL. *v.* KEEFE

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 135. Argued January 20, 1971—Decided May 17, 1971

Respondent real estate broker applied for and obtained from the Illinois courts an injunction enjoining petitioners from distributing any literature in the City of Westchester, on the ground that their leaflets, critical of respondent's alleged "blockbusting" and "panic peddling" activities in the Austin area of Chicago, invaded respondent's right of privacy, and were coercive and intimidating rather than informative, thus not being entitled to First Amendment protection. *Held:* Respondent has not met the heavy burden of justifying the imposition of the prior restraint of petitioners' peaceful distribution of informational literature of the nature disclosed by this record. Pp. 418–420.

115 Ill. App. 2d 236, 253 N. E. 2d 76, reversed.

BURGER, C. J., delivered the opinion of the Court in which BLACK, DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. HARLAN, J., filed a dissenting opinion, *post*, p. 420.

David C. Long argued the cause for petitioners. With him on the briefs was *Willard J. Lassers.*

Thomas W. McNamara argued the cause for respondent. With him on the brief was *John C. Tucker.*

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

We granted the writ in this case to consider the claim that an order of the Circuit Court of Cook County, Illinois, enjoining petitioners from distributing leaflets anywhere in the town of Westchester, Illinois, violates petitioners' rights under the Federal Constitution.

Petitioner Organization for a Better Austin (OBA) is a racially integrated community organization in the

Austin neighborhood of Chicago. Respondent is a real estate broker whose office and business activities are in the Austin neighborhood. He resides in Westchester, Illinois, a suburb of Chicago some seven miles from the Austin area.

OBA is an organization whose stated purpose is to "stabilize" the racial ratio in the Austin area. For a number of years the boundary of the Negro segregated area of Chicago has moved progressively west to Austin. OBA, in its efforts to "stabilize" the area—so it describes its program—has opposed and protested various real estate tactics and activities generally known as "blockbusting" or "panic peddling."

It was the contention of OBA that respondent had been one of those who engaged in such tactics, specifically that he aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to Negroes. OBA alleged that since 1961 respondent had from time to time actively promoted sales in this manner by means of flyers, phone calls, and personal visits to residents of the area in which his office is located, without regard to whether the persons solicited had expressed any desire to sell their homes. As the "boundary" marking the furthest westward advance of Negroes moved into the Austin area, respondent is alleged to have moved his office along with it.

Community meetings were arranged with respondent to try to persuade him to change his real estate practices. Several other real estate agents were prevailed on to sign an agreement whereby they would not solicit property, by phone, flyer, or visit, in the Austin community. Respondent who has consistently denied that he is engaging in "panic peddling" or "blockbusting" refused to sign, contending that it was his right under Illinois law to solicit real estate business as he saw fit.

Thereafter, during September and October of 1967, members of petitioner organization distributed leaflets in Westchester describing respondent's activities. There was no evidence of picketing in Westchester. The challenged publications, now enjoined, were critical of respondent's real estate practices in the Austin neighborhood; one of the leaflets set out the business card respondent used to solicit listings, quoted him as saying "I only sell to Negroes," cited a Chicago Daily News article describing his real estate activities and accused him of being a "panic peddler." Another leaflet, of the same general order, stated that: "When he signs the agreement, we stop coming to Westchester." Two of the leaflets requested recipients to call respondent at his home phone number and urge him to sign the "no solicitation" agreement. On several days leaflets were given to persons in a Westchester shopping center. On two other occasions leaflets were passed out to some parishioners on their way to or from respondent's church in Westchester. Leaflets were also left at the doors of his neighbors. The trial court found that petitioners' "distribution of leaflets was on all occasions conducted in a peaceful and orderly manner, did not cause any disruption of pedestrian or vehicular traffic, and did not precipitate any fights, disturbances or other breaches of the peace." One of the officers of OBA testified at trial that he hoped that respondent would be induced to sign the no-solicitation agreement by letting "his neighbors know what he was doing to us."

Respondent sought an injunction in the Circuit Court of Cook County, Illinois, on December 20, 1967. After an adversary hearing the trial court entered a temporary injunction enjoining petitioners "from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the City of Westchester, Illinois."

On appeal to the Appellate Court of Illinois, First District, that court affirmed. It sustained the finding of fact that petitioners' activities in Westchester had invaded respondent's right of privacy, had caused irreparable harm, and were without adequate remedy at law. The Appellate Court appears to have viewed the alleged activities as coercive and intimidating, rather than informative and therefore as not entitled to First Amendment protection. The Appellate Court rested its holding on its belief that the public policy of the State of Illinois strongly favored protection of the privacy of home and family from encroachment of the nature of petitioners' activities.*

It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near* v. *Minnesota,* 283 U. S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the

*The injunction is termed a "temporary" injunction by the Illinois courts. We have therefore considered whether we may properly decide this case. 28 U. S. C. § 1257. We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights. Although the record in this case is not such as to leave the matter entirely free from doubt we conclude we are not without power to decide this case. *Mills* v. *Alabama,* 384 U. S. 214 (1966); *Construction Laborers' Local 438* v. *Curry,* 371 U. S. 542 (1963).

basis of previous publications, distribution of literature "of any kind" in a city of 18,000.

This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. *E. g., Martin* v. *City of Struthers,* 319 U. S. 141 (1943); *Schneider* v. *State,* 308 U. S. 147 (1939); *Lovell* v. *Griffin,* 303 U. S. 444 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to "force" respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider* v. *State, supra; Thornhill* v. *Alabama,* 310 U. S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity. *Carroll* v. *Princess Anne,* 393 U. S. 175, 181 (1968); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden. No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an in-

vasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. *Rowan* v. *United States Post Office Dept.*, 397 U. S. 728 (1970), relied on by respondent, is not in point; the right of privacy involved in that case is not shown here. Among other important distinctions, respondent is not attempting to stop the flow of information into his own household, but to the public. Accordingly, the injunction issued by the Illinois court must be vacated.

Reversed.

MR. JUSTICE HARLAN, dissenting.

In deciding this case on the merits, the Court, in my opinion, disregards the express limitation of our appellate jurisdiction to "[f]inal judgments or decrees," 28 U. S. C. § 1257, and does so in a way which undermines the policies behind limiting our review to judgments "rendered by the highest court of a State in which a decision could be had," *ibid.*, and interferes with Illinois' arrangements for the expeditious processing of litigation in its own state courts.

It is plain, and admitted by all, that the "temporary" or "preliminary" injunction entered by the Circuit Court of Cook County and affirmed by the Appellate Court, First District, is not a final judgment. Review of preliminary injunctions is a classic form of interlocutory appeal, which Congress has authorized in limited instances not including review by this Court of state decrees. See 28 U. S. C. §§ 1252, 1253; cf. 28 U. S. C. § 1292 (a)(1). Despite the seemingly absolute provision of the statute, the Court holds that this case is within the judicially created exception for instances in which the affirmance of the interlocutory order by the highest state court decides the merits of the dispute for all practical purposes, leaving the remaining proceedings in the lower courts as

nothing more than a formality. See *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382 (1953); *Construction Laborers' Local 438* v. *Curry*, 371 U. S. 542, 550–551 (1963); *Mills* v. *Alabama*, 384 U. S. 214, 217–218 (1966). The apparent, though unstated, justification for this is the petitioners' representation in this Court that they have no defense to offer other than their First Amendment contentions, which they assert the Illinois courts have decided against them on the merits. Pet. for Cert. 6.

Even assuming that the latter position is correct,* this case does not fit into the mold of the cases in which this Court has reviewed orders of state supreme courts affirming the grant of preliminary relief, for here the Illinois

*Settled Illinois law provides that "[i]t is not, of course, the purpose of a temporary injunction to decide controverted facts or the merits of the case," *Lonergan* v. *Crucible Steel Co. of America*, 37 Ill. 2d 599, 611, 229 N. E. 2d 536, 542 (1967), but "merely to preserve the last actual peaceable uncontested status which preceded the pending suit." *Consumers Digest, Inc.* v. *Consumer Magazine, Inc.*, 92 Ill. App. 2d 54, 61, 235 N. E. 2d 421, 425 (App. Ct., 1st Dist., 1968). "It is enough if [the applicant] can show that he raises a fair question as to the existence of the right which he claims and can satisfy the court that matters should be preserved in their present state until such questions can be disposed of." *Nestor Johnson Mfg. Co.* v. *Goldblatt*, 371 Ill. 570, 574, 21 N. E. 2d 723, 725 (1939). The granting of a preliminary injunction is committed to the sound discretion of the trial judge, and it is reviewable only for abuse of discretion. *Lonergan* v. *Crucible Steel Co. of America*, *supra*, at 612, 229 N. E. 2d, at 542.

In argument before the Illinois chancellor, petitioners' attorney stated:

"We don't wish to go into lengthy argument on constitutional provisions at this time. We feel that it is only fair that both sides prepare briefs in preparation for a full hearing on the permanent injunction. And, to that end, we just want to point out that these are constitutional questions, on which we feel the law is abundantly clear, and that is a further reason why Your Honor in his discretion, should not see fit to issue a temporary injunction." R. 56.

Supreme Court has never passed on the merits of petitioners' constitutional contentions. If this case were permitted to return to the trial court for consideration of the merits of petitioners' contentions and the entry of final judgment, petitioners would have an appeal as of right directly to the Illinois Supreme Court if that judgment were adverse to them. Ill. Const., Art. 6, § 5; Ill. Sup. Ct. Rules 301, 302 (a). That court would then have an opportunity to correct the errors, if any, in the lower court judgment; or if it failed to do so we would have the benefit of that court's views on the issues here presented. Such review by "the highest court of a State in which a decision could be had" is particularly important in the context of Illinois procedure, which places primary responsibility for review of constitutional contentions in the State Supreme Court. All appeals from final judgments in cases involving a constitutional question must be taken directly to that court, see Ill. Sup. Ct. Rule 302 (a)(2); consequently the intermediate Appellate Court rarely has occasion to engage in constitutional adjudication.

To be sure, the Illinois Supreme Court, by denying petitioners' motion for leave to appeal from the order of the Appellate Court, had an opportunity to rule on the issue presented by this case and declined to do so. However, Illinois has a strong policy against Supreme Court review of interlocutory orders. Until recently the Supreme Court had no direct appellate jurisdiction over judgments of the Appellate Court on interlocutory appeals, but simply reviewed the issues presented by the subsequent final judgment. 6 C. Nichols, Illinois Civil Practice § 5998 (1962 rev. vol. H. Williams & M. Wingersky). Although interlocutory review is now available in the discretion of the Supreme Court, it is "not favored." Ill. Sup. Ct. Rule 318 (b); see also Ill. Sup. Ct. Rule 315 (a). We have ourselves often made a simi-

lar resolution of the competing interests in prompt correction of lower courts' errors on the one hand and in expeditious processing of litigation to final judgment on the other. See R. Stern & E. Gressman, Supreme Court Practice § 4.19 (4th ed. 1969). Under today's decision, Illinois will have to surrender its judgment in these matters if it desires to interpose the State Supreme Court between the subordinate state courts and review by this Court, as the highest-state-court requirement permits it to do. If this Court would respect the final-judgment limitation on our jurisdiction, Illinois would not be put to this choice.

It is, of course, tempting to ignore the proper limitations on our power when the alternative is to delay correction of what the Court today holds was a flagrant error by lower courts. This is particularly true where, as here, a "temporary" injunction has been outstanding for a lengthy period. But the question is not whether we think our intervention in the dispute at this stage would be desirable—although with our overall docket running at about 4,000 cases a Term there is surely much to be said for giving each litigant only one bite at the apple. The policy judgment involved was expressly committed to Congress by Art. III, § 2, of the Constitution, and Congress has spoken in § 1257.

I would respect that congressional judgment and dismiss the writ for lack of jurisdiction.

CALIFORNIA *v.* BYERS

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 75. Argued December 8, 1970—Decided May 17, 1971

Respondent demurred to a count of an indictment charging him with violating Cal. Vehicle Code § 20002 (a) (1) (Supp. 1971) by failing to stop and furnish his name and address after involvement in an automobile accident, resulting in damage to property, on the ground that compliance would have violated his privilege against self-incrimination. His demurrer was sustained by the California Supreme Court, which held that compliance confronted respondent with "substantial hazards of self-incrimination," but upheld the statute by inserting a use restriction on the information disclosed. That court concluded that it would be unfair to punish respondent since he could not reasonably have anticipated the use restriction. *Held:* The judgment is vacated and the case is remanded. Pp. 427–458.

71 Cal. 2d 1039, 458 P. 2d 465, vacated and remanded.

THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN, concluded that:

1. Compliance with this essentially regulatory and noncriminal statute, where self-reporting is indispensable to its fulfillment, where the burden is on "the public at large," as distinguished from a "highly selective group inherently suspect of criminal activities," and where the possibility of incrimination is not substantial, does not infringe the privilege against self-incrimination. Pp. 427–431.

2. Even assuming that the statutory requirement of the essentially neutral act of disclosing name and address is incriminating in the traditional sense, it would be an extravagant extension of the privilege to hold that it is testimonial in the Fifth Amendment sense. Just as there is no constitutional right to refuse to file an income tax return, there is no constitutional right to flee the scene of an accident to avoid any possible legal involvement. Pp. 431–434.

MR. JUSTICE HARLAN concluded that the presence, from the individual's point of view, of a "real" and not "imaginary" risk of self-incrimination is not a sufficient predicate for extension of the privilege against self-incrimination to regulatory schemes of the character involved in this case. Considering the noncriminal governmental purpose of securing the information (to ensure

financial responsibility for accidents), the necessity for self-reporting as a means of securing the information, and the limited nature of the required disclosures which leaves the "accusatorial" burden upon the State, the purposes of the Fifth Amendment do not warrant a use restriction as a condition of enforcement of the statute. Pp. 434–458.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in which STEWART, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed an opinion concurring in the judgment, *post,* p. 434. BLACK, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 459. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post,* p. 464.

Louise H. Renne, Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Thomas C. Lynch,* Attorney General, and *Albert W. Harris, Jr.,* Assistant Attorney General.

John W. Poulos, by appointment of the Court, 400 U. S. 813, argued the cause and filed a brief for respondent.

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and an opinion in which MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join.

This case presents the narrow but important question of whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called "hit and run" statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar "hit and run" or "stop and report" statutes are in effect in all 50 States and the District of Columbia.

On August 22, 1966, respondent Byers was charged in a two-count criminal complaint with two misdemeanor violations of the California Vehicle Code. Count 1 charged that on August 20 Byers passed another vehicle without maintaining the "safe distance" required by

§ 21750 (Supp. 1971). The second count charged that Byers had been involved in an accident but had failed to stop and identify himself as required by § 20002 (a)(1) (Supp. 1971).

This statute provides: [1]

> "The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there . . . [l]ocate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved . . . ."

It is stipulated that both charges arose out of the same accident.

Byers demurred to Count 2 on the ground that it violated his privilege against compulsory self-incrimination. His position was ultimately sustained by the California Supreme Court.[2] That court held that the privilege protected a driver who "reasonably believes that compliance with the statute will result in self-incrimination." 71

---

[1] As an alternative § 20002 (a)(2) (Supp. 1971) requires that the driver shall "[l]eave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department . . . ."

The California Supreme Court did not pass upon this part of the statute, and we express no opinion as to its validity. The violation of either part of the statute leaves the driver liable to imprisonment for up to six months or to a fine of up to $500 or both.

The California Vehicle Code also requires drivers involved in accidents resulting in personal injury or death to file accident reports, but there is a statutory use restriction for these compelled disclosures. §§ 20012–20013.

[2] The illegal passing charge contained in Count 1 has never been brought to trial.

Cal. 2d 1039, 1047, 458 P. 2d 465, 471 (1969). Here the court found that Byers' apprehensions were reasonable because compliance with § 20002 (a)(1) confronted him with "substantial hazards of self-incrimination." Nevertheless the court upheld the validity of the statute by inserting a judicially created use restriction on the disclosures that it required. The court concluded, however, that it would be "unfair" to punish Byers for his failure to comply with the statute because he could not reasonably have anticipated the judicial promulgation of the use restriction.[3] We granted certiorari to assess the validity of the California Supreme Court's premise that without a use restriction § 20002 (a)(1) would violate the privilege against compulsory self-incrimination. We conclude that there is no conflict between the statute and the privilege.

(1)

Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manu-

[3] Presumably the California holding contemplated that persons who fail to comply with the statute in the future will be subject to prosecution and conviction since the use restriction removed the justification for a reasonable apprehension of self-incrimination. Our disposition removes the premise upon which the use restriction rested.

419-882 O - 72 - 32

facturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.[4]

In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be "a link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

United States v. *Sullivan,* 274 U. S. 259 (1927), shows that an application of the privilege to the California statute is not warranted. There a bootlegger was prosecuted for failure to file an income tax return. He claimed that the privilege against compulsory self-incrimination afforded him a complete defense because filing a return would have tended to incriminate him by revealing the unlawful source of his income. Speaking for the Court, Mr. Justice Holmes rejected this claim on the ground that it amounted to "an extreme if not an extravagant application of the Fifth Amendment." *Id.,* at 263–264.[5]

---

[4] See *Shapiro* v. *United States,* 335 U. S. 1 (1948).

[5] "As the defendant's income was taxed, the statute of course required a return. . . . In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making

Sullivan's tax return, of course, increased his risk of prosecution and conviction for violation of the National Prohibition Act. But the Court had no difficulty in concluding that an extension of the privilege to cover that kind of mandatory report would have been unjustified. In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with "substantial hazards of self-incrimination."

The components of this requirement were articulated in *Albertson* v. *SACB,* 382 U. S. 70 (1965), and later in *Marchetti* v. *United States,* 390 U. S. 39 (1968), *Grosso* v. *United States,* 390 U. S. 62 (1968), and *Haynes* v. *United States,* 390 U. S. 85 (1968). In *Albertson* the Court held that an order requiring registration by individual members of a Communist organization violated the privilege. There *Sullivan* was distinguished:

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a *highly selective group inherently suspect of criminal activities.* Petitioners' claims are not asserted in an *essentially noncriminal* and *regulatory area* of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the . . . questions in context might involve the petitioners in the admission of a crucial element of a crime." 382 U. S., at 79 (emphasis added).

Albertson was followed by *Marchetti* and *Grosso* where the Court held that the privilege afforded a complete defense to prosecutions for noncompliance with federal

---

he could have raised the objection in the return, *but could not on that account refuse to make any return at all.*" 274 U. S., at 263 (emphasis added).

gambling tax and registration requirements. It was also followed in *Haynes* where petitioner had been prosecuted for failure to register a firearm as required by federal statute. In each of these cases the Court found that compliance with the statutory disclosure requirements would confront the petitioner with "substantial hazards of self-incrimination." *E. g., Marchetti* v. *United States,* 390 U. S., at 61.

In all of these cases the disclosures condemned were only those extracted from a "highly selective group inherently suspect of criminal activities" and the privilege was applied only in "an area permeated with criminal statutes"—not in "an essentially noncriminal and regulatory area of inquiry." *E. g., Albertson* v. *SACB,* 382 U. S., at 79; *Marchetti* v. *United States,* 390 U. S., at 47.

Although the California Vehicle Code defines some criminal offenses, the statute is essentially regulatory, not criminal. The California Supreme Court noted that § 20002 (a)(1) was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents. In *Marchetti* the Court rested on the reality that almost everything connected with gambling is illegal under "comprehensive" state and federal statutory schemes. The Court noted that in almost every conceivable situation compliance with the statutory gambling requirements would have been incriminating. Largely because of these pervasive criminal prohibitions, gamblers were considered by the Court to be "a highly selective group inherently suspect of criminal activities."

In contrast, § 20002 (a)(1), like income tax laws, is directed at all persons—here all persons who drive automobiles in California. This group, numbering as it does in the millions, is so large as to render § 20002 (a)(1) a statute "directed at the public at large." *Albertson* v. *SACB,* 382 U. S., at 79, construing *United States* v. *Sulli-*

van, 274 U. S. 259 (1927). It is difficult to consider this group as either "highly selective" or "inherently suspect of criminal activities." Driving an automobile, unlike gambling, is a lawful activity. Moreover, it is not a criminal offense under California law to be a driver "involved in an accident." An accident may be the fault of others; it may occur without any driver having been at fault. No empirical data are suggested in support of the conclusion that there is a relevant correlation between being a driver and criminal prosecution of drivers. So far as any available information instructs us, most accidents occur without creating criminal liability even if one or both of the drivers are guilty of negligence as a matter of tort law.

The disclosure of inherently illegal activity is inherently risky. Our decisions in *Albertson* and the cases following illustrate that truism. But disclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in *Marchetti, Grosso,* and *Haynes.* Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.

(2)

Even if we were to view the statutory reporting requirement as incriminating in the traditional sense, in our view it would be the "extravagant" extension of the privilege Justice Holmes warned against to hold that it is testimonial in the Fifth Amendment sense. Compliance with § 20002 (a)(1) requires two things: first, a driver involved in an accident is required to stop at the scene; second, he is required to give his name and address. The act of stopping is no more testimonial—indeed less so in some respects—than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, or to give samples of handwriting, fingerprints, or

blood. *United States* v. *Wade,* 388 U. S. 218, 221–223 (1967); *Schmerber* v. *California,* 384 U. S. 757, 764 and n. 8 (1966); 8 J. Wigmore, Evidence § 2265, pp. 386–400 (McNaughton rev. 1961). Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles.

Section 20002 (a)(1) first requires that a driver involved in an accident "shall immediately stop the vehicle at the scene of the accident . . . ." It is, of course, possible that compliance with this requirement might ultimately lead to prosecution for some contemporaneous criminal violation of the motor vehicle code if one occurred, or an unrelated offense, always provided such offense could be established by independent evidence. In that sense it might furnish the authorities with what might be called "a link in the chain of evidence needed to prosecute . . . ." *Hoffman* v. *United States,* 341 U. S. 479, 486 (1951). In *Schmerber* v. *California, supra,* at 764, the Court held that "the privilege is a bar against compelling 'communications' or 'testimony,' but . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." There the petitioner had been compelled to undergo the forcible withdrawal of blood samples for alcohol content analysis, and the Court sustained this procedure over petitioner's claim that he had been compelled to furnish evidence against himself. See also *Holt* v. *United States,* 218 U. S. 245, 252 (1910) (Holmes, J.) (requiring defendant to model a blouse would be barred only by "an extravagant extension of the Fifth Amendment").

Stopping in compliance with § 20002 (a)(1) therefore does not provide the State with "evidence of a testimonial or communicative nature" within the meaning of the Constitution. *Schmerber* v. *California, supra,* at 761.

It merely provides the State and private parties with the driver's identity for, among other valid state needs, the study of causes of vehicle accidents and related purposes, always subject to the driver's right to assert a Fifth Amendment privilege concerning specific inquiries.

Respondent argues that since the statutory duty to stop is imposed only on the "driver of any vehicle involved in an accident," a driver's compliance is testimonial because his action gives rise to an inference that he believes that he was the "driver of [a] vehicle involved in an accident." From this, the respondent tells us, it can be further inferred that he was indeed the operator of an "accident involved" vehicle. In *Wade,* however, the Court rejected the notion that such inferences are communicative or testimonial. There the respondent was placed in a lineup to be viewed by persons who had witnessed a bank robbery. At one point he was compelled to speak the words alleged to have been used by the perpetrator. Despite the inference that the respondent uttered the words in his normal undisguised voice, the Court held that the utterances were not of a "testimonial" nature in the sense of the Fifth Amendment privilege even though the speaking might well have led to identifying him as the bank robber. *United States* v. *Wade, supra,* at 222–223. Furthermore, the Court noted in *Wade* that no question was presented as to the admissibility in evidence at trial of anything said or done at the lineup. *Id.,* at 223. Similarly no such problem is presented here. Of course, a suspect's normal voice characteristics, like his handwriting, blood, fingerprints, or body may prove to be the crucial link in a chain of evidentiary factors resulting in prosecution and conviction. Yet such evidence may be used against a defendant.

After having stopped, a driver involved in an accident is required by § 20002 (a)(1) to notify the driver of the other vehicle of his name and address. A name, linked

with a motor vehicle, is no more incriminating than the tax return, linked with the disclosure of income, in *United States* v. *Sullivan, supra.* It identifies but does not by itself implicate anyone in criminal conduct.[6]

Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence. Here the compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement.

The judgment of the California Supreme Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

MR. JUSTICE HARLAN, concurring in the judgment.

For the reasons which follow, I concur in the judgment of the Court.

I

The respondent, Byers, as a driver of a vehicle involved in an accident resulting in property damage, was charged in a two-count complaint with overtaking another vehicle in a manner proscribed by § 21750 of the California Vehicle Code (Supp. 1971) and failing to comply with the requirements of § 20002 (a) of the California Vehicle

[6] We are not called on to decide, but if the dictum of the *Sullivan* opinion were followed, the driver having stopped and identified himself, pursuant to the statute, could decline to make any further statement. *United States* v. *Sullivan, supra,* at 263.

Code (Supp. 1971).[1] The parties have stipulated that the accident was caused by respondent's violation of § 21750 of the California Vehicle Code. App. 36. The California Supreme Court has held that in circumstances where a driver involved in an accident has reason to believe his compliance with § 20002 (a) creates a substantial risk of disclosure of incriminating evidence, the Fifth Amendment requires that the State must either excuse his noncompliance if he properly pleads the privilege against self-incrimination in a subsequent prosecution for failure to comply or forgo the use of any information disclosed by the State's compulsion. Construing the state statute as wholly nonprosecutorial in purpose, the court then held that imposition of a restriction on the use of the information or its fruits in a subsequent criminal prosecution for the conduct causing the accident would be consistent with the state legislative purpose.

I cannot separate the requirement that the individual stop from the requirement that he identify himself for purposes of applying either the "testimonial—non-testimonial" classification of *Schmerber* v. *California,* 384 U. S. 757 (1966), or the "substantial danger of incrimination" test of *Hoffman* v. *United States,* 341 U. S. 479 (1951). The California Supreme Court treated these requirements, in the primary context in which the statute operates, as compelling identification of oneself as a party involved in the statutorily regulated event. If evidence of that self-identification were admitted at trial, it would

[1] The text of § 20002 (a) is reproduced in THE CHIEF JUSTICE'S opinion, *ante,* at 426. Section 21750 of the Cal. Vehicle Code provides:

"The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle . . . ."

certainly be "testimonial." If all that is offered at trial is the identification evidence of third-party witnesses, it still does not follow from *United States* v. *Wade,* 388 U. S. 218 (1967), that because the policies of the Fifth Amendment are not significantly affected by state compulsion to cooperate in the production of real evidence where the State has independently focused investigation on the defendant, these policies are similarly unaffected where the State—in pursuit of "real" evidence—demands of the defendant that he focus the investigation on himself. See generally Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 121–124.

It may be said that requiring the defendant to focus attention on himself as an accident participant is not equivalent to requiring the defendant to focus attention on himself as a criminal suspect. And that proposition raises the underlying issue which we must resolve in this case: how do the various verbal formulations for assessing the legal significance of the risk of incrimination, developed by the Court primarily in the context of the criminal process, see *Malloy* v. *Hogan,* 378 U. S. 1, 11–14 (1964); *Hoffman* v. *United States,* 341 U. S. 479 (1951), operate in the context of the state collection of data for purposes essentially unrelated to criminal prosecution?

II

The California Supreme Court in the present case resolved that issue as follows:

> "Decisions of the United States Supreme Court make clear that the privilege against self-incrimination is a personal one, and that whether the government may require a disclosure depends upon the facts of each case. Invocation of the privilege is not limited to situations in which the *purpose* of the

> inquiry is to get an incriminating answer. It is the *effect* of the answer that is determinative. 'To sustain [a claim of] privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " [Citing *Hoffman, supra,* and Mansfield, *supra.*] *Byers* v. *Justice Court,* 71 Cal. 2d 1039, 1046, 458 P. 2d 465, 470 (1969) (emphasis in original).

The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer. For example, in the context of civil proceedings the privilege is generally available to witnesses as long as a substantial risk of self-incrimination can be made out by the witness. See *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924); *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 94 (1964) (WHITE, J., concurring). And, in fairness to the state tribunal whose decision we are reviewing, it must be recognized that a reading of our more recent cases—especially *Marchetti* v. *United States,* 390 U. S. 39 (1968), and *Grosso* v. *United States,* 390 U. S. 62 (1968)—suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual's point of view, there are "real" and not "imaginary" risks of self-incrimination in yielding to state compulsion. Thus, *Marchetti* and *Grosso* (and the cases they overruled, *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955)), start from an assumption of a nonprosecutorial governmental purpose in the decision to tax gambling revenue; those cases go on to apply what in another context I have

called the "real danger *v.* imaginary possibility" standard, see *Emspak* v. *United States,* 349 U. S. 190, 209 n. 1 (1955), to the gambling reporting requirements imposed on the individual in order to determine the constitutionality of those requirements. See *Marchetti* v. *United States, supra,* at 48–54; *Grosso* v. *United States, supra,* at 66–67. A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the "inherently-suspect-class" factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual's point of view. See also *Haynes* v. *United States,* 390 U. S. 85, 95–98 (1968); *Leary* v. *United States,* 395 U. S. 6, 16–18 (1969); and compare the dissenting opinion of Mr. Justice Frankfurter in the *Kahriger* case, *supra.*

That inference from our past cases was the central premise of the California Supreme Court's opinion. See *Byers* v. *Justice Court, supra,* at 1042–1043, 458 P. 2d, at 468. Thus, that tribunal is in agreement with the conclusion reached in today's opinion of THE CHIEF JUSTICE that the class of accident participants is not an "inherently suspect" class within the meaning of *Marchetti, Grosso,* and *Haynes.* But the state court went on to conclude that the widespread prevalence of criminal sanctions as a means of regulating driving conduct cast a substantial shadow of suspicion over the class, and that this circumstance plus the driver's awareness that his illegal behavior caused the accident rendered the driver's conclusion that he would incriminate himself by complying with the statute sufficiently plausible to support an assertion of the privilege. *Id.,* at 1045–1046, 458 P. 2d, at 470. Starting from the California Supreme Court's premise and looking at our cases defining the test

for risks of incrimination, see *Malloy* v. *Hogan,* 378 U. S., at 11–14; *Hoffman* v. *United States,* 341 U. S. 479 (1951); *Rogers* v. *United States,* 340 U. S. 367, 374 (1951); *Brown* v. *Walker,* 161 U. S. 591 (1896), I would have to reach the same conclusion. I am, however, for the reasons stated in the remainder of this opinion, constrained to hold that the presence of a "real" and not "imaginary" risk of self-incrimination is not a sufficient predicate for extending the privilege against self-incrimination to regulatory schemes of the character involved in this case.

III

First, it is instructive to consider the implications of adhering to the premise which the California Supreme Court drew from our prior cases. In *United States* v. *Sullivan,* 274 U. S. 259 (1927), Mr. Justice Holmes stated his view that "[i]t would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." *Id.,* at 263–264.[2] Yet—at least for an individual whose income is largely or entirely derived from illegal activities—it is, I think, manifestly unsatisfactory to maintain that it should be " '*perfectly clear* [to him], from a careful consideration of all the circumstances in the case [that his statement of the amount of his income] *cannot possibly* have [a] tendency' to incriminate." *Hoffman* v. *United States,* 341 U. S., at 488. (Emphasis in original.) Certainly that individual would have good reason to suspect that if the State is permitted to introduce his income tax return into evidence, the informa-

[2] He then went on to say that the question need not be reached because there the defendant had declined to make any return at all. *Id.,* at 264.

tion contained therein—even if wholly confined to a statement of his gross income—will, when combined with other evidence derived from independent sources, incriminate him. *United States* v. *Burr,* 25 F. Cas. 38, 40 (No. 14,692e) (CC Va. 1807). Nor can the "required records" doctrine of *Shapiro* v. *United States,* 335 U. S. 1 (1948), be invoked to avoid that conclusion; for that doctrine, as applied to this situation, would simply mean that the taxing power is of sufficient import to justify compelled self-incrimination.

If Mr. Justice Holmes' assertion that it would be an extreme, if not extravagant, extension of the Fifth Amendment to apply it in such a situation strikes a responsive chord, it is because the primary context from which the privilege emerges is that of the criminal process, both in the investigatory and trial phases. When applied in that context, the sole governmental interest that the privilege defeats is the enforcement of law through criminal sanctions. And, with regard to the witness' privilege, the judge can, for the most part, draw the line between "real" and "imaginary" risks of incrimination in the marginal cases, thereby offsetting the tendency for the privilege to become an absolute right not to disclose any information at all.

But, of course, governmental interests other than the enforcement of criminal laws are affected by an extension of the privilege to all instances of governmental compulsion to disclose information. In the present case, the interests of the State of California in a system of personal financial responsibility for automobile accidents are implicated. Indeed, in my Brother BRENNAN'S view, the price which the State must pay for utilizing compulsory self-reporting to assure personal financial responsibility on the highways is to forgo use of the criminal sanction to regulate driving habits in all cases where the individual would

be required to comply with § 20002.[3] And I emphasize that the logic of the *Hoffman* standard is such that the result cannot be said to turn on an empirical assumption that there is a lower correlation between criminal prosecutions and highway accidents, than between criminal

---

[3] Understandably, MR. JUSTICE BRENNAN recedes from the implications of his position as applied to the facts in the *Sullivan* case. Thus, while conceding that on his premises the privilege would have to apply "if disclosure of the amount of income criminally earned would create a not insubstantial risk of incrimination in any particular case . . ." he avers that "[s]ince the amount of income earned by an individual engaged in crime is usually neither relevant to his prosecution for such crimes nor helpful to police authorities in determining that he committed crimes, [Holmes, J.'s, suggestion that the privilege would not apply to report of income earned] would seem . . . logical . . . ." Opinion of MR. JUSTICE BRENNAN, *post,* at 471 n. 7.

That, however, will not do. Mr. Justice Holmes' suggestion related to the particular case of a defendant whose income was earned entirely or largely from business in violation of the National Prohibition Act. *Sullivan, supra,* at 262–263. I cannot treat as "imaginary" such a defendant's fear that supplying the Government with a statement of the amount of money derived from his crime will—when combined with other evidence perhaps in the Government's hands—prove helpful in securing his conviction for those crimes. That, of course, is the test MR. JUSTICE BRENNAN must—consistently with his premises—apply. See *United States* v. *Burr,* 25 F. Cas. 38, 40 (No. 14,692e) (CC Va. 1807); *Hoffman* v. *United States,* 341 U. S. 479 (1951). And since, on MR. JUSTICE BRENNAN's premises, he must judge the validity of the claim of privilege wholly from the defendant's point of view at the time he faces the decision whether or not to yield to governmental compulsion and supply the information, the issue cannot turn on whether or not the record as subsequently developed in a prosecution for income tax evasion shows that the Government actually had additional information on the defendant's criminal activities.

Assuming, then, that Sullivan's claim of privilege would have to be respected if we are to transpose *ipso facto* the Court's Fifth Amendment jurisprudence to self-reporting requirements of this sort,

prosecutions and income disclosure. For if the privilege is truly a personal one, and the central standard is the presence of "real" as opposed to "imaginary" risks of self-incrimination, such general empirical differences can only function as evidentiary indicia in assessing the particular individual's claim, in all the circumstances of his particular case, that if he were to comply with the reporting requirement he would run a genuine risk of incrimination. And, if the *Hoffman* standard is to be truly applied—as opposed to indulging in a collection of artificial, if not disingenuous judgments that the risks of incrimination are not there when they really are there—we will have to recognize that in the absence of some sort of immunity grant the individual will be required to decide whether or not to comply without the guidance of a judicial decision as to how the standard applies to his personal situation. That means that the marginal cases should be resolved in the individual's favor. What we are really talking about, then, is either a standard for risks of self-incrimination which protects all personal judgments which are not patently frivolous, or a grant of immunity potentially applicable to all instances of compelled "self-reporting."

Of course, the California Supreme Court took the position that the permissible state objective in the reporting requirement and the constitutional values protected by the Fifth Amendment could be accommodated by imposing a restriction on prosecutorial use of the disclosed

---

MR. JUSTICE BRENNAN'S position forces the Government to choose between taxing the proceeds of crime and enforcing the criminal sanction relevant to the transaction giving rise to those proceeds.

I note that the question whether the Fifth Amendment requires "transactional" as well as "use" immunity, even in the context of the criminal process, has not been resolved by the Court. See *Piccirillo* v. *New York*, 400 U. S. 548 (1971). See also MR. JUSTICE WHITE'S concurring opinion in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 92 (1964).

information and its fruits. See *infra,* at 444–447. See generally McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 229–231; Mansfield, *supra,* at 163–166. But that accommodation leaves the Government's capacity to utilize self-reporting schemes practically impaired by the necessary presumption that evidence used in a prosecution after the individual discloses his relationship to the regulated transaction would not have been available if the individual had not complied with the statute. In the context of "hit-and-run" statutes a use immunity—unless honored in the breach by consistent findings of "no taint"—is likely to render doubtful the State's ability to prosecute in a large class of cases where illegal driving has caused accidents. On the other hand, it would seem unlikely that the state legislature will accept the California Supreme Court's invitation to override the use requirement if the legislative judgment is that the State's ability to use the criminal sanction is too severely handicapped by a use restriction. See *infra,* at 446–447. For the impact of a practically self-executing claim of privilege on the noncriminal objectives of the reporting requirement would be even more severe. Even under a use restriction, then, the choice open to the State is to forgo prosecution in at least a large number of accident cases involving illegal driving—the precise situation where criminal sanctions are likely to be most appropriate—or to forgo self-reporting in a large class of accident cases.

MR. JUSTICE BRENNAN argues that to draw this conclusion from the record in this case is to "flout" the conclusion of the California Supreme Court and the California Legislature that imposition of a use restriction as a condition for prosecuting Byers for noncompliance with § 20002 (a) is "not at all inconsistent with the asserted state interests." *Post,* at 476. Apparently my Brother BRENNAN maintains that imposition of a use restriction

419-882 O - 72 - 33

in the circumstances of this case will not, in fact, significantly interfere with the State's ability to enforce criminal sanctions relating to driving behavior where that behavior culminates in an accident causing property damage.[4] That, in any event, seems to be the view he attributes to the California Supreme Court and the California Legislature. See opinion of MR. JUSTICE BRENNAN, *post*, at 475–476 and n. 10.

But that is certainly not the position the California Supreme Court took, nor the position that court attributed to the state legislature. Thus, having first concluded that the Federal Constitution required recognition of an assertion of the privilege in all situations where the individual confronts "real" and not "imaginary" risks of self-incrimination, the California Supreme Court set about the task of ascertaining the legislative preference between legislative goals which, by virtue of the imposition of a federal constitutional requirement, were placed in conflict:

> "Finally, it is instructive, in determining legislative intent, to consider an analogous field of legislation involving a similar conflict between requiring disclosures for noncriminal purposes and the privilege against self-incrimination. In the statutes requiring drivers involved in accidents resulting in personal injury or death to file accident reports, the

[4] That is a most difficult position to maintain. By compelling Byers to stop, the State compelled Byers to focus official attention on himself in circumstances which, I agree, involved for Byers a substantial risk of self-incrimination. In this circumstance, the State, if it is to prosecute Byers after the coerced stop, will bear the burden of proving that the State could have selected Byers out from the general citizenry for prosecution even if he had not stopped. With respect to automobile drivers, that would be a heavy burden indeed. I doubt this burden could be met in most cases of this sort consistent with a good-faith judicial application of the rules relating to proof of an independent source of evidence.

Legislature has explicitly subordinated the state's prosecutorial interest to the interest in obtaining the disclosure.

"In the present case there is no problem of conflicting state and federal interests; it is the state which both demands disclosure of information in 'hit-and-run' accidents and prosecutes those who commit criminal acts on the highways. Imposing use-restrictions in the present case merely involves this court in making a judgment, based on an assessment of probable legislative intent, that the Legislature would prefer to have the provisions of section 20002 of the Vehicle Code upheld even in cases involving possible criminal misconduct at the cost of some burden on prosecuting authorities in criminal cases arising out of or related to an accident covered by that section rather than avoid that burden at the cost of significantly frustrating the important noncriminal objective of the legislation. Imposition of use-restrictions in the present case will not preclude the Legislature from overriding our decision if it wishes by simply enacting legislation declaring that information derived from disclosures required by section 20002, subdivision (a), *may* be used in criminal prosecutions, in which case the privilege could be claimed in appropriate situations.

"There is another significant distinction between the circumstances in *Marchetti* and the circumstances in the present case. In *Marchetti* the imposition of use-restrictions on information obtained as a result of compliance with the federal wagering tax would have had a much more sweeping effect on state law enforcement than would the imposition of such restrictions here. It appears that most—perhaps almost all—violators of state criminal prohibitions against wagering and related activities are

subject to the disclosure requirements of the federal wagering tax. (*Marchetti* v. *United States, supra,* 390 U. S. 39, 44–46, fns. 5–6.) Thus, the imposition of use-restrictions in order to permit Congress to compel all wagerers to comply with the wagering tax law would have meant that in almost all state prosecutions for wagering or related illegal activities the state would be forced, if the defendant proved compliance with the federal law, to establish that its evidence was untainted. This situation might indeed seriously hamper such state prosecutions. By contrast, far from all criminal violations committed on the highways by drivers of motor vehicles involved property damage. The burden resulting from the imposition of use-restrictions in the latter situation will exist only in those instances where property damage occurs in the course or as a result of a criminal violation committed on the highways by a driver.

"We conclude that criminal prosecutions of drivers involved in accidents will not be unduly hampered by rules that prosecuting authorities may not use information divulged as a result of compliance with section 20002, subdivision (a), of the Vehicle Code or the fruits of such information and that in prosecutions of individuals who have complied with that section the state must establish that its evidence is not the fruit of such information.

"Since imposition in the present case of use-restrictions as described above will neither frustrate any apparent legislative purpose behind the enactment of section 20002 of the Vehicle Code nor unduly hamper criminal prosecutions of drivers involved in accidents; and since the imposition of such restrictions will not preclude the state Legislature from overriding our decision if it wishes, the reasons im-

> pelling the United States Supreme Court to reject the 'attractive and apparently practical' suggestion of imposing restrictions in *Marchetti* v. *United States, supra,* 390 U. S. 39, 58, are absent in the present case, and we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." *Byers* v. *Justice Court, supra,* at 1055–1057, 458 P. 2d, at 476–477 (footnotes omitted).

It is readily apparent from the above passages that the California Supreme Court recognized, as of course it had to, see n. 4, *supra,* that imposition of a use restriction would significantly impair the State's capacity to prosecute drivers whose illegal behavior caused accidents. But that court had decided that the Federal Constitution compelled the State, at the very least, to accept that burden on its prosecutorial efforts in such cases if it wished to pursue its nonprosecutorial goal through compelled self-reporting. Given the availability of the criminal sanction for cases where accidents do not occur the court concluded that interference with prosecutorial efforts in accident cases was not so important that it rendered the use restriction less palatable to the State than recognition of an outright privilege not to disclose. I fail to see how it "flouts" the State's assessment of its own interests to remove the premise that federal law compels a sacrifice of criminal law enforcement where accidents are involved; I doubt that anyone would maintain that criminal law enforcement goals are not significantly served by imposition of criminal sanctions in the very

cases where the feared results of dangerous driving have actually materialized. Of course, after the federal law premise has been removed, the State is free to conclude as a matter of state constitutional or legislative policy that continued imposition of use restrictions with respect to this category of cases would still be appropriate in light of the State's own assessment of the relevant regulatory interests at stake and the personal values protected by the privilege against self-incrimination.

IV

Thus the public regulation of driving behavior through a pattern of laws which includes compelled self-reporting to ensure financial responsibility for accidents and criminal sanctions to deter dangerous driving entails genuine risks of self-incrimination from the driver's point of view. The conclusion that the Fifth Amendment extends to this regulatory scheme will impair the capacity of the State to pursue these objectives simultaneously. For compelled self-reporting is a necessary part of an effective scheme of assuring personal financial responsibility for automobile accidents. Undoubtedly, it can be argued that self-reporting is at least as necessary to an effective scheme of criminal law enforcement in this area. The fair response to that latter contention may be that the purpose of the Fifth Amendment is to compel the State to opt for the less efficient methods of an "accusatorial" system. But see *Schmerber* v. *California,* 384 U. S. 757 (1966). But it would not follow that the constitutional values protected by the "accusatorial" system, see *infra,* at 450–451, are of such overriding significance that they compel substantial sacrifices in the efficient pursuit of other governmental objectives in all situations where the pursuit of those objectives requires the disclosure of information which will undoubtedly significantly aid in criminal law enforcement.

For while this Court's Fifth Amendment precedents have instructed that the Fifth Amendment be given a construction "as broad as the mischief against which it seeks to guard," *Miranda* v. *Arizona,* 384 U. S. 436, 459–460 (1966) (quoting from *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892)), and while the Court in *Malloy* v. *Hogan,* 378 U. S. 1 (1964), treated the privilege as one of those fundamental rights to be "selectively incorporated" into the Fourteenth Amendment, it is also true that the Court has recognized that the "scope of the privilege [does not coincide] with the complex of values it helps to protect." *Schmerber* v. *California,* 384 U. S., at 762. And see MR. JUSTICE BRENNAN's concurring opinion in *Marchetti, supra,* and *Grosso, supra,* 390 U. S., at 72–73. In the *Schmerber* case the Court concluded that the impact of compelled disclosure of "non-testimonial" evidence on the values the privilege is designed to protect was insufficient to warrant a further restriction on the State's enforcement of its criminal laws. And the Court in *Schmerber* explicitly declined reliance on the implication of a "testimonial" limitation to be found in the language of the Fifth Amendment. 384 U. S., at 761 n. 6.

The point I draw from the *Schmerber* approach to the privilege is that "[t]he Constitution contains no formulae with which we can calculate the areas within this 'full scope' to which the privilege should extend, and the Court has therefore been obliged to fashion for itself standards for the application of the privilege. In federal cases stemming from Fifth Amendment claims, the Court has chiefly derived its standards from consideration of two factors: the history and purposes of the privilege, and the character and urgency of the other public interests involved. . . ." *Spevack* v. *Klein,* 385 U. S. 511, 522–523 (1967). (HARLAN, J., dissenting.)

There are those, I suppose, who would put the "liberal construction" approach of cases like *Miranda,* and *Boyd*

v. *United States,* 116 U. S. 616 (1886), side by side with the balancing approach of *Schmerber* and perceive nothing more subtle than a set of constructional antinomies to be utilized as convenient bootstraps to one result or another. But I perceive in these cases the essential tension that springs from the uncertain mandate which this provision of the Constitution gives to this Court.

This Court's cases attempting to capture the "purposes" or "policies" of the privilege demonstrate the uncertainty of that mandate. See *Tehan* v. *Shott,* 382 U. S. 406, 413–416 (1966); *Murphy* v. *Waterfront Comm'n,* 378 U. S., at 55; *Miranda* v. *Arizona,* 384 U. S., at 460; *Boyd* v. *United States, supra.* One commentator takes from these cases two basic themes: (1) the privilege is designed to secure among governmental officials the sort of respect for the integrity and worth of the individual citizen thought to flow from the commitment to an "accusatorial" as opposed to an "inquisitorial" criminal process; (2) the privilege is part of the "concern for individual privacy that has always been a fundamental tenet of the American value structure." McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 210. Certainly, in view of the extension of the privilege to witnesses in civil lawsuits, see *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924)—a context in which, in most instances, information is sought by a private party wholly for purposes of resolving a private dispute—it is unlikely that the rationale of the privilege can be limited to preservation of official respect for the individual's integrity. Though the "privacy" rubric is not without its difficulties in the Fifth Amendment area,[5] it does, I think, capture an important element of the concerns of the privilege, which accounts in part for our willingness to accept

[5] See Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 687–690 (1968).

its reach beyond the context of the criminal investigation or trial. The premise of the criminal sanction—and the disgrace that goes with it—is that it is more feared than the mere censure of our fellow members of society; although communal living requires us to be willing to disclose much to the government and our fellow citizens about our private affairs—and although the fear of eventually having to disclose operates as an inhibiting factor on our personal lives—it still makes sense to think of the Fifth Amendment as intended at least in part to relieve us of the very particular fear arising from the imposition of criminal sanctions.

These values are implicated by governmental compulsion to disclose information about driving behavior as part of a regulatory scheme including criminal sanctions. The privacy interest is directly implicated, while the interest in preserving a commitment to the "accusatorial" system is implicated in the more attenuated sense that an officialdom which has available to it the benefits of a self-reporting scheme may be encouraged to rely upon that scheme for all governmental purposes. But, as I have argued, it is also true that, unlike the ordinary civil lawsuit context, special governmental interests in addition to the deterrence of antisocial behavior by use of criminal sanctions are affected by extension of the privilege to this regulatory context.[6] If the privilege is extended to the

[6] MR. JUSTICE BRENNAN maintains that the state governmental interest in ensuring personal financial responsibility for automobile accidents is indistinguishable from the ordinary civil lawsuit context. See *post,* at 476–477. That assertion truly does flout the State's assessment of its own interests; § 20002 (a) is only a part of a comprehensive self-reporting scheme for all classes of automobile accidents causing harm to others. See generally Cal. Vehicle Code §§ 20001–20012. The California Supreme Court informs us that this legislative scheme is related in coverage and intent to the state financial responsibility law. (Vehicle Code, §§ 16000–16553); see *Byers* v. *Justice Court, supra,* at 1054–1055, 458 P. 2d, at 475–

circumstances of this case, it must, I think, be potentially available in every instance where the government relies on self-reporting. And the considerable risks to efficient government of a self-executing claim of privilege will require acceptance of, at the very least, a use restriction of unspecified dimensions. Technological progress creates an ever-expanding need for governmental information about individuals. If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices.[7] To the extent that our *Marchetti-Grosso* line of

476. The premise of that court's decision to substitute the concededly less complete protection of a use restriction for the outright privilege not to disclose—presumably available in the ordinary civil lawsuit context—can only be that the State's interest in securing personal financial responsibility for automobile accidents is sufficiently distinguishable from the general governmental interest implicated in the maintenance of orderly dispute settlement mechanisms to justify the State's reliance on compelled self-selection as a party involved in events causing harm to others. In view of the presence of similar statutes in every State of the Union and the District of Columbia, I do not understand MR. JUSTICE BRENNAN's assertion that this premise is "artificial" if not "disingenuous." *Post*, at 477.

[7] My Brother BRENNAN's primary response to my view that significant interference with state regulatory goals unrelated to the deterrence of antisocial behavior through criminal sanctions may mean that there is no Fifth Amendment privilege even though from the individual's point of view there are "real" and not "imaginary" risks of self-incrimination is a citation to Mr. Justice Brandeis' distinguished dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 472–477 (1928). Brandeis' views were expressed in the context of a case where no such governmental interest could be said to be implicated; to sever those views from their context and transpose them *ipso facto* to the problem at hand is to slide softly into that "lake of generalities" from which confusion is sure to flow. Cf. opinion of MR. JUSTICE BRENNAN, *post*, at 469.

cases appears to suggest that the presence of perceivable risks of incrimination in and of itself justifies imposition of a use restriction on the information gained by the Government through compelled self-reporting, I think that line of cases should be explicitly limited by this Court.

V

I would not, however, overrule that line of cases. In each of those cases,[8] the Government, relying on its taxing power, undertook to require the individual to focus attention directly on behavior which was immediately recognizable as criminal in virtually every State in the Union. Since compelled self-reporting is certainly essential to the taxing power, those cases must be taken to stand at least for the proposition that the Fifth Amendment requires some restriction on the efficiency with which government may seek to maximize both noncriminal objectives through self-reporting schemes and enforcement of criminal sanctions. If the technique of self-reporting as a means of achieving regulatory goals unrelated to deterrence of antisocial behavior through criminal sanctions is carried to an extreme, the "accusatorial" system which the Fifth Amendment is supposed to secure can be reduced to mere ritual. And the risk that such a situation will materialize is not merely a function of the willingness of an ill-disposed officialdom to exploit the protective screen of ostensible legislative purpose to bypass the procedural limitations on governmental collection of information in the criminal process. The sweep of modern governmental regulation—and the dynamic growth of techniques for gathering and using information culled from individuals by force of criminal

---

[8] *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968); *Haynes* v. *United States,* 390 U. S. 85 (1968); *Leary* v. *United States,* 395 U. S. 6 (1969).

sanctions—could of course be thought to present a significant threat to the values considered to underpin the Fifth Amendment, quite apart from any supposed illegitimate motives that might not be cognizable under ordinary canons of judicial review. As uncertain as the constitutional mandate derived from this portion of the Bill of Rights may be, it is the task of this Court continually to seek that line of accommodation which will render this provision relevant to contemporary conditions.

In other words, we must deal in degrees in this troublesome area. The question whether some sort of immunity is required as a condition of compelled self-reporting inescapably requires an evaluation of the assertedly noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required. See generally Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 128–160.

The statutory schemes involved in *Marchetti* and related cases, see n. 8, *supra,* focused almost exclusively on conduct which was criminal. As the opinion of THE CHIEF JUSTICE points out, the gambling activities involved in *Marchetti* and *Grosso* which gave rise to the obligation to report under that statutory scheme were illegal under federal law and the laws of almost every State in the Union. See *Marchetti, supra,* at 44–46. Indeed, MR. JUSTICE BRENNAN'S concurring opinion in *Marchetti* and *Grosso, supra,* at 74–75, concisely sets forth the precise degree of focus on criminal behavior as the predicate for state compulsion to report information:

> "The Court's opinions fully establish the statutory system's impermissible invasions of the privilege. Indeed, 26 U. S. C. § 4401 should create substantial suspicion on privilege grounds simply because it is an

excise tax upon persons 'engaged in the business of accepting wagers' or who conduct 'any wagering pool or lottery.' The persons affected by this language are a relatively small group, many of whom are engaged in activities made unlawful by state and federal statutes. But § 4401 is actually even more directly confined to that group. Section 4402 (1) exempts from the tax wagers placed with a parimutuel wagering enterprise 'licensed under State law,' and § 4421 defines 'wager' to exclude most forms of unorganized gambling such as dice and poker, and defines 'lottery' to exclude commonly played games such as bingo and drawings conducted by certain tax-exempt organizations. The effect of these exceptions is to limit the wagering excise tax under § 4401 almost exclusively to illegal, organized gambling.

"Moreover the code contemplates extensive record-keeping reporting by persons obligated to pay the tax. But these are records and reports which would incriminate overwhelmingly. Section 6011 (a) requires any person liable to pay a tax to file a return in accordance with the forms and regulations promulgated by the Secretary or his delegate. The regulations promulgating record-keeping requirements and the requirement that taxpayers make a monthly return on Form 730 . . . were therefore formulated pursuant to specific congressional authority. That the return is intended to be a part of the wagering tax obligation is clear from the face of the return itself. . . ."

Although compelled self-reporting is certainly essential to the taxing power, the decision to collect taxes through a special regulatory scheme which conditions the obligation to report on intent to commit a crime or the actual commission of a crime represents a determination to pursue noncriminal governmental purposes to the entire

exclusion of the values protected by the Fifth Amendment. Cf. *Grosso, supra,* at 76 (BRENNAN, J., concurring). In a very real sense, compliance with the statutory requirements involved in *Marchetti* and *Grosso,* followed by use of the information in a prosecution, reduced the "accusatorial system" to the role of a merely ritualistic confirmation of the "conviction" secured through the exercise of the taxing power. Those statutory schemes are hardly distinguishable from a governmental scheme requiring robbers to register as such for purposes of paying an occupational tax and a tax on the proceeds of their crimes. Cf. my Brother BRENNAN's opinion in the instant case, *post,* at 473.

In contrast, the "hit and run" statute in the present case predicates the duty to report on the occurrence of an event which cannot, without simply distorting the normal connotations of language, be characterized as "inherently suspect"; *i. e.,* involvement in an automobile accident with property damage. And, having initially specified the regulated event—*i. e.,* an automobile accident involving property damage—in the broadest terms possible consistent with the regulatory scheme's concededly noncriminal purpose, the State has confined the portion of the scheme now before us, see n. 1 of THE CHIEF JUSTICE's opinion, to the minimal level of disclosure of information consistent with the use of compelled self-reporting in the regulation of driving behavior. Since the State could—in the context of a regulatory scheme including an otherwise broad definition of the regulated event—achieve the same degree of focus on criminal conduct through detailed reporting requirements as was achieved in *Marchetti* and *Grosso* through the definition of the event triggering the reporting duties of the gambling tax scheme, the Court must take cognizance of the level of detail required in the reporting program as well as the

circumstance giving rise to the duty to report; otherwise, the State, possessed as it is of increasingly sophisticated techniques of information gathering and storage, will, in the zealous pursuit of its noncriminal regulatory goals, reduce the "accusatorial system" which the Fifth Amendment is intended to secure to a hollow ritual.

California's decision to compel Byers to stop after his accident and identify himself will not relieve the State of the duty to determine, entirely by virtue of its own investigation after the coerced stop, whether or not any aspect of Byer's behavior was criminal. Nor will it relieve the State of the duty to determine whether the accident which Byers was forced to admit involvement in was proximately related to the aspect of his driving behavior thought to be criminal.[9] In short, Byers having once focused attention on himself as an accident participant, the State must still bear the burden of making the main evidentiary case against Byers as a violator of

---

[9] It bears repeating that Byers was charged with passing another vehicle at an unsafe distance, see n. 1, *supra;* he was not charged with being involved in an automobile accident causing property damage. Although the California Supreme Court did not deal with § 21750 of the Vehicle Code, we may assume that the fact of the accident becomes relevant to the illegal passing charge only if the allegedly unsafe aspects of Byers' passing was the proximate cause of the resulting accident. Of course, the parties in the instant litigation stipulated to that effect. See App. 36. That stipulation certainly supports the conclusion that Byers faced a "real" and not "imaginary" risk of self-incrimination at the time he had to make his decision whether or not to stop. But on my analysis the presence of such risks is not a sufficient predicate for the assertion of the privilege in this regulatory context; we must also consider the impact on the "accusatorial system" of permitting the State to utilize the fruits of the coerced stop in a subsequent prosecution. For that purpose, the *post hoc* stipulation of the parties as to the legal cause of the accident in a subsequent prosecution for failing to stop is irrelevant.

§ 21750 of the California Vehicle Code.[10] To characterize this burden as a merely ritualistic confirmation of the "conviction" secured through compliance with the reporting requirement in issue would be a gross distortion of reality; on the other hand, that characterization of the evidentiary burden remaining on the State and Federal Governments after compliance with the regulatory scheme involved in *Marchetti* and *Grosso* seems proper.

VI

Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute. To hold otherwise would, it seems to me, embark us on uncharted and treacherous seas. There will undoubtedly be other statutory schemes utilizing compelled self-reporting and implicating both permissible state objectives and the values of the Fifth Amendment which will render this determination more difficult to make. A determination of the status of those regulatory schemes must, of course, await a proper case.

On the premises set forth in this opinion, I concur in the judgment of the Court.[11]

---

[10] I do not minimize the aid given the State of California by virtue of the requirement to stop and identify oneself. But this minimal requirement is essential to the State's nonprosecutorial goal, and, the stop having been once coerced, virtually all information secured after the stop is likely to be tainted for purposes of exclusion under the Fifth Amendment in any subsequent prosecution. See n. 4, *supra*.

[11] My Brother BRENNAN, relying on *Raley* v. *Ohio*, 360 U. S. 423 (1959), apparently takes the position that because I do agree that *Marchetti* and *Grosso* could fairly be read to support respondent Byers' refusal to comply with § 20002 (a) on Fifth Amendment

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

Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment's prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a "link in the chain of testimony" needed to prosecute him for a crime. *United States* v. *Burr,* 25 F. Cas. 38, 40 (No. 14,692e) (CC Va. 1807). It is now established that the Fourteenth Amendment makes that provision of the Fifth Amendment applicable to the States. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The plurality opinion, if agreed to by a majority of the Court, would practically wipe out the Fifth Amendment's protection against compelled self-incrimination. This protective constitutional safeguard against arbitrary government was first most clearly declared by Chief Justice Marshall in the trial of Aaron Burr in 1807. *United States* v. *Burr, supra.* In erasing this principle from the Constitution the plurality opinion retreats from a cherished guarantee of liberty fashioned by James Madison and the other founders of what they proudly proclaimed to be our free government. One need only read with care the past cases cited in today's opinions to understand the shrinking process to which the Court today subjects a vital safeguard of our Bill of Rights.

---

grounds, I am constrained to hold that, as a matter of federal due process, Byers cannot be prosecuted by the State. See *post,* at 477. On the premises set forth in my opinion, Byers' position is analytically indistinguishable from that of any individual whose claim of constitutional privilege with respect to primary behavior is defeated by a holding of this Court limiting a prior constitutional precedent. *Raley,* of course, recognized such a due process right in a factual setting involving a great deal more than retroactive application of a judicial ruling limiting prior constitutional precedent.

419-882 O - 72 - 34

The plurality opinion labors unsuccessfully to distinguish this case from our previous holdings enforcing the Fifth Amendment guarantee against compelled self-incrimination. See, *e. g., Albertson* v. *SACB,* 382 U. S. 70 (1965); *Grosso* v. *United States,* 390 U. S. 62 (1968); *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Leary* v. *United States,* 395 U. S. 6 (1969); *Haynes* v. *United States,* 390 U. S. 85 (1968). The plurality opinion, *ante,* at 431, appears to suggest that those previous cases are not controlling because respondent Byers would not have subjected himself to a "substantial risk of self-incrimination" by stopping after the accident and providing his name and address as required by California law. See California Vehicle Code § 20002 (a)(1) (Supp. 1971). This suggestion can hardly be taken seriously. A California driver involved in an accident causing property damage is in fact very likely to have violated one of the hundreds of state criminal statutes regulating automobiles which constitute most of two volumes of the California Code.[1] More important, the particular facts of this case demonstrate that Byers would have subjected himself to a "substantial risk of self-incrimination," *ante,* at 431, had he given his name and address at the scene of the accident. He has now been charged not only with failing to give his name but also with passing without maintaining a safe distance as prohibited by California Vehicle Code § 21750 (Supp. 1971). It is stipulated that the allegedly improper passing caused the accident from which Byers left without stating his name and address. In a prosecution under § 21750, the State will be required to prove that Byers was the driver who passed without maintaining a safe distance. Thus, if Byers had stopped and provided his name and address as the driver involved in the accident, the State could have used that information to

[1] See Cal. Vehicle Code §§ 1–42275 (1960 and Supp. 1971).

establish an essential element of the crime under § 21750. It seems absolutely fanciful to suggest that he would not have faced a "substantial risk of self-incrimination," *ante,* at 431, by complying with the disclosure statute.

The plurality opinion also seeks to distinguish this case from our previous decisions on the ground that § 20002 (a)(1) requires disclosure in an area not "permeated with criminal statutes" and because it is not aimed at a "highly selective group inherently suspect of criminal activities." *Ante,* at 430. Of course, these suggestions ignore the fact that *this particular respondent* would have run a serious risk of self-incrimination by complying with the disclosure statute. Furthermore, it is hardly accurate to suggest that the activity of driving an automobile in California is not "an area permeated with criminal statutes." *Ibid.* And it is unhelpful to say the statute is not aimed at an "inherently suspect" group because it applies to "all persons who drive automobiles in California." *Ibid.* The compelled disclosure is required of all persons who drive automobiles in California *who are involved in accidents causing property damage.*[2] If this group is not "suspect" of illegal activities, it is difficult to find such a group.

The plurality opinion purports to rely on *United States* v. *Sullivan,* 274 U. S. 259 (1927), to support its result. But *Sullivan* held only that a taxpayer could not defeat a

[2] "The driver of any vehicle *involved in an accident resulting in damage to any property* including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either:

"(1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or;

"(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver . . . ." (Emphasis added.) Cal. Vehicle Code § 20002 (a).

prosecution for failure to file a tax return on the grounds that his income was illegally obtained. The Court there suggested that the defendant could lawfully have refused to answer particular questions on the return if they tended to incriminate him.[3] Here, unlike *Sullivan,* the only information that the State requires Byers to disclose greatly enhances the probability of conviction for crime. As I have pointed out, if Byers had stopped and identified himself as the driver of the car in the accident, he would have handed the State an admission to use against him at trial on a charge of failing to maintain a safe distance while passing. Thus, Byers' failure to stop is analogous to a refusal to answer a particular incriminating question on a tax return, an act protected by the Fifth Amendment under this Court's decision in *Sullivan.* Cf. *Marchetti* v. *United States, supra; Grosso* v. *United States, supra.*

I also find unacceptable the alternative holding that the California statute is valid because the disclosures it requires are not "testimonial" (whatever that term may mean). *Ante,* at 431. Even assuming that the Fifth Amendment prohibits the State only from compelling a man to produce "testimonial" evidence against himself, the California requirement here is still unconstitutional. What evidence can possibly be more "testimonial" than a man's own statement that he is a person who has just been involved in an automobile accident inflicting prop-

[3] "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." 274 U. S. 259, 263–264.

erty damage? Neither *United States* v. *Wade,* 388 U. S. 218 (1967), nor any other case of this Court has ever held that the State may convict a man by compelling him to admit that he is guilty of conduct constituting an element of a crime. Cf. *United States* v. *Burr, supra.* Yet the plurality opinion apparently approves precisely that result.

My Brother HARLAN'S opinion makes it clear that today the Court "balances" the importance of a defendant's Fifth Amendement right not to be forced to help convict himself against the government's interest in forcing him to do so. As in previous decisions, this balancing inevitably results in the dilution of constitutional guarantees. See, *e. g., Konigsberg* v. *State Bar,* 366 U. S. 36, 56 (1961) (BLACK, J., dissenting). By my Brother HARLAN'S reasoning it appears that the scope of the Fifth Amendment's protection will now depend on what value a majority of nine Justices chooses to place on this explicit constitutional guarantee as opposed to the government's interest in convicting a man by compelling self-incriminating testimony. In my view, vesting such power in judges to water down constitutional rights does indeed "embark us" on Brother HARLAN'S "uncharted and treacherous seas." *Ante,* at 458.

I can only assume that the unarticulated premise of the decision is that there is so much crime abroad in this country at present that Bill of Rights' safeguards against arbitrary government must not be completely enforced. I can agree that there is too much crime in the land for us to treat criminals with favor. But I can never agree that we should depart in the slightest way from the Bill of Rights' guarantees that give this country its high place among the free nations of the world. If we affirmed the State Supreme Court, California could still require persons involved in accidents to stop and give their names and addresses. The State

would only be denied the power to violate the Fifth Amendment by using the fruits of such compelled testimony against them in criminal proceedings. Instead of criticizing the Supreme Court of California for its rigid protections of individual liberty, I would without more ado affirm its judgment.

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

Although I have joined my Brother BLACK's opinion in this case, the importance of the issues involved and the wide range covered by the two opinions supporting the Court's judgment in this case make further comment desirable. Put briefly, one of the primary flaws of the plurality opinion is that it bears so little relationship to the case before us. Notwithstanding the fact that respondent was charged both with a violation of the California Vehicle Code which resulted in an accident, and with failing to report the accident and its surrounding circumstances as required by the statute under review, the plurality concludes, contrary to all three California courts below, that respondent was faced with no substantial hazard of self-incrimination under California law. My Brother HARLAN, by contrast, recognizes the inadequacy of any such conclusion. In his view, our task is to make the Bill of Rights "relevant to contemporary conditions" by simply not applying its provisions when we think the Constitution errs. *Ante,* at 454. In the context of the present case, this appears to mean that current technological progress enabling the Government more easily to use an individual's compelled statements against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using modern technology further to reduce individual privacy.

Needless to say, neither of these approaches is consistent with the Constitution.

I

This case arises from an attempt by the State of California to punish an assertion of the Fifth Amendment's privilege against self-incrimination. Respondent Byers was charged with a statutory duty to report his involvement as a driver in an auto accident involving property damage. This he refused to do, and California seeks to impose criminal punishment for his refusal. Unlike the plurality, I believe that analysis of the question whether California may do so is inevitably tied to the circumstances of this case. I therefore turn to the record.

Respondent was initially charged in Justice Court with two violations of California law. The criminal complaint alleged, first, that he violated California Vehicle Code § 21750 (Supp. 1971) by improper passing; and second, that he was involved in an accident causing property damage and failed to report his name, address, and the circumstances of the accident to the other driver involved and the California Highway Patrol. California Vehicle Code § 20002, as amended by Cal. Laws 1965, c. 872.[1] After a demurrer to the complaint was rejected, respondent sought a writ of prohibition to restrain prosecution of the second charge of the complaint.

The California Superior Court dealt with the statutory reporting requirement only as applied to respondent. It found as a fact that the alleged improper passing with which respondent was charged caused the accident that respondent was charged with failing to report. App. 49. The court found it "hard to imagine a more damaging

[1] In 1967, subsequent to the accident involved in this case, the statute was amended in ways not material here. See Cal. Vehicle Code § 20002 (Supp. 1971).

link in the chain in a prosecution under Vehicle Code Section 21750 than that which establishes that the defendant was driving the vehicle involved." App. 42. Since on these facts it was "obvious," App. 44, that respondent faced a substantial hazard of self-incrimination if he reported that he was the driver of one of the automobiles involved in the accident, the Superior Court issued the writ to restrain prosecution for failure to make the report.

The California Court of Appeal also dealt with the statute only as applied to respondent. Like the Superior Court, it found it "difficult to imagine a more damaging link in the chain of prosecution" than the requirement of § 20002 that respondent inform the police that he was the driver of one of the vehicles involved in the accident. As the Court of Appeal put the matter, "To compel [respondent] to comply with [§ 20002] and thus to admit a fact essential to his conviction of a violation of section 21750 is to compel him to give a testimonial declaration that falls directly within the scope of the constitutional privilege." 71 Cal. Rptr. 609, 612 (Ct. App. 1968). It concluded, however, that respondent could be criminally punished for his failure to report *because* the Fifth Amendment prohibited the use of "admissions and statements made in compliance with" § 20002 "in a prosecution for a criminal offense arising out of the same course of conduct." *Ibid.* It reversed the Superior Court's grant of the writ of prohibition.[2]

Finally, the California Supreme Court likewise dealt with the statute in the context of its application to respondent. It first identified the "crucial inquiry in determining the applicability of the privilege" as

> "whether the *individual* seeking to avoid disclosure faces 'substantial hazards of self-incrimination' because *in his particular case* there is a substantial

[2] Cf. *Raley* v. *Ohio*, 360 U. S. 423 (1959).

> likelihood that information disclosed by him in compliance with the statute could by itself or in conjunction with other evidence be used to secure his conviction of a criminal offense." 71 Cal. 2d 1039, 1043, 458 P. 2d 465, 468 (1969) (emphasis added).

Second, it construed the California statute in question to require a person to whom it applies to report not merely his name and address, but also that he was the driver of an automobile involved in a particular accident. 71 Cal. 2d, at 1045, 458 P. 2d, at 470. It held the privilege against self-incrimination applicable to the "driver of a motor vehicle involved in an accident [who] is confronted with [the] statutory requirement . . . [and who] reasonably believes that compliance with the statute will result in self-incrimination." *Id.*, at 1047, 458 P. 2d, at 471. It agreed with the two courts below that respondent, at the time of the accident, "had reasonable ground to apprehend that if he stopped to identify himself as required . . . he would confront a substantial hazard of self-incrimination." *Id.*, at 1057, 458 P. 2d, at 477. It agreed with the Court of Appeal, however, that the statute could and should be limited by restricting the use of information acquired pursuant to the statutory compulsion in circumstances where the particular individual reporting could demonstrate a substantial risk of self-incrimination.[3] *Id.*, at 1050–1056, 458 P. 2d, at 472–477. Contrary to the Court of Appeal, however, the California Supreme Court felt that it would be unfair to punish respondent when he could have had no knowledge that use restrictions would be applied by

---

[3] The California court noted that use restrictions were imposed by the California Legislature itself with regard to required accident reports where the accident resulted in personal injury or death, see Cal. Vehicle Code § 20012 (Supp. 1971). 71 Cal. 2d, at 1055, 458 P. 2d, at 476.

the courts. Accordingly, it affirmed the Superior Court. *Id.*, at 1057–1058, 458 P. 2d, at 477–478. The two dissenting justices took issue with the majority only over the question whether respondent's punishment would be unfair. *Id.*, at 1059–1060, 458 P. 2d, at 479.

II

The plurality opinion, unfortunately, bears little resemblance either to the facts of the case before us or to the law upon which it relies. Contrary to the plurality opinion, I do not believe that we are called upon to determine the broad and abstract question "whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called 'hit and run' statute [4] which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address." *Ante,* at 425. I believe we are called upon to decide the question presented by this case, which is whether California may punish respondent, over his claim of the privilege against self-incrimination, for failing to comply with the statutory requirement that he report his name and address, *and the fact that he was the driver of an automobile involved in this particular accident.* Despite the plurality's assurance that its "judicial scrutiny is . . . a close one," *ante,* at 427, I believe that in the course of explaining its own views regarding "disclosures with respect to automobile accidents" in general, *ante,* at 431, the plurality has lost sight of the record before us. See *ante,* at 427, 430–431. Instead of dealing with the "underlying constitutional issues in clean-cut and concrete form," *Rescue Army* v. *Municipal*

[4] To avoid confusion, it should be remembered that the California Supreme Court in its opinion refers to a number of state "hit-and-run" statutes, including but not limited to the single statute involved in this case. *Byers* v. *Justice Court,* 71 Cal. 2d, at 1044–1045, 458 P. 2d, at 469–470.

Court, 331 U. S. 549, 584 (1947), the plurality seeks a broad general formula to resolve the tensions "between the State's demand for disclosures and . . . the right against self-incrimination." *Ante,* at 427. But only rivers of confusion can flow from a lake of generalities. Cf. the opinion of my Brother BLACK, *ante,* at 460–461.

Much of the plurality's confusion appears to stem from its misunderstanding of the language, embodied in several of this Court's opinions, regarding questions "directed at a highly selective group inherently suspect of criminal activities." *Albertson* v. *SACB,* 382 U. S. 70, 79, (1965); see *Marchetti* v. *United States,* 390 U. S. 39, 47, 57 (1968). The plurality seems to believe that membership in such a suspect group is somehow an indispensable foundation for any Fifth Amendment claim. See *ante,* at 429–431. Of course, this is not so, unless the plurality is now prepared to assume that *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924), *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892), *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), and *Spevack* v. *Klein,* 385 U. S. 511 (1967), were based, respectively, upon the unarticulated premises that bankrupts, businessmen, policemen, and lawyers are all "group[s] inherently suspect of criminal activities." Instead, in the words of the California Supreme Court, "in each case the crime-directed character of the registration requirement was . . . important only insofar as it supported the claims of the specific petitioners that they faced 'substantial hazards of self-incrimination' justifying invocation of the privilege." 71 Cal. 2d, at 1043, 458 P. 2d, at 468. That this is so is evident from our emphasis in *Marchetti* that "we do not hold that these wagering tax provisions are as such constitutionally impermissible . . . . If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination . . . nothing we decide today would shield him from the

various penalties prescribed by the wagering tax statutes." 390 U. S., at 61. The point is that in both *Albertson* and *Marchetti,* petitioners arrived in this Court accompanied by a record showing only that they had failed to register, respectively, as Communists and as a gambler, and that, in fact, they were such. Since neither of these facts was necessarily criminal, we had to determine whether the petitioners faced "real and appreciable" or merely "imaginary and unsubstantial" [5] hazards when they refused to register. That the petitioners belonged in each case to an inherently suspect group was relevant to that question, and that alone. By contrast, in the present case we are dealing with a record which demonstrates, as found by all three courts below, that respondent was charged by California both with illegal passing which resulted in an accident, and with failing to report himself as one of the drivers involved in that accident. It is hard to imagine a record demonstrating a more substantial hazard of self-incrimination than this. Yet the plurality somehow concludes that respondent did not face the "substantial risk of self-incrimination involved in *Marchetti.*" [6] *Ante,* at 431.

---

[5] *Brown* v. *Walker,* 161 U. S. 591, 599 (1896), quoting *Queen* v. *Boyes,* 1 B. & S. 311, 330, 121 Eng. Rep. 730, 738 (1861).

[6] Even accepting the proposition that the Fifth Amendment applies only to statutory inquiries directed at persons who can demonstrate membership in a group inherently suspect of criminal activity, I find the plurality opinion confusing in its notion of how one determines the group at which a given statute is directed. Of course, in one sense, every statute not naming the persons or organizations to whom it applies is directed at the public at large. The paradigm is a statute requiring "any person who does [or is a member of] X" to answer certain questions. The activity involved in *Sullivan* was the earning of income, in *Marchetti* was gambling, and in *Albertson* was belonging to the Communist Party. The plurality appears to agree that those statutes were, respectively, directed at income earners (very nearly the public at large), gamblers, and Communists. The statute before us directs any person who is the

The plurality opinion also places great reliance upon *United States* v. *Sullivan,* 274 U. S. 259 (1927). I had understood that case to stand for the proposition that one who desired to raise a Fifth Amendment claim to protect his refusal to provide information required by the Government on a tax return should make specific objection to the particular question on the return. Sullivan's sole objection was to disclosing *the amount of his income,* on the ground that it had been made in crime; he did not claim to be entitled to refuse to disclose his name and address. The Court suggested, although it did not decide, that it would in a proper case reject the claim as to *amount of income.*[7] It may be that *Sullivan* also stands for the proposition that an individual may not refuse, on Fifth Amendment grounds, to file a return disclosing his name and address, and by implication disclosing that he has earned some income during the previous year.[8] But that question was not raised in *Sullivan,* and the Court explicitly noted that it was not

---

driver of an automobile *involved in an accident causing property damage* to answer certain questions. I would think, then, that it would be "directed at" drivers involved in accidents causing property damage. Yet the plurality states that it is "directed at . . . all persons who drive automobiles in California." Apparently four members of this Court are willing to assume that *all* California drivers at some time are involved in an automobile accident causing property damage. I would hesitate before making such an assertion.

[7] Since the amount of income earned by an individual engaged in crime is usually neither relevant to his prosecution for such crimes nor helpful to police authorities in determining that he committed crimes, this would seem a logical suggestion. Of course, if disclosure of the amount of income criminally earned would create a not insubstantial risk of incrimination in any particular case, the privilege would apply.

[8] More precisely, the statute required returns only of those who had earned specified amounts of net or gross income, the precise amount depending on the individual's marital status. Revenue Act of 1921, § 223, 42 Stat. 250.

called upon to decide what information could be withheld; certainly I would expect this Court to hesitate before affirming the conviction of a fugitive from justice for filing a tax return which omitted his address. However that may be, I am frankly unable to understand just what the plurality thinks that *Sullivan* stands for. Rather than pursue the matter further, I simply note below those portions of the *Sullivan* opinion quoted, paraphrased, or omitted in the plurality opinion. Portions there quoted are in roman type; portions there paraphrased are enclosed in brackets; portions there omitted are in italics.

> "As the defendant's income was taxed, the statute of course required a return. . . . In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. *We are not called on to decide what, if anything, he might have withheld.* . . . [It would be] an extreme if not an extravagant application of the Fifth Amendment [to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.] *But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon.*" *United States* v. *Sullivan,* 274 U. S., at 263–264.

Cf. the plurality opinion, *ante,* at 428–429, 433–434.

I find even less persuasive the plurality's alternative suggestion, see *ante,* at 431–434, that the California statute involved here does not require individuals to "provide the State with 'evidence of a testimonial or communicative nature' within the meaning of the Con-

stitution." *Ante,* at 432. To begin with, the plurality opinion states that "[c]ompliance with § 20002 (a)(1) requires two things: first, a driver involved in an accident is required to stop at the scene; second, he is required to give his name and address;" it later suggests that, conceivably, "it [could] be . . . inferred" that such a driver "was indeed the operator of an 'accident involved' vehicle." *Ante,* at 431, 433. But, the plurality opinion continues, *United States* v. *Wade,* 388 U. S. 218, 221–223 (1967), rejects the notion that "such inferences are communicative or testimonial." *Ante,* at 433. Putting aside the plurality's misreading of *Wade,* adequately dealt with by my Brother HARLAN, *ante,* at 435–436, the initial problem with the plurality opinion is that it adopts a construction of the California statute that was explicitly rejected by the California Supreme Court. That court specifically stated that the statute involved here "requires drivers involved in accidents *to identify themselves as involved drivers.*" 71 Cal. 2d, at 1045, 458 P. 2d, at 470 (emphasis added in part). We have no license to overrule the California Supreme Court on a question of the construction of a California statute. Even if we did, however, I would still not be persuaded by the plurality's reasoning that since "[d]isclosure of name and address is an essentially neutral act," *ante,* at 432, any inferences which may be drawn from that disclosure are not "communicative or testimonial" in nature. *Ante,* at 432, 433. Apparently the plurality believes that a statute requiring all robbers to stop and leave their names and addresses with their victims would not involve the compulsion of "communicative or testimonial" evidence.

III

Similarly, I do not believe that the force of my Brother BLACK's reasoning may be avoided by my Brother HAR-

LAN's approach. He quite candidly admits that our prior cases compel the conclusion that respondent was entitled to rely on the privilege against self-incrimination as a defense to prosecution for failure to stop and report his involvement in an accident. *Ante,* at 438–439. He would simply limit those cases because he believes that technological progress has made the privilege against self-incrimination a "threat" to "realistic" government that we can no longer afford.[9] To the extent that this argument calls for refutation, it is adequately disposed of in Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States,* 277 U. S. 438, 472–477, 479 (1928). Our society is not endangered by the Fifth Amendment. "The dangers of which we must really beware are . . . that we shall fall prey to the idea that in order to preserve our free society some of the liberties of the individual must be curtailed, at least temporarily. How wrong that kind of a program would be is surely evident from the mere statement of the proposition." J. Harlan, Live and Let Live, in The Evolution of a Judicial Philosophy 285, 288 (D. Shapiro ed. 1969).

In any event my Brother HARLAN's opinion is consistent neither with the present record nor its own premises. As to the first, my Brother HARLAN appears to believe that the imposition of use restrictions on the

[9] "Technological progress creates an ever-expanding need for governmental information about individuals. If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices. To the extent that our *Marchetti-Grosso* line of cases appears to suggest that the presence of perceivable risks of incrimination in and of itself justifies imposition of a use restriction on the information gained by the Government through compelled self-reporting, I think that line of cases should be explicitly limited by this Court." *Ante,* at 452–453.

present statute would threaten the capacity of California "to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices." *Ante,* at 452. If so, this threat passed unperceived by the California Supreme Court: that court stated that its imposition of a use restriction "will neither frustrate any apparent significant legislative purpose nor unduly hamper criminal prosecutions of drivers involved in accidents resulting in damage to the property of others." 71 Cal. 2d, at 1054, 458 P. 2d, at 475.[10] It seems to have passed unnoticed by the California Legislature as well. The present statute applies to drivers involved in accidents causing property damage. California Vehicle Code § 20012 (Supp. 1971) requires similar, albeit more detailed, reports from drivers involved in accidents resulting in either personal injury or death. Yet the California Legislature itself imposed use restrictions upon the use of such reports. *Ibid.*[11] It is one thing to respect a State's assertion that imposition of a particular requirement will unduly hamper a legitimate state

[10] The opinion of the California Supreme Court is quoted at some length by my Brother HARLAN, *ante,* at 444–447. Yet he somehow appears to conclude that that court did not mean what it said. For notwithstanding the language quoted above, he states that the California Supreme Court "concluded that interference with prosecutorial efforts in accident cases was not so important that it rendered the use restriction less palatable to the State than recognition of an outright privilege not to disclose." *Ante,* at 447.

[11] It could be argued that the use restriction created by the California Legislature is of lesser consequence—and therefore less burdensome—than that which was imposed by the California Supreme Court in this case. If so, however, under the premises of my Brother HARLAN's opinion, the appropriate response on our part would be not to hold that the privilege against self-incrimination could not be asserted, but at most to diminish the scope of the use restriction to that considered by the legislature to be consistent with the state interests asserted. There is no reason to protect those interests more than the legislature itself deems necessary.

419-882 O - 72 - 35

interest. It is quite another to flout the conclusion of the State's Supreme Court—and, so far as appears, of the state legislature as well—that imposition of a particular requirement is not at all inconsistent with the asserted state interests.

Moreover, I think my Brother HARLAN's opinion falls on its own premises. For he recognizes, and apparently would follow, our cases holding that the privilege against self-incrimination may be claimed by a witness in a noncriminal proceeding who is asked to give testimony that might indicate his commission of crime. *E. g., Counselman* v. *Hitchcock,* 142 U. S., at 562; *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924); *Hutcheson* v. *United States,* 369 U. S. 599 (1962) (HARLAN, J.). See *ante,* at 450–451. He appears to believe that these cases are different from the one before us, because they involve information "sought by a private party wholly for purposes of resolving a private dispute," *ante,* at 450, where no "special governmental interests in addition to the deterrence of antisocial behavior by use of criminal sanctions are affected." *Ante,* at 451. Yet this is precisely the case before us. For the only noncriminal interest that has ever been asserted to justify the California reporting statute at issue here is the State's interest in providing information "sought by a private party wholly for purposes of resolving a private dispute." Of course, state policy is exercised, in part, through the resolution of otherwise private disputes through the judicial process. But this is true of every civil case, whether it involves tort liability for negligent driving, the ability of private individuals to inherit from one another, *Labine* v. *Vincent,* 401 U. S. 532 (1971), or the right of private parties to dissolve a previous marriage, *Boddie* v. *Connecticut,* 401 U. S. 371 (1971) (HARLAN, J.). To distinguish the ordinary "civil lawsuit context," *ante,* at 451, from the civil lawsuit context in which the pres-

ent statute is involved is simply to indulge in the sort of "artificial, if not disingenuous judgments" against which my Brother HARLAN's opinion otherwise warns. *Ante,* at 442.

Finally, even if everything else in my Brother HARLAN'S opinion be accepted, I cannot understand his concurrence in the judgment. For the California Supreme Court *agreed* with his conclusion that the privilege against self-incrimination does not provide a defense to an individual who fails to comply with the statutory reporting requirement. 71 Cal. 2d, at 1057, 458 P. 2d, at 477. But it nevertheless concluded that *respondent* should not be punished because it would be "unfair" to do so. 71 Cal. 2d, at 1058, 458 P. 2d, at 478. Although my Brother HARLAN concludes that the Fifth Amendment does not excuse compliance with the California reporting requirements for reasons quite different from those relied upon by the California Supreme Court, the point is that both have reached the same conclusion. Of course, we have already held that due process is denied an individual if he is led to believe that the privilege against self-incrimination applies when he refuses to answer questions, and subsequently prosecuted on the grounds that it does not. *Raley* v. *Ohio,* 360 U. S. 423 (1959). One would assume that in such circumstances my Brother HARLAN would, although for very different reasons, agree that the judgment of the California Supreme Court should be affirmed.

IV

Although, strictly speaking, the only question before us is whether respondent may be punished for failing to comply with the statutory requirement at issue,[12] I am

[12] Although the case was tried and decided prior to our decisions in *Marchetti* v. *United States,* 390 U. S. 39 (1968), and *Grosso* v. *United States,* 390 U. S. 62 (1968), the principles of those cases must be applied here. *United States* v. *United States Coin & Currency,* 401 U. S. 715 (1971).

constrained to add that I cannot agree with the California Supreme Court's conclusion that the requirement may be enforced if the State is merely precluded from using the compelled evidence and its fruits in a criminal prosecution. When, as in the present case, the statute requires an individual to admit that he has engaged in conduct likely to be the subject of criminal punishment under the California traffic laws, the requirement in my view may be enforced only if those reporting their involvement in an accident pursuant to the statutory command are immune from prosecution under state law for traffic offenses arising out of the conduct involved in the accident. See *Piccirillo* v. *New York,* 400 U. S. 548, 550–551 (1971) (DOUGLAS, J., dissenting); *id.,* at 561–573 (BRENNAN, J., dissenting); *Mackey* v. *United States,* 401 U. S. 667, 702 (1971) (BRENNAN, J., concurring in judgment).

Syllabus

McGEE *v.* UNITED STATES

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

No. 362. Argued February 23, 1971—Decided May 17, 1971

Petitioner applied in 1966 for conscientious objector status to his local Selective Service board, which advised him that his claim would be passed on when his student deferment expired. His board was told in 1967 that petitioner had been accepted for a graduate program where, in petitioner's own view, he would "probably qualify" for a theological exemption. However, no request for ministerial student status was made, nor was pertinent supporting information presented. Petitioner refused to fill out a current information questionnaire sent to him on his graduation from college, announcing that he would not cooperate with the Selective Service System. Following the local board's subsequent reclassification of petitioner I–A, he did not seek a personal appearance before the board or appeal board review. Petitioner thereafter refused to submit to induction, for which, along with other draft law violations, he was prosecuted and convicted. The Court of Appeals, rejecting petitioner's defense that the local board had erred in its classification, affirmed. *Held:* Petitioner's failure to exhaust his administrative remedies jeopardized the interest of the Selective Service System, as the administrative agency responsible for classifying registrants, in developing the facts and using its expertise to assess his claims to exempt status and thus bars petitioner's defense that he was erroneously classified. *McKart* v. *United States,* 395 U. S. 185, factually distinguished. Pp. 483–491.

426 F. 2d 691, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 492.

Alan H. Levine argued the cause for petitioner. With him on the briefs were *Marvin M. Karpatkin* and *Melvin L. Wulf.*

William Bradford Reynolds argued the cause for the United States *pro hac vice*. With him on the brief were *Solicitor General Griswold* and *Assistant Attorney General Wilson*.

Marvin B. Haiken filed briefs for Richard Kenneth LeGrande as *amicus curiae*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was convicted of failing to submit to induction and other violations of the draft laws. His principal defense involves the contention that he had been incorrectly classified by his local Selective Service board. The Court of Appeals ruled that this defense was barred because petitioner had failed to pursue and exhaust his administrative remedies. We granted certiorari, 400 U. S. 864 (1970), to consider the applicability of the "exhaustion of administrative remedies" doctrine in the circumstances of this case.

I

In February 1966, while attending the University of Rochester, petitioner applied to his local Selective Service board for conscientious objector status. In support of his claim to that exemption he submitted the special form for conscientious objectors (SSS Form 150), setting forth his views concerning participation in war.[1] The board continued petitioner's existing classification—student de-

[1] In this connection he noted that he intended "to continue on to actual ordained Priesthood." After registering for the draft in 1961, petitioner had informed the local board that he was then a student at a Catholic seminary, preparing for the ministry under the direction of the Roman Catholic Church. Subsequently he left the seminary and later enrolled at the University of Rochester, a secular university.

ferment—and advised him that the conscientious objector claim would be passed upon when student status no longer applied.

In April 1967 petitioner wrote to President Johnson, enclosing the charred remnants of his draft cards and declaring his conviction that he must "sever every link with violence and war." The letter included a statement that petitioner had "already been accepted for graduate study in a program where I would probably qualify for the theological deferment." A copy of the letter was forwarded to the local board; the board continued petitioner's student deferment. Petitioner graduated in June 1967, and thereafter the board sent him a current information questionnaire (SSS Form 127), which asked *inter alia* for specific information concerning his future educational plans and generally for any information he thought should be called to the board's attention. Petitioner returned the questionnaire unanswered and announced in a cover letter that henceforth he would adhere to a policy of noncooperation with the Selective Service System.

In September 1967 the board reviewed petitioner's file, rejected the pending conscientious objector claim,[2] and reclassified petitioner I-A. In response to his reclassification petitioner sought neither a personal appearance before the local board nor review by the appeal board. Indeed, pursuant to his policy of noncooperation, he returned to the board, unopened, the communication notifying him of the reclassification and of his right to appear before the local board, to confer with the Government appeal agent, and to appeal. Petitioner did not appear for a physical examination ordered to take place in October 1967. He did respond to an order to appear

[2] See n. 10, *infra*.

for induction in January 1968, and he took a physical examination at that time. However, he refused to submit to induction.

Petitioner was prosecuted, under § 12 (a) of the Military Selective Service Act of 1967, 62 Stat. 622, as amended, 50 U. S. C. App. § 462 (a) (1964 ed., Supp. V) and applicable Selective Service regulations,[3] for failing to submit to induction (count I), failing to report for a pre-induction physical examination (count II), failing to keep possession of a valid classification notice (count III), and failing to submit requested information relevant to his draft status (count IV). Petitioner was convicted on all four counts and sentenced to two years' imprisonment on each count, the sentences to run concurrently. Petitioner's principal defense to liability for refusing induction [4] was that the local board had erred in classifying him I-A.[5] The Court of Appeals, with one judge dissenting, held that the defense of incorrect classification was barred because petitioner had failed to exhaust the administrative remedies available for correction of such an error. The conviction was affirmed by the Court of Appeals.

---

[3] See 32 CFR § 1632.14; 32 CFR § 1628.16; 32 CFR § 1623.5; 32 CFR § 1641.7 (b).

[4] In the Court of Appeals, as here, petitioner argued that the defense of erroneous classification would, if valid, defeat criminal liability for acts charged under counts II and III, as well as count I.

[5] Petitioner contended, as he does in this Court, that the board erroneously failed to pass on the merits of his conscientious objector claim when reclassifying him in September 1967, that at any rate the board erred in denying conscientious objector status, and also that the board erred in failing to grant him a ministerial student exemption. Petitioner had matriculated at Union Theological Seminary in September 1967, after being reclassified I–A. He had never, however, requested that he be classified as exempt from the draft as a ministerial student. See *infra,* at 486–488.

II

Two Terms ago, in *McKart* v. *United States,* 395 U. S. 185 (1969), the Court surveyed the place of the exhaustion doctrine in Selective Service cases, and the policies that underpin the doctrine. As it has evolved since *Falbo* v. *United States,* 320 U. S. 549 (1944), and *Estep* v. *United States,* 327 U. S. 114 (1946), the doctrine when properly invoked operates to restrict judicial scrutiny of administrative action having to do with the classification of a registrant, in the case of a registrant who has failed to pursue normal administrative remedies and thus has sidestepped a corrective process which might have cured or rendered moot the very defect later complained of in court. Cf. *Oestereich* v. *Selective Service Board,* 393 U. S. 233, 235–236, n. 5 (1968); *Gibson* v. *United States,* 329 U. S. 338, 349–350 (1946). *McKart* stands for the proposition that the doctrine is not to be applied inflexibly in all situations, but that decision also plainly contemplates situations where a litigant's claims will lose vitality because the litigant has failed to contest his rights in an administrative forum. The result in a criminal context is no doubt a substantial detriment to the defendant whose claims are barred. Still this unhappy result may be justified in particular circumstances by considerations relating to the integrity of the Selective Service classification process and the limited role of the courts in deciding the proper classification of draft registrants.[6]

---

[6] Certainly it is late in the day to launch a broadside against the whole scheme of the exhaustion doctrine in Selective Service cases, as petitioner attempts, on the ground that a doctrine of the same name operates in some other legal context simply to inhibit premature access to the courts on the part of a litigant seeking affirmatively to challenge agency action. Cf. *McKart* v. *United States,* 395 U. S. 185, 193–195 (1969). Nor is it tenable to say that

A

After *McKart* the task for the courts, in deciding the applicability of the exhaustion doctrine to the circumstances of a particular case, is to ask "whether allowing all similarly situated registrants to bypass [the administrative avenue in question] would seriously impair the Selective Service System's ability to perform its functions." 395 U. S., at 197. *McKart* specified the salient interests that may be jeopardized by a registrant's failure to pursue administrative remedies. Certain failures to exhaust may deny the administrative system important opportunities "to make a factual record" for purposes of classification, or "to exercise its discretion or apply its expertise" in the course of decisionmaking. *Id.*, at 194. There may be a danger that relaxation of exhaustion requirements, in certain circumstances, would induce "frequent and deliberate flouting of administrative processes," thereby undermining the scheme of decisionmaking that Congress has created. *Id.*, at 195. And of course, a strict exhaustion requirement tends to ensure that the agency have additional opportunities "to discover and correct its own errors," and thus may help to obviate all occasion for judicial review. *Ibid.*

To be weighed against the interests in exhaustion is the harsh impact of the doctrine when it is invoked to bar any judicial review of a registrant's claims. Surely an insubstantial procedural default by a registrant should

---

the doctrine is inappropriate when fashioned by judicial decision rather than specific congressional command. See *id.*, at 193–194, 197; *id.*, at 206 (WHITE, J., concurring in result). The whole rationale of the exhaustion doctrine in the present context lies in purposes intimately related to the autonomy and proper functioning of the particular administrative system Congress has constructed. See generally *Mulloy* v. *United States*, 398 U. S. 410, 416 (1970); *Witmer* v. *United States*, 348 U. S. 375, 380–381 (1955).

not shield an invalid order from judicial correction, simply because the interest in time-saving self-correction by the agency is involved. That single interest is conceivably slighted by any failure to exhaust, however innocuous the bypass in other respects, and *McKart* recognizes that the exhaustion requirement is not to be applied "blindly in every case." *Id.*, at 201. *McKart* also acknowledges that the fear of "frequent and deliberate flouting" can easily be overblown, since in the normal case a registrant would be "foolhardy" indeed to withhold a valid claim from administrative scrutiny. *Id.*, at 200. Thus the contention that the rigors of the exhaustion doctrine should be relaxed is not to be met by mechanical recitation of the broad interests usually served by the doctrine, but rather should be assessed in light of a discrete analysis of the particular default in question, to see whether there is "a governmental interest compelling enough" to justify the forfeiting of judicial review. *Id.*, at 197.

In the *McKart* case, the focal interest for purposes of analysis was the interest in allowing the agency "to make a factual record, or to exercise its discretion or apply its expertise." There the registrant had failed to take an administrative appeal from the local board's denial of "sole surviving son" status. Later the issue of McKart's entitlement to that exempt status arose in a criminal context, and the Court held that the claim should be heard as a defense to liability despite the failure to exhaust. The validity of the claim was a question "solely . . . of statutory interpretation." *Id.*, at 197–198. McKart's failure to exhaust did not inhibit the making of an administrative record—all the relevant facts had been presented. *Id.*, at 198 n. 15. The issue was not one of fact and thus its resolution would not have been aided by the exercise of special administrative expertise; and proper interpretation of the statutory provision in question was not a matter for agency discretion.

In the present case the same interest is pivotal—but here it is apparent that McGee's failure to exhaust did jeopardize the interest in full administrative fact gathering and utilization of agency expertise, rather than the contrary. Unlike the dispute about statutory interpretation involved in *McKart,* McGee's claims to exempt status—as a ministerial student or a conscientious objector—depended on the application of expertise by administrative bodies in resolving underlying issues of fact. Factfinding for purposes of Selective Service classification is committed primarily to the administrative process, with very limited judicial review to ascertain whether there is a "basis in fact" for the administrative determination. See 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. V); *Estep* v. *United States,* 327 U. S., at 122–123; cf. *Witmer* v. *United States,* 348 U. S. 375, 380–381 (1955). *McKart* expressly noted that as to classification claims turning on the resolution of particularistic fact questions, "the Selective Service System and the courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew." 395 U. S., at 198 n. 16. See *id.,* at 200–201. This "stronger interest," in the circumstances of the present case, has become compelling and fully sufficient to justify invocation of the exhaustion doctrine.

B

Petitioner argues that denial of exemption as a ministerial student was erroneous, but he had never requested that classification nor had he submitted information that would have been pertinent to such a claim. In regard to his entitlement to this exempt status, McGee made no effort to invoke administrative processes for factfinding, classification, and review, It is true that vagrant bits of information may have come to the attention of the local

board raising a bare possibility that petitioner might qualify as a ministerial student,[7] but this hardly changes the picture of a thoroughgoing attempt to sidestep the administrative process and make the first serious case for an exemption later in court.

Such a default directly jeopardizes the functional autonomy of the administrative bodies on which Congress has conferred the primary responsibility to decide questions of fact relating to the proper classification of Selective Service registrants.[8] See *McKart* v. *United States,*

---

[7] Petitioner's letter to President Johnson, a copy of which was transmitted to the board, declared that petitioner's future graduate studies in his own view "would probably qualify" him for the ministerial student exemption. This is the sole communication from petitioner that actually reached the board, however circuitously, and contained a hint of petitioner's projected studies at the Union Theological Seminary, though the letter did not say where petitioner intended to study and it gave no information whatever on other matters critical to ministerial student status. See n. 9, *infra.* Petitioner's reliance on information communicated by him, not to the local board, but to certain FBI agents and to an assistant United States attorney, is even more farfetched.

[8] Local Board Memorandum No. 56 (August 18, 1954) prescribes that "[t]o substantiate the claim of a registrant that he is a theological student, the local board must require him to furnish" certain relevant evidence. Petitioner contends that this directive places the burden of fact gathering on the board and relieves him of the responsibility to produce unsolicited evidence relevant to a ministerial student claim. However, in petitioner's case there was no "claim of a registrant" before the board, and at any rate the board's fact-gathering efforts were thwarted by petitioner's refusal to fill out the current information questionnaire (SSS Form 127) sent to him. Thus, we need not consider the relevance of the directive for exhaustion purposes in the case of a registrant who claims ministerial student status but falls short in his initial proofs.

Petitioner's emphasis on the mandatory statutory language relating to exemption of ministerial students, 50 U. S. C. App. § 456 (g) (such persons "shall be exempt"), is also misplaced. This is not a case where, though no definite formal request for exemption is

395 U. S. 185, 198 n. 15 (1969); cf. 32 CFR § 1622.1 (c). Here the bypass was deliberate and without excuse, and this is not a case where entitlement to an exemption would be automatically made out, given a minimal showing by the registrant or minimal investigatory effort by the local board.[9] The exhaustion requirement is properly imposed where, as here, the claim to exemption depends on careful factual analysis and where the registrant has completely sidestepped the administrative process designed to marshal relevant facts and resolve factual issues in the first instance. Cf. *Dickinson* v. *United States*, 346 U. S. 389, 395–396 (1953).

C

Petitioner did claim exemption as a conscientious objector to war. He filled out and returned the special form for conscientious objectors (SSS Form 150), and appended a further statement of beliefs, thereby making out a prima facie case for the exempt status. Since at that

made, entitlement to exemption is clear on information submitted. Indeed, even on the record as developed in the trial court below, much less on the scraps of information available to the Selective Service System, denial of exemption in petitioner's case is not unsupportable. See n. 9, *infra*.

[9] The Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (g), provides that "students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt . . . ." See 32 CFR § 1622.43 (a). Evidence aired at trial showed that after September 1967 petitioner was engaged in studies at Union Theological Seminary, a nondenominational seminary. There was some evidence that petitioner intended eventually to become a priest, but scant evidence, if any, tending to indicate that petitioner's studies were "under the direction" of his church. The Court of Appeals determined, in view of the trial record, that "denial of a [ministerial student] exemption to McGee would have had a 'basis in fact.'" 426 F. 2d 691, 696 (CA2 1970).

time—1966—petitioner held an undergraduate student deferment, the board postponed consideration of the claim to a "higher" classification. See 32 CFR § 1623.2. In 1967, after petitioner had graduated, the pending conscientious objector claim was reviewed [10] and rejected, and petitioner was classified I–A. Petitioner contends that denial of conscientious objector status was erroneous, but after the claim was rejected he did not invoke the administrative processes available to correct the error. He did not seek a personal appearance before the local board,[11] nor did he take an administrative appeal to contest the denial before the appeal board, which classifies *de novo*.[12]

That petitioner's failure to exhaust should cut off judicial review of his conscientious objector claim may seem too hard a result, assuming, as the Government admits, that the written information available to the board provided no basis in fact for denial of the exemption, and, as the Court of Appeals ruled, that neither did petitioner's conduct in relation to the conscription system or other acts that came into view. See 426 F. 2d 691, 697 (CA2 1970); *id.*, at 700–701 (dissenting opinion). But even assuming the above, petitioner's dual failure to exhaust—his failure either to secure a personal appearance or to take an administrative appeal—implicates decisively the policies served by the exhaustion requirement, especially the purpose of ensuring that the Selective Service System have full opportunity to "make

[10] Though the trial testimony was somewhat ambiguous, the District Judge found specifically that the local board had passed on the merits of petitioner's pending conscientious objector claim in September 1967, before reclassifying petitioner I–A. We do not disturb this finding, which was approved by the Court of Appeals majority below.

[11] See 32 CFR §§ 1624.1, 1624.2.

[12] See 32 CFR §§ 1626.2, 1626.26.

a factual record" and "apply its expertise" in relation to a registrant's claims. When a claim to exemption depends ultimately on the careful gathering and analysis of relevant facts, the interest in full airing of the facts within the administrative system is prominent, and as the Court of Appeals noted, the exhaustion requirement "cannot properly be limited to those persons whose claims would fail in court anyway." *Id.*, at 699.

Conscientious objector claims turn on the resolution of factual questions relating to the nature of a registrant's beliefs concerning war, *Gillette* v. *United States,* 401 U. S. 437 (1971), the basis of the objection in conscience and religion, *Welsh* v. *United States,* 398 U. S. 333 (1970), and the registrant's sincerity, *Witmer* v. *United States,* 348 U. S. 375, 381 (1955). See 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V). Petitioner declined to contest the denial of his conscientious objector claim before the local board by securing a personal appearance, and the Selective Service System was thereby deprived of one opportunity to supplement the record of relevant facts. The opportunity would have been restored had petitioner sought review by the appeal board. While the local board apparently was satisfied that classification should be made on the basis of the record it confronted,[13] the appeal board, which classifies *de novo,* might have determined that the record should be supplemented by the local board.[14] See 32 CFR § 1626.23. In the circumstances of this case, petitioner's failure to take an administrative appeal not only deprived the appeal board of the opportunity to "apply its expertise" in factfinding to the

[13] Petitioner's board did not summon him for an interview to inquire into the sincerity of his claim prior to classification, as it might have done. See Local Board Memorandum No. 41, as amended July 30, 1968 (rescinded August 27, 1970).

[14] Local boards have wide fact-gathering powers. See 32 CFR §§ 1621.14, 1621.15, and 1625.1 (c).

record that was available; it also removed an opportunity to supplement a record containing petitioner's own submissions but not containing the results of any specific inquiry into sincerity.

The Government contends that unless the exhaustion requirement is imposed to bar judicial review when the failure to exhaust has the present character, registrants would be encouraged to sidestep the administrative processes once a prima facie claim to conscientious objector status is made out by submission of a carefully drafted Form 150. Should the claim be denied at the local board level, the claimant might be tempted to circumvent further fact-gathering processes, and take a chance on showing in court that the only administrative record available contains no basis in fact for denial of the claim. This somewhat extreme situation is indeed presented by the circumstances of the present case, though, of course, there is no reason to question the bona fides of McGee's own supervening policy of noncooperation with the conscription system. It remains that McGee's failure to pursue his administrative remedies was deliberate and without excuse. And it is not fanciful to think that "frequent and deliberate flouting of administrative processes" might occur if McGee and others similarly situated were allowed to press their claims in court despite a dual failure to exhaust.

III

We conclude that petitioner's failure to exhaust administrative remedies bars the defense of erroneous classification,[15] and therefore the judgment below is

Affirmed.

---

[15] This defense figures in petitioner's challenge to his conviction on counts I, II, and III. The two-year sentences on each of the

419-882 O - 72 - 36

MR. JUSTICE DOUGLAS, dissenting.

This is a case where so far every judge has agreed that McGee is a conscientious objector. He expressed his belief "in a personal Supreme Being to whom obligation is superior when duties of human relations are considered"; he said that "taking part in any form of military operation indicates an approval/consent situation repugnant . . . to love and service of God and fellowman." The majority of the Court of Appeals concluded that "[n]either his prior nor his subsequent actions were inconsistent with his assertions . . . and we see nothing in McGee's file—all that was before the board—that could reasonably put his sincerity in issue." 426 F. 2d 691, 697. Judge Feinberg in dissent agreed. *Id.*, at 703.

Petitioner was a Roman Catholic studying at the Union Theological Seminary in New York City, preparing for the ministry. His sincerity and dedication to his moral cause are not questioned.

The critical issue in the case is whether the Selective Service Board in 1966 did "consider" and reject the claim of the registrant that he was a conscientious objector. The District Court and a majority of the Court of Appeals held that the board did pass on the claim. And this Court now refuses to pass on the registrant's claim to the contrary, because, it says, that finding is not "clearly erroneous." That the finding is clearly erroneous seems apparent to one who reads the entire record.

The advice which the registrant received in a letter from the board, dated March 23, 1966, was as follows: "We wish to advise that your claim as conscientious objector will be considered when you no longer qualify for student classification." That letter states that de-

---

four counts are to run concurrently, and we decline to disturb the conviction on count IV, a minor offense indeed in comparison to the act involved in count I.

cision on the "claim as conscientious objector" will be passed on later. The inference is clear—that it was not then considered and decided.

The Chairman of the board testified that the conscientious objector claim was not considered, "because the young man was attending college and in my judgment he rated a 2S qualification which we proceeded to give him." He later testified that in February 1966 he, the Chairman of the board, felt "that there weren't sufficient facts in that to motivate me to grant the registrant the request he sought." Yet even that ambiguous statement is a far cry from concluding that the board rejected his claim to status as a conscientious objector. Indeed, it was the duty of the board under the Regulations to classify the registrant "in the lowest class for which he is determined to be eligible." 32 CFR § 1623.2. And it is clear that the student classification of II–S is lower than the classification of a conscientious objector, I–O. In 1966 the board therefore had no occasion to pass on the conscientious objector claim.

As respects the reclassification of registrant in 1967 the Chairman of the board testified: ". . . I recall that subsequently the young man finished his college or left college, I don't recall, and did not further merit a 2S deferment at which time, sir, based on nothing further in his file other than what we had already had in the file, we gave him a 1A classification. In doing that, sir, we again reviewed what appeared in the file." And the Chairman also testified: "He was no longer in school and we had no alternative but to classify him 1A."

But it is clear from the Chairman's own testimony that the classification of I–A granted in 1967 was based upon the supposition that the board had denied the conscientious objector claim in 1966, for the Chairman stated:

> "Based on our previous determination that his request for conscientious objection status was denied,

we had no alternative at that time but to give him a 1A, which we did.

"Q. You didn't consider the conscientious objector claim again because it had been denied previously?

"A. Yes——"

And yet, as the Chairman also testified, the *board made no decision in 1966:*

Mr. Lande [board Chairman]: "When Mr. McGee's return application came in asking for his deferment on the grounds of conscientious objector, sir, that was reviewed by me and read and carefully considered, as I consider all requests. As I stated before, it was my considered judgment upon concluding the reading of it and my consideration that he did not rate the deferment.

. . . . . .

"Q. Mr. Lande, am I correct in understanding that the decision with respect to this conscientious objector application was made, then, by you and *not by the entire board?*

"The Court: Are you talking now about the original receipt of the application?

"Mr. Meyer [counsel for petitioner]: Yes, your Honor.

"The Court: Or when they were told or learned that he no longer was in college?

"Mr. Meyer: The original receipt.

"The Court: He said, as I recall it, that that was his decision."

It is, with all due respect, I think, a clear miscarriage of justice to allow a man to be sent off to prison where there are at best only dubious grounds for saying that the board discharged its statutory duty of considering and passing upon the conscientious objector claim.

The question might not loom as important as it seems to be in this case if the claim itself were a transparent one. But there is nothing on the face of the claim or in the record to detract from it. The man was a theological student studying for the priesthood, and to send him off to prison on this record is either to sanction a form of administrative trickery or to allow the Selective Service board to act quite irresponsibly.

If there were a "lawless" act in this case, it was committed by the Selective Service Board.

It was the board that defaulted, not McGee. Its duty under the Regulations was to "*receive and consider all information,* pertinent to the classification of a registrant, presented to it." 32 CFR § 1622.1 (c) (italics added). The board did not "consider" the claim. Since the board did not "consider" the claim and reject it, but deferred decision on it in 1966 and then in 1967 said that the 1966 deferment was a decision on the merits, there was no way in which McGee could have made a timely appeal to the board.

This case, on the facts, is a much stronger one for dispensing with the need to exhaust administrative remedies than was *McKart* v. *United States,* 395 U. S. 185. In *McKart* the registrant failed to appeal his classification of I–A where he had enjoyed a IV–A classification (sole surviving son status) until his mother died. Then the board put him in I–A on the ground that the "family unit" had ceased to exist. We excused exhaustion of remedies on the ground that only a question of law was involved. We rationalized the result as follows:

> "In short, we simply do not think that the exhaustion doctrine contributes significantly to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction. Accordingly, in the present

> case, where there appears no significant interest to be served in having the System decide the issue before it reaches the courts, we do not believe that petitioner's failure to appeal his classification should foreclose all judicial review." *Id.*, at 200.

By like reasoning, we should conclude that cases where the local board does not "consider" the conscientious objector claim must be few and far between. Moreover, the term "consider" is a key part of a Regulation and just as much a question of law as the phrase in issue in *McKart*. Men should not go to prison because boards are either derelict or vindictive.

I would reverse this judgment of conviction.

TRIANGLE IMPROVEMENT COUNCIL ET AL. *v.* RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF WEST VIRGINIA, ET AL.

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

No. 712. Argued March 22, 1971—Decided May 17, 1971

429 F. 2d 423, certiorari dismissed as improvidently granted.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *James M. Nabrit III, Charles Stephen Ralston, Elizabeth B. DuBois,* and *Thomas J. O'Sullivan.*

William Bradford Reynolds argued the cause for the federal respondents *pro hac vice.* With him on the brief were *Solicitor General Griswold* and *Assistant Attorney General Gray. Stanley E. Preiser* argued the cause and filed a brief for the state respondents.

Kenneth F. Phillips filed a brief for the National Housing and Economic Development Law Project as *amicus curiae* urging reversal.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE HARLAN, concurring.

In light of my Brother DOUGLAS' assertion, *post,* at 508, that today's disposition might be taken to impair the integrity of the "rule of four," see *Ferguson* v. *Moore-McCormack Lines,* 352 U. S. 521, 559–562, 564 (1957) (opinion of this writer), I deem it appropriate to set forth my reasons for joining in the dismissal of the writ as improvidently granted.

The Federal-Aid Highway Act of 1968 provided in pertinent part that:

> "The Secretary [of Transportation] shall not approve any project [such as that here involved] which will cause the displacement of any person . . . unless he receives satisfactory assurances from the State Highway department that—
>
> . . . . . .
>
> "(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment." 23 U. S. C. § 502 (1964 ed., Supp. V).

The principal issue presented by this case is whether that statute, either of its own force or together with the administrative regulations promulgated pursuant to it, prevents the Secretary from authorizing construction of a segment of the interstate highway system, even where the rights-of-way had been acquired and some persons displaced prior to the effective date of the 1968 Act, unless the State first compiles a comprehensive formal relocation plan. In short, the question is what constitutes "satisfactory assurances" in such a case.

Since certiorari was granted, a number of events have occurred that, in my judgment, have rendered this case wholly inappropriate for our review. First, the Act upon which petitioners base their case has been repealed. Secondly, a new statute has been enacted by the Congress

that alters drastically the potential impact of any decision we might reach in this case. Third, we were informed that, as of the date of oral argument, less than 10 persons remained to be displaced by this federal project. Finally, in their brief on the merits in this Court, petitioners have almost completely abandoned their original claim for relief and now seek to broaden substantially the nature of the remedy they seek.

The original prayer for relief simply sought to enjoin further displacement pending submission and implementation of a formal relocation plan by the West Virginia State Highway Department. The fact that the statute has been repealed since certiorari was granted and that less than 10 persons would be affected were we to accept petitioners' legal position renders this case, I think, a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import. Of course, every individual alleging he has been abused by the exercise of federal power should, as a general matter, be heard, even where his situation becomes unique due to repeal or cessation of the action he challenges. That is why federal district courts and courts of appeals are provided and vested with largely obligatory jurisdiction. Hearing such claims is not, however, a principal purpose for which this Court sits. See Rule 19 of the Rules of this Court.

At the same time Congress repealed the 1968 Act it enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 84 Stat. 1894. Its principal purpose, as the title implies, was to establish a uniform governing rule of federal law for all federally directed and federally financed projects that cause displacement of persons and businesses. The 1970 Act was very consciously modeled on the 1968 Federal-Aid Highway Act, following "as closely as possible [its] substantive provisions," S. Rep. No. 91–488 (1969), in an

effort to assure that all persons uprooted by federal authority would receive the beneficent protection earlier extended to those situated in the path of highway construction. See especially 115 Cong. Rec. 31535 (remarks of Sen. Cooper). Section 210 of the new Act provides that:

> "[T]he head of a Federal agency shall not approve any grant to . . . a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title, unless he receives satisfactory assurances from such State agency that—
>
> . . . . . .
>
> "(2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;
>
> "(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205 (c)(3)."

Section 205 (c)(3) describes in some detail the services that must be provided. It does not, however, explicitly state that such "program" shall include a comprehensive plan reflecting the projected relocation of each individual affected.

Arguably, the presence of this provision would enhance the general significance of our construction of the relevant,[1] and similarly worded, section of the 1968 Act.

---

[1] The 1968 Act is still the relevant focus of this class action. The 1970 Act did not become effective until January 1971, and it specifically preserves rights and liabilities existing under prior Acts. § 220 (b). Those petitioners not relocated prior to the effective date of the 1970 Act may have a claim under the latter statute as well.

Indeed, my Brother DOUGLAS asserts that "any necessary interpretation of the 1968 [Act] would be equally applicable to the 1970 Act." *Post,* at 504, n. 1. For me, however, this does not increase, but rather further diminishes, the appropriateness of our ruling in the instant case.

This case comes to us on a record that sheds light only upon the proper construction of the 1968 Act which governed only federal programs, administered by one agency, that aid highway construction by the States. It now appears that anything we might hold in that regard may very well have to be carried over in full force to govern the administration of the large number of federal programs that bring about human displacement. To render our determination upon such a wide-ranging issue we should, at a minimum, have the benefit of the thinking of lower federal courts on this problem, as well as some knowledge of the responses of the various affected agencies to this new statute. Yet we are entirely without these essential aids.

To the extent, then, that the instant case has any significance for the future, it seems to me that such issues should await a case arising under the new statute. Insofar as the case can be said to present an issue only as to the proper construction of the 1968 Act, events subsequent to the granting of the writ have, as noted previously, robbed it of all national significance.

Finally, it is troublesome that petitioners have virtually abandoned their initial claim for relief. Instead of the preparation of a plan,[2] they now seek a decree to the effect that the District Court should bring before it all

[2] Petitioners have not wholly abandoned their original claim for relief. They argue that preparation of a plan "may be appropriate relief" for those not yet relocated. Petitioners' Brief 51. Prime emphasis, however, is placed upon the new remedial technique described in the text.

persons displaced by the highway and inquire whether their new locations meet statutory standards. As to this issue, there is neither an opinion below nor a record upon which to judge the claim. The case was tried upon a theory that the statutes require a formal plan, not that numerous individuals had been improperly relocated in fact. And there would seem to be no bar to the initiation of subsequent proceedings, in the District Court, raising individual claims of this sort where they do exist.

In light of this changed posture of the case, I do not think its adjudication would be a provident expenditure of the energies of the Court. Cf. *Sanks* v. *Georgia,* 401 U. S. 144 (1971).

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL concur, dissenting.

This case involves two federal-aid interstate highway projects in Charleston, West Virginia. Charleston lies in a narrow valley, along the Kanawha River and is bisected on the east by the Elk River which joins the Kanawha near the center of the city. The Triangle district is located along the south side of the Elk and near its mouth. Many of the residents of the Triangle district are elderly and almost all have comparatively low incomes. As often happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live.

The common urban housing shortage is severe in Charleston, in part, because many homes have been demolished for public projects. The impact of public projects in the Triangle has been exceptionally severe. Land clearance for a proposed expansion of a local water company displaced some 243 persons a few years ago. The planned interstate highway will displace about 300 more.

And a proposed urban renewal project (which has been postponed indefinitely because of lack of replacement housing) will displace almost all of the area's 2,000 residents.

Although alternative routes for the interstate highway were considered, the route through Triangle was selected and approved in 1964. Federal authorization for the right-of-way was given in 1966 and 1967. There were about 300 persons to be dislocated within Triangle.

On August 23, 1968, the 1968 amendments to the Federal-Aid Highway Act relating to relocation benefits for persons displaced by federal-aid highways became effective. By that date some 60% of the proposed right-of-way in the present case had been acquired by the State. But the vast majority of persons within the Triangle area, who were to be dislocated by the highway, had not yet been displaced from the area as of the effective date of the 1968 amendments.

Just over three months after the 1968 amendments became effective petitioners commenced this action, arguing that the amendments had not been complied with and that there was no state plan disclosing the existence of adequate replacement housing. Prior to trial only 17 households had been moved and over 280 persons remained to be displaced. Once the construction began, however, displacement did occur and the Solicitor General's brief, filed just before oral argument, informs us that only nine persons are left in the Triangle and virtually all the vacant housing has been demolished pursuant to an order of Under Secretary of Transportation Beggs given November 6, 1970.

Much is made of the fact that although originally about 300 people were to be displaced in the Triangle, there remain only nine who have not been taken care of or who have not on their own found new shelter. If only one person were involved, the case would, in my

view, be no different. For under our regime even one person can call a halt where government acts lawlessly. And this is patently a case where the federal bureaucracy has defied a congressional mandate.

It is notorious that interstate highways have left displaced citizens without homes because no efforts or inadequate efforts have been made for relocation. In 1962 Congress amended the Federal-Aid Highway Act to require assurances of "relocation advisory assistance" and authorized minimal payments for relocation assistance. 23 U. S. C. § 133 (repealed by Pub. L. 90–495, § 37, 82 Stat. 836). But, as Judge Sobeloff noted below, the "cold administrative indifference to the plight of those left without roofs over their heads mounted to the level of a national scandal." 429 F. 2d 423, 424 (dissenting opinion). In 1968 Congress passed certain amendments to the Act to rectify this "national scandal." [1]

The 1968 amendments provide that any person displaced by a federal-aid highway project "may elect to receive actual reasonable expenses in moving." 23 U. S. C. § 505 (1964 ed., Supp. V).[2] If a property owner, he is entitled to a payment from the State, in addition to the acquisition price of the property taken, of up to $5,000, representing the difference between the acquisition price and the cost of obtaining a comparable dwelling. A tenant may receive up to $1,500 to enable him to rent for a period of two years, or make the down payment on the purchase of a decent, safe, and sanitary

[1] It is true, of course, that the 1968 amendments were repealed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894. That Act, however, is so similar to the 1968 amendments that any necessary interpretation of the 1968 amendments would be equally applicable to the 1970 Act. For convenience I have provided parallel citations in the footnotes.

[2] Cf. § 202 of the 1970 Act.

dwelling "not . . . less desirable" than his existing one. 23 U. S. C. § 506 (1964 ed., Supp. V).[3]

The duty of the Secretary of Transportation under the amendments was made explicit. He is to see that the amendments are effective. Under 23 U. S. C. § 502 (1964 ed., Supp. V)[4] he is not to approve any project "which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State Highway department that" (1) fair and reasonable relocation and other payments will be afforded in accordance with the Act, (2) relocation assistance programs will be afforded in accordance with the Act, and (3) "within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced,

[3] Cf. §§ 203 and 204 of the 1970 Act. The payments are substantially higher under the new Act.

[4] Cf. § 210 of the 1970 Act: "Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title, unless he receives satisfactory assurances from such State agency that—

"(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 202, 203, and 204 of this title;

"(2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;

"(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205 (c)(3)."

Section 205 (c)(3) of the 1970 Act is virtually identical to § 502 (3) mentioned *infra* in the textual paragraph.

decent, safe, and sanitary dwellings . . . equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment."

Satisfactory assurances have been strictly defined by regulation. Instructional Memorandum 80–1–68, § 5a (5) of the Department of Transportation requires that the program be "realistic." "The State highway department, prior to proceeding with . . . construction shall furnish . . . information for review and approval by the division engineer [concerning methods] *by which the needs of every individual to be displaced will be evaluated and correlated with available decent, safe, and sanitary housing* [*and the methods*] *by which the State will . . . inventory . . . currently available comparable housing.*" (Italics added.) *Id.*, at § 7b. Instructional Memorandum 80–1–68 was issued on September 5, 1968, § 5b of which stated that "assurances are not required where authorization to acquire right-of-way or to commence construction has been given prior to the issuance of this memorandum." [5] Even with this restriction, the memorandum would apply to this case since construction was not authorized until the fall of 1969.

The route for the highway was approved in 1964 and approval for acquisition of right-of-way was given in both 1966 and 1967. In early 1968 the Director of Public Roads issued a memorandum to his regional and state administrators directing that relocation problems be con-

[5] The Secretary, however, has subsequently changed that position and the memorandum now applies to all approvals of construction. See Memorandum of Secretary of Transportation: Implementation of Replacement Housing Policy, January 15, 1970; Federal Highway Administration Circular Memorandum: Relocation Assistance—Availability of Replacement Housing, March 27, 1970.

sidered more extensively. A state plan for Charleston was reviewed and a federal division engineer stated:

> "In the Charleston area the State did secure valuable information relative to persons to be dislocated by a survey which was a valuable assist in defining the overall problem involved. It would not be considered, in our opinion, a complete relocation plan since it did not provide information either factual, estimated or projected as to the availability of replacement housing."

Since there was no need for a relocation plan at all, the division engineer felt that the "half of a plan" of the State was to their credit. Then on August 23, 1968, the 1968 amendments became effective. Section 511 (3) (1964 ed., Supp. V) [6] provided that a displaced person was "any person who moves from real property on or after the effective date of this chapter" as a result of acquisition for a federal-aid highway.

The Secretary did not require the State to comply with the requirements of § 502. Yet as of the effective date of the 1968 amendments there had been no authorization of construction and at least 280 persons remained in the project area to be dislocated. The State finally did prepare a relocation plan, but only in response to this lawsuit and while the federal officials have obtained a copy of it, we are told they have made no attempt to review it. The plan that was prepared does not consider competing and simultaneous needs of other displaced persons because competition was not considered relevant. No formal plan for relocation was submitted to the division engineer because of the administrative interpretation that if authorization to acquire right-of-way had been

[6] § 101 (6) of the 1970 Act.

419-882 O - 72 - 37

given prior to August 23, 1968, then the 1968 amendments were of no effect. Subsequent to the District Court order dismissing petitioners' complaint construction was authorized.

This petition should not be dismissed as improvidently granted. Our "rule of four" [7] allows any four Justices to vote to grant certiorari and set the case for consideration on the merits. The four who now dissent were the only ones to vote to grant the petition. The rule should not be changed to a "rule of five" by actions of the five Justices who originally opposed certiorari. It is improper for them to dismiss the case after oral argument unless one of the four who voted to grant moves so to do, which has not occurred here. As MR. JUSTICE HARLAN has noted it would save time and money if the five would dismiss as improvidently granted immediately after certiorari is granted rather than waiting for briefs and oral argument. *Ferguson* v. *Moore-McCormack Lines,* 352 U. S. 521, 560 (separate opinion). As JUSTICE HARLAN's opinion in *Ferguson* makes clear, it is the duty of the five opposing certiorari to persuade others at Conference, but, failing that, to vote on the merits of the case. *Id.,* at 562. His advice should be heeded here, lest the integrity of the "rule of four" be impaired.

I therefore dissent from a dismissal of this petition.

---

[7] The problem is an old and recurring one. Mr. Justice Frankfurter took the position that even the five who voted to deny the petition can, after oral argument, properly dismiss the writ as improvidently granted. *United States* v. *Shannon,* 342 U. S. 288, 294–297. But I thought then—and still think—that such a practice impairs "the integrity of our certiorari jurisdiction." *Id.,* at 298.

"By long practice—announced to the Congress and well-known to this Bar—it takes four votes out of a Court of nine to grant a petition for certiorari. If four can grant and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule on certiorari would then be impaired." *Ibid.*

ASTRUP *v.* IMMIGRATION AND NATURALIZATION SERVICE

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

No. 840. Argued April 20, 1971—Decided May 24, 1971

Petitioner, an alien, agreed to give up his right to become an American citizen in exchange for exemption from military service, pursuant to § 4 (a) of the Selective Service Act of 1948. After that section was repealed, petitioner was subjected to the draft, but was found to be physically unfit. His subsequent petition for naturalization was denied on the ground that he was debarred from citizenship. Section 315 of the Immigration and Nationality Act of 1952 provides that any alien who has applied for exemption from military service on the ground of alienage "and is or was relieved . . . from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States." *Held:* Under § 315 an alien who requests exemption from military service is to be held to his agreement to relinquish all claims to naturalization only when the Government completely and permanently exempts him from service in the armed forces. Pp. 511–514.

432 F. 2d 438, reversed and remanded.

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

Paul N. Halvonik argued the cause for petitioner. With him on the brief was *Marshall W. Krause.*

Richard B. Stone argued the cause for respondent. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Charles Gordon.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The issue in this case is exceedingly simple. By signing SSS Form 130—Application by Alien for Relief from Training and Service in the Armed Forces—the peti-

tioner, Ib Otto Astrup, a native of Denmark, agreed to give up his right to become an American citizen, and in exchange, the United States, pursuant to § 4 (a) of the Selective Service Act of 1948, 62 Stat. 605, 50 U. S. C. App. § 454 (a) (1946 ed., Supp. III), agreed to give up the right to induct Astrup into the United States armed forces. Congress later repealed the law under which Astrup was exempted from military service, reneging on its part of the bargain with him.[1] Universal Military Training and Service Act § 4 (a), 65 Stat. 76, 50 U. S. C. App. § 454 (a) (1952 ed.). Thereafter the Selective Service System attempted to draft Astrup and would have succeeded in putting him into uniform but for the fact that he was found to be physically unfit for the draft. Later, when Astrup decided that he would like to become an American citizen, the Government attempted to enforce Astrup's promise even though it was unwilling to keep its own promise. When Astrup petitioned for naturalization, the United States District Court for the Northern District of California denied his petition on the ground that he was debarred from citizenship. The Court of Appeals for the Ninth Circuit affirmed. 432 F. 2d 438 (1970). We granted Astrup's petition for certiorari, 400 U. S. 1008 (1971), and now reverse.

---

[1] Astrup was lawfully admitted to the United States for permanent residence on February 20, 1950. On November 14, 1950, he executed SSS Form 130, requesting an exemption from military service on the ground of alienage. At that time the Selective Service Act of 1948, § 4 (a), 62 Stat. 605, 50 U. S. C. App. § 454 (a) (1946 ed., Supp. III), provided such an exemption for any alien. The Universal Military Training and Service Act § 4 (a), 65 Stat. 76, 50 U. S. C. App. § 454 (a) (1952 ed.), which became effective June 19, 1951, amended the earlier provision relating to exemptions for aliens so that the exemption was not available to aliens who were permanent residents of this country.

In support of the decision below the United States emphasizes the fact that Astrup admitted having read a notice proclaiming that:

> "Any citizen of a foreign country . . . shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability . . . ; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." Form SSS 130, quoting Selective Service Act of 1948, § 4 (a), 62 Stat. 606, 50 U. S. C. App. § 454 (a) (1946 ed., Supp. III).

He further admitted having signed a statement saying, "I understand that I will forever lose my rights to become a citizen of the United States . . . ." Upon the basis of these statements and § 4 (a) of the Selective Service Act of 1948, the United States argues that the case is controlled by our decision in *Ceballos* v. *Shaughnessy,* 352 U. S. 599 (1957), in which we enforced similar citizenship debarment provisions in a deportation case arising under the Immigration Act of 1917, § 19 (c), 39 Stat. 889, as amended, 54 Stat. 672, 62 Stat. 1206, 8 U. S. C. § 155 (c) (1946 ed., Supp. V). *Ceballos,* however, does not govern this case. In *Ceballos* the Court specifically held that § 315 of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 U. S. C. § 1426, was inapplicable because of the effective date of the 1952 Act and because § 315 was expressly inapplicable to deportation proceedings under the 1917 Act. 352 U. S., at 606 n. 17.

Astrup, unlike Ceballos, is not involved in a deportation proceeding under the Immigration Act of 1917 and consequently the saving clause of the Immigration and Nationality Act of 1952, § 405, 66 Stat. 280, is inappli-

cable.[2] See note following 8 U. S. C. § 1101. Moreover, Astrup petitioned for naturalization under § 316 of the 1952 Act. Therefore, § 315 of the 1952 Act, not § 4 (a) of the Selective Service Act of 1948, determines the effect to be given to Astrup's 1950 application for exemption from military service. Section 315 provides:

> "Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, *and is or was relieved or discharged from such training or service on such ground,* shall be permanently ineligible to become a citizen of the United States." 66 Stat. 242, 8 U. S. C. § 1426. (Emphasis added.)

This is a two-pronged prerequisite for the loss of eligibility for United States citizenship. The alien must be one who "applies or has applied for exemption or discharge" from military service and "is or was relieved or

---

[2] The United States argues that the saving clause of the 1952 Act is applicable, citing *United States* v. *Menasche,* 348 U. S. 528 (1955), and *Shomberg* v. *United States,* 348 U. S. 540 (1955). In *Menasche* the Court held that an alien who had filed a declaration of intention to become an American citizen had a "right in the process of acquisition" preserved by the saving clause which provided: "Nothing contained in [the 1952] Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention . . . ." The Court there found nothing in the 1952 Act that specifically nullified Menasche's declaration. In *Shomberg,* on the other hand, the Court found in § 318 of the 1952 Act, 66 Stat. 244, 8 U. S. C. § 1429, a specific bar to final determination of a naturalization petition by an alien against whom there was an outstanding deportation proceeding. This case is more like *Shomberg* than *Menasche* in that § 315 is addressed to events which may have occurred before the effective date of the 1952 Act and refers specifically to the saving clause as, at least partially, inapplicable.

discharged" from that service. There is no question that Astrup applied for an exemption. The United States argues that he was temporarily released from military service but recognizes that the release was not permanent. And even the Government is forced to concede that *temporary* release from military service is not by itself sufficient to debar an alien from a later claim to naturalized citizenship, because the Government recognizes the correctness of the Second Circuit's decision in *United States* v. *Hoellger,* 273 F. 2d 760 (1960), that if an alien is once relieved from service but is later compelled to perform military service the bar to citizenship does not arise.

Other courts have distinguished the *Hoellger* holding from the situation where an alien is once relieved from military service but later reclassified for service which he never performs because of intervening circumstances such as physical unfitness. See *Lapenieks* v. *Immigration and Naturalization Service,* 389 F. 2d 343 (1968); *United States* v. *Hoellger, supra,* at 762 n. 2. However, there is nothing in the language of § 315 which leads us to believe that Congress intended such harsh and bizarre consequences to flow from an individual's failure to pass a physical examination.[3] We think that Congress used the words "is or was relieved" to provide that an alien who requests exemption from the military service be

[3] We find no merit in the Government's contention that Astrup was *effectively* relieved from military service on account of alienage merely because he was found to be medically qualified for the draft on October 11, 1950, before he claimed an exemption and was later found to be medically unfit for the draft, after the Government repudiated its part of the bargain. The quality of pre-induction physical examinations varies widely and the standards of medical fitness are frequently revised. In any event, the examination is primarily for the benefit of the United States, insuring that those inducted are physically capable of performing adequately and that the United States does not become legally obligated to provide medical treatment for conditions not caused by military service.

held to his agreement to relinquish all claims to naturalized citizenship *only* when the Government abides by its part of the agreement and completely exempts him from service in our armed forces.[4]

Consequently, the United States District Court erred in denying Astrup's petition for naturalization on the ground that he was barred from citizenship because he had once claimed an exemption from military service as an alien. The decision of the Court of Appeals for the Ninth Circuit affirming the District Court is reversed and the case is remanded to the District Court for further proceedings on Astrup's petition for naturalization.

It is so ordered.

[4] Cf. *Federal Power Comm'n* v. *Tuscarora Indian Nation,* 362 U. S. 99, 142 (1960) (BLACK, J., dissenting): "Great nations, like great men, should keep their word."

Syllabus

GAINESVILLE UTILITIES DEPARTMENT ET AL. *v.* FLORIDA POWER CORP.

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

No. 464. Argued February 24, 1971—Decided May 24, 1971*

Pursuant to § 202 (b) of the Federal Power Act, the Federal Power Commission (FPC) is empowered to direct one electric utility to interconnect its electric system with another utility and it "may prescribe the terms and conditions of the arrangement to be made . . . including the apportionment of the cost between them and the compensation or reimbursement reasonably due to any of them." After hearings and staff studies the FPC found that an interconnection between Gainesville, a small municipally owned utility, and respondent, a major investor-owned electric utility, would be in the public interest, would not unduly burden respondent, and would benefit both parties. The FPC ordered the interconnection, requiring Gainesville to pay the entire $3 million cost thereof and to maintain certain generating capacity. In the light of these circumstances the FPC imposed no standby charge on Gainesville. The Court of Appeals denied enforcement of the order, agreeing with respondent's claim that the omission of an annual $150,000 payment to it by petitioner for the backup service provided by the interconnection resulted in a failure to satisfy the statutory mandate of "reimbursement reasonably due" respondent because respondent would obtain no benefit from the interconnection. Section 313 (b) of the Act provides that "findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Held:* Since there was substantial evidence to support the FPC's findings that benefits will accrue to respondent from the interconnection, the Court of Appeals erred in not deferring to the FPC's expert judgment. Pp. 521–529.

425 F. 2d 1196, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which all members joined except BLACKMUN, J., who took no part in the decision of the cases.

---

*Together with No. 469, *Federal Power Commission* v. *Florida Power Corp.*, also on certiorari to the same court.

George Spiegel argued the cause for petitioners in No. 464. With him on the briefs was *Melvin Richter*. *Gordon Gooch* argued the cause for petitioner in No. 469. With him on the brief were *Solicitor General Griswold*, *Samuel Huntington*, *Peter H. Schiff*, and *Leonard D. Eesley*.

Richard W. Emory argued the cause for respondent in both cases. With him on the brief were *Robert A. Shelton* and *S. A. Brandimore*.

Northcutt Ely filed a brief for the American Public Power Association as *amicus curiae* urging reversal.

Thomas M. Debevoise filed a brief for the American Electric Power Service Corp. et al. as *amici curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the Federal Power Act, an order of the Federal Power Commission that directs one electric utility "to establish physical connection of its transmission facilities with the facilities of" another utility "may prescribe the terms and conditions of the arrangement to be made . . . including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them." Federal Power Act § 202 (b), 49 Stat. 848, 16 U. S. C. § 824a (b).[1] The Commission order

[1] Section 202 (b) of the Federal Power Act, 49 Stat. 848, 16 U. S. C. § 824a (b), provides:

"(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one

which directed respondent Florida Power Corp. to interconnect its electric system with that of petitioner Gainesville Utilities Department did not contain a term or condition sought by respondent requiring petitioner to pay an annual standby charge of approximately $150,000 for the emergency or backup service provided by the interconnection, 40 F. P. C. 1227 (1968); 41 F. P. C. 4 (1969). The Court of Appeals for the Fifth Circuit held that, because of the omission of such a term or condition, "the terms of the interconnection do not adequately satisfy the statutory requirements because they do not provide Florida Power with the 'reimbursement reasonably due' it. . . . Thus we deny enforcement of this order insofar as no provision for the reasonable compensation of Florida Power is made." 425 F. 2d 1196, 1203 (1970) (footnote omitted). We granted the petition for certiorari of Gainesville Utilities Department in No. 464, and of the Federal Power Commission in No. 469, 400 U. S. 877 (1970). We reverse the judgment of the Court of Appeals insofar as it denied enforcement of the Commission's order and remand for the entry of a new judgment enforcing the Commission's order in its entirety.

I

The demand upon an electric utility for electric power fluctuates significantly from hour to hour, day to day,

---

or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

and season to season. For this reason, generating facilities cannot be maintained on the basis of a constant demand. Rather, the utility's generating capability must be geared to the utility's peak load of demand, and also take into account the fact that generating equipment must occasionally be out of service for overhaul, or because of breakdowns. In consequence, the utility builds certain "reserves" of generating capacity in excess of peak load requirements into its system.[2] The practice of a utility that relies completely on its own generating resources (an "isolated" system in industry jargon) is to maintain equipment capable of producing its peak load requirements plus equipment that produces a "reserve" capacity equal to the capacity of its largest generating unit.

The major importance of an interconnection is that it

---

[2] The industry distinguishes between various types of "reserve" requirements. Since time is required to start up equipment that is not operating, a certain amount of equipment must be maintained in such a state that it can begin generating power immediately. The industry calls these instantaneous or "spinning" reserves, and they must be available to meet load variations and breakdowns of equipment as they occur. A utility must always maintain "spinning" reserves equal to the size of the largest generator currently in service producing power, in order to protect against a breakdown of that unit. As "spinning" reserves are called upon a utility must start up more equipment in order to maintain "spinning" reserves at an adequate level. These reserves are called "quick-start" or "ready" reserves and must be available on short notice—usually 10 minutes or less. Both spinning and quick-start reserves are collectively referred to as "operating" reserves, in contrast to "installed" reserves. Installed reserves refers to the remaining generating capacity of a utility, those generators that are not ready to be operated, or in operation. Accordingly, the expense associated with "reserve" requirements includes both capital expense—building the necessary "installed" reserve generating capacity—and operating expense—running the necessary "spinning" reserves and maintaining the readiness of "quick-start" reserves. In general, this opinion will not differentiate between the different reserve requirements.

reduces the need for the "isolated" utility to build and maintain "reserve" generating capacity.[3] An interconnection is simply a transmission line connecting two utilities. Electric power may move freely through the line up to the line's capacity. Ordinarily, however, the energy generated by each system is sufficient to supply the requirements of the system's customers and no substantial amount of power flows through the interconnection. It is only at the times when one of the connected utilities is unable for some reason to produce sufficient power to meet its customers' needs that the deficiency may be supplied by power that automatically flows through the in-

[3] The reason that interconnections lower reserve requirements is well illustrated by a hypothetical discussed in the Commission's brief, at 15–16.

"Assume that four electric systems operate in isolation and that each has an annual peak load of 500 mw served by several generating units the largest of which is 200 mw. At a minimum, each system would have to provide 700 mw of installed generating capacity (500 mw to cover the annual peak load plus 200 mw of installed reserves equal to the largest unit). If we assume further that each system operates its 200 mw unit near capacity throughout the year, spinning reserves equal to the output of that unit would constantly be required. If the four systems are to be interconnected pursuant to the Florida Operating Committee formula, total generating capacity need not exceed 2300 mw (total annual peak load—if all peaks occur during the same period—plus operating reserves of 300 mw, *i.e.*, 1½ times the largest generating unit). This 2300 mw capacity requirement would be met by requiring each system to maintain generating capacity equal to 115 percent of its annual peak load. Each system would thus have to maintain only 575 mw of generating capacity—125 mw less than would be required if operating in isolation. The interconnected system as a whole would require the constant maintenance of 200 mw of spinning reserves and 100 mw of quick-start reserves; each system's pro rata share of operating reserves would amount to only 75 mw. Thus, interconnection of the four systems would result in substantial capital savings by reducing installed generating capacity requirements and substantial operating savings by reducing operating reserve requirements." (Footnote omitted.)

terconnection from the other utility. To the extent that the utility may rely upon the interconnection to supply this deficiency, the utility is freed of the necessity of constructing and maintaining its own equipment for the purpose.

The Gainesville Utilities Department is a municipally owned and operated electric utility serving approximately 17,000 customers in a 22-square-mile area covering the city of Gainesville and adjacent portions of Alachua County, Florida. In 1965, Gainesville's "isolated" system had a total generating capability of 108.4 megawatts (mw) while its peak load was 51.1 mw. Gainesville's generating capacity in 1965 consisted of five steam electric generating units ranging from five to 50 mw. Thus Gainesville's generating capacity of 108.4 mw gave it a reserve capacity of 57.3 mw over its annual peak load of 51.1 mw—a reserve adequate to cover the shutdown of the system's largest generating unit of 50 mw. Gainesville's peak load was projected to be doubled to 102 mw by 1970. Its 1970 capacity, however, was projected to increase to only 138.4 mw through the addition in 1968 of two 15-mw gas-turbine generators. Thus an interconnection was necessary if Gainesville was to avoid having to make a still greater investment in generating equipment.

Florida Power Corporation operates a major electric generation, transmission, and distribution system serving 370,000 retail customers in a 20,600-square-mile system serving 32 counties in central and northwest Florida, including Alachua County. It also supplies power at wholesale to 12 municipal distribution systems and 9 REA cooperatives. In 1966, Florida Power had an aggregate generating capability of 1595 mw and experienced a peak load of 1232 mw. At the time of the hearing before the Commission, Florida Power was building a 525-mw generating unit to begin service in December 1969, and

anticipated a 1970 generating capability of 2114 mw and a 1970 peak load of 1826 mw. Thus the anticipated excess of capacity over peak load, 288 mw, is less than the size of its largest generating unit, 525 mw. However, the deficiency is provided for by interconnections which Florida Power has with four other Florida utilities. See n. 3, *supra.* All five of these utilities constitute the Florida Operating Committee, which, though informal in nature, serves as a medium through which the technical operations of its members are coordinated. As a result of the sharing of reserves made possible by the interconnection of the Committee's members, each utility is able to reduce the reserve generating capacity that would be required if it were electrically isolated. Specifically, each of the Florida Operating Committee members maintains generating capacity equal to 115% of its annual peak load.

For several years prior to 1965, Gainesville sought to negotiate an "interconnection" with Florida Power and with another member of the Florida Operating Committee, Florida Power & Light. When those efforts failed, Gainesville, in 1965, filed an application with the Commission seeking an order under § 202 (b) directing Florida Power to interconnect with Gainesville.[4]

II

Section 202 (b) authorizes the Federal Power Commission to order a utility to interconnect with another, and to "prescribe the terms and conditions of the arrangement . . . ," if the Commission "finds such action

[4] At the same time, Gainesville also filed a complaint with the Commission charging Florida Power with unlawful discrimination under §§ 205 and 206 of the Federal Power Act, 16 U. S. C. §§ 824d, 824e, for failure to agree to an interconnection. The Commission dismissed this complaint as moot when the interconnection was ordered.

necessary or appropriate in the public interest," and "if the Commission finds that no undue burden will be placed upon such public utility thereby." The proviso to the section makes explicit that the Commission has no authority in ordering an interconnection "to compel the enlargement of generating facilities . . . [or] to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers." 16 U. S. C. § 824a (b).

Following extensive hearings, an examiner made findings that the proposed interconnection would be in the public interest and that it would not place an undue burden on Florida Power. The Commission affirmed the findings and further found that the interconnection would neither compel Florida Power to enlarge its generating facilities nor impair its ability to serve its customers. The Commission ordered the interconnection but on conditions (1) that Gainesville pay the entire $3 million cost of the interconnection, and (2) that Gainesville maintain generating capacity resources at least equal to 115% of its peak load—the requirement imposed by the Florida Operating Committee on all its members. The order also fixed the rates of compensation to be paid for actual energy transfers across the interconnection.

Respondent, Florida Power, does not challenge the Commission's order except in its omission of a term or condition that Gainesville pay approximately $150,000 annually as "compensation or reimbursement reasonably due" respondent for the backup service effected by the interconnection. Respondent contended that this charge, computed on the basis of Gainesville's largest generator, was justified because only Gainesville could gain from the interconnection since the reserve made available to respondent from Gainesville was too small to be of any realistic value to respondent's massive power system.

The Commission rejected the contention. It noted that respondent had not included a comparable charge in any of the contracts for interconnection voluntarily negotiated with members of the Florida Operating Committee. The Commission also emphasized that "the apportionment of cost" factor had been satisfied by requiring Gainesville to bear the full cost of making the interconnection. Primarily, however, the Commission rested its rejection upon two grounds. First, the Commission stated its view that, in applying the statutory provision, the appropriate analysis should focus not upon the respective gains to be realized by the parties from the interconnection but upon the sharing of responsibilities by the interconnected operations:

> "[T]hat sharing must be based upon, and follow the proportionate burdens each system places upon the interconnected system networks, not the benefits each expects to receive. Benefits received in any given situation may approximate these responsibilities or they may not. In the course of negotiation of voluntary pooling arrangements, benefits received may, on occasion, serve to offset burdens imposed in determining the appropriate charge for particular services rendered or facilities supplied. But where, as here, the cost of providing such services and facilities and the appropriate charges therefor have equitably been determined after a careful analysis and apportionment of the burdens and responsibilities of each party, there is no basis for any further consideration of relative benefits . . . ." 40 F. P. C., at 1237.

Second, the Commission found that even if the interconnection were evaluated on the basis of relative benefits, "this record shows that the proposed intertie will afford both parties opportunities to take advantage of

419-882 O - 72 - 38

substantial and important benefits: electrical operating benefits, and corporate financial savings." *Id.*, at 1238. In its original opinion and in its opinion denying rehearing, the Commission specified the benefits that it found Florida Power would gain from the interconnection, as set out in the margin.[5] On the basis of these findings, the Commission concluded that no standby charge should

[5] "For the Company, the interconnection will add an additional energy source to its network in a geographic area where the Company has a substantial load (customer demands), but does not have generating plants of its own. Because of that, the expected benefit to Florida Power may be very substantial since the [Gainesville] governors have a faster rate of response setting than Florida Power's. Also of great importance to Florida Power is the improved system reliability which the Company will gain through the proposed intertie. That is shown in studies submitted by staff from engineering analyses of loss of load probabilities. They establish that the interconnection will have the effect of improving the reliability of Florida Power's system." 40 F. P. C., at 1238.

"[T]hroughout its application [for rehearing], the Corporation emphasizes the contention that Gainesville will not be able to render any service of significant value to Florida Power. Upon consideration of this argument we find that Florida Power has greatly underestimated Gainesville's capacity to be of service to the Corporation. Because of its electrical isolation, Gainesville has maintained a very large reserve capacity in relationship to its peak load. In 1965 its peak load was 51.1 mw, and its reserve capacity was 57.3 mw or 112.1 percent of peak demand. Although the purpose of this interconnection proceeding is to enable Gainesville to lessen its need for self-reliance, Gainesville's reserve capacity will continue to be large even after interconnection. The staff's witness has testified that during the ten year period 1970–1979, Gainesville's average minimum reserves at the time of Florida Power's annual peak hour demand will be 43 percent. According to staff's computations, Gainesville will be able to deliver, if there will be sufficient interconnection transmission facilities, anywhere from 60 mw to 100 mw to Florida Power during certain periods in January, April, and September 1970. This prediction that Gainesville will be able to furnish capacity of this magnitude to Florida Power plainly refutes Florida Power's assertion that the

be imposed on either party to the interconnection. Thus, under the terms of the Commission's final order, each party pays only for the power actually received from the other, and each party is obligated to deliver power only on an "as available" basis. 40 F. P. C., at 1236 n. 4, 1245.

The Court of Appeals' denial of enforcement of the Commission's order insofar as no provision was made "for the reasonable compensation of Florida Power"

---

interconnection will prove to be a one-way street with all the benefits flowing from the Corporation to the City. The Commission is satisfied that the interconnection will permit a reciprocal exchange of benefits to the mutual advantage of both systems.

. . . . .

"Staff's studies of Gainesville's future reserve capacity also serve to refute Florida Power's allegation that there is 'no scintilla of evidence' to support the Commission's finding that Gainesville will become an additional interchange power source on Florida Power's network after the interconnection is consummated. Similarly, staff's studies rebut the Corporation's assertions regarding the insignificance of Gainesville's anticipated capacity contributions." 41 F. P. C., at 5–6 (opinion denying rehearing).

"Florida Power asserts that the Commission erred in finding that the interconnection will add an additional energy source in an area where Florida [Power] has no generating plant. The Corporation states that it now has three energy sources to supply its load in the Gainesville area and that it does not need a fourth. Florida Power's Form 12 for 1965 shows that the Corporation's Suwanee Plant is the closest generating source to its Gainesville load center. This plant is more than 75 transmission line miles away from this load center. The next closest plant is the Inglis Station which is more than 80 transmission line miles away. Florida Power's three energy sources are connected to the Gainesville load area by 69 kv transmission lines. According to staff, two of these lines serve other loads and could be vulnerable to outages. We agree with staff's position that the connection with Gainesville's generating resources would upgrade service reliability to the Corporation's customers in the Gainesville area." 41 F. P. C., at 7.

rested on the court's conclusion that the Commission's "proportionate burden" analysis was "largely illusory:"

> "The Commission's policy of proportionate utility responsibility really works only one way. The small system receives high benefits and, because of its size, no real obligations. The large system, however, receives no benefit but does incur real, substantial responsibilities. Such imaginary equity is not reasonable compensation." 425 F. 2d, at 1203.

The validity of this conclusion, however, depends upon whether the court correctly read the record as showing that Florida Power "receives no benefit" and that Gainesville incurs "no real obligations." [6] The Commission's findings are squarely contrary.

Although the Commission did argue that the benefits to be derived from the interconnection by each party were irrelevant to the proper decision of the case, nonetheless, in view of respondent's strenuous protest, the Commission went on to bring its expertise and judgment to bear upon the benefits and burdens and made findings identifying several specific benefits that would accrue to Florida Power from the interconnection. See n. 5, *supra*. Merely because the Commission argued that on its view of the legal question involved, findings of benefits were unnecessary to its decision does not render them any the less findings on the question of benefits. A reviewing court should hardly complain because an agency provides more analysis than it feels is absolutely necessary.[7]

---

[6] Respondent Florida Power concedes that the Commission's proportionate-burden analysis is appropriate when the interconnected systems are approximately equal in size and when the interconnection does benefit both parties to an interconnection. Brief for Florida Power Corp. 21.

[7] We, therefore, reject the Court of Appeals' conclusion that, because they were stated in the alternative, these were "not fact-

Section 313 (b) of the Federal Power Act, 16 U. S. C. § 825*l* (b), provides that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." See *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). Among the specific benefits the Commission found would accrue to Florida Power were increased reliability of Florida Power's service to customers in the Gainesville area, the availability of 60 to 100 mw of reserve capacity during certain periods of the year, and savings from coordinated planning to achieve use at all times of the most efficient generating equipment in both systems. The Commission's findings were aided by specific studies, made by the Commission's staff, and placed in the record. Insofar as the Court of Appeals' opinion implies that there was not substantial evidence to support a finding of *some* benefits, it is clearly wrong. And insofar as the court's opinion implies that the responsibilities assumed by Gainesville in combination with the benefits found to accrue to Florida Power were insufficient to constitute "compensation . . . reasonably due," the Court of Appeals overstepped the role of the judiciary. Congress ordained that that determination should be made, in the first instance, by the Commission, and on the record made in this case, the Court of Appeals erred in not deferring to the Commission's expert judgment.

Florida Power's emphasis on Gainesville's small size occurs only when discussing Gainesville's ability to provide Florida Power with energy. But Gainesville's small

---

findings protected by the umbrella of the substantial evidence test." 425 F. 2d, at 1203 n. 20. This is not a case where the Commission did not follow a procedure that it might have followed, see *SEC* v. *Chenery Corp.,* 318 U. S. 80 (1943), or failed to make findings or evaluate considerations relevant to its determination, see *Schaffer Transportation Co.* v. *United States,* 355 U. S. 83 (1957).

size has relevance in terms of the amount of power it may, even in emergencies, require from Florida Power. What Florida Power chooses to emphasize is that the availability of a certain amount of power flowing from it to Gainesville is relatively more valuable to Gainesville's small system than the availability of the same amount of power flowing from Gainesville to Florida Power. It is certainly true that the same service or commodity may be more valuable to some customers than to others, in terms of the price they are willing to pay for it. An airplane seat may bring greater profit to a passenger flying to California to close a million-dollar business deal than to one flying west for a vacation; as a consequence, the former might be willing to pay more for his seat than the latter. But focus on the willingness or ability of the purchaser to pay for a service is the concern of the monopolist, not of a governmental agency charged both with assuring the industry a fair return and with assuring the public reliable and efficient service, at a reasonable price.

Our guidepost here is the Act's explicit commitment of the judgment as to what compensation is reasonably due, in this highly technical field, to the Commission. Cf. *Permian Basin Area Rate Cases,* 390 U. S. 747, 767 (1968). In the exercise of this judgment, the Commission's order placed on Gainesville the entire $3 million cost of constructing the interconnection. Thus the benefits that the Commission found that Florida Power will receive from the interconnection will come without any capital investment on its part. In addition, the Commission required Gainesville to maintain generating capacity equal to at least 115% of its annual peak load and to maintain operating reserves in accordance with the procedures established by the Florida Operating Committee. In light of these circumstances, the Commission concluded on the basis of its proportionate-burden

analysis that Gainesville should not pay a standby charge for the availability of emergency service, which is provided only on an "as available" basis. It simply required Gainesville to pay for energy actually received. On this record, we cannot say that the Commission has failed to discharge either its responsibility to assure Florida Power of "reasonable compensation" or its responsibility to the public to assure reliable efficient electric service.

Since we conclude that substantial evidence supports the findings of the Commission that benefits will accrue to Florida Power from the interconnection, we have no occasion to decide whether the Commission in ordering the interconnection of two electric power companies, may properly condition the interconnection, when one party receives no benefits, upon compensation terms based on the relative burdens that each places on the interconnected network. Decision of that question must await a case which presents it.

Reversed and remanded.

MR. JUSTICE BLACKMUN took no part in the decision of these cases.

UNITED STATES *v.* RYAN

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

No. 758. Argued April 26, 1971—Decided May 24, 1971

District Court's order denying respondent's motion to quash a grand jury subpoena *duces tecum* requiring the production of records under his control in Kenya was not final and therefore not appealable, *Cobbledick* v. *United States,* 309 U. S. 323; nor was it rendered an appealable temporary injunction by inclusion of a provision requiring respondent to seek permission from Kenyan authorities to remove some documents from Kenya and if such permission was denied to grant United States agents access to the documents in that country. Pp. 532–534.

430 F. 2d 658, reversed.

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

Jerome M. Feit argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Philip R. Monahan.*

Herbert J. Miller, Jr., argued the cause for respondent. With him on the brief were *Raymond G. Larroca* and *Nathan Lewin.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In March of 1968, respondent was served with a subpoena *duces tecum* commanding him to produce before a federal grand jury all books, records, and documents of five named companies doing business in Kenya. He moved, on several grounds, to quash the subpoena. The District Court denied the motion to quash and, in light of respondent's claim that Kenya law forbids the removal

of books of account, minute books, and lists of members from the country without consent of its Registrar of Companies, ordered him to attempt to secure such consent and, if unsuccessful, to make the records available for inspection in Kenya.[1] The Court of Appeals, 430 F. 2d 658 (CA9 1970), held that by directing respondent to make application to a Kenyan official for release of some of the records, the District Court had done "more than deny a motion to quash; it in effect granted a mandatory injunction." *Id.*, at 659. The Court of Appeals therefore concluded that the order was appealable under 28 U. S. C. § 1292 (a)(1)[2] and, reaching the merits, reversed.

---

[1] The District Court ordered that:

"I. The motion of [respondent] to quash the subpoena *duces tecum* is denied.

"II. [Respondent] will produce, with the exception of the books of account, minute books and the list of members, before the Federal grand jury at Los Angeles, California, on September 11, 1968, the books, records, papers and documents of Ryan Investment, Ltd., of Nairobi, Kenya, and Mawingo, Ltd., of Nanyuki and Nairobi, Kenya, doing business as The Mount Kenya Safari Club, referred to in the . . . subpoena *duces tecum* served on [respondent].

"III. [Respondent] shall forthwith make application to the Registrar of Companies in Kenya to release the books of account, minute books, and list of members so that [respondent] may produce these books, records, papers and documents at the Federal grand jury held at Los Angeles, California, on September 11, 1968, provided that if [respondent] is unable to secure the consent of the Registrar of Companies of Kenya, then [respondent] will make available to agents of the United States Department of Justice and/or the United States Department of the Treasury the books of account, minute books, and list of members, of Ryan Investment, Ltd., and Mawingo, Ltd., and these agents may inspect and make copies of these books and records." App. 63–64.

[2] The statute provides, in pertinent part, that: "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ."

Ibid. We granted certiorari, 400 U. S. 1008 (1971). We conclude that the District Court's order was not appealable, and reverse.

Respondent asserts no challenge to the continued validity of our holding in *Cobbledick* v. *United States,* 309 U. S. 323 (1940), that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey. Respondent, however, argues that *Cobbledick* does not apply in the circumstances before us because, he asserts, unless immediate review of the District Court's order is available to him, he will be forced to undertake a substantial burden in complying with the subpoena, and will therefore be "powerless to avert the mischief of the order." *Perlman* v. *United States,* 247 U. S. 7, 13 (1918).

We think that respondent's assertion misapprehends the thrust of our cases. Of course, if he complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted in order to comply.[3] But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.[4] But we have

[3] In such event, of course, respondent could still object to the introduction of the subpoenaed material or its fruits against him at a criminal trial. *United States* v. *Blue,* 384 U. S. 251, 255 (1966).

[4] *Walker* v. *Birmingham,* 388 U. S. 307 (1967), is not to the contrary. Our holding that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage.

consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. *Cobbledick* v. *United States, supra; Alexander* v. *United States,* 201 U. S. 117 (1906); cf. *United States* v. *Blue,* 384 U. S. 251 (1966); *DiBella* v. *United States,* 369 U. S. 121 (1962); *Carroll* v. *United States,* 354 U. S. 394 (1957). Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle. We have thus indicated that review is available immediately of a denial of a motion for the return of seized property, where there is no criminal prosecution pending against the movant. See *DiBella* v. *United States, supra,* at 131–132. Denial of review in such circumstances would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession. Similarly, in *Perlman* v. *United States,* 247 U. S., at 12–13, we allowed immediate review of an order directing a third party to produce exhibits which were the property of appellant and, he claimed, immune from production. To have denied review would have left Perlman "powerless to avert the mischief of the order," *id.,* at 13, for the custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review. In the present case, however, respondent is free to refuse compliance and, as we have noted, in such event he may obtain full review of his claims before undertaking any burden of compliance with the subpoena.

Perlman, therefore, has no application in the situation before us.

Finally, we do not think that the District Court's order was rendered a temporary injunction appealable under 28 U. S. C. § 1292 (a)(1) by its inclusion of a provision requiring respondent to seek permission from the Kenyan authorities to remove some of the documents from that country, and in the event that permission was denied to permit Government officials access to the documents in Kenya. The subpoena, if valid, placed respondent under a duty to make in good faith all reasonable efforts to comply with it, and respondent himself had asserted that compliance would be in violation of Kenya law unless permission to remove was properly obtained. Read against this background, the District Court's order did nothing more than inform respondent before the event of what efforts the District Court would consider sufficient attempts to comply with the subpoena. We cannot imagine that respondent would be prosecuted for contempt if he produced the documents as required but without attempting to obtain permission from the authorities in Kenya. The additional provisions in the order added nothing to respondent's burden and, if anything, rendered the burden of compliance less onerous. They did not convert denial of a motion to quash into an appealable injunctive order.

Reversed.

BELL *v.* BURSON, DIRECTOR, GEORGIA DEPARTMENT OF PUBLIC SAFETY

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 5586. Argued March 23, 1971—Decided May 24, 1971

Georgia's Motor Vehicle Safety Responsibility Act, which provides that the motor vehicle registration and driver's license of an uninsured motorist involved in an accident shall be suspended unless he posts security for the amount of damages claimed by an aggrieved party and which excludes any consideration of fault or responsibility for the accident at a pre-suspension hearing *held* violative of procedural due process. Before Georgia, whose statutory scheme significantly involves the issue of liability, may deprive an individual of his license and registration, it must provide a procedure for determining the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. Pp. 539–543.

121 Ga. App. 418, 174 S. E. 2d 235, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, HARLAN, STEWART, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., and BLACK and BLACKMUN, JJ., concurred in the result.

Elizabeth Roediger Rindskopf argued the cause for petitioner *pro hac vice*. With her on the brief was *Howard Moore, Jr.*

Dorothy T. Beasley, Assistant Attorney General of Georgia, argued the cause for respondent. With her on the brief were *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, and *Courtney Wilder Stanton,* Assistant Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Georgia's Motor Vehicle Safety Responsibility Act provides that the motor vehicle registration and driver's

license of an uninsured motorist involved in an accident shall be suspended unless he posts security to cover the amount of damages claimed by aggrieved parties in reports of the accident.[1] The administrative hearing conducted prior to the suspension excludes consideration of the motorist's fault or liability for the accident. The Georgia Court of Appeals rejected petitioner's contention that the State's statutory scheme, in failing before suspending the licenses to afford him a hearing on the question of his fault or liability, denied him due process in violation of the Fourteenth Amendment: the court

---

[1] Motor Vehicle Safety Responsibility Act, Ga. Code Ann. § 92A–601 *et seq.* (1958). In pertinent part the Act provides that anyone involved in an accident must submit a report to the Director of Public Safety. Ga. Code Ann. § 92A–604 (Supp. 1970). Within 30 days of the receipt of the report the Director "shall suspend the license and all registration certificates and all registration plates of the operator and owner of any motor vehicle in any manner involved in the accident unless or until the operator or owner has previously furnished or immediately furnishes security, sufficient . . . to satisfy any judgments for damages or injuries resulting . . . and unless such operator or owner shall give proof of financial responsibility for the future as is required in section 92A–615.1. . . ." Ga. Code Ann. § 92A–605 (a) (Supp. 1970). Section 92A–615.1 (Supp. 1970) requires that "such proof must be maintained for a one-year period." Section 92A–605 (a) works no suspension, however, (1) if the owner or operator had in effect at the time of the accident a liability insurance policy or other bond, Ga. Code Ann. § 92A–605 (c) (Supp. 1970); (2) if the owner or operator qualifies as a self-insurer, *ibid.;* (3) if only the owner or operator was injured, Ga. Code Ann. § 92A–606 (1958); (4) if the automobile was legally parked at the time of the accident, *ibid.;* (5) if as to an owner, the automobile was being operated without permission, *ibid.;* or (6) "[i]f, prior to the date that the Director would otherwise suspend license and registration . . . there shall be filed with the Director evidence satisfactory to him that the person who would otherwise have to file security has been released from liability or been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments . . . ." *Ibid.*

held that " 'Fault' or 'innocence' are completely irrelevant factors." 121 Ga. App. 418, 420, 174 S. E. 2d 235, 236 (1970). The Georgia Supreme Court denied review. App. 27. We granted certiorari. 400 U. S. 963 (1970). We reverse.

Petitioner is a clergyman whose ministry requires him to travel by car to cover three rural Georgia communities. On Sunday afternoon, November 24, 1968, petitioner was involved in an accident when five-year-old Sherry Capes rode her bicycle into the side of his automobile. The child's parents filed an accident report with the Director of the Georgia Department of Public Safety indicating that their daughter had suffered substantial injuries for which they claimed damages of $5,000. Petitioner was thereafter informed by the Director that unless he was covered by a liability insurance policy in effect at the time of the accident he must file a bond or cash security deposit of $5,000 or present a notarized release from liability, plus proof of future financial responsibility,[2] or suffer the suspension of his driver's license and vehicle registration. App. 9. Petitioner requested an administrative hearing before the Director asserting that he was not liable as the accident was unavoidable, and stating also that he would be severely handicapped in the performance of his ministerial duties by a suspension of his licenses. A hearing was scheduled but the Director informed petitioner that "[t]he only evidence that the Department can accept and consider is: (a) was the petitioner or his vehicle involved in the accident; (b) has petitioner complied with the provisions of the Law as provided; or (c) does petitioner come within

[2] Questions concerning the requirement of proof of future financial responsibility are not before us. The State's brief, at 4, states: "The one year period for proof of financial responsibility has now expired, so [petitioner] would not be required to file such proof, even if the Court of Appeals decision were affirmed."

any of the exceptions of the Law." App. 11.[3] At the administrative hearing the Director rejected petitioner's proffer of evidence on liability, ascertained that petitioner was not within any of the statutory exceptions, and gave petitioner 30 days to comply with the security requirements or suffer suspension. Petitioner then exercised his statutory right to an appeal *de novo* in the Superior Court. Ga. Code Ann. § 92A–602 (1958). At that hearing, the court permitted petitioner to present his evidence on liability, and, although the claimants were neither parties nor witnesses, found petitioner free from fault. As a result, the Superior Court ordered "that the petitioner's driver's license not be suspended . . . [until] suit is filed against petitioner for the purpose of recovering damages for the injuries sustained by the child . . . ." App. 15. This order was reversed by the Georgia Court of Appeals in overruling petitioner's constitutional contention.

---

[3] Ga. Code Ann. § 92A–602 (1958) provides:

"The Director shall administer and enforce the provisions of this Chapter and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the Director under the provisions of this Chapter. Such hearing need not be a matter of record and the decision as rendered by the Director shall be final unless the aggrieved person shall desire an appeal, in which case he shall have the right to enter an appeal to the superior court of the county of his residence, by notice to the Director, in the same manner as appeals are entered from the court of ordinary, except that the appellant shall not be required to post any bond nor pay the costs in advance. If the aggrieved person desires, the appeal may be heard by the judge at term or in chambers or before a jury at the first term. The hearing on the appeal shall be de novo, however, such appeal shall not act as a supersedeas of any orders or acts of the Director, nor shall the appellant be allowed to operate or permit a motor vehicle to be operated in violation of any suspension or revocation by the Director, while such appeal is pending. A notice sent by registered mail shall be sufficient service on the Director that such appeal has been entered."

If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. *Ex parte Poresky,* 290 U. S. 30 (1933); *Continental Baking Co.* v. *Woodring,* 286 U. S. 352 (1932); *Hess* v. *Pawloski,* 274 U. S. 352 (1927). It does not follow, however, that the amendment also permits the Georgia statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under penalty of loss of the licenses. See *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Frost & Frost Trucking Co.* v. *Railroad Comm'n,* 271 U. S. 583 (1926). Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege." *Sherbert* v. *Verner,* 374 U. S. 398 (1963) (disqualification for unemployment compensation); *Slochower* v. *Board of Education,* 350 U. S. 551 (1956) (discharge from public employment); *Speiser* v. *Randall,* 357 U. S. 513 (1958) (denial of a tax exemption); *Goldberg* v. *Kelly, supra* (withdrawal of welfare benefits). See also *Londoner* v. *Denver,* 210 U. S. 373, 385–386 (1908); *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117 (1926); *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126 (1941).

We turn then to the nature of the procedural due process which must be afforded the licensee on the ques-

419-882 O - 72 - 39

tion of his fault or liability for the accident.[4] A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case. Thus, procedures adequate to determine a welfare claim may not suffice to try a felony charge. Compare *Goldberg* v. *Kelly,* 397 U. S., at 270–271, with *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). Clearly, however, the inquiry into fault or liability requisite to afford the licensee due process need not take the form of a full adjudication of the question of liability. That adjudication can only be made in litigation between the parties involved in the accident. Since the only purpose of the provisions before us is to obtain security from which to pay any judgments against the licensee resulting from the accident, we hold that procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee.

The State argues that the licensee's interest in avoiding the suspension of his licenses is outweighed by countervailing governmental interests and therefore that this procedural due process need not be afforded him. We disagree. In cases where there is no reasonable possibility of a judgment being rendered against a licensee, Georgia's interest in protecting a claimant from the possibility of an unrecoverable judgment is not, within the context of the State's fault-oriented scheme, a justification for denying the process due its citizens. Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement. " 'While the problem of additional expense must be kept

[4] Petitioner stated at oral argument that while "it would be possible to raise [an equal protection argument] . . . we don't raise this point here." Tr. of Oral Arg. 14.

in mind, it does not justify denying a hearing meeting the ordinary standards of due process.' " *Goldberg* v. *Kelly,* 397 U. S., at 261, quoting *Kelly* v. *Wyman,* 294 F. Supp. 893, 901 (SDNY 1968).

The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. We may assume that were this so, the prior administrative hearing presently provided by the State would be "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 313 (1950). But "[i]n reviewing state action in this area . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored." *Willner* v. *Committee on Character,* 373 U. S. 96, 106–107 (1963) (concurring opinion). And looking to the operation of the State's statutory scheme, it is clear that liability, in the sense of an ultimate judicial determination of responsibility, plays a crucial role in the Safety Responsibility Act. If prior to suspension there is a release from liability executed by the injured party, no suspension is worked by the Act. Ga. Code Ann. § 92A–606 (1958). The same is true if prior to suspension there is an adjudication of nonliability. *Ibid.* Even after suspension has been declared, a release from liability or an adjudication of nonliability will lift the suspension. Ga. Code Ann. § 92A–607 (Supp. 1970). Moreover, other of the Act's exceptions are developed around liability-related concepts. Thus, we are not dealing here with a no-fault scheme. Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing.

The hearing required by the Due Process Clause must be "meaningful," *Armstrong* v. *Manzo,* 380 U. S. 545,

552 (1965), and "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co., supra,* at 313. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.

Finally, we reject Georgia's argument that if it must afford the licensee an inquiry into the question of liability, that determination, unlike the determination of the matters presently considered at the administrative hearing, need not be made prior to the suspension of the licenses. While "[m]any controversies have raged about . . . the Due Process Clause," *ibid.*, it is fundamental that except in emergency situations (and this is not one) [5] due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective. *Ibid. Opp Cotton Mills* v. *Administrator,* 312 U. S., at 152–156; *Sniadach* v. *Family Finance Corp., supra; Goldberg* v. *Kelly, supra; Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971).

We hold, then, that under Georgia's present statutory scheme, before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. We deem it inappropriate in this case to do more than lay down this requirement. The alternative methods of compliance are several. Georgia may decide merely to include consideration of the question at the administrative

[5] See, *e. g., Fahey* v. *Mallonee,* 332 U. S. 245 (1947); *Ewing* v. *Mytinger & Casselberry,* 339 U. S. 594 (1950).

hearing now provided, or it may elect to postpone such a consideration to the *de novo* judicial proceedings in the Superior Court. Georgia may decide to withhold suspension until adjudication of an action for damages brought by the injured party. Indeed, Georgia may elect to abandon its present scheme completely and pursue one of the various alternatives in force in other States.[6] Finally, Georgia may reject all of the above and devise an entirely new regulatory scheme. The area of choice is wide: we hold only that the failure of the present Georgia scheme to afford the petitioner a prior hearing on liability of the nature we have defined denied him procedural due process in violation of the Fourteenth Amendment.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BLACKMUN concur in the result.

[6] The various alternatives include compulsory insurance plans, public or joint public-private unsatisfied judgment funds, and assigned claims plans. See R. Keeton & J. O'Connell, After Cars Crash (1967).

PALMER *v.* CITY OF EUCLID, OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

No. 143. Argued January 11, 1971—Decided May 24, 1971

Appellant, who had been seen to drive his car late at night from a parking lot and discharge a female at an apartment house, park on the street, and use a two-way radio, and who thereafter gave the police multiple addresses and denied knowledge of his friend's identity, was convicted of violating the Euclid, Ohio, "suspicious person ordinance," which makes it a crime to (1) wander about the streets or be abroad at late or unusual hours; (2) be at the time without visible or lawful business; and (3) fail satisfactorily to explain one's presence on the streets. His conviction was upheld on appeal. *Held:* The ordinance is unconstitutionally vague as applied to appellant since it gave insufficient notice that appellant's conduct in the parked car or in discharging his passenger was enough to show him to be "without visible or lawful business."

Reversed.

Niki Z. Schwartz argued the cause for appellant. With him on the brief was *Joshua J. Kancelbaum.*

David J. Lombardo argued the cause for appellee. With him on the brief was *William T. Monroe.*

PER CURIAM.

Appellant Palmer was convicted by a jury of violating the City of Euclid's "suspicious person ordinance," that is, of being

> "[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself."

He was fined $50 and sentenced to 30 days in jail. The County Court of Appeals affirmed the judgment and appeal to the Supreme Court of Ohio was dismissed "for

the reason that no substantial constitutional question exists herein." We noted probable jurisdiction. 397 U. S. 1073 (1970).

We reverse the judgment against Palmer because the ordinance is so vague and lacking in ascertainable standards of guilt that, as applied to Palmer, it failed to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ." *United States* v. *Harriss,* 347 U. S. 612, 617 (1954).

The elements of the crime defined by the ordinance apparently are (1) wandering about the streets or being abroad at late or unusual hours; (2) being at the time without visible or lawful business;* and (3) failing to give a satisfactory explanation for his presence on the streets. Palmer, in his car, was seen late at night in a parking lot. A female left his car and entered by the front door an adjoining apartment house. Palmer then pulled onto the street, parked with his lights on, and used a two-way radio. He was not armed. He said he had just let off a friend. He was then arrested. At the station he gave three different addresses for himself and said he did not know his friend's name or where she was going when she left his car. Palmer could reasonably be charged with knowing that he was on the streets at a late or unusual hour and that denying knowledge of his friend's identity and claiming multiple addresses amounted to an unsatisfactory explanation under the ordinance. But in our view the ordinance gave insufficient notice to the average person that discharging

*The ordinance seemingly requires a "business" purpose to be on the streets. But it seems irrational to construe the ordinance as permitting only visible and lawful commercial activities on the streets, thus in effect converting the ordinance into a curfew with exceptions for lawful commercial conduct. Neither the lower court nor appellee city suggests that the ordinance should be construed in this manner or that anyone would expect that it would be so construed.

a friend at an apartment house and then talking on a car radio while parked on the street was enough to show him to be "without any visible or lawful business." Insofar as this record reveals, everything appellant did was quite visible and there is no suggestion whatsoever that what he did was unlawful under local, state, or federal law. If his conduct nevertheless satisfied the being-without-visible-or-lawful-business element of the ordinance, as the state courts must have held, it is quite unreasonable in our view to charge him with notice that such would be the construction of the ordinance. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss, supra,* at 617; *Bouie* v. *Columbia,* 378 U. S. 347 (1964); *Wright* v. *Georgia,* 373 U. S. 284 (1963).

The judgment of the Supreme Court of Ohio is reversed.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result.

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

While I agree with the Court that Euclid's "suspicious person ordinance" is unconstitutional as applied to the appellant, I would go further and hold that the ordinance is unconstitutionally vague on its face.

A policeman has a duty to investigate suspicious circumstances, and the circumstance of a person wandering the streets late at night without apparent lawful business may often present the occasion for police inquiry. But in my view government does not have constitutional power to make that circumstance, without more, a criminal offense.

BOSTIC *v.* UNITED STATES

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

No. 5250. Argued April 21, 1971—Decided May 24, 1971

Writ of certiorari, granted to review Court of Appeals' affirmance of petitioner's conviction of conspiracy to commit murder, dismissed as improvidently granted since, contrary to that court's opinion and Government's representation, it now appears that petitioner was not charged with or convicted of that offense.

424 F. 2d 951, certiorari dismissed as improvidently granted.

Thomas C. Binkley argued the cause for petitioner. With him on the brief was *Philip M. Carden.*

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Jerome M. Feit.*

PER CURIAM.

We granted the writ of certiorari in this case [1] to consider whether the Court of Appeals for the Sixth Circuit had erred in holding that the petitioner had properly been convicted of conspiracy to commit murder in order to avoid apprehension for the robbery of a federally insured bank. The Court of Appeals purported to uphold a conviction for this offense, though there was no evidence that the petitioner knew of the plan to commit murder, and he had been confined in prison for several months prior to the date the murder was committed.[2] The

---

[1] 400 U. S. 991.

[2] 424 F. 2d 951. The opinion recites that the conspiracy count on which the petitioner was convicted "alleged a conspiracy to rob federally insured banks with dangerous weapons and to commit murder to avoid apprehension for same." 424 F. 2d, at 953. The

memorandum for the United States in opposition to the granting of the writ urged that the petitioner was "responsible for the actions of his co-conspirators in killing one member of the group," and as to this issue, relied on the opinion of the Court of Appeals.

It now appears that these statements in the opinion of the Court of Appeals and in the memorandum of the United States were erroneous, and that the facts are not as we believed them to be at the time we granted the writ. The record shows that the petitioner was neither charged with nor convicted of the offense of conspiracy to commit murder. The conspiracy count on which the petitioner was convicted did not include any charge of conspiracy to murder. Indeed, in his closing argument to the jury the prosecutor stated that the petitioner had left the conspiracy prior to the murder, when he was returned to the penitentiary.

Inasmuch as our grant of the writ of certiorari in this case was predicated on the mistaken representation that the petitioner had been convicted of the offense of conspiracy to commit murder, we now dismiss the writ as improvidently granted.

It is so ordered.

---

court went on to say, "As to Bostic, although he had been returned to the penitentiary sometime before Ferguson's murder, there is no evidence that he had renounced or withdrawn from the conspiracy." 424 F. 2d, at 964.

Syllabus

UNITED STATES *v.* GREATER BUFFALO PRESS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. 821. Argued April 19, 1971—Decided June 1, 1971

The United States brought this civil antitrust suit charging that the acquisition by Greater Buffalo Press (Buffalo) in 1955 of all the stock of International Color Printing Co. (International) violated § 7 of the Clayton Act; and that Buffalo, Hearst Corp., through its unincorporated division King Features Syndicate (King), Newspaper Enterprise Assn., and others had conspired to restrain the sale to newspapers of the printing of color comic supplements in violation of § 1 of the Sherman Act. Before trial a consent decree was entered against Hearst. Buffalo, which does not control ownership of features or license them, prints the color supplements for newspapers and sells them. International prints color supplements only for King, which controls many popular comic features and is a licensor. International's owners wanted to sell rather than raise capital for modernization and expansion. International paid dividends every year, and in the year of sale its profits increased. Only King and Buffalo were considered as prospective purchasers; no others were even approached. After acquiring International, Buffalo controlled about 75% of the independent color comic supplement business and, through International, it entered into a 10-year contract with King to supply King's printing. The District Court dismissed the complaint after trial. As to the Clayton Act claim, it found two distinct lines of commerce: (1) printing of color comic supplements for newspapers not printing their own, and (2) printing of color comic supplements for syndicates selling copyrighted features to newspapers. That court also found the acquisition to be within the "failing company" exception to § 7 of the Clayton Act. The United States appeals only from dismissal of the Clayton Act claim. The court did not reach the question of remedy. *Held:*

1. The line of commerce here is the color comic supplement printing business, which includes the printing of the supplements and their sale, and the "area of effective competition" encompasses the business of Buffalo, International, and King. While there may be submarkets within this broad market, "submarkets are not a

basis for the disregard of a broader line of commerce that has economic significance." Pp. 552–554.

2. The test of § 7 of the Clayton Act, whether the effect of an acquisition "may be substantially to lessen competition," is met here by Buffalo's control of about 75% of the independent color comic supplement printing business. P. 555.

3. The District Court erred in finding that the acquisition was within the "failing company" exception, as the two requirements, (a) that International's resources were "so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure," and (b) that there was no other prospective purchaser, were not satisfied. Pp. 555–556.

4. The mere passage of time is no barrier to the divestiture of stock illegally acquired. P. 556.

5. The case is remanded to the District Court which has the initial responsibility of the drafting of a decree that will provide an appropriate and effective remedy. Pp. 556–557.

327 F. Supp. 305, reversed and remanded.

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

Deputy Solicitor General Friedman argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General McLaren, Samuel Huntington, Lee A. Rau,* and *Elliott H. Feldman.*

Frank G. Raichle argued the cause and filed a brief for appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a civil antitrust case brought by the United States charging a violation of § 7 of the Clayton Act,[1]

[1] Section 7 provides in part:

"That 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

as amended, 64 Stat. 1125, 15 U. S. C. § 18. The main thrust of the case involves the acquisition by Greater Buffalo Press, Inc. (Greater Buffalo), of all the stock of International Color Printing Co. (International). The complaint, at the secondary level, charged that Greater Buffalo, Hearst Corp., through its unincorporated division King Features Syndicate (King), Newspaper Enterprise Association, Inc. (NEA), and others had conspired to restrain the sale to newspapers of the printing of comic supplements in violation of § 1 of the Sherman Act, as amended, 26 Stat. 209, 15 U. S. C. § 1. It also charged that Hearst and NEA were violators of certain tying arrangements involving the licensing of comic features and the sale of comic supplements.[2]

Before trial a consent decree was entered against Hearst, enjoining King from entering into any agreement limiting competition in the printing of color comic supplements and barring any tying arrangement.

After full trial the District Court dismissed the complaint.[3] The case came here under § 2 of the Expediting Act, as amended, 32 Stat. 823, 15 U. S. C. § 29. We noted probable jurisdiction, 400 U. S. 990. We reverse the judgment below.

The case involves the comic supplement business used weekends by most newspapers. Some papers print their own comic supplements; others purchase them.

Greater Buffalo prints color supplements for newspapers and sells them.

International prints color comic supplements for King only.

---

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."

[2] A monopolization charge against Greater Buffalo was eliminated by an amended complaint.

[3] The United States did not appeal from the dismissal against NEA.

Most color comic supplements are printed by companies like Greater Buffalo and sold to newspapers. But individual newspapers contract for the purchase of comic features and it is those comics that Greater Buffalo prints for the particular papers.

The most popular comic features used by major metropolitan papers are controlled by King.

Greater Buffalo has no control over the ownership of features and therefore does not license them. As noted, however, King is a licensor; and moreover, it prints "ready-print" supplements which are preprinted and supplied to many newspapers only with masthead change.

The District Court declared that the acquisition of International by Greater Buffalo has not, and will not, result in a substantial lessening of competition in the color comic supplement industry, and therefore did not constitute a violation of § 7 of the Clayton Act.

The basic error of the District Court, in our view, was in its finding that the significant lines of commerce involved in this action should be divided into "two distinct and separate categories: (1) the printing of color comic supplements for newspapers which do not print their own, and (2) the printing of color comic supplements for syndicates engaged in the sale of copyrighted comic features to newspapers. These are the lines of commerce—to treat them together as one line of commerce, *i. e.*, the printing and sale of color comic supplements, would be to ignore the tremendous leverage of the syndicates which control the copyrighted features."

As we read the record, the printing of color comic supplements and their sale are component parts of the color comic supplement printing business. One firm or company may both print and sell; another may print yet sell through a third organization, as does International through King. The "area of effective competition,"

Standard Oil Co. v. *United States,* 337 U. S. 293, 299–300 n. 5, comprises the business of Greater Buffalo, International, and King. There may be submarkets within this broad market for antitrust purposes (*Brown Shoe Co.* v. *United States,* 370 U. S. 294, 325), but, as we said in *United States* v. *Phillipsburg National Bank,* 399 U. S. 350, 360, "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance."

The District Court, proceeding from its premise as to the relevant market, analyzed the effects on the competition between Greater Buffalo and International resulting from the purchase of the stock of the latter. The true import would include not only that but also the effect on competition of the alliance with King, through the acquisition of King's client, International. The three of them were engaged in the single line of commerce consisting of the printing and distribution of color comic supplements. The printing of color comics is the same no matter for whom it is done or through whom they are distributed. The combination of those who print and sell comic supplements with those who sell comic supplements printed by others fastens more tightly the hold of the group on the side of supplement printing business. As a result of the acquisition, King has become dependent on Greater Buffalo for most of the printing which it sells in competition with Greater Buffalo. Greater Buffalo, it is said, had no long-term contract for King's business following the acquisition. Yet it had the almost certain right to print for King, its principal selling competitor, and a 10-year contract was entered into in the summer after the acquisition. There is evidence that Greater Buffalo has taken accounts from King since the acquisition. But existing competition between them is naturally restricted to sales at a price

higher than Greater Buffalo charges King for printing; and it is not that fuller competition that could exist if King had an independent printing source.

King's executive officer proposed, after the stock acquisition of International, that King acquire its own color supplement printing capacity.

> "Even if it cost money to do this and diminished profits, wouldn't that be better than the eventual loss of most, if not all, of our readyprint business?
>
> . . . . . .
>
> "The Syndicate which for more than a quarter of a century has been number one in the readyprint field is now at best number two, and quite helpless. Newspaper history clearly emphasizes the difficulty, in fact hopelessness of regaining a lost position. There is plenty of current evidence to substantiate this.
>
> "If Koessler [head of Greater Buffalo], because of what he has done the past few years, were to be attacked, in my opinion he would lose, but there is the danger, I suppose, of our becoming an accessory. Here is another reason why I think that if we were in the readyprint field with plants of our own it would restore a competitive aspect and certainly that wouldn't be discouraged in Washington."

Prior to the acquisition, King put pressure on International to construct a southern plant to meet Greater Buffalo's proposed expansion there. Prior to the acquisition King also induced International to cut its price to meet competition and actually transferred a few contracts from International to Greater Buffalo because of prices.

Those practices ceased after the acquisition. Greater Buffalo acquired control of about 75% of independent color comic supplement printing, leaving King no reliable alternative supply. Greater Buffalo and International

which had been competitors ceased to be such. The threat that newspaper customers will do their own printing is of course a factor in the competitive situation. But, according to the record, color comic supplement printing requires exacting mechanical techniques performed by specially trained personnel, and independent printers specializing in supplement printing and handling a high volume of business can produce a high quality product more economically than most newspapers.

The test of § 7 is whether the effect of an acquisition "may be substantially to lessen competition." The concentration of 75% of the independent color comic supplement printing business in one firm points firmly to the conclusion that the difficulties of new entrants becoming real competitors of Greater Buffalo are greatly increased.

We also disagree with the District Court that the acquisition of International by Greater Buffalo was within the "failing company" exception to § 7 of the Clayton Act.

That test is met only if two requirements are satisfied: (1) that the resources of International were "so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure . . . ," *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U. S. 291, 302, and (2) that there was no other prospective purchaser for it. *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 138.

It is true that its owners wished to sell rather than raise the capital needed for modernization and expansion, and that King, its sole customer, was threatening to place some of its business elsewhere. Yet King had not threatened to invoke, nor had it invoked, the six-month cancellation provision in the contract. Its expansion plans were being actively pursued and it continued to pay dividends to its owners. Indeed in the year of the sale it had shown a substantial increase in profits.

419-882 O - 72 - 40

Moreover, only King and Greater Buffalo were considered as prospective purchasers; the numerous other smaller color comic supplement printers were never even approached.

Since the District Court found no violation of § 7, it naturally did not reach the question of remedy though it said that if there were a violation, it would not warrant "a court's exercising its discretion to order a divestiture fifteen years after the occurrence of the alleged illegal conduct." That is not the law; the passage of time *per se* is no barrier to divestiture of stock illegally acquired. *United States* v. *Du Pont,* 353 U. S. 586, 590; 366 U. S. 316. Divestiture performs several functions, the foremost being the liquidation of the illegally acquired market power. *Schine Chain Theatres* v. *United States,* 334 U. S. 110, 127–129.

We do not, however, reach the question of divestiture. A majority of the Court is of the view that the nature of the decree to be fashioned should be initially considered by the District Court. In that connection two additional questions will need to be passed on by the District Court.

First is the question of the consent decree entered with Hearst. As to it the District Court said: "King Features may continue to engage in the practice of combining the sale of features and printing until the court shall determine the antitrust issue as to Greater Buffalo. The decree also provided that Hearst shall obey the antitrust laws during the pendency of the action."

We do not have enough information about the consent decree and its operation and the related facts to know how it should now be integrated into a decree.

Second. In the fifties Greater Buffalo erected a printing plant at Lufkin, Texas, to improve its market in that area by saving transportation costs. There is some evidence that in 1950 Greater Buffalo made a moral commitment to certain newspapers to build a plant in the

Deep South. A plant was constructed at Sylacauga, Alabama, after the acquisition of International.

There are cross-currents in the record which suggest that the Sylacauga plant was the product of International's wishes, rather than Greater Buffalo's, and that the primary motive for Greater Buffalo's acquisition of International stock was to eliminate International's planned expansion in the South as a competitive threat.

The status of the Sylacauga plant is a matter to be considered by the District Court under the controlling precedents. See, *e. g., United States* v. *Aluminum Co. of America,* 247 F. Supp. 308, aff'd, 382 U. S. 12.

The judgment is reversed and the cause remanded for the drafting of a decree and the making of such additional findings both as respects the consent decree and the Sylacauga plant as may be appropriate or necessary for an effective remedy.

Reversed and remanded.

UNITED STATES *v.* INTERNATIONAL MINERALS & CHEMICAL CORP.

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

No. 557. Argued April 26, 1971—Decided June 1, 1971

Appellee was charged by information with shipping sulfuric and hydrofluosilicic acids in interstate commerce and that it "did knowingly fail to show on the shipping papers the required classification of said property, to wit, Corrosive Liquid, in violation of 49 C. F. R. 173.437," issued pursuant to 18 U. S. C. § 834 (a). Section 834 (f) provides that whoever "knowingly violates any such regulation" shall be fined and imprisoned. The District Court dismissed the information, holding that it did not charge a "knowing violation" of the regulation. *Held:* The statute does not signal an exception to the general rule that ignorance of the law is no excuse. The word "knowingly" in the statute pertains to knowledge of the facts, and where, as here, dangerous products are involved, the probability of regulation is so great that anyone who is aware that he is in possession of or dealing with them must be presumed to be aware of the regulation. Pp. 560–565.

Reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which HARLAN and BRENNAN, JJ., joined, *post*, p. 565.

John F. Dienelt argued the cause for the United States *pro hac vice*. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Wilson,* and *Beatrice Rosenberg.*

Harold E. Spencer argued the cause for appellee. With him on the brief was *Charles J. McCarthy.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The information charged that appellee shipped sulfuric acid and hydrofluosilicic acid in interstate commerce and "did knowingly fail to show on the shipping papers the required classification of said property, to wit, Corrosive Liquid, in violation of 49 C. F. R. 173.427."

Title 18 U. S. C. § 834 (a) gives the Interstate Commerce Commission power to "formulate regulations for the safe transportation" of "corrosive liquids" and 18 U. S. C. § 834 (f) states that whoever "knowingly violates any such regulation" shall be fined or imprisoned.

Pursuant to the power granted by § 834 (a) the regulatory agency [1] promulgated the regulation already cited which reads in part:

> "Each shipper offering for transportation any hazardous material subject to the regulations in this chapter, shall describe that article on the shipping paper by the shipping name prescribed in § 172.5 of this chapter and by the classification prescribed in § 172.4 of this chapter, and may add a further description not inconsistent therewith. Abbreviations must not be used." 49 CFR § 173.427.

The District Court, relying primarily on *Boyce Motor Lines, Inc.* v. *United States,* 342 U. S. 337, ruled that the information did not charge a "knowing violation" of the regulation and accordingly dismissed the information.

The United States filed a notice of appeal to the Court of Appeals, 18 U. S. C. § 3731, and in reliance on that section later moved to certify the case to this Court which

---

[1] The regulatory authority originally granted the Interstate Commerce Commission was transferred to the Department of Transportation by 80 Stat. 939, 49 U. S. C. § 1655 (e) (1964 ed., Supp. V).

the Court of Appeals did; and we noted probable jurisdiction, 400 U. S. 990.

Here as in *United States* v. *Freed,* 401 U. S. 601, which dealt with the possession of hand grenades, strict or absolute liability is not imposed; knowledge of the shipment of the dangerous materials is required. The sole and narrow question is whether "knowledge" of the regulation is also required. It is in that narrow zone that the issue of *"mens rea"* is raised; and appellee bears down hard on the provision in 18 U. S. C. § 834 (f) that whoever "knowingly violates any such regulation" shall be fined, etc.

Boyce Motor Lines, Inc. v. *United States, supra,* on which the District Court relied, is not dispositive of the issue. It involved a regulation governing transporting explosives, inflammable liquids, and the like and required drivers to "avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." The statute punished whoever "knowingly" violated the regulation. *Id.,* at 339. The issue of *"mens rea"* was not raised below, the sole question turning on whether the standard of guilt was unconstitutionally vague. *Id.,* at 340. In holding the statute was not void for vagueness we said:

> "The statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid. That is evident from a consideration of the effect of the requirement in this case. To sustain a conviction, the Government not only must prove that petitioner could have taken another route which was both

commercially practicable and appreciably safer (in its avoidance of crowded thoroughfares, etc.) than the one it did follow. It must also be shown that petitioner knew that there was such a practicable, safer route and yet deliberately took the more dangerous route through the tunnel, or that petitioner willfully neglected to exercise its duty under the Regulation to inquire into the availability of such an alternative route.

"In an effort to give point to its argument, petitioner asserts that there was no practicable route its trucks might have followed which did not pass through places they were required to avoid. If it is true that in the congestion surrounding the lower Hudson there was no practicable way of crossing the River which would have avoided such points of danger to a substantially greater extent than the route taken, then petitioner has not violated the Regulation. But that is plainly a matter for proof at the trial. We are not so conversant with all the routes in that area that we may, with no facts in the record before us, assume the allegations of the indictment to be false. We will not thus distort the judicial notice concept to strike down a regulation adopted only after much consultation with those affected and penalizing only those who knowingly violate its prohibition." *Id.*, at 342–343.

The *"mens rea"* that emerged in the foregoing discussion was not knowledge of the regulation but knowledge of the safer routes and those that were less safe within the meaning of the regulation. Mr. Justice Jackson, writing in dissent for himself, Mr. Justice Black, and Mr. Justice Frankfurter, correctly said:

"I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence of

such a regulation its ignorance would constitute a defense." 342 U. S., at 345.

There is no issue in the present case of the propriety of the delegation of the power to establish regulations and of the validity of the regulation at issue. We therefore see no reason why the word "regulations" should not be construed as a shorthand designation for specific acts or omissions which violate the Act. The Act, so viewed, does not signal an exception to the rule that ignorance of the law is no excuse and is wholly consistent with the legislative history.

The failure to change the language in § 834 in 1960 should not lead to a contrary conclusion. The Senate approved an amendment deleting "knowingly" and substituting therefor the language "being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles." [2] But the House refused to agree. As the House Committee stated, its version would "retain the present law by providing that a person must 'knowingly' violate the regulations." [3]

The House Committee noted there was a "judicial pronouncement as to the standards of conduct that make a violation a 'knowing' violation." [4] In *St. Johnsbury Trucking Co.* v. *United States,* 220 F. 2d 393, 397, Chief Judge Magruder had concluded that knowledge of the regulations was necessary. But whether the House Committee was referring to *Boyce Motor Lines* or the opinion of Chief Judge Magruder is not clear since both views of the section were before Congress.[5] It is clear that

---

[2] See H. R. Rep. No. 1975, 86th Cong., 2d Sess., 10–11.

[3] *Id.,* at 2.

[4] *Ibid.*

[5] See the HEW Staff Memorandum, *id.,* at 16–19.

strict liability was not intended. The Senate Committee felt it would be too stringent and thus rejected the position of the Interstate Commerce Commission.[6] But despite protestations of avoiding strict liability the Senate version was very likely to result in strict liability because knowledge of the facts would have been unnecessary and anyone involved in the business of shipping dangerous materials would very likely know of the regulations involved. Thus in rejecting the Senate version the House was rejecting strict liability.[7] But it is too much to conclude that in rejecting strict liability the House was also carving out an exception to the general rule that ignorance of the law is no excuse.

The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation. In the context of these proposed 1960 amendments we decline to attribute to Congress the inaccurate view that that Act requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word "knowingly." We conclude that the meager legislative history of the 1960 amendments makes unwarranted the conclusion that Congress abandoned the general rule and required knowledge of both the facts and the pertinent law before a criminal conviction could be sustained under this Act.

So far as possession, say, of sulfuric acid is concerned the requirement of "*mens rea*" has been made a requirement of the Act as evidenced by the use of the word "knowingly." A person thinking in good faith that he was shipping distilled water when in fact he was shipping

[6] S. Rep. No. 901, 86th Cong., 1st Sess., 3.

[7] The Senate language might "well create an almost absolute liability for violation." H. R. Rep. No. 1975, *supra,* at 2.

some dangerous acid would not be covered. As stated in *Morissette* v. *United States,* 342 U. S. 246, 250:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

There is leeway for the exercise of congressional discretion in applying the reach of *"mens rea." United States* v. *Balint,* 258 U. S. 250. *United States* v. *Murdock,* 290 U. S. 389, closely confined the word "willfully" in the income tax law to include a purpose to bring about the forbidden result:

> "He whose conduct is defined as criminal is one who *'willfully'* fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information." *Id.,* at 396.

In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in *Murdock, "mens*

rea" as to each ingredient of the offense. But where, as here and as in *Balint* and *Freed,* dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN join, dissenting.

This case stirs large questions—questions that go to the moral foundations of the criminal law. Whether postulated as a problem of *"mens rea,"* of "willfulness," of "criminal responsibility," or of *"scienter,"* the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice. See, *e. g., Morissette* v. *United States,* 342 U. S. 246; *Lambert* v. *California,* 355 U. S. 225; *Scales* v. *United States,* 367 U. S. 203. Cf. *Durham* v. *United States,* 214 F. 2d 862. But there is no occasion here for involvement with this root problem of criminal jurisprudence, for it is evident to me that Congress made punishable only knowing violations of the regulation in question. That is what the law quite clearly says, what the federal courts have held, and what the legislative history confirms.

The statutory language is hardly complex. Section 834 (a) of Title 18, U. S. C., gives the regulatory agency power to "formulate regulations for the safe transportation" of, among other things, "corrosive liquids." Section 834 (f) provides that "[w]hoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both." In dismissing the information in this case because it did not charge the appellee shipper with knowing violation of the applicable labeling regulation, District Judge Porter

did no more than give effect to the ordinary meaning of the English language.

It is true, as the Court today points out, that the issue now before us was not directly involved in *Boyce Motor Lines, Inc.* v. *United States,* 342 U. S. 337, which dealt with a claim that the statute is unconstitutionally vague. But in holding the statute valid, the Court bottomed its reasoning upon the proposition that "the presence of culpable intent [is] a necessary element of the offense." *Id.,* at 342. Other federal courts, faced with the precise issue here presented, have held that the statute means exactly what it says—that the words "knowingly violates any such regulation" mean no more and no less than "knowingly violates any such regulation." *St. Johnsbury Trucking Co.* v. *United States,* 220 F. 2d 393 (CA1 1955); *United States* v. *Chicago Express,* 235 F. 2d 785 (CA7 1956). Chief Judge Magruder filed a concurring opinion in the *St. Johnsbury* case, and he put the matter thus:

> "If it be thought that the indicated requirement of proof will seriously hamper effective enforcement of the Interstate Commerce Commission regulations, the answer is that Congress is at liberty to fix that up by striking out . . . the prescribed element of *mens rea*—'knowingly'—as applied to violation of regulations of the sort here involved. . . .
>
> "If a statute provides that it shall be an offense 'knowingly' to sell adulterated milk, the offense is complete if the defendant sells what he knows to be adulterated milk, even though he does not know of the existence of the criminal statute, on the time-honored principle of the criminal law that ignorance of the law is no excuse. But where a statute provides, as does 18 U. S. C. § 835, that whoever knowingly violates a regulation of the Interstate Commerce Commission shall be guilty of an offense, it

> would seem that a person could not knowingly violate a regulation unless he knows of the terms of the regulation and knows that what he is doing is contrary to the regulation. Here again the definition of the offense is within the control and discretion of the legislature." *Id.*, at 398.

In 1960 these judicial decisions were brought to the attention of the appropriate committees of Congress by the Interstate Commerce Commission, which asked Congress to overcome their impact by amending the law, either by simply deleting the word "knowingly" or, alternatively, by substituting therefor the words "being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles." [1] The Senate passed a bill adopting the second alternative, based on a committee report that stated:

> "Prosecution for violations of the Commission's transportation of explosives regulations has been extremely difficult because of the requirement in section 835 of the act that violators must have knowledge that they violated the Commission's regulations. While the committee believes that every reasonable precaution should be taken to provide for punishing those violating a statute whose purpose is to promote safety, the creation of an absolute liability is deemed too stringent." [2]

The House, however, refused to accept the Senate's language and resubstituted the word "knowingly," its committee report stating:

> "The present Transportation and Explosives Act requires that a violation 'knowingly' be committed before penalty may be inflicted for such violation.

---

[1] See H. R. Rep. No. 1975, 86th Cong., 2d Sess., 10–11.

[2] S. Rep. No. 901, 86th Cong., 1st Sess., 2–3.

> Under the present law there is judicial pronouncement as to the standards of conduct that make a violation a 'knowing' violation. The instant bill would change substantially the quantum of proof necessary to prove a violation since it provides that 'any person who being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles' is guilty if there is a noncompliance with the regulations. Such language may well create an almost absolute liability for violation. . . . Since the penalties prescribed for violation of the Explosives Act are substantial and since proof required to sustain a charge of violation of such regulations under the bill would require little more than proof that the violation occurred, it is the considered opinion of the committee that such a substantial departure in present law is not warranted. It is the purpose of this amendment to retain the present law by providing that a person must 'knowingly' violate the regulations." [3]

Three days later the Senate agreed to the resubstitution of the word "knowingly" by passing the House version of the bill.

The Court today thus grants to the Executive Branch what Congress explicitly refused to grant in 1960. It effectively deletes the word "knowingly" from the law. I cannot join the Court in this exercise, requiring as it does such a total disregard of plain statutory language, established judicial precedent, and explicit legislative history.

A final word is in order. Today's decision will have little practical impact upon the prosecution of interstate motor carriers or institutional shippers. For interstate

[3] H. R. Rep. No. 1975, 86th Cong., 2d Sess., 2.

motor carriers are members of a regulated industry, and their officers, agents, and employees are required by law to be conversant with the regulations in question.[4] As a practical matter, therefore, they are under a species of absolute liability for violation of the regulations despite the "knowingly" requirement. This, no doubt, is as Congress intended it to be. Cf. *United States* v. *Dotterweich,* 320 U. S. 277; *United States* v. *Balint,* 258 U. S. 250. Likewise, prosecution of regular shippers for violations of the regulations could hardly be impeded by the "knowingly" requirement, for triers of fact would have no difficulty whatever in inferring knowledge on the part of those whose business it is to know, despite their protestations to the contrary. The only real impact of this decision will be upon the casual shipper, who might be any man, woman, or child in the Nation. A person who had never heard of the regulation might make a single shipment of an article covered by it in the course of a lifetime. It would be wholly natural for him to assume that he could deliver the article to the common carrier and depend upon the carrier to see that it was properly labeled and that the shipping papers were in order. Yet today's decision holds that a person who does just that is guilty of a criminal offense punishable by a year in prison. This seems to me a perversion of the purpose of criminal law.

I respectfully dissent from the opinion and judgment of the Court.

---

[4] 49 CFR § 397.02.

CHICAGO & NORTH WESTERN RAILWAY CO. *v.* UNITED TRANSPORTATION UNION

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

No. 189. Argued January 18, 1971—Decided June 1, 1971

Petitioner railroad brought this suit (after formal procedures of the Railway Labor Act had been exhausted) to enjoin a threatened strike by respondent Union, charging that the Union had failed to perform its obligations under § 2 First of the Railway Labor Act "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." The Union answered that the Norris-LaGuardia Act deprived the District Court of jurisdiction to enjoin the strike and that in any event the complaint failed to state a claim on which relief could be granted. The District Court, declining to pass on whether either party had violated § 2 First, concluded that the matter was one for administrative determination by the National Mediation Board and was not justiciable, and that §§ 4 and 7 of the Norris-LaGuardia Act deprived the court of jurisdiction to enjoin the threatened strike. The Court of Appeals affirmed, construing § 2 First as hortatory and not enforceable by the courts but only by the National Mediation Board. *Held:*

1. Sec. 2 First was intended to be, not just a mere exhortation, but an enforceable legal obligation on carriers and employees alike. Pp. 574–578.

2. The obligation imposed by § 2 First, which is central to the effective working of the Railway Labor Act, is enforceable in the courts rather than by the Mediation Board, as is clear from the Act's legislative history. Pp. 578–581.

3. Sec. 4 of the Norris-LaGuardia Act does not prohibit the use of a strike injunction where that remedy is the only practical, effective means of enforcing the duty imposed by § 2 First. Pp. 581–584.

422 F. 2d 979, reversed and remanded.

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and BLACKMUN, JJ., joined. BREN-

NAN, J., filed a dissenting opinion, in which BLACK, DOUGLAS, and WHITE, JJ., joined, *post*, p. 584.

William H. Dempsey, Jr., argued the cause for petitioner. With him on the briefs were *David Booth Beers* and *Richard M. Freeman.*

John H. Haley, Jr., argued the cause for respondent. With him on the brief was *John J. Naughton.*

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The Chicago and North Western Railway Co., petitioner in this action, brought suit in the United States District Court for the Northern District of Illinois to enjoin a threatened strike by the respondent, the United Transportation Union. The substance of the complaint was that in the negotiations between the parties over work rules, the Union had failed to perform its obligation under § 2 First of the Railway Labor Act, as amended, 44 Stat. 577, 45 U. S. C. § 152 First, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." [1] Jurisdiction was said to rest on 28 U. S. C. §§ 1331 and

[1] The subsection provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

419-882 O - 72 - 41

1337. The Union in its answer contended that §§ 4, 7, and 8 of the Norris-LaGuardia Act, 47 Stat. 70, 71, 72, 29 U. S. C. §§ 104, 107, 108,[2] deprived the District Court of jurisdiction to issue a strike injunction and that in any event the complaint failed to state a claim upon which relief could be granted.[3] The District Judge, having heard evidence and argument, declined to pass on whether either party had violated § 2 First. In an unreported opinion, he concluded that the question was a matter for administrative determination by the National Mediation Board and was nonjusticiable; he further ruled that §§ 4 and 7 of the Norris-LaGuardia Act deprived the court of jurisdiction to issue an injunction against the Union's threatened strike. The Court of Appeals for the Seventh Circuit affirmed, 422 F. 2d 979, construing § 2 First as a statement of the purpose and policy of the subsequent provisions of the Act, and not as a specific requirement anticipating judicial enforcement. Rather, in that court's view, the enforcement of § 2 First was solely a matter for the National Mediation Board. *Id.*, at 985–988. We granted certiorari to consider this important question under the Railway Labor

---

[2] Section 4 reads in relevant part:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . ." 29 U. S. C. § 104.

Section 7 imposes strict procedural requirements on the issuance of injunctions in labor disputes. Section 8 is set out in n. 12, *infra*.

[3] The Union also averred that it had complied with the command of § 2 First and that the Railroad had been derelict in its duty under that section.

Act, on which the lower courts had expressed divergent views.[4] For reasons that follow we reverse.

I

For at least the past decade, the Nation's railroads and the respondent Union or its predecessors have been engaged in an off-and-on struggle over the number of brakemen to be employed on each train. We find it unnecessary to describe this history in any great detail, either generally or with particular reference to petitioner. Accounts at earlier stages may be found in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U. S. 284, 285–288 (1963); *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11, 14–17 (DC), aff'd, 118 U. S. App. D. C. 100, 331 F. 2d 1020 (1964); *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, 128 U. S. App. D. C. 59, 66–70, 385 F. 2d 581, 588–592 (1967); *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 127 U. S. App. D. C. 298, 383 F. 2d 225 (1967); and see the opinion of the court below, 422 F. 2d, at 980–982, and n. 4. For present purposes it is sufficient to observe that the parties have exhausted the formal procedures of the Railway Labor Act: notices, conferences, unsuccessful mediation, refusal by the Union to accept the National Mediation Board's proffer of arbitration, termination of mediation, and expiration of the 30-day cooling-off period of § 5 First, 45

[4] See, besides the opinion below, *Piedmont Aviation, Inc.* v. *Air Line Pilots Assn.*, 416 F. 2d 633 (CA4 1969); *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, 128 U. S. App. D. C. 59, 385 F. 2d 581 (1967), aff'g 253 F. Supp. 538 (1966); *Seaboard World Airlines, Inc.* v. *Transport Workers*, 425 F. 2d 1086 (CA2 1970); *United Industrial Workers* v. *Galveston Wharves*, 400 F. 2d 320 (CA5 1968).

U. S. C. § 155 First. The Railroad's charge that the Union had violated § 2 First was based principally on its contention that the Union had consistently refused to handle the dispute on a nationwide basis while maintaining an adamant determination that no agreement should be reached with the Chicago & North Western more favorable to the carrier than agreements which the Union had already reached with other railroads. The complaint also alleged that the Union had refused to bargain on the proposals in the Railroad's counternotices.

The narrow questions presented to us are whether § 2 First imposes a legal obligation on carriers and employees or is a mere exhortation; whether the obligation is enforceable by the judiciary; and whether the Norris-LaGuardia Act strips the federal courts of jurisdiction to enforce the obligation by a strike injunction. The parties have not requested us to decide whether the allegations of the complaint or the evidence presented at the hearing was sufficient to show a violation of § 2 First, and the lower courts, by their resolution of the threshold questions, did not reach the issue. Accordingly, we intimate no view on this matter.

II

This Court has previously observed that "[t]he heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'" *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 377–378 (1969). It is not surprising that such is the case. As one leading commentator has said, in connection with the duty under

the National Labor Relations Act to bargain in good faith, "[i]t was not enough for the law to compel the parties to meet and treat without passing judgment upon the quality of the negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition." Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1412–1413 (1958). We recognized this to be true when we said in *NLRB* v. *Insurance Agents' International,* 361 U. S. 477, 484–485 (1960), that "the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union."

Virginian R. Co. v. *System Federation No. 40,* 300 U. S. 515 (1937), furnishes an early illustration of this principle in connection with the duty to "exert every reasonable effort" under the Railway Labor Act. In that case, the railroad refused to recognize a union certified by the National Mediation Board as the duly authorized representative of its shop workers, and instead sought to coerce these employees to join a company union. The employees sought and obtained an injunction requiring the railroad to perform its duty under § 2 Ninth to "treat with" their certified representative; the injunction also compelled the railroad "to exert every reasonable effort" to make and maintain agreements with the union. This Court affirmed that decree, explicitly rejecting the argument that the duty to exert every reasonable effort was only a moral obligation. This conclusion has been repeatedly referred to without criticism in subsequent decisions.[5]

---

[5] *E. g., Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 721–722, n. 12 (1945), adhered to on rehearing, 327 U. S. 661 (1946); *Stark* v. *Wickard,* 321 U. S. 288, 306–307 (1944); *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.,* 362 U. S. 330, 339 (1960); *International Association of Machinists* v. *Street,* 367 U. S. 740, 758

The conclusion that § 2 First is more than merely hortatory finds support in the legislative history of the Railway Labor Act as well. As this Court has often noted, the Railway Labor Act of 1926 was, and was acknowledged to be, an agreement worked out between management and labor, and ratified by the Congress and the President.[6] Accordingly, the statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act.[7]

In the House hearings, Donald R. Richberg, counsel for the organized railway employees supporting the bill, was unequivocal on whether § 2 First imposed a legal obligation on the parties. He stated, "it is [the parties'] duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion." [8] Mr. Richberg went on to describe why the bill had been drafted in general language applicable equally to both parties, rather than in terms of specific

---

(1961); *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U. S. 650, 658 (1965); *Detroit & T. S. L. R. Co.* v. *United Transportation Union,* 396 U. S. 142, 149, 151 (1969).

[6] *E. g., International Association of Machinists* v. *Street,* 367 U. S. 740, 758 (1961).

[7] See, *e. g., Detroit & T. S. L. R. Co.* v. *United Transportation Union,* 396 U. S. 142, 151 n. 18, 152 n. 19, 153 n. 20 (1969).

[8] Hearings on Railroad Labor Disputes (H. R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 91 (1926). See also *id.,* at 40–41, 66, 84–85.

requirements or prohibitions accompanied by explicit sanctions:

> "We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America." [9]

Accordingly, we think it plain that § 2 First was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.

The Court of Appeals, in seemingly coming to the contrary conclusion, relied on this Court's decision in *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943). In that case, the Court held that jurisdictional disputes between unions were not justiciable, but were left by the Act either to resolution by the National Mediation Board under § 2 Ninth or to the economic muscle of the parties. Reliance had been placed on § 2 Second, which requires that all disputes should be considered and if possible decided in conference of the authorized representatives of the parties. The Court held that this reliance was misplaced: "Nor does § 2, Second make justiciable what otherwise is not. . . . § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands." *Id.*, at 334 (footnote omitted).

---

[9] *Id.*, at 91. See also *id.*, at 66.

In light of the place of § 2 First in the scheme of the Railway Labor Act, the legislative history of that section, and the decisions interpreting it, the passing reference to it in the *M–K–T* case cannot bear the weight which the Court of Appeals sought to place upon it.

III

Given that § 2 First imposes a legal obligation on the parties, the question remains whether it is an obligation enforceable by the judiciary. We have often been confronted with similar questions in connection with other duties under the Railway Labor Act.[10] Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

We have already observed that the obligation under § 2 First is central to the effective working of the Railway Labor Act. The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with "a desire not to reach an agreement." *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (CA1 1953). While cases in which the union is the party with this attitude are perhaps rare, they are not unknown. See *Chicago Typographical Union No. 16*, 86 N. L. R. B. 1041 (1949), enforced *sub nom. American Newspaper Publishers Assn.* v. *NLRB*, 193 F. 2d 782 (CA7 1951), aff'd as to another issue, 345 U. S. 100

[10] See, *e. g.*, *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548 (1930); *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952).

(1953). We think that at least to this extent the duty to exert every reasonable effort is of the essence.[11]

The capacity of the courts to enforce this duty was considered and affirmed in the *Virginian* case. Mr. Justice Stone, speaking for the Court, noted that "whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." 300 U. S., at 550. Section 8 of the Norris-LaGuardia Act explicitly requires district courts to determine whether plaintiffs have "failed to make every reasonable effort" to settle the dispute out of which the request for the injunction grows.[12] We have no reason to believe that the district courts are less capable of making the inquiry in the one situation than in the other.

Finally, we must consider the Court of Appeals' posi-

---

[11] While we have no occasion to determine whether § 2 First requires more of the parties than avoidance of "bad faith" as defined by Judge Magruder in *Reed & Prince, supra,* we note two caveats. First, parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes. Cf. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 383 (1969). Second, great circumspection should be used in going beyond cases involving "desire not to reach an agreement," for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements. See n. 19, *infra.*

[12] The section provides in full:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U. S. C. § 108.

tion that the question whether a party had exerted every reasonable effort was committed by the Railway Labor Act to the National Mediation Board rather than to the courts. We believe that the legislative history of the Railway Labor Act rather plainly disproves this contention. It is commonplace that the 1926 Railway Labor Act was enacted because of dissatisfaction with the 1920 Transportation Act, and particularly with the performance of the Railroad Labor Board. While there were many causes of this dissatisfaction, one of the most prominent was that because of its adjudicatory functions, the Board effectively lost any influence in attempting to settle disputes. Throughout the hearings on the bill which became the 1926 Act there are repeated expressions of concern that the National Mediation Board should retain no adjudicatory function, so that it might maintain the confidence of both parties.[13] And as the Court noted in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 303 (1943), when Congress in 1934 gave the Board power to resolve certain jurisdictional disputes, it authorized the Board to appoint a committee of neutrals to decide the dispute "so that the Board's

---

[13] *E. g., Hearings, supra,* n. 8, at 18 (Mr. Richberg):

"The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports condemning one party or the other, even though the board may think one party is wrong. That is the fundamental cause of failure of the [Railroad] Labor Board. That is the reason why the Labor Board machinery never would work, because a board was constituted to sit and deliver opinions which must be opinions for or against one party, and as soon as that board began delivering opinions publicly against a party, that party was sure the board was unfair to it. That is human nature. The board, in other words, was created in a manner to destroy any confidence in itself.

"The board of mediators is not for that function. The board of mediators should never make any reports to the public condemning one party or the other. Their duty is that of remaining persuaders."

'own usefulness of settling disputes that might arise thereafter might not be impaired.' S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3." Only last Term we referred to the fact that "the Mediation Board has no adjudicatory authority with regard to major disputes." *Detroit & T. S. L. R. Co.* v. *United Transportation Union,* 396 U. S. 142, 158 (1969). In light of these considerations, we think the conclusion inescapable that Congress intended the enforcement of § 2 First to be overseen by appropriate judicial means rather than by the Mediation Board's retaining jurisdiction over the dispute or prematurely releasing the parties for resort to self-help if it feels such action called for.[14]

IV

We turn finally to the question whether § 4 of the Norris-LaGuardia Act[15] prohibits the use of a strike injunction in all cases of violation of § 2 First. The fundamental principles in this area were epitomized in *International Association of Machinists* v. *Street,* 367 U. S. 740, 772–773 (1961):

> "The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115, expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *System Federation,* 300 U. S. 515; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen,*

[14] If such were the exclusive remedy for violations of § 2 First, not only would it endanger the effectiveness of the Board's mediatory role and risk premature interruptions of transportation, but it would provide no remedy for cases where the violations of § 2 First occurred or first became apparent after the Board had certified that its mediatory efforts had failed.

[15] See n. 2, *supra,* for the text.

> 338 U. S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right."

Similar statements may be found in many of our opinions.[16] We consider that these statements properly accommodate the conflicting policies of our labor laws, and we adhere to them. We find it quite impossible to say that no set of circumstances could arise where a strike injunction is the only practical, effective means of enforcing the command of § 2 First. Accordingly, our prior decisions lead us to hold that the Norris-LaGuardia Act did not forbid the District Court from even considering whether this is such a case.[17] If we have misinterpreted the congressional purpose, Congress can remedy the situation by speaking more clearly. In the meantime we have no choice but to trace out as best we may the uncertain line of appropriate accommodation of two statutes with purposes that lead in opposing directions.[18]

---

[16] See *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S., at 562–563; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen,* 338 U. S. 232, 237 (1949); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768, 774 (1952); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.,* 353 U. S. 30, 41–42 (1957); cf. *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.,* 362 U. S., at 338–339; *id.,* at 360–364 (dissenting opinion); *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 458 (1957).

[17] The congressional debates over the Norris-LaGuardia Act support a construction of that Act permitting federal courts to enjoin strikes in violation of the Railway Labor Act in appropriate cases. See 75 Cong. Rec. 4937–4938 (Sen. Blaine); *id.,* at 5499, 5504 (Rep. LaGuardia).

[18] Section 2 First was re-enacted in 1934, two years after the Norris-LaGuardia Act. Act of June 21, 1934, c. 691, 48 Stat. 1185. In the event of irreconcilable conflict between the policies of the earlier, general provisions of the Norris-LaGuardia Act and those of

We recognize, of course, that our holding that strike injunctions may issue when such a remedy is the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements falls far short of that definiteness and clarity which businessmen and labor leaders undoubtedly desire. It creates a not insignificant danger that parties will structure their negotiating positions and tactics with an eye on the courts, rather than restricting their attention to the business at hand. Moreover, the party seeking to maintain the status quo may be less willing to compromise during the determinate processes of the Railway Labor Act if he believes that there is a chance of indefinitely postponing the other party's resort to self-help after those procedures have been exhausted. See *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S., at 380–381; cf. Hearings, *supra,* n. 8, at 17, 50, 100 (Mr. Richberg); *id.,* at 190 (Mr. Robertson). Finally, the vagueness of the obligation under § 2 First could provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place.[19]

These weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of § 2 First. See n. 11, *supra.* Nevertheless, the result reached today is unavoidable if we are to give effect to all our labor laws—enacted as they were by Congresses

---

the subsequent, more specific provisions of § 2 First, the latter would prevail under familiar principles of statutory construction. *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S., at 563.

[19] Section 8 (d) of the National Labor Relations Act, 29 U. S. C. § 158 (d), was added precisely because of congressional concern that the NLRB had intruded too deeply into the collective-bargaining process under the guise of enforcing the duty to bargain in good faith. See *NLRB* v. *American National Insurance Co.,* 343 U. S. 395 (1952); *NLRB* v. *Insurance Agents' International,* 361 U. S. 477 (1960).

of differing political makeup and differing views on labor relations—rather than restrict our examination to those pieces of legislation which are in accord with our personal views of sound labor policy. See *Boys Markets* v. *Retail Clerks Local 770,* 398 U. S. 235, 250 (1970).

V

As we noted at the outset, we have not been requested to rule on whether the record shows a violation of § 2 First in circumstances justifying a strike injunction, and we do not do so. Such a question should be examined by this Court, if at all, only after the facts have been marshaled and the issues clarified through the decisions of lower courts.

In view of the uncertainty heretofore existing on what constituted a violation of § 2 First and what showing was necessary to make out a case for a strike injunction, we believe the appropriate course is to remand the case to the Court of Appeals with instructions to return the case to the District Court for the taking of such further evidence as the parties may deem necessary and that court may find helpful in passing on the issues which the case presents in light of our opinion today.

Reversed and remanded.

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

The instant dispute between the Chicago & North Western Railway Company (Railway) and the United Transportation Union (Union) reaches back to the decision of Arbitration Board No. 282, established pursuant to 77 Stat. 132 (1963). That board was established by Congress, after the failure of the dispute-settlement

machinery of the Railway Labor Act, to arbitrate disputes between various carriers and unions over the number of brakemen required on trains and the necessity of firemen on diesel locomotives. Insofar as is here pertinent, Board 282's award ultimately led to elimination of approximately 8,000 brakemen's jobs across the Nation. By its terms, however, the award expired January 25, 1966. Prior to expiration, the Union served upon the Railway notices under § 6 of the Railway Labor Act, 45 U. S. C. § 156,[1] which called for re-establishing many of the brakemen's positions eliminated by Board 282 by changing the existing agreements to require not less than two brakemen on every freight and yard crew. The Railway reciprocated by serving upon the Union a § 6 notice requesting an agreement that would make crew size a matter of managerial judgment. The parties held conferences under § 6 without reaching agreement. The National Mediation Board attempted to mediate the dispute pursuant to § 5, 45 U. S. C. § 155,[2] failed, and prof-

---

[1] Section 6 provides in part:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions . . . ."

[2] Section 5 First, provides in part:

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

. . . . . .

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts . . . shall be unsuccessful, the said Board shall at once endeavor as its final required action . . . to induce the parties to

fered arbitration pursuant to the same section. After the Union declined to accept arbitration, the National Mediation Board terminated its jurisdiction. Since no emergency board was appointed by the President under § 10, 45 U. S. C. § 160,[3] after the 30-day cooling-off period of § 5 had run,[4] the Act's prohibition against resort to self-help measures lapsed.

Thereafter, the Railway brought this action in Federal District Court seeking an injunction against a threatened strike, alleging that the Union had not lived up to its obligation under § 2 First, 45 U. S. C. § 152 First, to "exert every reasonable effort" to make and maintain working agreements. Specifically, the Railway alleged

---

submit their controversy to arbitration, in accordance with the provisions of this chapter."

[3] Section 10 provides in part:

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. . . .

. . . . . .

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

[4] Section 5 First, provides in part:

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

that the Union had violated its statutory duty in the following ways:

> "First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT [Brotherhood of Railroad Trainmen] had served like notices, nevertheless
>
> "(a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;
>
> "(b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;
>
> "(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and
>
> Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices." App. 7.

The District Judge denied the injunction, holding that "[w]hether there has been compliance with Section 2 First . . . is a matter for administrative determination . . . is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection . . . ." App. 204–205. The Court of Appeals affirmed, 422 F. 2d 979 (CA7 1970). We granted certiorari, 400 U. S. 818 (1970), to resolve a conflict in the circuits. *Piedmont Aviation, Inc.* v. *Air Line Pilots Assn.*, 416 F. 2d 633 (CA4 1969). I

419-882 O - 72 - 42

believe that the Railway Labor Act evidences a clear intention to prohibit courts from weighing the relative merits of each party's attempts to reach a bargaining agreement, and that the decision of the Seventh Circuit should, therefore, be affirmed.

This case presents the question whether, in a major dispute, a District Court may enjoin self-help measures after the completion of the statutory procedures if it determines that a party has not made "every reasonable effort" to reach agreement as required by § 2 First. Underlying this question is the corollary one, to what extent a District Court may inquire into collective negotiations in determining whether a party has complied with its statutory duty.

In answering these questions particular attention must be paid to the legislative history of the Act. Railway labor dispute-settlement law has undergone a long legislative evolution which this Court has previously explored. *International Association of Machinists* v. *Street,* 367 U. S. 740, 750–760, and nn. 10–12 (1961); see also *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548 (1930); *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515 (1937); *Union Pacific R. Co.* v. *Price,* 360 U. S. 601 (1959); *Detroit & T. S. L. R. Co.* v. *United Transportation Union,* 396 U. S. 142 (1969). Much of the experimentation prior to passage of the Railway Labor Act of 1926 proved unsuccessful. Recognition that growing unrest in the railway industry had created a situation with potentially grave public consequences, led the President, in three messages to Congress between 1923 and 1925, and both the Republican and Democratic Parties, in 1924, to call for unprecedented cooperation between carriers and unions. H. R. Rep. No. 328, 69th Cong., 1st Sess., 2–3 (1926); S. Rep. No. 606, 69th Cong., 1st Sess., 2–3 (1926); Hearings on

Railroad Labor Disputes (H. R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 21–22, 90, 98, 197 (1926) (hereinafter Hearings). These basically antagonistic forces were urged to sit down and develop a workable solution for settling disputes in their industry in order to minimize the rupture of the public services that they provided. The legislative product devised by the parties themselves, which Congress enacted in 1926 as the Railway Labor Act, 44 Stat. 577, was a unique blend of moral and legal duties looking toward settlement through conciliation, mediation, voluntary arbitration, presidential intervention, and finally, in case of ultimate failure of the statutory machinery, resort to traditional self-help measures. The cooperation involved was unparalleled in this country's labor history. It was felt significant to all involved that the parties themselves had worked out a solution and had presented it to Congress.[5]

[5] "Mr. Richberg: . . . This bill which has been introduced in the House and in the Senate simultaneously represents the product of months of negotiations and conferences between the representatives of 20 railroad labor organizations and the Association of Railway Executives representatives, representing the great majority, practically all, of the carriers by railroad." Hearings 9.

"I want to emphasize again that this bill is the product of a negotiation between employers and employees which is unparalleled, I believe, in the history of American industrial relations.

"For the first time representatives of a great majority of all the employers and all the employees of one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community. They are now asking to have this agreement written into law, not for the purpose of having governmental power exerted to compel the parties to do right but in order to obtain Government aid in their cooperative efforts and in order to assure the public that their

The significance lay in the fact that since the bill represented "the agreement of the parties . . . they will be under the moral obligation to see that their agreement accomplishes its purpose, and that if enacted into law they will desire to prove the law a success." Hearings 21.

The outstanding feature of the bill was that it was voluntary—Congress, the carriers, and the unions all recognized that there were very few enforceable provisions, and still fewer judicially enforceable ones.[6] In testimony before Congress, Mr. Richberg, the major spokesman for the unions, stated, "[O]ur thought has been in this law not to write a lot of statute law for the courts to enforce. . . . We expect that most of the provisions of this bill are to be enforced by the power of persuasion, either exercised by the parties themselves or by the Gov-

---

interest in efficient continuous transportation service will be permanently protected.

. . . . . .

"It is a remarkable fact that all parties concerned were able to lay aside the hostile feelings and suspicions that had too often characterized past negotiations and to act upon the belief that if an agreement were reached, it would be carried out in the same spirit of good faith and fair dealing that characterized the negotiations." Hearings 21–22.

[6] Mr. Thom (carrier representative). "I wish you to bear that fact in mind—the moral obligation now resting upon each one of the proponents of this bill in respect to its effect upon the public interest. Suppose it is changed in any important particular, what effect will that have upon the moral obligation to which I have just alluded? . . .

"I personally attach most substantial importance to the view I am now asking you to consider. I think that when a measure is adopted, backed by the moral obligation of the parties that it will not be permitted in any degree to [a]ffect adversely the public interests, it would be a most unwise thing to insert measures of coercion, substitute principles, or anything that would have the effect of liberating these parties from the position they have voluntarily assumed before you, that this is a workable measure." Hearings 115.

ernment board of mediation representing the public interest." Hearings 65–66. Congress recognized the absence of coercive measures but chose not to add them, noting that "it is in the public interest to permit a fair trial of the method of amicable adjustment agreed upon by the parties . . . ." S. Rep. No. 606, 69th Cong., 1st Sess., 4 (1926). Thus, the history of the Act reveals that in dealing with major disputes Congress was content to enact a machinery which dragged on, with cooling-off periods and various status quo restrictions, while the parties were required to "treat with" one another, § 2 Ninth, 45 U. S. C. § 152 Ninth, in the hope that ultimately they would voluntarily reach agreement.

In order to bring about settlement, it was made "the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements . . . in order to avoid any interruption to commerce . . . ." § 2 First, 45 U. S. C. § 152 First. From the outset, Congress was interested in the meaning of this provision and whether this statutory duty was viewed by the drafters to be a judicially enforceable one. During the hearings on the House bill the following colloquy occurred:

> "Mr. Huddleston. Now, referring to section 2 on page 3, ['] it shall be the duty of all carriers, their officers, agents, and employees, to exert every reasonable effort to make and maintain agreements,' etc. Do you agree that that also is unenforceable by judicial proceeding?
>
> "Mr. Richberg. Not always. I think any action involving an arbitrary refusal to comply with that duty might be subject to judicial compulsion. I am sure it would work both ways.
>
> . . . . .
>
> "In other words, I think it would not be exerting a reasonable effort to make and maintain agreements,

for a carrier or its appropriate officers to refuse to even meet a committee that sought to make an agreement.

. . . . . .

"Mr. Huddleston. You think, then, that this section is enforceable?

"Mr. Richberg. I think that a duty imposed by law is enforceable by judicial power, yes. Of course, this is not a duty which could be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the court would be an order against an arbitrary refusal to even attempt to comply with that duty, but I believe that could be subject to judicial power." Hearings 84–85.

In response to an earlier question Mr. Richberg had testified:

". . . In the first place, I think if either party showed a willful disregard of the fundamental requirements, that they should make every reasonable effort to make an agreement—in other words, if they refuse absolutely to confer, to meet or discuss or negotiate, I think there is a question as to whether there might not be invoked some judicial compulsion, but I would rather see that left to development rather than see it written into the law. But outside of that, if the parties do not make an agreement, I think you face this question, first, as to whether the Government board of mediation could bring them to see the error of their ways; and, second, if that effort was unsuccessful, whether they could bring them to refer that dispute to an arbitration, and then if it was of sufficient magnitude so that it actually affected commerce substantially, whether the emergency board could not itself bring about an adjustment." Hearings 66.

Since the Act was the product of months of discussion between the carriers and unions and since Mr. Richberg's testimony was uncontradicted by the representatives of the carriers,[7] it seems fair to say that the above testimony evidences an understanding on the part of the unions, carriers, and Congress that the duty "to exert every reasonable effort" was judicially enforceable at least to the extent of requiring the parties to sit down at the bargaining table and talk to each other. This is exactly what this Court held in *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515 (1937). That case was an equitable action brought by the Federation to force the Railway to bargain with it. The carrier, despite the Mediation Board's certification of the Federation as the bargaining agent of the employees, had continued to deal only with its company union. This Court held that the duty to exert every reasonable effort to reach agreement, which had been held to be without legal sanction in the context of the previous Act, *Pennsylvania R. Co.* v. *Labor Board,* 261 U. S. 72 (1923),

> "no longer stand[s] alone and unaided by mandatory provision . . . . The amendment of the Railway Labor Act added new provisions in § 2, Ninth, which makes it the duty of the Mediation Board, when any dispute arises among the carrier's employees, 'as to who are the representatives of such employees,' to investigate the dispute and to certify . . . the name of the organization authorized to represent the employees. It commands that 'Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.'

[7] Carrier representatives were present throughout the congressional testimony of Mr. Richberg. None contradicted Mr. Richberg's viewpoint in their testimony.

> "It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts." 300 U. S., at 544–545.
>
> "[W]e cannot assume that its [§ 2 Ninth's] addition to the statute was purposeless . . . . The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.*, at 547–548.

Virginian R. Co. stands, then, for the proposition that, once the Board has certified a union as the bargaining agent of the employees, a court may require the employer to "treat with" that representative in order that the statutory machinery of the Railway Labor Act be given a chance to bring about a voluntary settlement. It is, in essence, an order for the parties to recognize one another and *begin* the long, drawn-out statutory bargaining process.

In the years since *Virginian R. Co.* this Court, in the context of a major dispute, has authorized the issuance of an injunction in only two other carefully limited classes of railway litigation—that seeking to prevent invidious discrimination on the part of a union as against employees and that seeking to prevent violation of the Act's status quo provisions during bargaining. In a series of cases beginning with *Steele* v. *Louisville & N. R. Co.*,

323 U. S. 192 (1944),[8] this Court has held that "the language of the Act to which we have referred [§§ 1 Sixth; 2 Second, Third, Fourth, and Ninth], read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Id.*, at 202–203. Recently, in *Detroit & T. S. L. R. Co.* v. *United Transportation Union*, 396 U. S. 142 (1969), this Court held that the Act's status quo requirement, which "is central to its design," could be enforced by judicial authority. *Id.*, at 150. While in each of these instances the Court found specific, positive statutory mandates for judicial interference, the underlying cohesiveness of the decisions lies in the fact that in each instance the scheme of the Railway Labor Act could not begin to work without judicial involvement. That is, unless the unions fairly represented all of their employees; unless the employer bargained with the certified representative of the employees; unless the status quo was maintained during the entire range of bargaining, the statutory mechanism could not hope to induce a negotiated settlement. In each case the judicial involvement was minimal and in keeping with the central theme of the Act—to bring about voluntary settlement. In each case the "collective bargaining agents stepped outside their legal duties and violated the Act which called them into being . . . ." *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, 338 (1960).

[8] See also *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952).

In the instant case, we have an entirely different situation. Here, all parties were fairly represented, the status quo was being maintained, and, most important, each bargaining representative met and conferred with his counterpart. The step-by-step procedures prescribed by the Railway Labor Act had been carried through. In essence, the Court holds that a district court has the duty under § 2 First, to assess the bargaining tactics of each of the parties *after* the entire statutory scheme has run its course. If, then, the court determines that a party had not exerted sufficient effort to reach settlement, it should enjoin self-help measures, and, if such action is to make any sense within this statutory scheme, remand the parties to some unspecified point in the bargaining process. Such a notion is entirely contrary to the carefully constructed premise of the Railway Labor Act.

My summary of the legislative history of the Act clearly discloses that judicial involvement in the railway bargaining process was to be minuscule since the entire focus of the Act was toward achieving a voluntary settlement between the protagonists. "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them." *Terminal Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1, 6 (1943) (footnote omitted). It is clear to me that the duty to exert every reasonable effort was agreed upon to make effective the duty of the carrier to recognize the union chosen by the employees—in other words, it is essentially a corollary of the duty. Such a duty does not contemplate that governmental power should, after failure of the parties to reach accord, be added to the scales in favor of either party and thus compel the other to agree upon the aided party's terms. Rather, at that point, impasse was to free both parties

to resort to self-help. See *NLRB* v. *Insurance Agents' International,* 361 U. S. 477, 484–486 (1960). As Mr. Richberg had testified, "I wish to stress that one point above all others. We are seeking an opportunity to preserve self-government in industry. . . . We are not asking the Government to use force against one or the other party. We are simply asking aid and cooperation." Hearings 22.

Even apart from what the drafters of the Act representing both sides specifically contemplated, the result reached today will destroy entirely the carefully planned scheme of the Act. The Act is built upon a step-by-step framework. Each step is carefully drawn to introduce slightly different pressures upon the parties to reach settlement from the preceding step. First, the parties confer jointly. Next, the National Mediation Board may add its pressure through mediation. Then, the President may call into effect both the great power of his office and that of informed public opinion through the creation of an emergency board. Underlying the entire statutory framework is the pressure born of the knowledge that in the final instance traditional self-help economic pressure may be brought to bear if the statutory mechanism does not produce agreement. The Act does not evidence an intention to return to any step once completed. The Court's decision will effectively destroy the scheme of gradually escalating pressures. Moreover, the Court provides absolutely no guidance as to where in the bargaining scheme the parties are to be remanded. Does the court send them back to the Mediation Board which has already terminated jurisdiction finding the parties to have reached impasse? Should the court remand to some other phase of the proceedings? If so, where?

More important, however, is the mortal wound today's holding inflicts on the critical role to be played by the

presence of economic weapons in reserve. *NLRB* v. *Insurance Agents' International, supra,* at 488–489. As the statutory machinery nears termination without achieving settlement, the threat of economic self-help and the pressures of informed public opinion create new impetus toward compromise and agreement. If self-help can now effectively be thwarted by injunction and by drawn-out court proceedings after the termination of the entire bargaining process, or worse yet, at each step thereof, the threat of its use becomes impotent, indeed.

Since there is no specific mandate for an injunction in the circumstances presented by this case, the more general provisions of the Norris-LaGuardia Act are applicable. *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S., at 563; *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.,* 353 U. S. 30, 40–41 (1957).

> "The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115, expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *System Federation,* 300 U. S. 515; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen,* 338 U. S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." *International Association of Machinists* v. *Street,* 367 U. S., at 772–773.

My conclusion, then, is that the Railway Labor Act as designed by its coframers and as enforced by this Court

excludes any role for the judiciary to oversee the relative efforts of the parties in their mutual attempt to reach settlement. A court may order the parties to recognize one another and sit down to bargain, but upon failure of the statutory machinery to induce settlement, the judiciary is denied power to enjoin resort to traditional self-help measures. If this scheme has proved ineffective, Congress, not this Court, must redress the deficiencies.

I would affirm.

NATIONAL LABOR RELATIONS BOARD *v.* NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE

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

No. 785. Argued April 20, 1971.—Decided June 1, 1971

In this unfair labor practice proceeding under the Labor Management Relations Act respondent contended that it was not an "employer" but came within the "political subdivision" exemption in § 2 (2) of the Act. The National Labor Relations Board (NLRB) had found that respondent met neither of the tests to which it held that exemption was limited, *viz.*, entities that are either (1) created directly by the State, so as to constitute governmental departments or administrative arms, or (2) administered by individuals who are responsible to public officials or the general electorate. The Court of Appeals upheld respondent's contention, viewing as controlling a Tennessee Supreme Court decision construing the State's Utility District Law under which respondent had been organized. A District organized under that statute is a "'municipality' or public corporation," has eminent domain powers, is exempt from state, county, or municipal taxation, and whose income from its bonds is exempt from federal income tax. The officers who conduct the District's business receive nominal compensation, are appointed by a public official, and are subject to removal by statutory procedures applicable to public officials. *Held:*

1. Federal, rather than state, law governs the determination whether an entity is a "political subdivision" of a State within the meaning of § 2 (2) of the Labor Management Relations Act. *NLRB* v. *Randolph Electric Membership Corp.*, 343 F. 2d 60. Pp. 602–604.

2. While the NLRB's construction of the statutory term is entitled to great respect, there is no "warrant in the record" and "no reasonable basis in law" for the NLRB's conclusion that respondent was not a political subdivision. In the light of all the factors present here, including the fact that the District is administered by individuals who are responsible to public officials (thus meeting even one of the tests used by the NLRB), respond-

ent comes within the coverage of that statutory exemption. Pp. 604–609.

427 F. 2d 312, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, DOUGLAS, HARLAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 609.

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

Eugene Greener, Jr., argued the cause and filed a brief for respondent.

Charles F. Wheatley, Jr., and *Jerome C. Muys* filed a brief for the American Public Gas Association as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Upon the petition of Plumbers and Steamfitters Local 102, the National Labor Relations Board ordered that a representation election be held among the pipefitters employed by respondent, Natural Gas Utility District of Hawkins County, Tennessee, 167 N. L. R. B. 691 (1967). In the representation proceeding, respondent objected to the Board's jurisdiction on the sole ground that as a "political subdivision" of Tennessee, it was not an "employer" subject to Board jurisdiction under § 2 (2) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, 61 Stat. 137, 29 U. S. C. § 152 (2).[1] When the Union won the election

[1] Section 2 (2), 29 U. S. C. § 152 (2), provides:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any

and was certified by the Board as bargaining representative of the pipefitters, respondent refused to comply with the Board's certification and recognize and bargain with the Union. An unfair labor practice proceeding resulted and the Board entered a cease-and-desist order against respondent on findings that respondent was in violation of §§ 8 (a)(1) and 8 (a)(5) of the Act, 29 U. S. C. §§ 158 (a)(1) and 158 (a)(5). 170 N. L. R. B. 1409 (1968). Respondent continued its noncompliance and the Board sought enforcement of the order in the Court of Appeals for the Sixth Circuit. Enforcement was refused, the court holding that respondent was a "political subdivision," as contended. 427 F. 2d 312 (1970). We granted certiorari, 400 U. S. 990 (1971). We affirm.

The respondent was organized under Tennessee's Utility District Law of 1937, Tenn. Code Ann. §§ 6–2601 to 6-2627 (1955). In *First Suburban Water Utility District* v. *McCanless,* 177 Tenn. 128, 146 S. W. 2d 948 (1941), the Tennessee Supreme Court held that a utility district organized under this Act was an operation for a state governmental or public purpose. The Court of Appeals held that this decision "was of controlling importance on the question whether the District was a political subdivision of the state" within § 2 (2) and "was binding on the Board." 427 F. 2d, at 315. The Board, on the other hand, had held that "while such State law declarations and interpretations are given careful consideration . . . , they are not necessarily controlling." 167 N. L. R. B., at 691. We disagree with the Court of Appeals and agree with the Board. Federal,

---

corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

rather than state, law governs the determination, under § 2 (2), whether an entity created under state law is a "political subdivision" of the State and therefore not an "employer" subject to the Act.[2]

The Court of Appeals for the Fourth Circuit dealt with this question in *NLRB* v. *Randolph Electric Membership Corp.*, 343 F. 2d 60 (1965), where the Board had determined that Randolph Electric was not a "political subdivision" within § 2 (2). We adopt as correct law what was said at 62–63 of the opinion in that case:

> "There are, of course, instances in which the application of certain federal statutes may depend on state law. . . .
>
> "But this is controlled by the will of Congress. In the absence of a plain indication to the contrary, however, it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law. Jerome v. United States, 318 U. S. 101, 104 . . . (1943).
>
> "The argument of the electric corporations fails to persuade us that Congress intended the result for which they contend. Furthermore, it ignores the teachings of the Supreme Court as to the congressional purpose in enacting the national labor laws. In National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 123 . . . (1944), the Court dealt with the meaning of the term 'employee' as used in the Wagner Act, saying:
>
> " 'Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation,

[2] Respondent agrees in its brief in this Court, p. 13, that state law is not controlling.

419-882 O - 72 - 43

> administered by a national agency, intended to solve a national problem on a national scale. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.'
>
> "Thus, it is clear that state law is not controlling and that it is to the actual operations and characteristics of [respondents] that we must look in deciding whether there is sufficient support for the Board's conclusion that they are not 'political subdivisions' within the meaning of the National Labor Relations Act."

We turn then to identification of the governing federal law. The term "political subdivision" is not defined in the Act and the Act's legislative history does not disclose that Congress explicitly considered its meaning. The legislative history does reveal, however, that Congress enacted the § 2 (2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.[3] In the light of that purpose, the Board, according to its Brief, p. 11, "has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who

[3] See 78 Cong. Rec. 10351 *et seq.;* Hearings on Labor Disputes Act before the House Committee on Labor, 74th Cong., 1st Sess., 179; 93 Cong. Rec. 6441 (Sen. Taft). See also C. Rhyne, Labor Unions and Municipal Employee Law 436–437 (1946). Vogel, What About the Rights of the Public Employee?, 1 Lab. L. J. 604, 612–615 (1950).

are responsible to public officials or to the general electorate."

The Board's construction of the broad statutory term is, of course, entitled to great respect. *Randolph Electric, supra,* at 62. This case does not however require that we decide whether "the actual operations and characteristics" of an entity must necessarily feature one or the other of the Board's limitations to qualify an entity for the exemption, for we think that it is plain on the face of the Tennessee statute that the Board erred in its reading of it in light of the Board's own test. The Board found that "the Employer in this case is neither created directly by the State, nor administered by State-appointed or elected officials." 167 N. L. R. B., at 691–692 (footnotes omitted). But the Board test is not whether the entity is administered by "State-appointed or elected officials." Rather, alternative (2) of the test is whether the entity is "administered *by individuals who are responsible to public officials* or to the general electorate" (emphasis added), and the Tennessee statute makes crystal clear that respondent is administered by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens. Therefore, in the light of other "actual operations and characteristics" under that administration, the Board's holding that respondent "exists as an essentially private venture, with insufficient identity with or relationship to the State of Tennessee," 167 N. L. R. B., at 691, has no "warrant in the record" and no "reasonable basis in law." *NLRB* v. *Hearst Publications,* 322 U. S. 111, 131 (1944).

Respondent is one of nearly 270 utility districts established under the Utility District Law of 1937. Under that statute, Tennessee residents may create districts to provide a wide range of public services such as the

furnishing of water, sewers, sewage disposal, police protection, fire protection, garbage collection, street lighting, parks, and recreational facilities as well as the distribution of natural gas. Tenn. Code Ann. § 6–2608 (Supp. 1970). Acting under the statute, 38 owners of real property submitted in 1957 a petition to the county court of Hawkins County requesting the incorporation of a utility district to distribute natural gas within a specified portion of the county. The county judge, after holding a required public hearing and making required findings that the "public convenience and necessity requires the creation of the district," and that "the creation of the district is economically sound and desirable," Tenn. Code Ann. § 6–2604 (Supp. 1970), entered an order establishing the District. The judge's order and findings were appealable to Tennessee's appellate courts by any party "having an interest in the subject-matter." Tenn. Code Ann. § 6–2606 (1955).

To carry out its functions, the District is granted not only all the powers of a private corporation, Tenn. Code Ann. § 6–2610 (1955), but also "all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature." Tenn. Code Ann. § 6–2612 (1955). This delegation includes the power of eminent domain, which the District may exercise even against other governmental entities. Tenn. Code Ann. § 6–2611 (1955). The District is operated on a nonprofit basis, and is declared by the statute to be "a 'municipality' or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes." Tenn. Code Ann. § 6–2607 (Supp. 1970). The property and revenue of the District are exempted from all state, county, and municipal taxes, and the District's bonds are similarly

exempt from such taxation, except for inheritance, transfer, and estate taxes. Tenn. Code Ann. § 6–2626 (1955).

The District's records are "public records" and as such open for inspection. Tenn. Code Ann. § 6–2615 (Supp. 1970). The District is required to publish its annual statement in a newspaper of general circulation, showing its financial condition, its earnings, and its method of setting rates. Tenn. Code Ann. § 6–2617 (Supp. 1970). The statute requires the District's commissioners to hear any protest to its rates filed within 30 days of publication of the annual statement at a public hearing, and to make and to publish written findings as to the reasonableness of the rates. Tenn. Code Ann. § 6–2618 (1955). The commissioners' determination may be challenged in the county court, under procedures prescribed by the statute. *Ibid.*

The District's commissioners are initially appointed, from among persons nominated in the petition, by the county judge, who is an elected public official. Tenn. Code Ann. § 6–2604 (Supp. 1970). The commissioners serve four-year terms [4] and, contrary to the Board's finding that the State reserves no "power to remove or otherwise discipline those responsible for the Employer's operations," 167 N. L. R. B., at 692, are subject to removal under Tennessee's General Ouster Law, which provides procedures for removing public officials from office for misfeasance or nonfeasance. Tenn. Code Ann. § 8–2701 *et seq.* (1955); *First Suburban Water Utility District* v. *McCanless,* 177 Tenn., at 138, 146 S. W. 2d, at 952. Proceedings under the law may be initiated by the Governor, the state attorney general, the county prosecutor, or ten citizens. Tenn. Code Ann. §§ 8–2708, 8–2709, 8–2710 (1955). When a vacancy occurs, the county

[4] The commissioners' initial terms are staggered, with one commissioner appointed to a two-year term, one to a three-year term, and one to a four-year term. Tenn. Code Ann. § 6–2604 (Supp. 1970).

judge appoints a new commissioner if the remaining two commissioners cannot agree upon a replacement. Tenn. Code Ann. § 6–2614 (Supp. 1970). In large counties, all vacancies are filled by popular election. *Ibid.* The commissioners are generally empowered to conduct the District's business. They have the power to subpoena witnesses and to administer oaths in investigating District affairs, Tenn. Code Ann. § 6–2616 (5) (1955), and they serve for only nominal compensation. Tenn. Code Ann. § 6–2615 (Supp. 1970). Plainly, commissioners who are beholden to an elected public official for their appointment, and are subject to removal procedures applicable to all public officials, qualify as "individuals who are responsible to public officials or to the general electorate" within the Board's test.

In such circumstances, the Board itself has recognized that authority to exercise the power of eminent domain weighs in favor of finding an entity to be a political subdivision. *New Jersey Turnpike Authority,* 33 L. R. R. M. 1528 (1954). We have noted that respondent's power of eminent domain may be exercised even against other governmental units. And the District is further given an extremely broad grant of "all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature." Tenn. Code Ann. § 6–2612 (1955). The District's "public records" requirement and the automatic right to a public hearing and written "decision" by the commissioners accorded to all users betoken a state, rather than a private, instrumentality. The commissioners' power of subpoena and their nominal compensation further suggest the public character of the District.

Moreover, a conclusion that the District is a political subdivision finds support in the treatment of the District under other federal laws. Income from its bonds is ex-

empt from federal income tax, as income from an obligation of a "political subdivision" under 26 U. S. C. § 103. Social Security benefits for the District's employees are provided through voluntary rather than mandatory coverage since the District is considered a political subdivision under the Social Security Act. 42 U. S. C. § 418.

Respondent is therefore an entity "administered by individuals [the commissioners] who are responsible to public officials [an elected county judge]" and this together with the other factors mentioned satisfies us that its relationship to the State is such that respondent is a "political subdivision" within the meaning of § 2 (2) of the Act. Accordingly, the Court of Appeals' judgment denying enforcement of the Board's order is

Affirmed.

MR. JUSTICE STEWART, dissenting.

I agree with the Court that federal, rather than state, law governs the determination of whether an employer is a "political subdivision" of the State within the meaning of § 2 (2) of the National Labor Relations Act, as amended, 29 U. S. C. § 152 (2). But I cannot agree that the Board erred in this case in concluding that the respondent is not entitled to exemption under the Act.

In determining that the respondent Utility District was not a "political subdivision" of the State, the Board followed its settled policy of weighing all relevant factors, with particular emphasis here on the circumstances that the District is neither "created directly by the State" nor "administered by State-appointed or elected officials" and is "autonomous in the conduct of its day-to-day affairs." On the other side, the Board gave less weight to the State's characterization of a utility district as an arm of the State for purposes of exemption from state taxes and conferral of the power of eminent domain.

This approach seems wholly acceptable to me, inas-

much as state tax exemption and the power of eminent domain are not attributes peculiar to political subdivisions nor attributes with any discernible impact on labor relations. Attributes which *would* implicate labor policy, such as the payment of wages out of public funds or restrictions upon the right of the employees to strike, are not present here.

The Court points to provisions that the records of the District be available for public inspection, and that the commissioners of the District hold hearings and make written findings. These factors are said to "betoken a state, rather than a private, instrumentality." The question, however, is not whether the District is a state instrumentality, but whether it is a "political subdivision" of the State. And the provisions in question hardly go to that issue.

The Board's reasonable construction of the Act is entitled to great weight and it is not our function to weigh the facts *de novo* and displace its evaluation with our own. The Board here has made a reasoned decision which does no violence to the purposes of the Act. Accordingly, I would reverse the judgment of the Court of Appeals and remand the case with instructions to enforce the Board's order.

COATES ET AL. *v.* CITY OF CINCINNATI

APPEAL FROM THE SUPREME COURT OF OHIO

No. 117. Argued January 11, 1971—Decided June 1, 1971

Cincinnati, Ohio, ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ," which has not been narrowed by any construction of the Ohio Supreme Court, *held* violative on its face of the due process standard of vagueness and the constitutional right of free assembly and association. Pp. 614–616.

21 Ohio St. 2d 66, 255 N. E. 2d 247, reversed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, HARLAN, BRENNAN, and MARSHALL, JJ., joined. BLACK, J., filed a separate opinion, *post,* p. 616. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post,* p. 617.

Robert R. Lavercombe argued the cause and filed a brief for appellants.

A. David Nichols argued the cause for appellee. With him on the brief was *William A. McClain.*

MR. JUSTICE STEWART delivered the opinion of the Court.

A Cincinnati, Ohio, ordinance makes it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." [1]

[1] "It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both." Section 901–L6, Code of Ordinances of the City of Cincinnati (1956).

The issue before us is whether this ordinance is unconstitutional on its face.

The appellants were convicted of violating the ordinance, and the convictions were ultimately affirmed by a closely divided vote in the Supreme Court of Ohio, upholding the constitutional validity of the ordinance. 21 Ohio St. 2d 66, 255 N. E. 2d 247. An appeal from that judgment was brought here under 28 U. S. C. § 1257 (2),[2] and we noted probable jurisdiction, 398 U. S. 902. The record brought before the reviewing courts tells us no more than that the appellant Coates was a student involved in a demonstration and the other appellants were pickets involved in a labor dispute. For throughout this litigation it has been the appellants' position that the ordinance on its face violates the First and Fourteenth Amendments of the Constitution. Cf. *Times Film Corp.* v. *Chicago,* 365 U. S. 43.

In rejecting this claim and affirming the convictions the Ohio Supreme Court did not give the ordinance any construction at variance with the apparent plain import of its language. The court simply stated:

> "The ordinance prohibits, *inter alia,* 'conduct . . . annoying to persons passing by.' The word 'annoying' is a widely used and well understood word; it is not necessary to guess its meaning. 'Annoying' is the present participle of the transitive verb 'annoy' which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate.

---

[2] "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."

> "We conclude, as did the Supreme Court of the United States in *Cameron* v. *Johnson,* 390 U. S. 611, 616, in which the issue of the vagueness of a statute was presented, that the ordinance 'clearly and precisely delineates its reach in words of common understanding. It is a "precise and narrowly drawn regulatory statute [ordinance] evincing a legislative judgment that certain specific conduct be . . . proscribed." ' " 21 Ohio St. 2d, at 69, 255 N. E. 2d, at 249.

Beyond this, the only construction put upon the ordinance by the state court was its unexplained conclusion that "the standard of conduct which it specifies is not dependent upon each complainant's sensitivity." *Ibid.* But the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.[3]

---

[3] Cf. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, where this Court upheld a statute that punished "offensive, derisive or annoying" words. The state courts had construed the statute as applying only to such words "as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." The state court also said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace." This Court was "unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression." 315 U. S., at 573.

We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391.

It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. *Gregory* v. *Chicago*, 394 U. S. 111, 118, 124–125 (BLACK, J., concurring). It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.[4]

[4] In striking down a very similar ordinance of Cleveland, Ohio, as constitutionally invalid, the Court of Appeals for Cuyahoga County said:

"As it is written, the disorderly assembly ordinance could be used to incriminate nearly any group or individual. With little effort,

But the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. See *Street* v. *New York,* 394 U. S. 576, 592; *Cox* v. *Louisiana,* 379 U. S. 536, 551–553; *Edwards* v. *South Carolina,* 372 U. S. 229, 238; *Terminiello* v. *Chicago,* 337 U. S. 1; *Cantwell* v. *Connecticut,* 310 U. S. 296, 311; *Schneider* v. *State,* 308 U. S. 147, 161. The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct.[5]

---

one can imagine many . . . assemblages which, at various times, might annoy some persons in the city of Cleveland. Anyone could become an unwitting participant in a disorderly assembly, and suffer the penalty consequences. It has been left to the police and the courts to decide when and to what extent ordinance Section 13.1124 is applicable. Neither the police nor a citizen can hope to conduct himself in a lawful manner if an ordinance which is designed to regulate conduct does not lay down ascertainable rules and guidelines to govern its enforcement. This ordinance represents an unconstitutional exercise of the police power of the city of Cleveland, and is therefore void." *Cleveland* v. *Anderson,* 13 Ohio App. 2d 83, 90, 234 N. E. 2d 304, 309–310.

[5] In striking down a very similar ordinance of Toledo, Ohio, as constitutionally invalid, the Municipal Court of that city said:

"Under the provisions of Sections 17–5–10 and 17–5–11, arrests and prosecutions, as in the present instance, would have been effective as against Edmund Pendleton, Peyton Randolph, Richard Henry Lee, George Wythe, Patrick Henry, Thomas Jefferson, George Washington and others for loitering and congregating in front of Raleigh Tavern on Duke of Gloucester Street in Williamsburg, Virginia, at any time during the summer of 1774 to the great annoy-

And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.[6]

The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.

The judgment is reversed.

MR. JUSTICE BLACK.

First. I agree with the majority that this case is properly before us on appeal from the Supreme Court of Ohio.

Second. This Court has long held that laws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face. *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939), *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921). Likewise, laws which broadly forbid conduct or activities which are protected by the Federal Constitution, such as, for instance, the discussion of political matters, are void on their face. *Thornhill* v. *Alabama,* 310 U. S. 88

---

ance of Governor Dunsmore and his colonial constables." *City of Toledo* v. *Sims,* 14 Ohio Op. 2d 66, 69, 169 N. E. 2d 516, 520.

[6] The alleged discriminatory enforcement of this ordinance figured prominently in the background of the serious civil disturbances that took place in Cincinnati in June 1967. See Report of the National Advisory Commission on Civil Disorders 26–27 (1968).

(1940). On the other hand, laws which plainly forbid conduct which is constitutionally within the power of the State to forbid but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain instances. As my Brother WHITE states in his opinion (with which I substantially agree), this is one of those numerous cases where the law could be held unconstitutional because it prohibits both conduct which the Constitution safeguards and conduct which the State may constitutionally punish. Thus, the First Amendment which forbids the State to abridge freedom of speech, would invalidate this city ordinance if it were used to punish the making of a political speech, even if that speech were to annoy other persons. In contrast, however, the ordinance could properly be applied to prohibit the gathering of persons in the mouths of alleys to annoy passersby by throwing rocks or by some other conduct not at all connected with speech. It is a matter of no little difficulty to determine when a law can be held void on its face and when such summary action is inappropriate. This difficulty has been aggravated in this case, because the record fails to show in what conduct these defendants had engaged to annoy other people. In my view, a record showing the facts surrounding the conviction is essential to adjudicate the important constitutional issues in this case. I would therefore vacate the judgment and remand the case with instructions that the trial court give both parties an opportunity to supplement the record so that we may determine whether the conduct actually punished is the kind of conduct which it is within the power of the State to punish.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

The claim in this case, in part, is that the Cincinnati ordinance is so vague that it may not constitutionally

be applied to any conduct. But the ordinance prohibits persons from assembling with others and "conduct[ing] themselves in a manner annoying to persons passing by . . . ." Cincinnati Code of Ordinances § 901–L6. Any man of average comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the "annoying conduct" standard of the ordinance. It would be frivolous to say that these and many other kinds of conduct are not within the foreseeable reach of the law.

It is possible that a whole range of other acts, defined with unconstitutional imprecision, is forbidden by the ordinance. But as a general rule, when a criminal charge is based on conduct constitutionally subject to proscription and clearly forbidden by a statute, it is no defense that the law would be unconstitutionally vague if applied to other behavior. Such a statute is not vague on its face. It may be vague as applied in some circumstances, but ruling on such a challenge obviously requires knowledge of the conduct with which a defendant is charged.

In *Williams* v. *United States,* 341 U. S. 97 (1951), a police officer was charged under federal statutes with extracting confessions by force and thus, under color of law, depriving the prisoner there involved of rights, privileges, and immunities secured or protected by the Constitution and laws of the United States, contrary to 18 U. S. C. § 242. The defendant there urged that the standard—rights, privileges, and immunities secured by the Constitution—was impermissibly vague and, more particularly, that the Court was often so closely divided on illegal-confession issues that no defendant could be expected to know when he was violating the law. The Court's response was that, while application of the stat-

ute to less obvious methods of coercion might raise doubts about the adequacy of the standard of guilt, in the case before it, it was "plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause." *Id.*, at 101. The claim of facial vagueness was thus rejected.

So too in *United States* v. *National Dairy Corp.*, 372 U. S. 29 (1963), where we considered a statute forbidding sales of goods at "unreasonably" low prices to injure or eliminate a competitor, 15 U. S. C. § 13a, we thought the statute gave a seller adequate notice that sales below cost were illegal. The statute was therefore not facially vague, although it might be difficult to tell whether certain other kinds of conduct fell within this language. We said: "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *Id.*, at 33. See also *United States* v. *Harriss*, 347 U. S. 612 (1954). This approach is consistent with the host of cases holding that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960), and cases there cited.

Our cases, however, including *National Dairy*, recognize a different approach where the statute at issue purports to regulate or proscribe rights of speech or press protected by the First Amendment. See *United States* v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Kunz* v. *New York*, 340 U. S. 290 (1951). Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is

419-882 O - 72 - 44

permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. *Dombrowski* v. *Pfister,* 380 U. S. 479, 491–492 (1965). The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights. See *United States* v. *National Dairy Corp., supra,* at 36.

Even accepting the overbreadth doctrine with respect to statutes clearly reaching speech, the Cincinnati ordinance does not purport to bar or regulate speech as such. It prohibits persons from assembling and "conduct[ing]" themselves in a manner annoying to other persons. Even if the assembled defendants in this case were demonstrating and picketing, we have long recognized that picketing is not solely a communicative endeavor and has aspects which the State is entitled to regulate even though there is incidental impact on speech. In *Cox* v. *Louisiana,* 379 U. S. 559 (1965), the Court held valid on its face a statute forbidding picketing and parading near a courthouse. This was deemed a valid regulation of conduct rather than pure speech. The conduct reached by the statute was "subject to regulation even though [it was] intertwined with expression and association." *Id.,* at 563. The Court then went on to consider the statute as applied to the facts of record.

In the case before us, I would deal with the Cincinnati ordinance as we would with the ordinary criminal statute. The ordinance clearly reaches certain conduct but may be illegally vague with respect to other conduct. The statute is not infirm on its face and since we have no information from this record as to what conduct was

charged against these defendants, we are in no position to judge the statute as applied. That the ordinance may confer wide discretion in a wide range of circumstances is irrelevant when we may be dealing with conduct at its core.

I would therefore affirm the judgment of the Ohio Supreme Court.

NELSON, WARDEN *v.* O'NEIL

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

No. 336. Argued March 24, 1971—Decided June 1, 1971

Respondent and one Runnels were charged with committing various crimes and at their joint trial offered an alibi defense. A police officer testified that Runnels had orally admitted the crimes and implicated respondent. Runnels, who took the stand, denied making the statement. The trial judge ruled that Runnels' alleged statement was inadmissible hearsay as to respondent and could not be considered by the jury in deciding whether respondent was guilty. Respondent also took the stand on his own behalf and gave the same version of their activities as Runnels. Both defendants were found guilty, and, after unsuccessful efforts to have his conviction set aside, respondent applied for habeas corpus relief. The District Court ruled that respondent's conviction was improper under *Bruton* v. *United States,* 391 U. S. 123, and *Roberts* v. *Russell,* 392 U. S. 293, which held that the Confrontation Clause of the Sixth Amendment as made applicable to the States by the Fourteenth is violated where a codefendant's out-of-court hearsay statement is admitted into evidence without the declarant's being available at trial for "full and effective" cross-examination by the defendant, and that a cautionary instruction to the jury does not adequately protect the defendant where the codefendant does not testify. The Court of Appeals affirmed, stressing that effective confrontation of a witness who has allegedly made an out-of-court statement implicating the defendant was possible only if the witness affirmed the statement as his. *Held:* Where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and testifies in the defendant's favor, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments and in the circumstances of this case respondent, who would have encountered greater difficulty had Runnels affirmed the statement as his, was denied neither the opportunity nor the benefit of fully and effectively cross-examining Runnels. *Bruton, supra,* distinguished. Pp. 626–630.

422 F. 2d 319, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed a concurring opinion, *post,* p. 630. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post,* p. 632. MARSHALL, J., filed a dissenting opinion, *post,* p. 635.

Charles R. B. Kirk, Deputy Attorney General of California, argued the cause for petitioner. With him on the brief were *Evelle J. Younger,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *John T. Murphy,* Deputy Attorney General.

James S. Campbell, by appointment of the Court, 400 U. S. 955, argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Joe O'Neil, was arrested along with a man named Runnels when the police of Culver City, California, answered a midnight call from a liquor store reporting that two men in a white Cadillac were suspiciously cruising about in the neighborhood. The police responded to the call, spotted the Cadillac, and followed it into an alley where a gun was thrown from one of its windows. They then stopped the car and apprehended the respondent and Runnels. Further investigation revealed that the car had been stolen about 10:30 that night in Los Angeles by two men who had forced its owner at gunpoint to drive them a distance of a few blocks and then had robbed him of $8 and driven off. The victim subsequently picked Runnels and the respondent from a lineup, positively identifying them as the men who had kidnaped and robbed him.

Arraigned on charges of kidnaping, robbery, and vehicle theft, both the respondent and Runnels pleaded not

guilty, and at their joint trial they offered an alibi defense. Each told the same story: they had spent the evening at the respondent's home until about 11 p. m., when they had left together. While waiting at a bus stop they were picked up by a friend driving a white Cadillac, and he offered to lend them the car for a few hours while he went into a nightclub. They accepted the offer, and once on their way discovered that there was a gun in the glove compartment. They entered an alley in search of a place to dispose of the gun, since they were afraid of being stopped with it in the car. Soon after throwing the gun out of the window they were stopped by the police and arrested. The supposed friend was not called as a witness and was not shown to be unavailable, but other witnesses corroborated parts of their alibi testimony.

The owner of the white Cadillac made a positive in-court identification of the defendants, and a police officer testified to the facts of the arrest. Another police officer testified that after the arrest Runnels had made an unsworn oral statement admitting the crimes and implicating the respondent as his confederate. The trial judge ruled the officer's testimony as to the substance of the alleged statement admissible against Runnels, but instructed the jury that it could not consider it against the respondent. When Runnels took the stand in his own defense, he was asked on direct examination whether he had made the statement, and he flatly denied having done so. He also vigorously asserted that the substance of the statement imputed to him was false. He was then intensively cross-examined by the prosecutor, but stuck to his story in every particular. The respondent's counsel did not cross-examine Runnels, although he was, of course, fully free to do so. The respondent took the stand on his own behalf and told a story identical to that of Runnels as to the activities of the two on the night

in question. Both the prosecutor and Runnels' counsel discussed the alleged confession in their closing arguments to the jury, and the trial judge repeated his instruction that it could be considered only against Runnels.

The jury found both defendants guilty as charged. After unsuccessful efforts to set aside the conviction in the California courts, the respondent applied for federal habeas corpus relief in the United States District Court for the Northern District of California, and while the case was pending there this Court decided *Bruton* v. *United States,* 391 U. S. 123, and *Roberts* v. *Russell,* 392 U. S. 293, holding that under certain circumstances the Confrontation Clause of the Sixth Amendment,[1] applicable to the States through the Fourteenth,[2] is violated when a codefendant's confession implicating the defendant is placed before the jury at their joint trial.[3] The District Court ruled that the respondent's conviction had to be set aside under *Bruton* and *Roberts,* and the Court of Appeals for the Ninth Circuit affirmed. 422 F. 2d 319 (1970). Petitioner then sought a writ of certiorari in this Court, contending, first, that there was no constitutional error under *Bruton* and *Roberts,* second, that any error there might have been was harmless beyond a reasonable doubt under the doctrine of *Chapman* v. *California,* 386 U. S. 18, and, third, that the District Court should have required the respondent first to seek redress in the state courts, which had had no opportunity to consider the *Bruton* claim. We granted certiorari to

[1] The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

[2] See *Pointer* v. *Texas,* 380 U. S. 400; *Douglas* v. *Alabama,* 380 U. S. 415.

[3] *Roberts* v. *Russell,* 392 U. S. 293, held that the decision in *Bruton* v. *United States,* 391 U. S. 123, is applicable to the States and is to be applied retroactively.

consider these issues. 400 U. S. 901. Since we agree with the petitioner that there was no violation of the Constitution in this case, it is unnecessary to consider the other questions presented.

Runnels' out-of-court confession implicating the respondent was hearsay as to the latter, and therefore inadmissible against him under state evidence law. The trial judge so ruled, and instructed the jury that it must not consider any part of the statement in deciding whether or not the respondent was guilty. In *Bruton,* however, we held that, quite apart from the law of evidence, such a cautionary instruction to the jury is not an adequate protection for the defendant where the codefendant does not take the witness stand. We held that where the jury hears the codefendant's confession implicating the defendant, the codefendant becomes in substance, if not in form, a "witness" against the defendant. The defendant must constitutionally have an opportunity to "confront" such a witness. This the defendant cannot do if the codefendant refuses to take the stand.

It was clear in *Bruton* that the "confrontation" guaranteed by the Sixth and Fourteenth Amendments is confrontation *at trial*—that is, that the absence of the defendant at the time the codefendant allegedly made the out-of-court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial. This was confirmed in *California* v. *Green,* 399 U. S. 149, where we said that "[v]iewed historically . . . there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.,* at 158. Moreover, "where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the con-

clusion that the admission of his out-of-court statements does not create a confrontation problem." *Id.*, at 162. This is true, of course, even though the declarant's out-of-court statement is hearsay as to the defendant, so that its admission against him, in the absence of a cautionary instruction, would be reversible error under state law. The Constitution as construed in *Bruton,* in other words, is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for "full and effective" cross-examination.

The question presented by this case, then, is whether cross-examination can be full and effective where the declarant is present at the trial, takes the witness stand, testifies fully as to his activities during the period described in his alleged out-of-court statement, but denies that he made the statement and claims that its substance is false.

In affirming the District Court, the Court of Appeals relied heavily on the dictum of this Court in *Douglas* v. *Alabama,* 380 U. S. 415, 420, that "effective confrontation" of a witness who has allegedly made an out-of-court statement implicating the defendant "was possible only if [the witness] affirmed the statement as his." The Court in that case also remarked that the witness "could not be cross-examined on a statement imputed to but not admitted by him." *Id.*, at 419. Of course, a witness *can* be cross-examined concerning a statement not "affirmed" by him, but this dictum from *Douglas* was repeated in *Bruton, supra,* at 127. In *Douglas* and *Bruton* (and in the other confrontation cases before *Green*) [4] there was in fact no question of the effect of an affirmance or denial

[4] *Brookhart* v. *Janis,* 384 U. S. 1; *Barber* v. *Page,* 390 U. S. 719; *Roberts* v. *Russell,* 392 U. S. 293; *Harrington* v. *California,* 395 U. S. 250.

of the incriminating statement, since the witness or codefendant was in each case totally unavailable at the trial for any kind of cross-examination. The specific holding of the Court in *Bruton* was:

> "Plainly, the introduction of [the codefendant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since [the codefendant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation." 391 U. S., at 127–128.

This Court has never gone beyond that holding.

In *California* v. *Green, supra,* the defendant was accused of furnishing marihuana to a minor, partly on the basis of an unsworn statement, not subject to cross-examination, made by the minor himself while he was under arrest for selling the drug. When the minor, not a codefendant, took the stand at the defendant's trial, he claimed that he could not remember any of the incriminating events described in his out-of-court statement, although he admitted having made the statement and claimed that he believed it when he made it. The earlier statement was then introduced in evidence to show the truth of the matter asserted, and this Court held it admissible for that purpose. The circumstances of *Green* are inverted in this case. There, the witness affirmed the out-of-court statement but was unable to testify in court as to the underlying facts; here, the witness, Runnels, denied ever making an out-of-court statement but testified at length, and favorably to the defendant, concerning the underlying facts.

Had Runnels in this case "affirmed the statement as his," the respondent would certainly have been in far worse straits than those in which he found himself when

Runnels testified as he did. For then counsel for the respondent could only have attempted to show through cross-examination that Runnels had confessed to a crime he had not committed, or, slightly more plausibly, that those parts of the confession implicating the respondent were fabricated. This would, moreover, have required an abandonment of the joint alibi defense, and the production of a new explanation for the respondent's presence with Runnels in the white Cadillac at the time of their arrest. To be sure, Runnels might have "affirmed the statement" but denied its truthfulness, claiming, for example, that it had been coerced, or made as part of a plea bargain. But cross-examination by the respondent's counsel would have been futile in that event as well. For once Runnels had testified that the statement was false, it could hardly have profited the respondent for his counsel through cross-examination to try to shake that testimony. If the jury were to believe that the statement was false as to Runnels, it could hardly conclude that it was not false as to the respondent as well.

The short of the matter is that, given a joint trial and a common defense, Runnels' testimony respecting his alleged out-of-court statement was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had Runnels "affirmed the statement as his." It would be unrealistic in the extreme in the circumstances here presented to hold that the respondent was denied either the opportunity or the benefit of full and effective cross-examination of Runnels.

We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights

protected by the Sixth and Fourteenth Amendments. Accordingly, the judgment is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

I join in the opinion and judgment of the Court. I would, however, go further and hold that, because respondent's conviction became final before this Court decided *Bruton* v. *United States,* 391 U. S. 123 (1968), he cannot avail himself of that new rule in subsequent federal habeas corpus proceedings. See *Mackey* v. *United States,* 401 U. S. 667, 675 (1971) (separate opinion of this writer).

It is difficult to fathom what public policy is served by opening the already overcrowded federal courts to claims such as these. Respondent's trial and appeals were, at the time they occurred, conducted in a manner perfectly consistent with then-prevailing constitutional norms. A reversal of the conviction now would either compel the State to place an already once-tried case again on its criminal docket, to be retried on substantially the same (but now more stale) evidence or else force the State to forgo its interest in enforcing in this instance its criminal laws relating to kidnaping, robbery, and car theft because of the disappearance of evidence. Conversely, if federal habeas relief is denied on the merits, as it now is by this Court, the energies of the federal courts have been expended to no good purpose.

To justify such a serious interference with the State's powers to enforce its criminal law and the ability of federal courts to provide full, fair, and prompt hearings to those who have no other forum available should require the presence of a most substantial countervailing societal

interest. But what interest is conceivably promoted by further adjudication of the contentions respondent urges upon us? Surely, indulging his claims does not serve the function of assuring that state courts properly apply governing constitutional standards. For this is precisely what the California courts did in this case. See, *e. g., Delli Paoli* v. *United States,* 352 U. S. 232 (1957). Nor can it plausibly be argued that we perceive in this case serious issues as to whether respondent was in fact likely innocent of the crime for which he was convicted or whether he was subjected to an intolerable abuse of the prosecutorial function that rendered his trial fundamentally unfair.

The only rationale I can imagine that might support entertaining *Bruton* claims in federal habeas proceedings brought by state prisoners whose convictions had become final prior to the decision in *Bruton* and who had a full and fair opportunity to litigate their claims at trial and on appeal, is the notion that *Bruton* is somehow an unimpeachably correct decision, so infallibly just that other earlier decisions inconsistent with it must be treated as though they had never been made. Even were this a tenable position, the fact is, as the Court notes, that respondent is actually seeking an extension of the *Bruton* holding. More importantly, for me such an "infallibility" argument could rest on nothing more than the fanciful notion that perception of ultimate constitutional verity is always to be found in those who "came after" to this Court.

Such a drastic disruption of judicial processes and alteration of our traditional federal-state balance should be supported by more persuasive considerations than those which led the Court in *Roberts* v. *Russell,* 392 U. S. 293 (1968), to hold the *Bruton* rule fully "retroactive" in ap-

plication. I venture to repeat what I stated earlier this Term in *Mackey, supra:*

> "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." 401 U. S., at 667.

I think it unfortunate that substantial federal judicial energies have been expended, for virtually no purpose at all, on the adjudication of this habeas proceeding. Since the Court has decided to address the merits of respondent's contentions, however, I unreservedly join in its resolution of them.

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

With all deference, I think the Court asks and answers the wrong question in this case. Under the law of California at the time of respondent's trial, admissions to a police officer by a criminal defendant after his arrest could not be used as substantive evidence against other defendants, whether or not the declarant testified at trial.[1] The question with which we are faced is not, therefore, whether the Sixth Amendment would forbid California from using Runnels' statement as substantive evidence against respondent O'Neil if it chose to do so. California rejected that choice: the jury in the present case was explicitly instructed that Runnels' statement could not be considered as evidence against O'Neil.

[1] See *People* v. *Aranda,* 63 Cal. 2d 518, 407 P. 2d 265 (1965); *People* v. *Roberts,* 40 Cal. 2d 483, 254 P. 2d 501 (1953). The California Evidence Code, presently in effect, did not become operative until January 1, 1967.

The question, therefore, is whether California, having determined for whatever reason that the statement involved in this case was inadmissible against respondent, may nevertheless present the statement to the jury that was to decide respondent's guilt, and instruct that jury that it should not be considered against respondent. I think our cases compel the conclusion that it may not.

In *Bruton* v. *United States,* 391 U. S. 123 (1968), we reviewed a federal trial in which the extrajudicial confession of one Evans, which implicated both Evans and Bruton in the crime charged, was set before the jury along with instructions that it could be considered as evidence only against Evans. Evans himself did not testify. We held, first, that the Sixth Amendment in those circumstances forbade the use against Bruton of Evans' statement; and second, that since there was a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt," the Sixth Amendment required that Bruton's conviction be reversed. *Id.,* at 126.

Shortly thereafter, we made clear that the second prong of our holding in *Bruton*—that instructing juries not to use one defendant's admissions against the other could not, in fact, prevent them from making such a use—had a constitutional basis.[2] In *Roberts* v. *Russell,* 392 U. S. 293 (1968), we reviewed a state criminal trial presenting facts substantially identical to those presented in *Bruton.* Roberts and one Rappe had been jointly tried on charges

[2] This point was explicitly made in *Bruton* itself by MR. JUSTICE STEWART:

"[C]ertain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give." 391 U. S., at 138 (concurring opinion) (emphasis in original).

to which Rappe had confessed to a police officer. Rappe's confession implicated both himself and Roberts; it was presented to the jury together with instructions that Rappe's extrajudicial statements could be considered as evidence only against Rappe, and not against Roberts. As in *Bruton,* we reversed. *Roberts* v. *Russell,* therefore, must stand for the proposition that as a constitutional matter, the risk that a jury will not follow instructions to disregard the statements of one codefendant against another is too great to tolerate in a criminal trial. For, as we pointed out in *Bruton,* "If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor." 391 U. S., at 126.

Bruton and *Roberts,* therefore, compel the conclusion that the Federal Constitution forbids the States to assume that juries can follow instructions that tell them to wipe their minds of highly damaging, incriminating admissions of one defendant that simultaneously incriminate another defendant whose guilt or innocence the jury is told to decide. In the present case, California itself has made the judgment that, although Runnels did take the stand, his extrajudicial statements could not be considered by the jury as evidence against respondent. Under *Bruton* and *Roberts,* California having made the determination that Runnels' statement could not be considered as evidence against O'Neil may not subvert its own judgment in some but not all cases by presenting the inadmissible evidence to the jury and telling the jury to disregard it. For the inevitable result of this procedure is that, in fact, different rules of evidence will be applied to different defendants depending solely upon the fortuity of whether they are jointly or

separately tried. This is a discrimination that the Constitution forbids.

Accordingly, I would affirm the judgment below. In no event, however, would I reach the question decided by the Court in this case. For if we assume that the jury did follow its instructions to disregard Runnels' statement against respondent, his complaint is obviously without foundation. If we assume that it did not, we still need not reach the question whether California could constitutionally allow Runnels' statements to be used as evidence against respondent, for California has not purported to do so.[3] Having made that judgment, California is bound to apply it to all defendants or to none. I dissent.

MR. JUSTICE MARSHALL, dissenting.

This case dramatically illustrates the need for the adoption of new rules regulating the use of joint trials. Here there is no question that Runnels' alleged statement to the police was not admissible under state law against O'Neil. But as my Brother BRENNAN points out and as this Court recognized in *Bruton* v. *United States,* 391 U. S. 123 (1968), there is a very real danger that the statement was in fact used against O'Neil.

Those that argue for the use of joint trials contend that joint trials, although often resulting in prejudice to recognized rights of one or more of the codefendants, are justified because of the saving of time, money, and energy that result. But, as this case shows, much of the supposed saving is lost through protracted litigation that results from the impingement or near impingement on a codefendant's rights of confrontation and equal protection.

---

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

419-882 O - 72 - 45

The American Bar Association's Project on Standards for Criminal Justice, Advisory Committee on the Criminal Trial, suggested that if a defendant in a joint trial moves for a severance because the prosecutor intends to introduce an out-of-court statement by his codefendant that is inadmissible against the moving defendant, then the trial court should require the prosecutor to elect between a joint trial in which the statement is excluded; a joint trial at which the statement is admitted but the portion that refers to the moving defendant is effectively deleted; and severance.* I believe that the adoption of such a practice is the only way in which the recurring problems of confrontation and equal protection can be eliminated.

---

*Section 2.3 of the American Bar Association Project on Standards for Criminal Justice, Joinder and Severance (Approved Draft 1968) provides:

"Severance of defendants.

"(a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:

"(i) a joint trial at which the statement is not admitted into evidence;

"(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or

"(iii) severance of the moving defendant."

Syllabus

PEREZ ET UX. *v.* CAMPBELL, SUPERINTENDENT, MOTOR VEHICLE DIVISION, ARIZONA HIGHWAY DEPARTMENT, ET AL.

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

No. 5175. Argued January 19, 1971—Decided June 1, 1971

The provision that "discharge in bankruptcy following the rendering of any such judgment [as a result of an automobile accident] shall not relieve the judgment debtor from any of the requirements of this article," contained in Ariz. Rev. Stat. § 28–1163 (B), part of the Motor Vehicle Safety Responsibility Act, which the Arizona courts have construed as having as "its principal purpose the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons," directly conflicts with § 17 of the Bankruptcy Act, which states that a discharge in bankruptcy fully discharges all but certain specified judgments, and is thus unconstitutional as violative of the Supremacy Clause. *Kesler* v. *Department of Public Safety,* 369 U. S. 153, and *Reitz* v. *Mealey,* 314 U. S. 33, have no authoritative effect to the extent they are inconsistent with the controlling principle that state legislation that frustrates the full effectiveness of federal law is invalidated by the Supremacy Clause. Pp. 644–656.

421 F. 2d 619, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BLACK, DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result as to petitioner Emma Perez and dissenting as to petitioner Adolfo Perez, in which BURGER, C. J., and HARLAN and STEWART, JJ., joined, *post,* p. 657.

Anthony B. Ching argued the cause and filed a brief for petitioners.

Robert H. Schlosser argued the cause for respondents. With him on the brief was *Gary K. Nelson,* Attorney General of Arizona.

Briefs of *amici curiae* were filed by *David A. Binder, Raine Eisler,* and *Paul L. McKaskle* for the Western Center on Law and Poverty et al., and by *William D. Browning* for the National Organization for Women.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises an important issue concerning the construction of the Supremacy Clause of the Constitution—whether Ariz. Rev. Stat. Ann. § 28–1163 (B) (1956), which is part of Arizona's Motor Vehicle Safety Responsibility Act, is invalid under that clause as being in conflict with the mandate of § 17 of the Bankruptcy Act, 11 U. S. C. § 35, providing that receipt of a discharge in bankruptcy fully discharges all but certain specified judgments. The courts below, concluding that this case was controlled by *Kesler* v. *Department of Public Safety,* 369 U. S. 153 (1962), and *Reitz* v. *Mealey,* 314 U. S. 33 (1941), two earlier opinions of this Court dealing with alleged conflicts between the Bankruptcy Act and state financial responsibility laws, ruled against the claim of conflict and upheld the Arizona statute.

On July 8, 1965, petitioner Adolfo Perez, driving a car registered in his name, was involved in an automobile accident in Tucson, Arizona. The Perez automobile was not covered by liability insurance at the time of the collision. The driver of the second car was the minor daughter of Leonard Pinkerton, and in September 1966 the Pinkertons sued Mr. and Mrs. Perez in state court for personal injuries and property damage sustained in the accident. On October 31, 1967, the petitioners confessed judgment in this suit, and a judgment order was entered against them on November 8, 1967, for $2,425.98 plus court costs.

Mr. and Mrs. Perez each filed a voluntary petition in bankruptcy in Federal District Court on November 6, 1967. Each of them duly scheduled the judgment debt

to the Pinkertons. The District Court entered orders on July 8, 1968, discharging both Mr. and Mrs. Perez from all debts and claims provable against their estates, including the Pinkerton judgment. 11 U. S. C. § 35; *Lewis* v. *Roberts,* 267 U. S. 467 (1925).

During the pendency of the bankruptcy proceedings, the provisions of the Arizona Motor Vehicle Safety Responsibility Act came into play. Although only one provision of the Arizona Act is relevant to the issue presented by this case, it is appropriate to describe the statutory scheme in some detail. The Arizona statute is based on the Uniform Motor Vehicle Safety Responsibility Act promulgated by the National Conference on Street and Highway Safety.[1] Articles 1 and 2 of the Act deal, respectively, with definitional matters and administration.

The substantive provisions begin in Art. 3, which requires the posting of financial security by those involved in accidents. Section 28–1141 of that article requires suspension of licenses for unlawful failure to report accidents, and § 28–1142 (Supp. 1970–1971) provides that within 60 days of the receipt of an accident report the Superintendent of the Motor Vehicle Division of the Highway Department shall suspend the driver's license of the operator and the registration of the owner of a car involved in an accident "unless such operator or owner or both shall deposit security in a sum which is sufficient in the judgment of the superintendent to satisfy any judgment or judgments for damages resulting from the accident as may be recovered against the operator or owner." Under the same section, notice of such suspension and the amount of security required must be sent to the owner and operator not less than 10 days prior to the effective date of the suspension. This section does not apply if the owner or the operator carried liabil-

[1] See Reviser's Note, Ariz. Rev. Stat. Ann. § 28–1101.

ity insurance or some other covering bond at the time of the accident, or if such individual had previously qualified as a self-insurer under § 28–1222. Other exceptions to the requirement that security be posted are stated in § 28–1143.[2] If none of these exceptions applies, the suspension continues until: (1) the person whose privileges were suspended deposits the security required under § 28–1142 (Supp. 1970–1971); (2) one year elapses from the date of the accident and the person whose privileges were suspended files proof with the Superintendent that no one has initiated an action for damages arising from the accident; (3) evidence is filed with the superintendent that a release from liability, an adjudication of nonliability, a confession of judgment, or some other written settlement agreement has been entered.[3] As far as the record in the instant case shows,

---

[2] Under Ariz. Rev. Stat. Ann. § 28–1143 (A), the owner or operator of a car involved in an accident need not post security as required by § 28–1142 (Supp. 1970–1971): (1) if the accident caused injury or damage to no person or property other than the owner's car or the operator's person; (2) if the car was parked when involved in the accident, unless it was parked illegally or did not carry a legally sufficient complement of lights; (3) if the car was being driven or was parked by another without the owner's express or implied permission; (4) if prior to date for suspension the person whose license or registration would be suspended files with the superintendent a release, a final adjudication of nonliability, a confession of judgment, or some other written settlement agreement providing for payment, in installments, of an agreed amount of damages with respect to claims arising from the accident; or (5) if the driver at the time of the accident was driving a vehicle owned, operated, or leased by his employer with the employer's permission; in that case the security and suspension provisions apply only to the owner-employer's registration of vehicles not covered by insurance or other bond.

[3] This section further provides that the superintendent may employ suspension a second time as a means of enforcing payment should

the provisions of Art. 3 were not invoked against petitioners, and the constitutional validity of these provisions is, of course, not before us for decision.

Article 4 of the Arizona Act, which includes the only provision at issue here, deals with suspension of licenses and registrations for nonpayment of judgments. Interestingly, it is only when the judgment debtor in an automobile accident lawsuit—usually an owner-operator like Mr. Perez—fails to respond to a judgment entered against him that he must overcome two hurdles in order to regain his driving privileges. Section 28–1161, the first section of Art. 4, requires the state court clerk or judge, when a judgment [4] has remained unsatisfied for 60 days after entry, to forward a certified copy of the judgment to the superintendent.[5] This was done in the present case, and on March 13, 1968, Mr. and Mrs. Perez were served with notice that their drivers' licenses and registration were suspended pursuant to § 28–1162 (A).[6] Under other provisions of Art. 4, such suspension is to

---

there be a default on installment obligations arising under a confession of judgment or a written settlement agreement. Ariz. Rev. Stat. Ann § 28–1144 (3).

[4] Ariz. Rev. Stat. Ann § 28–1102 (Supp. 1970–1971) defines "judgment," for purposes of the Motor Vehicle Safety Responsibility Act, as "any judgment which has become final . . . , upon a cause of action arising out of the ownership, maintenance or use of a motor vehicle, for damages . . . or upon a cause of action on an agreement of settlement for such damages."

[5] Under Ariz. Rev. Stat. Ann. § 28–1161 (B), a similar notice must also be forwarded to officials in the home State of a nonresident judgment debtor.

[6] "A. The superintendent upon receipt of a certified copy of a judgment, shall forthwith suspend the license and registration and nonresident operating privilege of a person against whom the judgment was rendered, except as otherwise provided in this section and § 28–1165."

continue until the judgment is paid,[7] and § 28–1163 (B) specifically provides that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article." In addition to requiring satisfaction of the judgment debt, § 28–1163 (A) provides that the license and registration "shall remain suspended and shall not be renewed, nor shall any license or registration be thereafter issued in the name of the person . . . until the person gives proof of financial responsibility" for a future period.[8] Again, the validity of this limited requirement that some drivers post evidence of financial responsibility for the future in order to regain driving privileges is not questioned here. Nor is the broader issue of whether a

---

[7] Ariz. Rev. Stat. Ann. § 28–1163 (A). Ariz. Rev. Stat. Ann. § 28–1164 (Supp. 1970–1971) defines when a judgment is "paid." Ariz. Rev. Stat. Ann. § 28–1165 sets forth a procedure for paying judgments in installments. Ariz. Rev. Stat. Ann. § 28–1162 (B) provides that if a creditor consents in writing and the debtor furnishes proof of financial responsibility, see Ariz. Rev. Stat. Ann. § 28–1167, the debtor's license and registration may be restored in the superintendent's discretion. After six months, however, the creditor's consent is revocable provided the judgment debt remains unpaid.

[8] Sections 28–1167 through 28–1178 set forth the requirements for various forms of proof. Under § 28–1178, the judgment debtor is apparently able to regain his license and registration to operate a motor vehicle without proof of financial responsibility after three years from the date such proof was first required of him, if during that period the superintendent has not received any notice—and notice can come from other States—of a conviction or forfeiture of bail which would require or permit the suspension or revocation of the driver's license and if the individual is not involved in litigation arising from an accident covered by the security he posted. If the driver required to post financial security does so, and is involved as an owner or operator in another accident resulting in personal injury or property damage within one year prior to the date he requests permission to cancel his security, the superintendent may not permit cancellation.

State may require proof of financial responsibility as a precondition for granting driving privileges to anyone before us for decision. What is at issue here is the power of a State to include as part of this comprehensive enactment designed to secure compensation for automobile accident victims a section providing that a discharge in bankruptcy of the automobile accident tort judgment shall have no effect on the judgment debtor's obligation to repay the judgment creditor, at least insofar as such repayment may be enforced by the withholding of driving privileges by the State. It was that question, among others, which petitioners raised after suspension of their licenses and registration by filing a complaint in Federal District Court seeking declaratory and injunctive relief and requesting a three-judge court. They asserted several constitutional violations, and also alleged that § 28–1163 (B) was in direct conflict with the Bankruptcy Act and was thus violative of the Supremacy Clause of the Constitution.[9] In support of their complaint, Mr. and Mrs. Perez filed affidavits stating that the suspension of their licenses and registration worked both physical and financial hardship upon them and their children. The District Judge granted the petitioners leave to proceed *in forma pauperis*, but thereafter granted the respondents' motion to dismiss the complaint for failure to state a claim upon which relief could be granted, citing *Kesler* and *Reitz*.[10] The Court of Appeals affirmed, relying on

[9] U. S. Const., Art. VI, cl. 2.

[10] Mr. and Mrs. Perez also alleged in their complaint that certain provisions of the Arizona Act imposed involuntary servitude in violation of the Thirteenth Amendment, and denied Fourteenth Amendment due process and equal protection. They also claimed that portions of the Arizona Act operated as a bill of attainder in violation of Art. I, § 10, of the Constitution. The District Judge, in refusing to request the convening of a three-judge court, ruled that these constitutional claims were "obviously insubstantial." The Court of Appeals agreed. 421 F. 2d 619, 625 (CA9 1970). Because

the same two decisions. 421 F. 2d 619 (CA9 1970). We granted certiorari. 400 U. S. 818 (1970).

I

Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict. In the present case, both statutes have been authoritatively construed. In *Schecter* v. *Killingsworth,* 93 Ariz. 273, 380 P. 2d 136 (1963), the Supreme Court of Arizona held that "[t]he Financial Responsibility Act has for its principal purpose the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons." 93 Ariz., at 280, 380 P. 2d, at 140. The Arizona court has consistently adhered to this construction of its legislation, see *Camacho* v. *Gardner,* 104 Ariz. 555, 558, 456 P. 2d 925, 928 (1969); *New York Underwriters Ins. Co.* v. *Superior Court,* 104 Ariz. 544, 456 P. 2d 914 (1969); *Sandoval* v. *Chenoweth,* 102 Ariz. 241, 243, 428 P. 2d 98, 100 (1967); *Farmer* v. *Killingsworth,* 102 Ariz. 44, 47, 424 P. 2d 172, 175 (1967); *Hastings* v. *Thurston,* 100 Ariz. 302, 306, 413 P. 2d 767, 770 (1966); *Jenkins* v. *Mayflower Ins. Exchange,* 93 Ariz. 287, 290, 380 P. 2d 145, 147 (1963), and we are bound by its rulings. See, *e. g., General Trading Co.* v. *State Tax Comm'n,* 322 U. S. 335, 337 (1944). Although the dissent seems unwilling to accept the Arizona Supreme Court's construction of the statute as expressive of the Act's primary purpose [11]

---

of our resolution of this case, we express no opinion as to the substantiality of any of petitioners' other constitutional claims.

[11] As discussed below, the majorities in *Kesler* and *Reitz* also seemed unwilling to be bound by, or even to look for, state court constructions of the financial responsibility laws before them. See

and indeed characterizes that construction as unfortunate, *post,* at 667, a reading of the provisions outlined above leaves the impression that the Arizona Court's

---

infra, at 652–654. It is clear, however, from even a cursory examination of decisions in other States that the conclusion of the Arizona Supreme Court as to the purpose of the financial responsibility law is by no means unusual. See, *e. g., Sullivan* v. *Cheatham,* 264 Ala. 71, 76, 84 So. 2d 374, 378 (1955) ("The purpose of the [Motor Vehicle Safety-Responsibility] Act is clearly to require and establish financial responsibility for *every* owner or operator of a motor vehicle 'in any manner involved in an accident.' . . . The Act is designed to protect all persons having claims arising out of highway accidents."); *Escobedo* v. *State Dept. of Motor Vehicles,* 35 Cal. 2d 870, 876, 222 P. 2d 1, 5 (1950) ("[T]he state chose to allow financially irresponsible licensed operators to drive until they became involved in an accident with the consequences described in the [financial responsibility law] and their financial irresponsibility was thus brought to the attention of the department, and then to require suspension of their licenses."); *People* v. *Nothaus,* 147 Colo. 210, 215–216, 363 P. 2d 180, 183 (1961) ("The requirement of C. R. S. '53, 13–7–7, that the director of revenue, '. . . shall suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in [an] accident . . .' unless such persons deposit a sum 'sufficient in the judgment of the director . . .' to pay any damage which may be awarded, or otherwise show ability to indemnify the other party to the accident against financial loss, has nothing whatever to do with the protection of the public safety, health, morals or welfare. It is a device designated and intended to bring about the posting of security for the payment of a private obligation without the slightest indication that any legal obligation exists on the part of any person. The public gets no protection whatever from the deposit of such security. This is not the situation which we find in some states where the statutes require public liability insurance as a condition to be met *before a driver's license will issue.* Such statute protects the public. The statute before us is entirely different. In the matters to which we have particularly directed attention, C. R. S. '53, 13–7–7, is unconstitutional. On a matter so obviously basic and fundamental no additional citation of authority is required. We reach this conclusion notwithstanding the fact that other jurisdictions have seemingly overlooked basic constitutional guarantees which must be ignored in reaching an opposite conclu-

description of the statutory purpose is not only logical but persuasive. The sole emphasis in the Act is one of providing leverage for the collection of damages from

---

sion."); *Dempsey* v. *Tynan,* 143 Conn. 202, 208, 120 A. 2d 700, 703 (1956) ("The purpose of the legislature in enacting the financial responsibility provisions . . . was to keep off our highways the financially irresponsible owner or operator of an automobile who cannot respond in damages for the injuries he may inflict, and to require him, as a condition for securing or retaining a registration or an operator's license, to furnish adequate means of satisfying possible claims against him."); *City of St. Paul* v. *Hoffmann,* 223 Minn. 76, 77–78, 25 N. W. 2d 661, 662–663 (1946) ("The apparent objective of the safety responsibility act is to provide financial responsibility for injuries and damages suffered in motor vehicle traffic. It seeks to achieve its objective solely by the suspension of licenses. While its announced purpose is to promote safety of travel, its provisions take effect after an accident happens and subject drivers and owners of vehicles involved to suspension of their 'licenses' unless liability insurance coverage equivalent to that required by the act is carried by the owner or driver of the vehicle. . . . The purpose of the act was to effect financial responsibility to injured persons."); *Rosenblum* v. *Griffin,* 89 N. H. 314, 318, 197 A. 701, 704 (1938) ("Two reasons were thought to avail for sustaining such a law. One was its character as a regulation of the use of public highways and the other was its capacity to secure public safety in dangerous agencies and operations. This latter reason has slight if any evidence for its factual support. Certainly, in the absence of known experience and statistics, it is doubtful whether the insured owner's car, driven either by himself or another, may be considered to be operated more carefully than one whose owner is uninsured. But protection in securing redress for injured highway travelers is a proper subject of police regulation, as well as protection from being injured. It is a reasonable incident of the general welfare that financially irresponsible persons be denied the use of the highway with their cars, regardless of the competency of themselves or others as the drivers."). For legislative statements to the effect that financial responsibility laws are designed to secure compensation for injured victims, see, *e. g.,* Alaska Stat. § 28.20.010 (1970); *Gillaspie* v. *Department of Public Safety,* 152 Tex. 459, 463, 259 S. W. 2d 177, 180 (1953) (quoting emergency clause enacted by the Texas Legislature in connection with its financial responsibility

drivers who either admit that they are at fault or are adjudged negligent. The victim of another driver's carelessness, if he so desires, can exclude the superintendent entirely from the process of "deterring" a repetition of that driver's negligence.[12] Further, if an

---

law); S. Rep. No. 515, 83d Cong., 1st Sess., 2 (1953) (Report of the Senate Committee on the District of Columbia on the financial responsibility law proposed for the District).

[12] See *Reitz,* 314 U. S., at 40–43 (DOUGLAS, J., dissenting).

Under Art. 3 of the Arizona Act, dealing with the posting of security for damages arising from a particular accident, the victim may cut the superintendent out by executing a release from liability or agreeing to some other written settlement or confession of judgment providing for payment of some damages, in installments or otherwise. Ariz. Rev. Stat. Ann. § 28–1143 (A)(4) discussed in n. 2, *supra.* Assuming that such an agreement or confession of judgment providing for installment payments is filed with the superintendent, it prevents him from suspending driving privileges for failure to post the amount of financial security the superintendent determines to be necessary; however, if the careless driver later defaults on one installment, the victim may give notice to the superintendent, who must then use his power of suspension to either coerce full payment or the posting of security. Ariz. Rev. Stat. Ann. § 28–1144 (3), discussed in n. 3, *supra.*

Under Art. 4, dealing with suspension for nonpayment of a judgment, the victim who has chosen to reduce his claim to judgment maintains substantial control over the suspension of driving privileges if the judgment remains unsatisfied 60 days after entry. He may consent that the judgment debtor's driving privileges not be suspended, but the debtor still must furnish proof of financial responsibility for the future. Ariz. Rev. Stat. Ann. § 28–1162 (B). For an argument that a similar provision delegating to judgment creditors the right to choose which careless drivers who do not pay judgments shall escape suspension conflicts with the Bankruptcy Act see *Kesler,* 369 U. S., at 179–182 (Warren, C. J., dissenting). If the judgment debtor is able to secure a discretionary court order permitting him to pay a judgment in installments under § 28–1165 (A), the creditor may cause suspension of driving privileges until the judgment is fully satisfied by notifying the superintendent of any default in payment of the installments. Ariz. Rev.

accident is litigated and a special verdict that the defendant was negligent and the plaintiff contributorily negligent is entered, the result in Arizona, as in many other States, is that there is no liability for damages arising from the accident. *Heimke* v. *Munoz,* 106 Ariz. 26, 470 P. 2d 107 (1970); *McDowell* v. *Davis,* 104 Ariz. 69, 448 P. 2d 869 (1968). Under the Safety Responsibility Act, the apparent result of such a judgment is that no consequences are visited upon either driver although both have been found to have driven carelessly. See Ariz. Rev. Stat. Ann. §§ 28–1143 (A)(4), 28–1144 (3). Moreover, there are no provisions requiring drivers proved to be careless to stay off the roads for a period of time. Nor are there provisions requiring drivers who have caused accidents to attend some kind of driver improvement course, a technique that is not unfamiliar in sentencing for traffic offenses.

Turning to the federal statute, the construction of the Bankruptcy Act is similarly clear. This Court on numerous occasions has stated that "[o]ne of the primary purposes of the bankruptcy act" is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt." *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 244 (1934). Accord, *e. g., Harris* v. *Zion's Savings Bank & Trust Co.,* 317 U. S. 447, 451 (1943); *Stellwagen* v. *Clum,* 245 U. S. 605, 617 (1918); *Williams* v. *United States Fidelity & Guaranty Co.,* 236 U. S. 549, 554–555 (1915). There can be no doubt, given *Lewis* v. *Roberts,* 267 U. S. 467 (1925), that Congress intended this "new opportunity" to include freedom from most kinds of pre-existing tort judgments.

Stat. Ann. § 28–1165 (C). Again, however, the judgment debtor must still give proof of financial responsibility for the future. See Ariz. Rev. Stat. Ann. § 28–1165 (B).

II

With the construction of both statutes clearly established, we proceed immediately to the constitutional question whether a state statute that protects judgment creditors from "financially irresponsible persons" is in conflict with a federal statute that gives discharged debtors a new start "unhampered by the pressure and discouragement of preëxisting debt." As early as *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), Chief Justice Marshall stated the governing principle—that "acts of the State Legislatures . . . [which] *interfere with,* or are contrary to the laws of Congress, made in pursuance of the constitution," are invalid under the Supremacy Clause. *Id.,* at 211 (emphasis added). Three decades ago MR. JUSTICE BLACK, after reviewing the precedents, wrote in a similar vein that, while "[t]his Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, ha[d] made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference[,] . . . [i]n the final analysis," our function is to determine whether a challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). Since *Hines* the Court has frequently adhered to this articulation of the meaning of the Supremacy Clause. See, *e. g., Nash* v. *Florida Industrial Comm'n,* 389 U. S. 235, 240 (1967); *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U. S. 225, 229 (1964); *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.,* 372 U. S. 714, 722 (1963) (dictum); *Free* v. *Bland,* 369 U. S. 663, 666 (1962); *Hill* v. *Florida,* 325 U. S. 538, 542–543 (1945); *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, 176 (1942). Indeed, in *Florida Lime &*

Avocado Growers, Inc. v. *Paul,* 373 U. S. 132 (1963), a recent case in which the Court was closely divided, all nine Justices accepted the *Hines* test. *Id.,* at 141 (opinion of the Court), 165 (dissenting opinion).

Both *Kesler* [13] and *Reitz,* however, ignored this controlling principle. The Court in *Kesler* conceded that Utah's financial responsibility law left "the bankrupt to some extent burdened by the discharged debt," 369 U. S., at 171, made "it more probable that the debt will be paid despite the discharge," *id.,* at 173, and thereby made "some inroad . . . on the consequences of bankruptcy . . . ." *Id.,* at 171. Utah's statute, in short, frustrated Congress' policy of giving discharged debtors a new start. But the *Kesler* majority was not concerned by this frustration. In upholding the statute, the majority opinion did not look to the effect of the legislation but simply asserted that the statute was "not an Act for the Relief of Mulcted Creditors," *id.,* at 174, and was "not designed to aid collection of debts but to enforce a policy against irresponsible driving . . . ." *Id.,* at 169. The majority, that is, looked to the purpose of the state legislation and upheld it because the purpose was not to circumvent the Bankruptcy Act but to promote highway safety; those in dissent, however, were concerned that, whatever the purpose of the Utah Act, its "plain and inevitable effect . . . [was] to create a powerful weapon for collection of a debt from which [the] bankrupt [had] been released by federal law." *Id.,* at 183. Such a result, they argued, left "the States free . . . to impair . . . an important and historic policy

[13] *Kesler* also decided a jurisdictional question, holding that a Supremacy Clause challenge to a state statute was required to be heard by a three-judge district court under 28 U. S. C. § 2281. See 369 U. S., at 155–158. This jurisdictional part of the decision was overruled almost four years later in *Swift & Co.* v. *Wickham,* 382 U. S. 111, 116 (1965).

of this Nation . . . embodied in its bankruptcy laws." *Id.*, at 185.

The opinion of the Court in *Reitz* was similarly concerned, not with the fact that New York's financial responsibility law frustrated the operation of the Bankruptcy Act, but with the purpose of the law, which was divined as the promotion of highway safety. As the Court said:

> "The penalty which § 94–b imposes for injury due to careless driving is not for the protection of the creditor merely, but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expedient of voluntary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety." 314 U. S., at 37.

The dissenting opinion written by MR. JUSTICE DOUGLAS for himself and three others noted that the New York legislation put "the bankrupt . . . at the creditor's mercy," with the results that "[i]n practical effect the bankrupt may be in as bad, or even worse, a position than if the state had made it possible for a creditor to attach his future wages" and that "[b]ankruptcy . . . [was not] the sanctuary for hapless debtors which Congress intended." *Id.*, at 41.

We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than

419-882 O - 72 - 46

one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. In view of the consequences, we certainly would not apply the *Kesler* doctrine in all Supremacy Clause cases. Although it is possible to argue that *Kesler* and *Reitz* are somehow confined to cases involving either bankruptcy or highway safety, analysis discloses no reason why the States should have broader power to nullify federal law in these fields than in others. Thus, we conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. Section 28–1163 (B) thus may not stand.

III

Even accepting the Supremacy Clause analysis of *Kesler* and *Reitz*—that is, looking to the purpose rather than the effect of state laws—those decisions are not dispositive of this case. Just as *Kesler* went a step beyond *Reitz* and broadened the holding of the earlier case, 369 U. S., at 184 (dissenting opinion), so in the present case the respondents asked the courts below and this Court to expand the holdings of the two previous cases. The distinction between *Kesler* and *Reitz* and this case lies in the State's expressed legislative purpose.

Kesler and *Reitz* were aberrational in their treatment of this question as well. The majority opinions in both cases assumed, without citation of state court authority or any indication that such precedent was unavailable,

that the purpose of the state financial responsibility laws there under attack was not provision of relief to creditors but rather deterrence of irresponsible driving. The assumption was, in effect, that all state legislatures which had enacted provisions such as § 28–1163 (B) had concluded that an uninsured motorist about to embark in his car would be more careful on the road if he did not have available what the majority in *Kesler* cavalierly characterized as an "easy refuge in bankruptcy." 369 U. S., at 173.[14] Passing the question of whether the Court gave sufficient attention to binding state interpretations of state legislative purpose and conceding that it employed proper technique in divining as obvious from their face the aim of the state enactments, the present case raises doubts about whether the Court was correct even in its basic assumptions. The Arizona Supreme Court has declared that Arizona's Safety Responsibility Act "has for its principal purpose the protec-

[14] It also seems clear that even under the logic of *Kesler* and *Reitz* Mrs. Perez should not have lost her driving privileges. She was not present when the accident occurred, and no act or omission on her part contributed to it. Because the automobile was community property under Arizona law and because judgment was confessed as to her in the Pinkerton negligence action, the Court of Appeals reasoned that loss of Mrs. Perez' license "is the price an Arizona wife must pay for negligent driving by her husband of the community vehicle" when the resulting judgment is not paid. 421 F. 2d, at 624. The *Kesler* and *Reitz* assumption that depriving uninsured motorists of the full relief afforded by a discharge in bankruptcy would prompt careful driving is without foundation when applied to Mrs. Perez. As the Court of Appeals for the Third Circuit has stated in a recent decision involving similar facts:

"Even accepting the fiction that, as applied to drivers, motor vehicle responsibility statutes are intended to promote safety, it is just too much fiction to contend that, applied to a judgment debtor held vicariously liable for the omission of a sub-agent, the statute is anything but a means for the enforcement of judgments." *Miller* v. *Anckaitis*, 436 F. 2d 115, 118 (CA3 1970) (*en banc*).

tion of the public . . . from financial hardship" resulting from involvement in traffic accidents with uninsured motorists unable to respond to a judgment. *Schecter* v. *Killingsworth,* 93 Ariz., at 280, 380 P. 2d, at 140. The Court in *Kesler* was able to declare, although the source of support is unclear, that the Utah statute could be upheld because it was "not an Act for the Relief of Mulcted Creditors" or a statute "designed to aid collection of debts." 369 U. S., at 174, 169. But here the respondents urge us to uphold precisely the sort of statute that *Kesler* would have stricken down—one with a declared purpose to protect judgment creditors "from financial hardship" by giving them a powerful weapon with which to force bankrupts to pay their debts despite their discharge. Whereas the Acts in *Kesler* and *Reitz* had the effect of frustrating federal law but had, the Court said, no such purpose, the Arizona Act has both that effect and that purpose. Believing as we do that *Kesler* and *Reitz* are not in harmony with sound constitutional principle, they certainly should not be extended to cover this new and distinguishable case.

IV

One final argument merits discussion. The dissent points out that the District of Columbia Code contains an anti-discharge provision similar to that included in the Arizona Act. Motor Vehicle Safety Responsibility Act of the District of Columbia, D. C. Code Ann. § 40–464 (1967), 68 Stat. 132. In light of our decision today, the sum of the argument is to draw into question the constitutional validity of the District's anti-discharge section, for as noted in the dissent the Constitution confers upon Congress the power "[t]o establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States." U. S. Const., Art. I, § 8, cl. 4 (emphasis

added). It is asserted that "Congress must have regarded the two statutes as consistent and compatible," *post,* at 665, but such an argument assumes a modicum of legislative attention to the question of consistency. The D. C. Code section does, of course, refer specifically to discharges, but its passage may at most be viewed as evidencing an opinion of Congress on the meaning of the general discharge provision enacted by an earlier Congress and interpreted by this Court as early as 1925. See *Lewis* v. *Roberts, supra.* In fact, in passing the initial and amended version of the District of Columbia financial responsibility law, Congress gave no attention to the interaction of the anti-discharge section with the Bankruptcy Act.[15] Moreover, the legislative history is

[15] See S. Rep. No. 10, 74th Cong., 1st Sess. (1935); H. R. Rep. No. 208, 74th Cong., 1st Sess. (1935) (both presenting a summary of the provisions of the proposed statute dealing with "Financial Responsibility of Motor Vehicle Operators in the District of Columbia," but failing to mention the fact that a discharge in bankruptcy of an accident judgment would have no effect on suspension of driving privileges for failure to satisfy such judgment); H. R. Conf. Rep. No. 799, 74th Cong., 1st Sess. (1935) (Conference Report making no mention of anti-discharge provision); 79 Cong. Rec. 272–273 (Senate); 79 Cong. Rec. 3416–3417, 4621–4629, 4631–4641, 6556–6564 (House). Some members of the House, which debated some aspects of the financial responsibility law concept rather extensively in 1935, demonstrated in debate that they were totally unaware of any of the provisions designed to enforce payment of a judgment for injuries caused by the first accident of a financially irresponsible driver. See 79 Cong. Rec. 4624 (remarks of Reps. Fitzpatrick and Sisson); *id.,* at 4625 (remarks of Rep. Hull).

When the present District of Columbia financial responsibility law was enacted in 1954, debate was much more limited and the reports of the House and Senate District Committees were quite brief. Except for the reading of the bill, no mention was made of the anti-discharge provision. See S. Rep. No. 515, 83d Cong., 1st Sess. (1953); H. R. Rep. No. 1448, 83d Cong., 2d Sess. (1954); 99 Cong. Rec. 8950–8951; 100 Cong. Rec. 6281–6287, 6347–6348.

quite clear that when Congress dealt with the subject of financial responsibility laws for the District, it based its work upon the efforts of the uniform commissioners which had won enactment in other States.[16]

Had Congress focused on the interaction between this minor subsection of the rather lengthy financial responsibility act and the discharge provision of the Bankruptcy Act, it would have been immediately apparent to the legislators that the only constitutional method for so defining the scope and effect of a discharge in bankruptcy was by amendment of the Bankruptcy Act, which by its terms is a uniform statute applicable in the States, Territories, and the District of Columbia. 11 U. S. C. § 1 (29). To follow any other course would obviously be to legislate in such a way that a discharge in bankruptcy means one thing in the District of Columbia and something else in the States—depending on state law—a result explicitly prohibited by the uniformity requirement in the constitutional authorization to Congress to enact bankruptcy legislation.

V

From the foregoing, we think it clear that § 28–1163 (B) of the Arizona Safety Responsibility Act is constitutionally invalid. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

---

[16] S. Rep. No. 10, 74th Cong., 1st Sess., 3 (1935); H. R. Rep. No. 208, 74th Cong., 1st Sess., 3 (1935); 79 Cong. Rec. 4626–4627 (remarks of Rep. Norton, chairman of the House District Committee). In reference to the present version of the financial responsibility act, see S. Rep. No. 515, 83d Cong., 1st Sess., 1 (1953); H. R. Rep. No. 1448, 83d Cong., 2d Sess., 2 (1954); 100 Cong. Rec. 6287 (remarks of Rep. Talle); *id.*, at 6347 (remarks of Sen. Beall).

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART.

I concur in the result as to petitioner Emma Perez and dissent as to petitioner Adolfo Perez.

I

The slaughter on the highways of this Nation exceeds the death toll of all our wars.[1] The country is fragmented about the current conflict in Southeast Asia, but I detect little genuine public concern about what takes place in our very midst and on our daily travel routes. See *Tate* v. *Short,* 401 U. S. 395, 401 (1971) (concurring opinion).

This being so, it is a matter of deep concern to me that today the Court lightly brushes aside and overrules two cases where it had upheld a representative attempt by the States to regulate traffic and where the Court had considered and rejected the very Supremacy Clause argument that it now discovers to be so persuasive.[2]

II

I think it is desirable to stress certain factual details. The facts, of course, are only alleged, but for purposes of the motion to dismiss, we are to accept them as true. *Cooper* v. *Pate,* 378 U. S. 546 (1964).

Arizona is a community property state. Adolfo and Emma Perez are husband and wife. They were resident citizens of Arizona at the time of the accident in Tucson in July 1965. Mr. Perez was driving an automobile registered in his name. He was alone. Mrs. Perez was not with him and had nothing to do with her husband's

[1] See Appendix to this opinion, *post,* p. 672.

[2] The petitioners urge upon us only the Supremacy Clause.

operation of the car on that day. The automobile, however, was the property of the marital community.

Accompanying, and supposedly supportive of, the Perez complaint in the present suit, were affidavits of Mr. and Mrs. Perez. These affidavits asserted that the Perezes had four minor children ages 6 to 17; that Emma is a housewife and not otherwise gainfully employed; that Emma's inability to drive has required their two older children, aged 17 and 14, to walk one and a half miles to high school and the third child, aged 9, one mile to elementary school, with consequent nosebleeding; that Emma's inability to drive has caused inconvenience and financial injury; and that Adolfo's inability to drive has caused inconvenience because he must rely on others for transportation or use public facilities or walk.

III

The Statutory Plan

Arizona has a comprehensive statutory plan for the regulation of vehicles upon its highways. Ariz. Rev. Stat. Ann., Tit. 28. Among the State's efforts to assure responsibility in this area of increasing national concern are its Uniform Motor Vehicle Operators' and Chauffeurs' License Act (c. 4), its Uniform Act Regulating Traffic on Highways (c. 6), and its Uniform Motor Vehicle Safety Responsibility Act (c. 7).[3]

The challenged § 28–1163 (B) is a part of the Motor Vehicle Safety Responsibility Act. The Act's provisions are not unfamiliar. There is imposed upon the Motor

[3] In 1943 some of the motor vehicle uniform laws were "withdrawn from active promulgation pending further study" by the National Conference of Commissioners on Uniform State Laws. 9B U. L. A. Table III, xix, xxii, xxiii. See Mr. Justice Frankfurter's detailed review of the development of state legislation and of the uniform laws in this field in *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 158–168 (1962).

Vehicle Division Superintendent the duty to suspend the license of each operator, and the registration of each owner, of a motor vehicle involved in an accident resulting in bodily injury or death or property damage to any one person in excess of $100, except, among other situations, where proof of financial responsibility, as by the deposit of appropriate security or by the presence of a liability policy of stated minimum coverage, is afforded. §§ 28–1142 (Supp. 1970–1971), 28–1143, and 28–1167. The suspension, once imposed, remains until the required security is deposited or until one year has elapsed and no action for damages has been instituted. § 28–1144. If the registrant or operator fails, within 60 days, to satisfy an adverse motor vehicle final judgment, as defined in § 28–1102 (2) (Supp. 1970–1971), the court clerk has the duty to notify the Superintendent and the latter to suspend the license and registration of the judgment debtor. §§ 28–1161 (A) and 28–1162 (A). But if the judgment creditor consents in writing that the debtor be allowed to retain his license and registration, the Superintendent in his discretion may grant that privilege. § 28–1162 (B). Otherwise the suspension remains in effect until the judgment is satisfied. § 28–1163 (A). Payments of stated amounts are deemed to satisfy the judgment, § 28–1164 (Supp. 1970–1971), and court-approved installment payment of the judgment will preserve the license and registration, § 28–1165.

IV

Adolfo Perez

Inasmuch as the case is before us on the motion of defendants below to dismiss the Perez complaint that alleged Adolfo's driving alone, the collision, and the judgment in favor of the Pinkertons, it is established, for present purposes, that the Pinkerton judgment was

based on Adolfo's negligence in driving the Perez vehicle.

Adolfo emphasizes, and I recognize, that under Art. I, § 8, cl. 4, of the Constitution, Congress has possessed the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States"; that, of course, this power, when exercised, as it has been since 1800, is "exclusive," *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.*, 91 U. S. 656, 661 (1876), and "unrestricted and paramount," *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 265 (1929); that one of the purposes of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh . . . ," *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 549, 554–555 (1915); and that a bankrupt by his discharge receives "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt," *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244 (1934).

From these general and accepted principles it is argued that § 28–1163 (B), with its insistence upon post-discharge payment as a condition for license and registration restoration, is violative of the Bankruptcy Act and, thus, of the Supremacy Clause.

As Mr. Perez acknowledges in his brief here, the argument is not new. It was raised with respect to a New York statute in *Reitz* v. *Mealey*, 314 U. S. 33 (1941), and was rejected there by a five-to-four vote:

> "The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent. The universal practice is to register ownership of automobiles and to license their drivers. Any appropriate means adopted by the states to insure competence and care on the part of its licensees

> and to protect others using the highway is consonant with due process. . . .
>
> . . . . .
>
> "The penalty which § 94–b imposes for injury due to careless driving is not for the protection of the creditor merely, but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expedient of voluntary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety." 314 U. S., at 36–37.

Left specifically unanswered in that case, but acknowledged as a "serious question," 314 U. S., at 38, was the claim that interim amendments of the statutes gave the creditor control over the initiation and duration of the suspension and thus violated the Bankruptcy Act. The dissenters, speaking through MR. JUSTICE DOUGLAS, concluded that that constitutional issue "cannot be escaped . . . unless we are to overlook the realities of collection methods." 314 U. S., at 43.

Nine years ago, the same argument again was advanced, this time with respect to Utah's Motor Vehicle Safety Responsibility Act, and again was rejected. *Kesler* v. *Department of Public Safety,* 369 U. S. 153, 158–174 (1962). There, Utah's provisions relating to duration of suspension and restoration, more stringent than those of New York, were challenged. It was claimed that the statutes made the State a "collecting agent for the creditor rather than furthering an interest in highway safety,"

and that suspension that could be perpetual "only renders the collection pressure more effective." 369 U. S., at 169. There was a troublesome jurisdictional issue in the case, the decision as to which was later overruled, *Swift & Co.* v. *Wickham*, 382 U. S. 111, 124–129 (1965), but on the merits the Court, by a five-to-three vote, sustained all the Utah statutes then under attack: [4]

> "But the lesson *Zavelo* [v. *Reeves*, 227 U. S. 625 (1913)] and *Spalding* [v. *New York ex rel. Backus*, 4 How. 21 (1845)] teach is that the Bankruptcy Act does not forbid a State to attach any consequence whatsoever to a debt which has been discharged.
>
> "The Utah Safety Responsibility Act leaves the bankrupt to some extent burdened by the discharged debt. Certainly some inroad is made on the consequences of bankruptcy if the creditor can exert pressure to recoup a discharged debt, or part of it, through the leverage of the State's licensing and registration power. But the exercise of this power is deemed vital to the State's well-being, and, from the point of view of its interests, is wholly unrelated to the considerations which propelled Congress to enact a national bankruptcy law. There are here overlapping interests which cannot be uncritically resolved by exclusive regard to the money consequences of enforcing a widely adopted measure for safeguarding life and safety.
>
> ". . . At the heart of the matter are the complicated demands of our federalism.
>
> "Are the differences between the Utah statute and

[4] Mr. Chief Justice Warren, dissenting in part, would have upheld the Utah statutes other than that "which gives to a creditor the discretion of determining if and when driving privileges may be restored by the State . . . ." 369 U. S., at 179–182.

that of New York so significant as to make a constitutionally decisive difference? A State may properly decide, as forty-five have done, that the prospect of a judgment that must be paid in order to regain driving privileges serves as a substantial deterrent to unsafe driving. We held in *Reitz* that it might impose this requirement despite a discharge, in order not to exempt some drivers from appropriate protection of public safety by easy refuge in bankruptcy. . . . To whatever extent these provisions make it more probable that the debt will be paid despite the discharge, each no less reflects the State's important deterrent interest. Congress had no thought of amending the Bankruptcy Act when it adopted this law for the District of Columbia; we do not believe Utah's identical statute conflicts with it either.

"Utah is not using its police power as a devious collecting agency under the pressure of organized creditors. Victims of careless car drivers are a wholly diffused group of shifting and uncertain composition, not even remotely united by a common financial interest. The Safety Responsibility Act is not an Act for the Relief of Mulcted Creditors. It is not directed to bankrupts as such. Though in a particular case a discharged bankrupt who wants to have his rightfully suspended license and registration restored may have to pay the amount of a discharged debt, or part of it, the bearing of the statute on the purposes served by bankruptcy legislation is essentially tangential." 369 U. S., at 170–174 (footnotes omitted).

MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, dissented on the ground that Utah Code Ann. § 41–12–15 (1953), essentially identical to Arizona's § 28–1163 (B),

operated to deny the judgment debtor the federal immunity given him by § 17 of the Bankruptcy Act and, hence, violated the Supremacy Clause. 369 U. S., at 182–185.

The Perezes in their brief, p. 7, acknowledge that the Arizona statutes challenged here "are not unlike the Utah ones discussed in *Kesler*." Accordingly, Adolfo Perez is forced to urge that *Reitz* and the remaining portion of *Kesler* that bears upon the subject be overruled. The Court bows to that argument.

I am not prepared to overrule those two cases and to undermine their control over Adolfo Perez' posture here. I would adhere to the rulings and I would hold that the States have an appropriate and legitimate concern with highway safety; that the means Arizona has adopted with respect to one in Adolfo's position (that is, the driver whose negligence has caused harm to others and whose judgment debt based on that negligence remains unsatisfied) in its attempt to assure driving competence and care on the part of its licensees, as well as to protect others, is appropriate state legislation; and that the Arizona statute, like its Utah counterpart, despite the tangential effect upon bankruptcy, does not operate in derogation of the Bankruptcy Act or conflict with it to the extent it may rightly be said to violate the Supremacy Clause.

Other factors of significance are also to be noted:

1. The Court struggles to explain away the parallel District of Columbia situation installed by Congress itself. Section 40–464 of the D. C. Code Ann. (1967) in all pertinent parts is identical with Arizona's § 28–1163 (B). The only difference is in the final word, namely, "article" in the Arizona statute and "chapter" in the District's. The District of Columbia statute was enacted as § 48 of Pub. Law 365 of May 25, 1954, effective one year later, 68 Stat. 132. This is long after the Bankruptcy Act

was placed on the books and, indeed, long after this Court's decision in *Lewis* v. *Roberts,* 267 U. S. 467 (1925), that a personal injury judgment is a provable claim in bankruptcy. Surely, as the Court noted in *Kesler,* 369 U. S., at 173–174, "Congress had no thought of amending the Bankruptcy Act when it adopted this law for the District of Columbia." See *Lee* v. *England,* 206 F. Supp. 957 (DC 1962). Congress must have regarded the two statutes as consistent and compatible, and cannot have thought otherwise for the last 35 years.[5] If the statutes truly are in tension, then I would suppose that the later one, that is, § 40–464, would be the one to prevail. *Gibson* v. *United States,* 194 U. S. 182, 192 (1904). But, if so, we then have something less than the "uniform Laws on the subject of Bankruptcies throughout the United States" that Art. I, § 8, cl. 4, of the Constitution commands, for the law would be one way in Arizona (and, by the present overruling of *Reitz* and *Kesler,* in New York and in Utah) and the other way in the District of Columbia. Unfortunately, such is the dilemma in which the Court's decision today leaves us.

2. Arizona's § 28–1163 (B) also has its counterparts in the statutes of no less than 44 other States.[6] It is, after

---

[5] Public Law 365 replaced the Act of May 3, 1935, 49 Stat. 166, known as the Owners' Financial Responsibility Act of the District of Columbia. Section 3 of the earlier Act provided, 49 Stat. 167, that a judgment's discharge in bankruptcy, as distinguished from other discharge, would not relieve the judgment debtor from suspension.

[6] Ala. Code, Tit. 36, § 74 (55) (Supp. 1969); Alaska Stat. § 28.20.350 (1962); Ark. Stat. Ann. § 75–1457 (1957); Cal. Vehicle Code § 16372 (1960); Colo. Rev. Stat. Ann. § 13–7–25 (2) (Supp. 1965); Conn. Gen. Stat. Rev. § 14–131 (1966); Del. Code Ann., Tit. 21, § 2943 (1953); Hawaii Rev. Stat. § 287–17 (1968); Idaho Code § 49–1514 (1967); Ill. Ann. Stat., c. 95 1/2, § 7–310 (1971); Iowa Code § 321A.14 (2) (1971); Kan. Stat. Ann. § 8–744 (b) (1964); Ky. Rev. Stat. § 187.420 (1962); La. Rev. Stat. Ann.

all, or purports to be, a *uniform* Act. I suspect the Court's decision today will astonish those members of the Congress who were responsible for the District of Columbia Code provision, and will equally astonish the legislatures of those 44 States that absorbed assurance from *Reitz* and *Kesler* that the provision withstands constitutional attack.

3. The Court rationalizes today's decision by saying that *Kesler* went beyond *Reitz* and that the present case goes beyond *Kesler*, and that that is too much. It would justify this by noting the Arizona Supreme Court's characterization of the Arizona statute as one for the protection of the public from financial hardship and by con-

---

§ 32:893 (1963); Me. Rev. Stat. Ann., Tit. 29, § 783 (6) (1964) (10 years); Md. Ann. Code, Art. 66 1/2, § 7–315 (1970); Mich. Comp. Laws § 257.513 (b) (Supp. 1956); Minn. Stat. § 170.33, subd. 5 (1967); Miss. Code Ann. § 8285–14 (b) (1942); Mo. Rev. Stat. § 303.110 (1959); Mont. Rev. Codes Ann. § 53–431 (1961); Neb. Rev. Stat. § 60–519 (1968); Nev. Rev. Stat. § 485.303 (1968); N. H. Rev. Stat. Ann. § 268:9 (1966); N. J. Stat. Ann. § 39:6–35 (Supp. 1971); N. M. Stat. Ann. § 64–24–78 (1960); N. Y. Veh. & Traf. Law § 337 (c) (1970); N. C. Gen. Stat. § 20–279.14 (Supp. 1969); N. D. Cent. Code § 39–16.1–04 (5) (Supp. 1969); Ohio Rev. Code Ann. § 4509.43 (Supp. 1970); Okla. Stat. Ann., Tit. 47, § 7–315 (1962); Pa. Stat. Ann., Tit. 75, § 1414 (1960); R. I. Gen. Laws Ann. § 31–32–15 (1969); S. C. Code Ann. § 46–748 (Supp. 1960); S. D. Comp. Laws Ann. § 32–35–58 (1967); Tenn. Code Ann. § 59–1236 (1968); Tex. Rev. Civ. Stat. Ann., Art. 6701h, § 14 (b) (1969); Utah Code Ann. § 41–12–15 (1953); Vt. Stat. Ann., Tit. 23, § 802 (b) (1967); Va. Code Ann. § 46.1–444 (a)(4) (Supp. 1970) (15 years); Wash. Rev. Code Ann. § 46.29.380 (1967); W. Va. Code Ann. § 17D–4–6 (1966); Wis. Stat. § 344.26 (2) (1967) [cf. *Zywicke* v. *Brogli*, 24 Wis. 2d 685, 130 N. W. 2d 180 (1964)]; Wyo. Stat. Ann. § 31–299 (1967).

See also Fla. Stat. Ann. § 324.131 (1968) and Op. Atty. Gen. 059–200 (1959); Ga. Code Ann. § 92A–605 (e)(3) (Supp. 1970); Ind. Ann. Stat. § 47–1049 (1965) and Op. Atty. Gen. 1936, p. 272; Mass. Gen. Laws Ann., c. 90, § 22A (Supp. 1971); Ore. Rev. Stat. § 486.211 (5) (1967).

cluding, from this description, that the statute is not a public highway safety measure, but rather a financial one protective, I assume the implication is, of insurance companies. The Arizona court's characterization of its statute, I must concede, is not a fortunate one. However, I doubt that that court, in evolving that description, had any idea of the consequences to be wrought by this Court's decision today. I am not willing to say that the description in *Schecter* v. *Killingsworth,* 93 Ariz. 273, 380 P. 2d 136 (1963), embraced the only purpose of the State's legislation. Section 28–1163 (B) is a part of the State's Motor Vehicle *Safety* Responsibility Act and does not constitute an isolated subchapter of that Act concerned only with financial well-being of the victims of drivers' negligence. In any event, as the Court's opinion makes clear, the decision today would be the same however the Arizona court had described its statute.

4. While *stare decisis* "is no immutable principle," [7] as a glance at the Court's decisions over the last 35 years, or over almost any period for that matter, will disclose, it seems to me that the principle does have particular validity and application in a situation such as the one confronting the Court in this case. Here is a statute concerning motor vehicle responsibility, a substantive matter peculiarly within the competence of the State rather than the National Government. Here is a serious and conscientious attempt by a State to legislate and do something about the problem that, in terms of death and bodily injury and adverse civilian effect, is so alarming. Here is a statute widely adopted by the several States and legitimately assumed by the lawmakers of those States to be consistent with the Bankruptcy Act, an assumption rooted in positive, albeit divided, decision

[7] MR. JUSTICE DOUGLAS, dissenting, in *Swift & Co.* v. *Wickham,* 382 U. S., at 133.

419-882 O - 72 - 47

by this Court, not once, but twice. And here is a statute the Congress itself, the very author of the Bankruptcy Act, obviously considered consistent therewith. I fear that the Court today makes *stare decisis* meaningless and downgrades it to the level of a tool to be used or cast aside as convenience dictates. I doubt if Justices Roberts, Stone, Reed, Frankfurter, Murphy, Warren, Clark, HARLAN, BRENNAN, and STEWART, who constituted the respective majorities on the merits in *Reitz* and *Kesler,* were all that wrong.

5. Adolfo's affidavit protestation of hardship goes no further than to assert a resulting reliance upon friends and neighbors or upon public transportation or upon walking to cover the seven miles from his home to his place of work; this is inconvenience, perhaps, even in this modern day when we are inclined to equate convenience with necessity and to eschew what prior generations routinely accepted as part of the day's labor, but it falls far short of the "great harm" and "irreparable injury" that he otherwise asserts only in general and conclusory terms. Perez' professed inconvenience stands vividly and starkly in contrast with his victims' injuries. But as is so often the case, the victim, once damaged, is seemingly beyond concern. What seems to become important is the perpetrator's inconvenience.

6. It is conceded that Arizona constitutionally could prescribe liability insurance as a condition precedent to the issuance of a license and registration.

V

Emma Perez

Emma Perez' posture is entirely different. Except for possible emotional strain resulting from her husband's predicament, she was in no way involved in the Pinkerton accident. She was not present when it occurred and no negligence or nonfeasance on her part contributed to it.

Emma thus finds herself in a position where, having done no wrong, she nevertheless is deprived of her operator's license. This comes about because the Perez vehicle concededly was community property under § 25–211 (A), and because, for some reason, the judgment was confessed as to her as well as against her husband. As one *amicus* brief describes it, Emma, a fault-free driver, "is without her license solely because she is the impecunious wife of an impecunious, negligent driver in a community property state."

At this point a glance at the Arizona community property system perhaps is indicated. Emma Perez was a proper nominal defendant in the Pinkerton lawsuit, see *Donato* v. *Fishburn,* 90 Ariz. 210, 367 P. 2d 245 (1961), but she was not a necessary party there. *First National Bank* v. *Reeves,* 27 Ariz. 508, 517, 234 P. 556, 560 (1925); *Bristol* v. *Moser,* 55 Ariz. 185, 190–191, 99 P. 2d 706, 709 (1940). However, a judgment against a marital community based upon the husband's tort committed without the wife's knowledge or consent does not bind her separate property. *Ruth* v. *Rhodes,* 66 Ariz. 129, 138, 185 P. 2d 304, 310 (1947). The judgment would, of course, bind the community property vehicle to the extent permitted by Arizona law. See § 33–1124.

In Arizona during coverture personal property may be disposed of only by the husband. § 25–211 (B). The community personalty is subject to the husband's dominance in management and control. *Mortensen* v. *Knight,* 81 Ariz. 325, 334, 305 P. 2d 463, 469 (1956). The wife has no power to make contracts binding the common property. § 25–214 (A). Her power to contract is limited to necessaries for herself and the children. § 25–215. Thus, as the parties appear to agree, she could neither enter into a contract for the purchase of an automobile nor acquire insurance upon it except by use of her separate property.

The Court of Appeals ruled that Mrs. Perez' posture, as the innocent wife who had no connection with the negligent conduct that led to the confession and entry of judgment, was, under the logic of *Kesler* and *Reitz*, "a distinction without a significant difference" even though "she had no alternative." 421 F. 2d 619, 622–623. The court opined that the spouse can acquire an automobile with her separate funds and that negligent operation of it on separate business would then not call into question the liability of the other spouse. It described Emma's legal status as "closely analogous" to that of the automobile owner who permits another person to drive, and it regarded as authority cases upholding a State's right to revoke the owner's license and registration after judgment had been entered against him and remains unsatisfied. The husband was described, under Arizona law, as the managing agent of the wife in the control of the community automobile, and "the driver's licenses of both husband and wife are an integral part of the ball of wax, which is the basis of the Arizona community property laws." The loss of her license "is the price an Arizona wife must pay for negligent driving by her husband of the community vehicle" when the resulting judgment is not paid. 421 F. 2d, at 624.

For what it is worth, Emma's affidavit is far more persuasive of hardship than Adolfo's. She relates the family automobile to the children and their medical needs and to family purchasing at distant discount stores. But I need not, and would not, decide her case on the representations in her affidavit.

I conclude that the reasoning of the Court of Appeals, in its application to Emma Perez and her operator's license, does not comport with the purpose and policy of the Bankruptcy Act and that it effects a result at odds with the Supremacy Clause. Emma's subordinate

position with respect to the community's personal property, and her complete lack of connection with the Pinkerton accident and with the negligence that occasioned it, are strange accompaniments for the deprival of her operator's license. The nexus to the state police power, claimed to exist because of her marriage to the negligent Adolfo and the community property character of the accident vehicle, is, for me, elusive and unconvincing. The argument based on Arizona's appropriate concern with highway safety, that prompts me to adhere to the *Reitz-Kesler* rationale for Adolfo, is drained of all force and persuasion when applied to the innocent Emma. Despite the underlying community property legal theory, Emma had an incident of ownership in the family automobile only because it was acquired during coverture. She had no "control" over Adolfo's use of the vehicle and she could not forbid his use as she might have been able to do were it her separate property. Thus, the state purpose in deterring the reckless driver and his unsafe driving has only undeserved punitive application to Emma. She is personally penalized not only with respect to the operation of the Perez car but also with respect to any automobile.

I therefore would hold that under these circumstances the State's action, under § 28–1163 (B), in withholding from Emma her operator's license is not, within the language of *Reitz,* an appropriate means for Arizona "to insure competence and care on the part of [Emma] and to protect others" using the highways, 314 U. S., at 36, and that it interferes with the paramount federal interest in her bankruptcy discharge and violates the Supremacy Clause.

[For Appendix to opinion of BLACKMUN, J., see *post,* p. 672.]

APPENDIX TO OPINION OF BLACKMUN, J.

MOTOR-VEHICLE DEATHS AND WAR DEATHS

From 1900 through 1969, motor-vehicle deaths in the U. S. totalled nearly 1,800,000. Deaths of U. S. military personnel in all wars are shown below. In making comparisons, it must be kept in mind that nearly everyone is exposed to motor-vehicle accidents but relatively few are exposed to war deaths.

U. S. Military Casualties in Principal Wars

War	Deaths			Nonfatal Wounds
	Total	Battle	Others*	
Total	†1,146,000	643,052	†503,200	§1,540,000
Revolutionary War (1775–83)	4,435	4,435	N.A.	6,188
War of 1812 (1812–15)	2,260	2,260	N.A.	4,505
Mexican War (1846–48)	13,283	1,733	11,550	4,152
Civil War (1861–65)				
Union Forces	364,511	140,414	224,097	281,881
Confederate Forces	133,821	74,524	59,297	N.A.
Spanish-American War (1898)	2,446	385	2,061	1,662
World War I (1917–18)	116,708	53,513	63,195	204,002
World War II (1941–45)	407,316	292,131	115,185	670,846
Korean War (1950–53)	54,246	33,629	20,617	103,284
Viet Nam War (1961–69)	47,251	40,028	7,223	262,799

Source: Office of Secretary of Defense.
†Rounded.
*Includes deaths from disease, accidents, etc.
§Incomplete and rounded. N. A. Not available.

Accident Facts 63, published by the National Safety Council (1970 ed.).

The same publication, page 59, discloses that the annual death toll for motor vehicle accidents in the United States has exceded 52,000 in each of the last five calendar years. Thus, the *annual* motor vehicle carnage approximates the *total* number of lives lost during the entire Vietnam conflict beginning in 1961.

UNITED STATES *v.* ARMOUR & CO. ET AL.

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

No. 759. Argued April 19, 1971—Decided June 1, 1971

The ownership of the majority of the stock of Armour & Co., a meat-packer, by Greyhound Corp., which has retail food subsidiaries and accordingly engages in business that may be forbidden to Armour by the Meat Packers Consent Decree of 1920, in itself and without any evidentiary showing as to the consequences, does not violate the Decree's prohibition against Armour's "directly or indirectly . . . engaging in or carrying on" the forbidden business. Pp. 674–683.

Affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN and STEWART, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined, *post,* p. 683. BLACK and BLACKMUN, JJ., took no part in the consideration or decision of this case.

Deputy Solicitor General Springer argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Deputy Assistant Attorney General Comegys,* and *Howard E. Shapiro.*

Edward L. Foote argued the cause for appellee Greyhound Corp. With him on the brief was *Robert J. Bernard.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Here as in *United States* v. *Armour & Co.,* 398 U. S. 268, we have been asked to determine if the Meat Packers Consent Decree of 1920, which prohibits Armour & Co. from dealing directly or indirectly in certain specified commodities, prohibits a corporation that may deal in some of those specified commodities from acquiring a controlling interest in Armour. When this decree was

here last Term the Government was seeking to prevent General Host, a company engaged in the manufacture and sale of a variety of food products, from acquiring control of Armour. While that case was pending, General Host agreed to sell its interest in Armour to Greyhound Corp., a regulated motor carrier. After the required approval was obtained from the Interstate Commerce Commission, the transaction was consummated. This Court then dismissed the action against General Host as moot. 398 U. S. 268.

The Government then proceeded against Greyhound as it had against General Host and filed a petition in the District Court alleging that Greyhound's engagement in businesses [1] forbidden to Armour or any firm in which Armour has a direct or indirect interest, and that Greyhound's ownership of Armour create a relationship forbidden by the 1920 Consent Decree. The District Court, as it had when General Host's ownership of Armour was at issue, held that the Consent Decree did not prohibit such acquisitions. The Government appealed.

This case does not involve the question whether the acquisition of a majority of Armour stock by Greyhound is illegal under the antitrust laws. If the Government had wished to test that proposition, it could have brought an action to enjoin the acquisition under § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18. Alternatively, if the Government believed that changed conditions warranted further relief against the acquisition, it could have sought modification of the

[1] The Government claims that two of Greyhound's wholly owned subsidiaries are engaged in the retail food business. Prophet Foods Co., an industrial catering company, operates eating facilities in industrial plants, schools, hospitals, nursing homes, and other commercial establishments. In 1968 Prophet's sales were in excess of $77 million. Post Houses, Inc., operates restaurants in bus stations and at rest and meal stop locations. Post Houses had sales in excess of $33 million in 1968.

Meat Packers Decree itself.[2] It took neither of those steps, but, rather, sought to enjoin the acquisition under the decree as originally written. Thus the case presents only the narrow question whether ownership of a majority of stock in Armour by a company that engages in business forbidden to Armour by the decree, in itself and without any evidentiary showing as to the consequences, violates the prohibition against Armour's "directly or indirectly . . . engaging in or carrying on" that forbidden business.

On February 27, 1920, the United States filed a bill in equity against the Nation's five largest meatpackers, including Armour, and against their subsidiary corporations and controlling stockholders, charging conspiratorial and individual attempts to monopolize a substantial part of the Nation's food supply. The bill alleged that the packers, from their initial position of power in the slaughtering and packing business, had acquired control of the Nation's stockyards, stockyard terminal rail lines, refrigerated rolling stock, and cold storage facilities, and that they had used predatory practices to eliminate competition in the food business.

The bill further alleged that the packers, having gained monopoly power in the meat business, were attempting to destroy competition in products which might be substituted for meat. That objective was being pursued through the acquisition of nonmeat food companies and by means of exclusive output contracts with suppliers. The prayer for relief sought, along with other prohibitions against the defendants' attempts to monopolize, the divestiture of most of their nonpacking operations and the permanent exclusion of them from the substitute food business.

---

[2] See *Chrysler Corp.* v. *United States,* 316 U. S. 556 (1942); and see generally Note, Flexibility and Finality in Antitrust Consent Decrees, 80 Harv. L. Rev. 1303 (1967).

On the same day as the complaint was filed, defendants filed their answer, denying its essential allegations, and both sides filed a stipulation to a consent decree, granting the Government the largest part of the relief it had sought. Paragraph Fourth of the decree enjoined the corporate defendants, including Armour, from "either directly or indirectly, by themselves or through their officers, directors, agents, or servants, engaging in or carrying on, either by concert of action or otherwise . . . the manufacturing, jobbing, selling . . . distributing, or otherwise dealing in" a long list of food and other products sold by grocery stores. Paragraph Fourth further enjoined the corporate defendants from "owning, either directly or indirectly . . . any capital stock or other interests whatsoever" in any business which dealt in these commodities.[3]

Paragraph Eighteenth of the decree provided that the court should retain jurisdiction of the case "for the purpose of taking such other action or adding to the foot of this decree such other relief, if any, as may become necessary or appropriate for the carrying out and enforcement of this decree."

Since 1920, the decree has withstood a motion to vacate it in its entirety, *Swift & Co.* v. *United States,* 276 U. S. 311 (1928), and two attempts on the part of the defendants to have it modified in light of alleged changed circumstances. *United States* v. *Swift & Co.,* 286 U. S. 106 (1932); *United States* v. *Swift & Co.,* 189 F. Supp. 885, 892 (ND Ill. 1960), aff'd, 367 U. S. 909 (1961). Thus the decree stood at the time this case arose, and still stands, as originally written.

The Government does not contend that Greyhound's acquisition of controlling interest in Armour subjects

[3] Paragraph Eighth made identical provisions with respect to certain dairy commodities.

Greyhound to punishment for contempt since it was not a party to the decree. Nor does the Government contend that Greyhound has acted "in active concert or participation with" a party.[4] Instead, the Government argues that Greyhound should have been brought before the District Court, which retained permanent jurisdiction over the decree, pursuant to § 5[5] of the Sherman Act, and be enjoined from acting to exercise control over or influence the business affairs of Armour, and be required to divest itself of the Armour stock.

The contention is that the acquisition violates the decree since it causes Armour to be engaged in activities prohibited by the decree. The claim is that Greyhound is engaged in businesses that the decree prohibits Armour from being engaged in and the decree's purported purpose of separating the meatpackers from the retail food business is thus circumvented.

But while structural separation of this kind may have been the Government's overall aim, the decree itself, carefully worked out between the parties in exchange for their right to litigate the issues, does not effect a complete separation, but, rather, prohibits particular actions

---

[4] Fed. Rule Civ. Proc. 65 (d) provides:

"Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

[5] Section 5 of the Sherman Act, 26 Stat. 210, 15 U. S. C. § 5, provides:

"Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

and relationships not including the one here in question. The crucial provision, Paragraph Fourth, forbids the corporate defendants from "engaging in or carrying on" commerce in the enumerated product lines. This language, taken in its natural sense, bars only active conduct on the part of the defendants. Thus Armour could not trade in these products, either under its own corporate form, or through its "officers, directors, agents, or servants." The entry of Armour into the grocery business through subsidiaries is clearly and Draconically prevented by the separate provision of Paragraph Fourth forbidding the defendant meatpackers from owning "any . . . interests whatsoever" [6] in a firm trading in the enumerated commodities. In the Government's view these prohibitions also bar Armour from having any ownership relationship with corporations like Greyhound. The Government contends that Armour has an obligation not to engage directly or indirectly in legal or economic association with firms in the retail food business. It refers to the prohibited relationship between Armour and Greyhound.

But the decree does not speak in terms of relationships in general, but, rather, prohibits certain behavior, and in doing so prohibits some but not all economic interrelationship between Armour and the retail food business. Armour may not carry on or engage in that business, nor may it acquire any interest in any firm

[6] That portion of Paragraph Fourth provides:

"[T]he corporation defendants and each of them be, and they are hereby, further perpetually enjoined and restrained from owning, either directly or indirectly, severally or jointly, by themselves or through their officers, directors, agents, or servants any capital stock or other interests whatsoever in any corporation, firm, or association except common carriers, which is in the business, in the United States, of manufacturing, jobbing, selling, transporting, except as common carriers, distributing, or otherwise dealing in any of the above-described products or commodities."

in that business, but there is no prohibition against selling any interest to a grocery firm, or more generally against entering into an ownership relationship with such a firm.[7] If the parties had agreed to such a prohibition, they could have chosen language that would have established the sort of prohibition that the Government now seeks.

If the parties had agreed to prohibit the kind of transaction here involved, that end could also have been accomplished through the provision of the decree running against the stockholders of the defendant meatpackers. Many of the controlling stockholders were defendants in the 1920 action, and the decree prohibits certain conduct on their part in Paragraph Fifth.[8] That paragraph prohibits the individual defendants from own-

[7] The Government contends that Paragraph Fourth prohibits Armour from *having* "any . . . interests whatsoever" in firms engaged in the prohibited businesses and that Armour as a subsidiary of Greyhound *has* an "interest" in the other Greyhound subsidiaries that are engaged in the retail food business. But Paragraph Fourth does not prohibit Armour from *having* any interest; it prohibits Armour from "owning" an interest. See n. 6, *supra*. Clearly, Armour has nothing approaching an ownership interest in Greyhound or Greyhound's subsidiaries.

[8] Paragraph Fifth provides:

"That the individual defendants and each of them, be, and they are hereby, perpetually enjoined and restrained from, in the United States, either directly or indirectly, by themselves or through their agents, servants, or employees, owning voting stock which in the aggregate amounts to 50% or more of the voting stock of any corporation, except common carriers, or any interest in such corporation resulting in a voting power amounting to 50 per cent or more of the total voting power of such corporation, or which interest by any device gives to any such defendant or defendants a voting power of 50 per cent or more in any such corporation, or a half interest or more in any firm or association which corporation, firm, or association may be, in the United States, in the business of manufacturing, jobbing, selling, transporting, distributing, or otherwise dealing in . . . [specified products]."

ing a half interest or more in any firm engaged in the product lines enumerated in Paragraph Fourth. This prohibition, through its negative implications, refutes the Government's argument that the decree established a complete structural separation between the defendant corporations and the retail food business. For it allows a controlling stockholder of a meatpacker to own a controlling, though not a majority, interest in a grocery firm—say 49% of the common stock, a figure which in all but the most unusual corporate situation would represent *de facto* control.

Perhaps more important, the prohibitions of Paragraph Fifth run only against the named stockholders and not against their successors and assigns. If a "successors and assigns" clause had been included, the Government could argue with some persuasiveness that ownership of a meatpacker by a controlling interest in a retail food firm was prohibited. And the parties were able to use the words "successors and assigns" when they wanted to. Paragraph Third, which prohibits the corporate defendants from using their distribution facilities to handle the commodities named in Paragraph Fourth, expressly runs against the corporations and their "successors and assigns."

In short, we do not find in the decree a structural separation such as the Government claims. On the one hand, the decree leaves gaps inconsistent with so complete a separation; on the other, language that would have been apt either to create a complete separation or to bar with particularity the sort of transaction involved here was not used.

Stepping back from this analysis of the terms of the 1920 decree, we are confronted with the Government's argument that to allow Greyhound to take over Armour would allow the same kind of anticompetitive evils that the 1920 suit was brought to prevent. In its 1920 suit,

the Government sought to insulate the large meatpackers from the grocery business, both to prevent the destruction of competition in that business, and to prevent consolidation of the packers' monopoly control of the meat business by controlling commerce in products that might be substitutes for meat. Those purposes, the Government says, are frustrated as much by a retail food company's acquisition of a meatpacker as they would be by a meatpacker's entry into the retail food business.

This argument would have great force if addressed to a court that had the responsibility for formulating original relief in this case, after the factual and legal issues raised by the pleadings had been litigated. It might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint.[9] Here, however, where we deal with the construction of an existing consent decree, such an argument is out of place.

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill

---

[9] See sources cited in n. 2, *supra*.

to achieve.[10] For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

This Court has recognized these principles before. In *Hughes* v. *United States,* 342 U. S. 353 (1952), the Government sought to construe a consent decree that gave the defendant the option of selling his stock or putting it in a voting trust as requiring him to sell the stock within a reasonable time even though he chose the voting trust alternative, because the pro-competitive purpose of the decree would otherwise be frustrated. The Court responded:

> "It may be true as the Government now contends that Hughes' large block of ownership in both types of companies endangers the independence of each. Evidence might show that a sale by Hughes is indispensable if competition is to be preserved. However, in section V the parties and the District Court provided their own detailed plan to neutralize the evils from such ownership. Whatever justification there may be now or hereafter for new terms that require a sale of Hughes' stock, we think there is no fair support for reading that requirement into the language of section V." 342 U. S., at 357.

In *United States* v. *Atlantic Refining Co.,* 360 U. S. 19 (1959), the Government sought an order limiting the

[10] Cf. Note, Flexibility and Finality, n. 2, *supra,* at 1314–1315.

dividends payable by common carriers to shipper-owners, under a consent decree that allowed such dividends to be paid according to a stated formula. Noting that the language in which the formula was expressed could "be made to support the United States' contention," but characterizing that construction as "strained," 360 U. S., at 22, the Court stated:

> "The Government contends that the interpretation it now offers would more nearly effectuate 'the basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike.' This may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues." *Id.*, at 23.

And here too, although the relief the Government seeks may be in keeping with the purposes of the antitrust laws, we do not believe that it is supported by the terms of the consent decree under which it is sought.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE BLACKMUN took no part in the consideration or the decision of this case.

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

The antitrust decree before us last Term in *United States* v. *Armour & Co.*, 398 U. S. 268, is here again in a new posture. Under the original decree of 1920 the defendants were required to abandon their interests in a wide variety of food and nonfood lines. They were required to divest themselves of any interest in the businesses of "manufacturing, jobbing, selling, transporting . . . distributing, or otherwise dealing in" some 114 specified food products and some 30 other products.

419-882 O - 72 - 48

They were enjoined from "owning, either directly or indirectly . . . any capital stock or other interests whatsoever in any corporation . . . which is in the business, in the United States, of manufacturing, jobbing, selling, transporting . . . distributing, or otherwise dealing in any" of the prohibited products. Under the decree the District Court retained jurisdiction "for the purpose of taking such other action or adding to the foot of this decree such other relief, if any, as may become necessary or appropriate for the carrying out and enforcement of this decree."

Armour, one of the parties to the decree, is now the second largest meatpacker in the United States with total assets of almost $700 million and total sales in 1967 of approximately $2,150,000,000. In addition to meatpacking, Armour manufactures, processes, and sells various nonprohibited products. In early 1969 the Government filed a petition in Federal District Court to make General Host Corp., a company engaged in the manufacture and sale of numerous food products, a party to the decree and forbid it from acquiring control of Armour. The District Court held that the decree prohibited Armour from holding any interest in a company handling any of the prohibited products but did not prohibit such a company from acquiring Armour. The Government appealed the decision arguing that acquisition by General Host of a majority of Armour's stock would be in violation of the decree and General Host should have been made a party to the decree so that an injunction could issue. We noted probable jurisdiction. 396 U. S. 811.

In the interim, General Host entered into an agreement to sell its controlling stock interest in Armour to Greyhound, a regulated motor carrier. The Interstate Commerce Commission approved the acquisition. Following

Greyhound's acquisition, the Court dismissed the case as moot. 398 U. S. 268.

The Government then filed a new petition in the District Court alleging (as it had against General Host) that Greyhound is engaged in businesses forbidden to Armour, or any firm in which Armour has a direct or indirect interest, and therefore Greyhound's acquisition violates the decree. The petition prayed that Greyhound be brought before the Court under § 5 of the Sherman Act and that an order supplemental to the original decree be entered enjoining Greyhound from acquiring any additional stock or exercising control over or influencing the business affairs of Armour, and requiring Greyhound to divest itself of the Armour stock. The District Court dismissed the Government's complaint, ruling that since Greyhound was not a party to the original decree, Greyhound may not be enjoined from "committing any acts on the ground that they are prohibited by the decree." The court also rejected the Government's argument that acquisition of the Armour stock placed the two companies in a "corporate relationship" which was prohibited by the decree. The court stated "the decree does not speak in terms of corporate relationships; it speaks in terms of the defendants dealing in the specified lines of commerce . . . ." The Government appealed.

The Sherman Act (15 U. S. C. § 5) provides:

> "Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

Under § 5 and the All Writs Act (28 U. S. C. § 1651 (a)) the District Court has ample power to prevent frustration of the original decree.

Greyhound may well have devised a plan which would render the original decree nugatory.

Under the decree, none of the meatpackers could own a chain of grocery stores. Yet under the interpretation of the District Court a chain of grocery stores could acquire a meatpacking company. I do not view the decree so narrowly. The evil at which the decree is aimed is combining meatpackers with companies in other food product areas.

The authorities support the proposition that judges who construe, interpret, and enforce consent decrees look at the evil which the decree was designed to rectify. See Note, Flexibility and Finality in Antitrust Consent Decrees, 80 Harv. L. Rev. 1303, 1315.* My interpretation of the evil at which this decree was aimed is the same as that of Mr. Justice Cardozo, writing for this Court in *United States* v. *Swift & Co.*, 286 U. S. 106. As we stated in *Chrysler Corp.* v. *United States*, 316 U. S. 556, 562, the test for reviewing modifications is "whether the change served to effectuate or to thwart the basic purpose of the original consent decree."

Neither *Hughes* v. *United States*, 342 U. S. 353, nor *United States* v. *Atlantic Refining Co.*, 360 U. S. 19, relied on by the Court, is to the contrary. *Hughes* involved a Government attempt to require the trustee to sell stock in a voting trust where the consent decree expressly allowed Hughes a choice of selling the stock himself or placing the stock in a voting trust "until Howard R. Hughes shall have sold his holdings of stock." *Atlantic*

*See the cases cited in Note, Requests by the Government for Modification of Consent Decrees, 75 Yale L. J. 657, 667–668, n. 56.

Refining was a case where for 16 years, right until the eve of the litigation, both parties had construed the decree in one way. Then the Government changed its interpretation not because it would effectuate the purposes of the decree but because it "would more nearly effectuate 'the basic purpose of the Elkins and Interstate Commerce Acts.'" 360 U. S., at 23.

The evil at which the present decree is aimed—combining meatpackers with companies in other food product areas—is present whether Armour purchases a company dealing in the various prohibited food lines or whether that company purchases Armour. When any company purchases Armour it acquires not only Armour's assets and liabilities, but also Armour's legal disabilities. And one of Armour's legal disabilities is that Armour cannot be combined with a company in the various food lines set out in the decree.

I read the decree to prohibit any combination of the meatpacking company defendants with companies dealing in various food lines.

In the District Court the Government offered an affidavit which showed that Greyhound deals in food products through its divisions and wholly owned subsidiaries, which provide industrial catering services, and operates restaurants, cafeterias, and other eating facilities. The affidavit states that in 1969 Greyhound had revenues of about $124 million from food operations which accounted for over 16% of Greyhound's total revenues that year. Greyhound has contended that it operates no grocery business and only buys raw foodstuffs and sells prepared meals. Thus, Greyhound argues, it can acquire Armour even if it is made a party to the decree because the decree does not prohibit meatpackers from entering the restaurant business. I do not pass on this contention. Rather,

I would reverse the judgment of the District Court and remand the case to that court for any further proceedings which are necessary to determine if Greyhound's acquisition of Armour violates the decree. If it does, then the District Court should make Greyhound a party to that decree.

DEWEY *v.* REYNOLDS METALS CO.

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

No. 835. Argued April 20–21, 1971—Decided June 1, 1971

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

Donald F. Oosterhouse argued the cause and filed a brief for petitioner.

William A. Coughlin, Jr., argued the cause for respondent. With him on the brief was *Fred R. Edney.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Leonard, David L. Rose, Stanley P. Hebert, Julia P. Cooper,* and *George H. Darden.*

Briefs of *amici curiae* urging reversal were filed by *Nathan Lewin, Samuel Rabinove,* and *Sol Rabkin* for the National Jewish Commission on Law and Public Affairs et al., and by *Paul S. Berger, Joseph B. Robison,* and *Beverly Coleman* for the American Jewish Congress.

Milton A. Smith and *Jay S. Siegel* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

CONNOR ET AL. *v.* JOHNSON ET AL.

ON APPLICATION FOR STAY

Decided June 3, 1971

A three-judge District Court invalidated Mississippi apportionment statute as allowing impermissibly large variations among election districts. The court stated that single-member districts "would be ideal," but in light of a June 4, 1971, deadline for filing notices of candidacy, issued its apportionment plan providing for some multi-member districts, including Hinds County. Applicants, who had quickly submitted four plans calling for single-member districts in Hinds County, ask for a stay of that judgment and an extension of the filing deadline until the District Court provides single-member districts for Hinds County, or until the Attorney General or the District Court for the District of Columbia approves the District Court's apportionment plan under § 5 of the Voting Rights Act of 1965. *Held:* A stay is granted until June 14, 1971.

(a) A decree of a district court is not within the reach of § 5 of the Voting Rights Act of 1965.

(b) Single-member districts are generally preferable to large multi-member districts in court-fashioned apportionment plans.

(c) In view of the availability of 1970 census data and the dispatch with which applicants devised their plans, the District Court is instructed, absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County by June 14, 1971, and to extend appropriately the filing date for candidates from that county.

PER CURIAM.

On May 14, 1971, a three-judge District Court, convened in the Southern District of Mississippi, invalidated the Mississippi Legislature's latest reapportionment statute as allowing impermissibly large variations among House and Senate districts. The parties were requested by the court to submit suggested plans, and the applicants did so on May 17. All four plans suggested by applicants utilized single-member districts ex-

clusively in Hinds County. The following day, May 18, the court issued its own plan, which included single- and multi-member districts in each House; Hinds County was constituted as a multi-member district electing five senators and 12 representatives. The court expressed some reluctance over use of multi-member districts in counties electing four or more senators or representatives, saying: "[I]t would be ideal if [such counties] could be divided into districts, for the election of one member [from] the district." However, in view of the June 4, 1971, deadline for filing notices of candidacy, the court concluded that: "[W]ith the time left available it is a matter of sheer impossibility to obtain dependable data, population figures, boundary locations, etc. so as fairly and correctly to divide these counties into districts for the election of single members of the Senate or the House in time for the elections of 1971." The court promised to appoint a special master in January 1972 to investigate the possibility of single-member districts for the general elections of 1975 and 1979.

Applicants moved the District Court to stay its order. The motion was denied on May 24. Applicants have now applied to this Court for a stay of the District Court's order and for an extension of the June 4 filing deadline until the District Court shall have provided single-member districts in Hinds County, or until the Attorney General or the District Court for the District of Columbia approves the District Court's apportionment plan under Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. V).

Insofar as applicants ask relief under the Voting Rights Act the motion for stay is denied. A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act. However, other reasons lead us to grant the motion to the extent indicated below.

In failing to devise single-member districts, the court was under the belief that insufficient time remained until June 4, the deadline for the filing of notices of candidacy. Yet at that time June 4 was 17 days away and, according to an uncontradicted statement in the brief supporting this motion, the applicants were able to formulate and offer to the court four single-member district plans for Hinds County in the space of three days. Also according to uncontradicted statements, these plans were based on data which included county maps showing existing political subdivisions, the supervisory districts used by the Census Bureau for the taking of the 1970 census, official 1970 Census Bureau "final population counts," and "computer print-out from Census Bureau official computer tapes showing total and white/Negro population by census enumeration districts." Applicants also assert that no other population figures will subsequently become available.

The District Court's judgment was that single-member districting would be "ideal" for Hinds County. We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter. Furthermore, given the census information apparently available and the dispatch with which the applicants devised suggested plans for the District Court, it is our view that, on this record, the District Court had ample time to devise single-member districts for Hinds County prior to the June 4 filing deadline. While meeting the June 4 date is no longer possible, there is nothing before us to suggest any insurmountable barrier to devising such a plan by June 14, 1971. Therefore the motion for stay is granted and the judgment below is stayed until June 14. The District Court is instructed, absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County by that date.

In light of this disposition, the District Court is directed to extend the June 4 filing date for legislative candidates from Hinds County to an appropriate date so that those candidates and the State of Mississippi may act in light of the new districts into which Hinds County will be divided.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN dissent and reserve the right to file an opinion to that effect.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE HARLAN join, dissenting.*

I strongly dissent from the stay order of June 3, 1971, more particularly as it relates to a postponement of the Hinds County, Mississippi, election. Under Mississippi law and the decrees of the three-judge court, Hinds County candidates for the state legislature would be elected from the county at large. But this Court—at the eleventh hour—now commands the District Court to change its decree and divide Hinds County into single-member districts so that each voter there can vote for only one state representative and one state senator. Under Mississippi law, the final filing date for candidates is June 4. This Court's order now postpones that deadline to "an appropriate date" after June 14. The order compels candidates who had expected to run county-wide to change their plans completely and to campaign only in a particular district which is part of the county. The confusion is compounded because the candidates do not yet know where the district lines will be drawn. Any candidate would be dumbfounded by the thought that his old district had suddenly been abolished on the eve

*[NOTE: This opinion was filed June 4, 1971.]

of the filing date and he must now run in a new but unspecified district which is still only a dream in the eyes of the United States Supreme Court sitting a thousand miles from Hinds County.

This abrupt order by the Court is all the more astounding since this Court has consistently approved multi-member districts for state legislatures. *Burnette* v. *Davis,* 382 U. S. 42 (1965); *Fortson* v. *Dorsey,* 379 U. S. 433 (1965); *Burns* v. *Richardson,* 384 U. S. 73 (1966).

I do not deny that this Court has the sheer, raw power to impose single-member districts on Hinds County. I do, however, strongly object to this Court's exercising that power by throwing a monkey wrench into the county election procedure at this late date.

Above all else, we should remember that no one of us is a resident of Mississippi or the Judicial Circuit of which Mississippi is a part. The judges who entered this order do reside in that Circuit, they heard the evidence and oral arguments, and examined the statistics. We should not forget they concluded that:

> "There is no evading the fact that with the time left available it is a matter of sheer impossibility to obtain dependable data, population figures, boundary locations, etc. so as fairly and correctly to divide these counties into districts for the election of single members of the Senate or the House in time for the elections of 1971."

The holding of a county election is a difficult, intricate, and time-consuming process. Orders must be filed, ballots printed, campaigning plans laid, and officials appointed. Many different procedures must be carefully synchronized if the elections are to be efficiently and fairly administered. But today the Court plunges into an unfamiliar arena and creates utter confusion for the voters, candidates, and officials of Hinds County by

subjecting them to the judicial branch of Federal Government.

Needless to say I completely agree with the holding of the majority that a reapportionment plan formulated and ordered by a federal district court need not be approved by the United States Attorney General or the United States District Court for the District of Columbia. Under our constitutional system it would be strange indeed to construe § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. V), to require that actions of a federal court be stayed and reviewed by the Attorney General or the United States District Court for the District of Columbia.

I dissent.

Reporter's Note

The next page is purposely numbered 901. The numbers between 695 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM APRIL 15 THROUGH JUNE 1, 1971

APRIL 15, 1971

Dismissal Under Rule 60

No. 710. ASSOCIATED PRESS *v.* ADAMS ET AL. Motion for leave to file petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

APRIL 19, 1971

Affirmed on Appeal

No. 1352. CONSOLIDATED CARRIERS CORP. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 321 F. Supp. 1098.

Appeals Dismissed

No. 1347. FAIRVIEW DEVELOPMENT, INC. *v.* CITY OF FAIRBANKS. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 475 P. 2d 35.

No. 1368. FOREMAN *v.* CITY OF BELLEFONTAINE ET AL. Appeal from Ct. App. Ohio, Logan County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1426. DELAHAY *v.* ALASKA ET AL. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 476 P. 2d 908.

419-882 O - 72 - 49

No. 6381. PRICE *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 46 Ill. 2d 209, 263 N. E. 2d 484.

No. 1367. CLAIROL, INC. *v.* DIRECTOR OF DIVISION OF TAXATION. Appeal from Sup. Ct. N. J. Motion of Automobile Manufacturers Assn., Inc., for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and case set for oral argument. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 57 N. J. 199, 270 A. 2d 702.

No. 1390. PRUETT *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 463 S. W. 2d 191.

No. 1391. H. L. FEDERMAN & Co., INC. *v.* ZERBEL, DBA JOHN A. ZERBEL & Co. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 48 Wis. 2d 54, 179 N. W. 2d 872.

No. 1428. FRIED ET AL. *v.* DANAHER, CLERK OF CIRCUIT COURT, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 46 Ill. 2d 469, 263 N. E. 2d 820.

No. 962. KOSTAMO *v.* NORTHERN CITY NATIONAL BANK, ADMINISTRATOR, ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN dissent from dismissal of appeal. Reported below: 287 Minn. 556, 178 N. W. 2d 896.

No. 5925. HIETALA *v.* HEIR OF PAKARINEN. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN dissent from dismissal of appeal. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 287 Minn. 330, 178 N. W. 2d 714.

Vacated and Remanded on Appeal

No. 1353. MCCANN, DISTRICT ATTORNEY OF MILWAUKEE COUNTY *v.* BABBITZ. Appeal from D. C. E. D. Wis. Judgment vacated and case remanded for reconsideration in light of *Younger* v. *Harris,* 401 U. S. 37; and *Samuels* v. *Mackell* and *Fernandez* v. *Mackell,* 401 U. S. 66. MR. JUSTICE DOUGLAS dissents from the remand. Reported below: 320 F. Supp. 219.

*Certiorari Dismissed**

No. 5029. ROMONTIO *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 400 U. S. 901.] Writ of certiorari dismissed as improvidently granted. Reported below: 400 F. 2d 618.

Miscellaneous Orders

No. 538. SWARB ET AL. *v.* LENNOX ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 401 U. S. 991.] Motion to proceed on original record and motion to dispense with printing appellants' brief on merits granted.

No. 1042. DIFFENDERFER ET AL. *v.* CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INC., ET AL. Appeal from D. C. S. D. Fla. [Probable jurisdiction noted, 401 U. S. 934.] Joint motion to dispense with printing appendix record granted.

---

*[REPORTER'S NOTE: This is a new category for summary dispositions. Cf. REPORTER'S NOTE, 398 U. S. 901.]

No. 798. UNITED STATES ET AL. *v.* MITCHELL ET AL. C. A. 5th Cir. [Certiorari granted, 400 U. S. 1008.] Motion of respondent Angello for additional time for oral argument granted and an additional 15 minutes allotted for that purpose. The Solicitor General also granted an additional 15 minutes to argue on behalf of the United States.

No. 835. DEWEY *v.* REYNOLDS METALS CO. C. A. 6th Cir. [Certiorari granted, 400 U. S. 1008.] Motions of National Jewish Commission on Law & Public Affairs et al., Chamber of Commerce of the United States, and American Jewish Congress for leave to file briefs as *amici curiae* granted. MR. JUSTICE HARLAN took no part in the consideration or decision of these motions.

No. 1463. DEKAR INDUSTRIES, INC., ET AL. *v.* BISSETT-BERMAN CORP. C. A. 9th Cir. Motion of respondent to restrict distribution of petition or in the alternative to delete portions thereof denied. Reported below: 434 F. 2d 1304.

No. 6303. TRULL *v.* SMITH, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 6319. NEY *v.* FIELD, MEN'S COLONY SUPERINTENDENT;

No. 6474. BROWN *v.* BUCHKOE, WARDEN;

No. 6579. WARD *v.* PAGE, WARDEN; and

No. 6663. REESE ET AL. *v.* SMITH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 6601. HARRIS *v.* LAFAVE; and

No. 6665. LAUGHLIN *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 1346. UNITED STATES *v.* TOPCO ASSOCIATES, INC. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. Reported below: 319 F. Supp. 1031.

Certiorari Granted

No. 1331. AFFILIATED UTE CITIZENS OF UTAH ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 431 F. 2d 1337 and 1349.

Certiorari Denied. (See also Nos. 1347, 1368, 1426, and 6381, *supra.*)

No. 1023. HEALY ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 126 Ill. App. 2d 189, 261 N. E. 2d 468.

No. 1189. DELEGGE *v.* UNITED STATES;

No. 1277. DADDANO *v.* UNITED STATES; and

No. 6532. CAIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1119.

No. 1228. ROBERTS *v.* STATE REAL ESTATE COMMISSION. Sup. Ct. Pa. Certiorari denied. Reported below: 441 Pa. 159, 271 A. 2d 246.

No. 1265. CONSTRUCTION & GENERAL LABORERS' LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO *v.* JORDAN CO. Sup. Ct. Ga. Certiorari denied. Reported below: 226 Ga. 682, 177 S. E. 2d 54.

No. 1294. MCAFEE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 431 F. 2d 1360.

No. 1337. MORELLI ET AL. *v.* NEW YORK; and

No. 1399. COLON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 1, 267 N. E. 2d 577.

No. 1296. EL RANCO, INC., ET AL. *v.* FIRST NATIONAL BANK OF NEVADA, ADMINISTRATOR. C. A. 9th Cir. Certiorari denied.

No. 1308. UNITED MINE WORKERS OF AMERICA *v.* DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AKA INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA. C. A. D. C. Cir. Certiorari denied. Reported below: 140 U. S. App. D. C. 349, 435 F. 2d 421.

No. 1338. BETO, CORRECTIONS DIRECTOR *v.* MARION. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 29.

No. 1339. HALDANE *v.* RUPPE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 647.

No. 1342. MCMANN, WARDEN *v.* OWEN. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 813.

No. 1345. NOLL MOTORS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 433 F. 2d 853.

No. 1357. LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 433 F. 2d 302.

No. 1358. COAKLEY *v.* REISING ET AL. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 457 S. W. 2d 431.

No. 1361. SINATRA *v.* GOODYEAR TIRE & RUBBER CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 711.

No. 1369. MOORE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 140 U. S. App. D. C. 309, 435 F. 2d 113.

No. 1366. BAUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 1197.

No. 1372. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 436 F. 2d 517.

No. 1374. GRANGER ET AL. *v.* CITY OF MENTOR. Ct. Common Pleas, Lake County, Ohio. Certiorari denied.

No. 1377. ROSE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 149.

No. 1379. INTERNATIONAL METAL SPECIALTIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 870.

No. 1380. MATHER CONSTRUCTION CO. ET AL. *v.* CONTINENTAL CASUALTY CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 143 U. S. App. D. C. 234, 443 F. 2d 649.

No. 1382. MACLEOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 947.

No. 1384. RAYMOND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 436 F. 2d 951.

No. 1385. KIRKLAND, TRUSTEE IN BANKRUPTCY *v.* PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 804.

No. 1388. MESSICK, DBA GEORGIAN HALL MOTOR LODGE, ET AL. *v.* GORDON. C. A. 4th Cir. Certiorari denied.

No. 1400. DROBNICK ET AL. (FIRST NATIONAL BANK OF WAUKEGAN, TRUSTEE) *v.* FOSS PARK DISTRICT. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 125 Ill. App. 2d 276, 260 N. E. 2d 474.

No. 1396. LOMBARDOZZI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 878.

No. 1401. BAGEL BAKERS COUNCIL OF GREATER NEW YORK ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 884.

No. 1403. STANLEY AIR TOOLS, A DIVISION OF STANLEY WORKS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 432 F. 2d 358.

No. 1404. NORIEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 435.

No. 1405. LESLIE SALT CO. *v.* ALAMEDA CONSERVATION ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 1087.

No. 1407. DOYLE *v.* KOELBL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1014.

No. 1408. BOARD OF EDUCATION OF THE CITY OF CHICAGO *v.* KING ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 295.

No. 1410. CERTAIN SPACE IN PROPERTY KNOWN AS CHIMES BUILDING ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 872.

No. 1411. NATIONAL BANK OF ALBANY PARK IN CHICAGO, TRUSTEE, ET AL. *v.* CITY OF CHICAGO IN TRUST FOR USE OF SCHOOLS. Sup. Ct. Ill. Certiorari denied. Reported below: See 127 Ill. App. 2d 51, 261 N. E. 2d 711.

No. 1416. CANEL LODGE No. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* UNITED AIRCRAFT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 1.

No. 1417. SHERWOOD ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 435 F. 2d 867.

No. 1418. SANDOVAL ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 635.

No. 1422. SHAW ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1427. AETNA LIFE INSURANCE CO. *v.* LESTER. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 884.

No. 1437. ARMSTRONG EQUIPMENT CO. *v.* CLARK EQUIPMENT CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1039.

No. 1458. COSTEN ET VIR *v.* HIRSCHBACH MOTOR LINE ET AL. Sup. Ct. La. Certiorari denied. Reported below: 256 La. 1158, 241 So. 2d 256.

No. 1462. SPARKS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 46 Ala. App. 357, 242 So. 2d 403.

No. 1466. DEMOCRATIC ORGANIZATION OF COOK COUNTY ET AL. *v.* SHAKMAN ET AL. C. A. 7th Cir. Certiorari denied.

No. 1486. ATLAS ENGINE WORKS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 435 F. 2d 558.

No. 6071. BOOTH *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied.

No. 6127. SCOTT *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 104.

No. 6163. REYNOLDS *v.* ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 6182. BUSTOS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6231. MALONE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 6261. DUDLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 305, 263 N. E. 2d 1.

No. 6273. LAY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 6299. HILL *v.* CIRCUIT COURT OF HILLSBOROUGH. Sup. Ct. Fla. Certiorari denied.

No. 6318. BLANTON *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 6326. FITZSIMMONS *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 6332. MURPHY *v.* CONTE. Sup. Ct. Wash. Certiorari denied.

No. 6337. LOCKRIDGE ET AL. *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 3d 166, 474 P. 2d 683.

No. 6339. NICHOLS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 3d 150, 474 P. 2d 673.

No. 6347. WALTERS, AKA ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 6358. MAYFIELD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 24 Ohio St. 2d 36, 263 N. E. 2d 311.

No. 6369. RUSH *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 6387. GILYARD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 2d 95, 260 N. E. 2d 364.

No. 6398. LANDGHAM *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 2d 9, 257 N. E. 2d 484.

No. 6408. PASZEK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 780.

No. 6428. LIGUE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: See 123 Ill. App. 2d 171, 260 N. E. 2d 20.

No. 6437. SCOTT *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 6438. FOGNINI, AKA SWARTZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 150, 265 N. E. 2d 133.

No. 6469. MUHAMMAD *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 432 F. 2d 1046.

No. 6497. HARPER *v.* CICCONE, MEDICAL CENTER DIRECTOR. C. A. 8th Cir. Certiorari denied. Reported below: 434 F. 2d 247.

No. 6506. SOSTRE *v.* MITCHELL, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied.

No. 6520. VERMEULEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 72.

No. 6526. HEPLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 6530. HASLAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 419.

No. 6542. NORDESTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6546. REEB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 381.

No. 6549. SULLIVAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 650.

No. 6556. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 1245.

No. 6561. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 1166.

No. 6577. TANNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 434 F. 2d 260.

No. 6581. ZENCHAK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6582. HARGROVE *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 6585. SEYFRIED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 696.

No. 6591. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 436 F. 2d 122.

No. 6595. MARTIN *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: See 2 Wash. App. 904, 472 P. 2d 607.

No. 6596. CARTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 141 U. S. App. D. C. 259, 437 F. 2d 692.

No. 6597. BORMAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 437 F. 2d 44.

No. 6599. PLATT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 220.

No. 6603. MOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 1259.

No. 6605. TANNER *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 6606. HOLMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 863.

No. 6607. BOURNETT *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 6608. HICKS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 277 N. C. 349, 177 S. E. 2d 283.

No. 6609. JORDAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 6616. LEWIS *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 227 Ga. 220, 179 S. E. 2d 745.

No. 6618. ROSE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 6620. LOPEZ *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 6631. MASON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 6641. ENTY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 442 Pa. 39, 271 A. 2d 926.

No. 6634. HACKER *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 6644. WILLIAMS *v.* McMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 103.

No. 6650. MORRISON *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 6655. HUGHES *v.* DISTRICT ATTORNEY FOR ATLANTA, GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 568.

No. 6669. ALEXANDER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 6670. McKINNEY *v.* PATUXENT INSTITUTION DIRECTOR. Ct. Sp. App. Md. Certiorari denied.

No. 6675. DUFFEN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 160 Conn. 77, 273 A. 2d 863.

No. 6678. HATHORNE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 459 S. W. 2d 826.

No. 1248. LaVALLEE, CORRECTIONAL SUPERINTENDENT *v.* MILLER ET AL. C. A. 2d Cir. Motion of respondent Miller for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 436 F. 2d 875.

No. 1279. TIMMONS *v.* UNITED STATES; and

No. 1315. NOLTE *v.* UNITED STATES. C. A. 9th Cir. Motions to dispense with printing petitions granted. Certiorari denied. Reported below: 432 F. 2d 1011.

No. 1281. HEINE *v.* RAUS. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 432 F. 2d 1007.

No. 1348. LITTLEPAGE *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 435 F. 2d 498.

No. 1364. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 442 F. 2d 1341.

No. 1310. EDWARDS *v.* BRYAN ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 435 F. 2d 28.

No. 6635. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 1.

No. 1340. PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 438 F. 2d 79.

No. 1350. UNITED TRANSPORTATION UNION *v.* ILLINOIS CENTRAL RAILROAD CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 433 F. 2d 566.

No. 1351. INTERBORO CONTRACTORS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 854.

No. 1356. FRANCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 434 F. 2d 956.

No. 1316. 2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 1286.

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

In 1945 Congress authorized the Benbrook Dam and Reservoir Project on the Clear Fork of the Trinity River near the southwest outskirts of Fort Worth, Texas. The authorization stated in part:

> "The improvement of the Trinity River and tributaries, Texas, for navigation, flood control, and allied purposes is hereby approved and authorized in accordance with the reports contained in House Document Numbered 403, Seventy-seventh Congress." § 2, 59 Stat. 18.

The project described in House Document 403 called for a gated spillway dam to be located on the Clear Fork at river mile 11.3. The storage capacity of the reservoir in acre feet of water was to be dead storage, 603; conservation storage, 30,603; and controlled (combined conservation and flood control) storage, 208,850. The elevation of the spillway crest was 672 feet and the top of the dam was 702 feet. Approximately 6,200 acres of land would have been required. Projected cost of the land was $483,600 and the entire project was estimated to cost about $5,205,502.

The project that was subsequently built bears little resemblance to the one described in House Document 403. It is located 3.7 miles farther upstream at river mile 15. It is an uncontrolled spillway type. The notch crest of the spillway is 710 feet, and the main spillway crest is 724 feet. The top of the dam is 747 feet. The storage capacity in acre feet of water as stated by the Definite Project Report is dead storage, 17,750; conservation storage, 88,250; and controlled storage, 410,013. Over 13,000

acres of land were acquired at a cost of about $2,500,000; total project cost was well over $14,000,000.

This case arose when the United States filed a petition for condemnation of petitioners' land in federal district court. Some 1,207 acres were finally sought. Of this land some lies below the elevation of 697.1 feet (conservation pool elevation, the maximum water level of the pool below flood stage). That land below elevation 697.1 is not involved in the case here. But some 647 acres lie above that elevation. The Army Corps of Engineers took that land for recreation purposes. Petitioners claim that taking is not authorized by law. Petitioners have consistently contended that the land was taken for recreation purposes and that was not authorized under statutes authorizing the Benbrook Project and that the project, as built, was so radically and materially changed that it had to be resubmitted to Congress for a new authorization.

Shortly after the Government filed its condemnation suit, petitioners' predecessor, Richardson, instituted discovery proceedings. The Secretary of the Army refused to submit and the District Court abated the cause with bare legal title left in the Government and possession restored to Richardson pending the Government's obedience to the court's discovery orders. The Court of Appeals for the Fifth Circuit affirmed this action. *United States* v. *Richardson*, 204 F. 2d 552 (1953). The Government later submitted to discovery and discovery showed, as General Sturgis, former Chief of the Corps, admitted to a congressional subcommittee, that "it could have been very embarrassing to have justified his [the Secretary's] certification of the public need of all of this particular taking." [1]

[1] Hearings on Army-Interior Reservoir Land Acquisition Policy before a Subcommittee of the House Committee on Government Operations, 85th Cong., 1st Sess., 422 (1957).

419-882 O - 72 - 50

As a result of a congressional investigation and discovery in this case certain facts about this case emerged. Petitioners allege that prior to 1953 the Corps had a "field practice" of taking more property than was authorized in order to create land for purely recreational purposes. According to the District Court, 309 F. Supp. 887, almost simultaneously with the 1945 authorization the Corps in the present case began its plans for twice as much land as had been authorized with much of the excess for purely recreational purposes. Maps were prepared showing the locations of the recreational facilities. The final recreational plans for the project were in the form of Appendix VIII E to the Definite Project Report. In preliminary drafts certain proposed expenses were designated as "for recreation," but in final drafts they were credited to "preparation of master plan." Similarly, the maps initially showed "recreational areas," but in final stages the label was changed to "reservoir management." In addition, Appendix VIII E was stamped "Not for Public Release." According to the District Court, no other appendix was so classified. *Id.*, at 896.

Justification for the excess land was necessary. The District Court found that to accomplish this, the Corps created the Great Storm and used its Great Storm as a basis for its spillway design on the dam as built. It is said that the storm will indeed be great, if it ever comes, dumping some 28.2 inches of rain in the area within a 60-hour period. The likelihood of this happening is said not to be high. Average annual rainfall in the area is 31.3 inches. The greatest storm ever recorded there dropped 12.57 inches in a 57-hour period. The District Court says the Great Storm was invented from a storm near Thrall, Texas, in 1922. Thrall is 130 miles from the Gulf of Mexico and over 150 miles from the Benbrook Project. The Thrall storm dropped an uncertain amount of rain and reports of the amount increased as

the years passed. The District Court found that in all probability about 18–19 inches were dropped in a three-day period in Thrall.

But even with the Great Storm, recordbreaking though it would be, the District Court found that the Corps could not justify the height of the spillway necessary to obtain the land it wanted for recreational purposes. But one Great Storm deserves another and that, it is said, is what the Corps postulated. The Great Storm was assumed to come right after another big storm had dropped large amounts of rain in the area, thus preventing any opening of the dam gates. Furthermore, none of the spillway design criteria made any allowance for the well-established reservoir management practice of lowering the level of water during potential flood months. And large floods have occurred only during three months of the year in the Fort Worth area.

The District Court found that the taking of the land for recreational purpose was lawless. The Court of Appeals for the Fifth Circuit reversed, concluding that recreational development was an "allied purpose" within the meaning of the project authorization and also concluding the modifications were proper and needed no further authorization. 432 F. 2d, at 1291.

From the Solicitor General's brief in opposition there is much we do not know about the Government position. There have been congressional inquiries into the Corps' actions in taking more land than necessary for projects which it is building. Hearings on Army-Interior Reservoir Land Acquisition Policy before a Subcommittee of the House Committee on Government Operations, 85th Cong., 1st Sess. (1957); Report of the Subcommittee on Deficiencies and Army Civil Functions of the House Committee on Appropriations, Investigation of Corps of Engineers Civil Works Program, 82d Cong., 1st Sess.

(Comm. Print 1951). The Solicitor General does not discuss the effect of these reports on this litigation.

Further, there is some relevant statutory material which the Solicitor General does not discuss or cite. Section 701b–8 of 33 U. S. C. states that "[n]o . . . modification not authorized, of a project . . . shall be authorized . . . unless a report for such . . . modification has been previously submitted by the Chief of Engineers . . . in conformity with existing law." Section 701m authorizes the Corps to make a dam smaller than originally planned, but does not authorize making a dam larger, as happened here. Section 701 requires reports for projects or modifications covering, *inter alia*, "the extent and character of the area to be affected by the proposed improvement" and "such other uses as may be properly related to or coordinated with the project."

Finally we do not know to what use the land has been put. If there is no development yet, what are the current plans? The National Environmental Policy Act of 1969, 42 U. S. C. § 4331 *et seq.* (1964 ed., Supp. V), requires environmental impact statements for proposed projects.[2] So far as we are advised, no such statement has been filed.

The questions raised are of such great public importance that I dissent from a denial of certiorari.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

The National Environmental Policy Act of 1969, 83 Stat. 852, provides in § 102 the following:

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted

[2] The relevant portions of this Act are set forth in an Appendix to this dissent.

and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop

and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

No. 1359. WHEELER *v.* LYKES BROS. STEAMSHIP CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 431 F. 2d 570.

No. 1386. CHICAGO HOUSING AUTHORITY ET AL. *v.* GAUTREAUX ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 436 F. 2d 306.

No. 1432. LYND ET AL. *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 47 Ill. 2d 205, 265 N. E. 2d 116.

No. 6087. MCKENZIE *v.* DIRECTOR, PATUXENT INSTITUTION. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 6567. KEMBER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 437 F. 2d 534.

No. 1376. SAMUEL GOLDWYN PRODUCTIONS ET AL. *v.* MULVEY. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 433 F. 2d 1073.

No. 6082. HARRINGTON ET UX. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE HARLAN would grant certiorari, vacate judgment below, and remand case in light of *Chimel* v. *California,* 395 U. S. 752 (1969), and his separate opinion in *Mackey* v. *United States* (and companion cases), 401 U. S. 667, 675. Reported below: 2 Cal. 3d 991, 471 P. 2d 961.

No. 6484. AGUIRRE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE HARLAN would grant certiorari, vacate judgment below, and remand case in light of *Chimel* v. *California,* 395 U. S. 752 (1969), and his separate opinion in *Mackey* v. *United States* (and companion cases), 401 U. S. 667, 675. Reported below: 10 Cal. App. 3d 884, 89 Cal. Rptr. 384.

No. 6105. CANTRELL *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 6512. CANTRELL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 206 Kan. 323, 478 P. 2d 192.

No. 6325. NEMKE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE HARLAN and MR. JUSTICE MARSHALL would grant certiorari, vacate judgment below, and remand case in light of *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and MR. JUSTICE HARLAN's separate opinion in *Mackey* v. *United States* (and companion cases), 401 U. S. 667, 675, and MR. JUSTICE MARSHALL's separate opinion in *Williams* v. *United States* (and companion case), 401 U. S. 646, 665. Reported below: 46 Ill. 2d 49, 263 N. E. 2d 97.

No. 6698. GANCI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 27 N. Y. 2d 418, 267 N. E. 2d 263.

Rehearing Denied

No. 152. PATTERSON *v.* HUMBLE OIL & REFINING CO. ET AL., 401 U. S. 922. Petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition.

No. 1034. JACOBS *v.* UNITED STATES, 401 U. S. 924. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 6276. SINGAL *v.* BLACKWELL, WARDEN, ET AL., 401 U. S. 922. Motion for leave to file petition for rehearing denied.

No. 370. MAGNESIUM CASTING CO. *v.* NATIONAL LABOR RELATIONS BOARD, 401 U. S. 137;

No. 964. VAN SICKLE *v.* NEVADA, 401 U. S. 910;

No. 966. FLORIDA STATE BOARD OF DENTISTRY *v.* MACK, 401 U. S. 960;

No. 1037. PEACOCK *v.* RETAIL CREDIT CO., 401 U. S. 938;

No. 1130. NOLYNN ASSOCIATION OF SEPARATE BAPTIST IN CHRIST OF KENTUCKY ET AL. *v.* OAK GROVE SEPARATE BAPTIST CHURCH ET AL., 401 U. S. 955;

No. 1132. CITY OF MILLARD ET AL. *v.* CITY OF OMAHA ET AL., 401 U. S. 951;

No. 5740. GARCIA ET UX. *v.* UNITED STATES, 400 U. S. 945;

No. 5942. SHIRLEY *v.* LOUISIANA, 401 U. S. 926;

No. 6175. SPIGNER *v.* UNITED STATES, 401 U. S. 918; and

No. 6355. MARAS *v.* GEHRING, 401 U. S. 946. Petitions for rehearing denied.

No. 1211. LEVY *v.* UNITED STATES, 401 U. S. 962. Petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit beginning June 1, 1971, and ending June 4, 1971, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

APRIL 21, 1971

Miscellaneous Order

No. ——. MORTON, SECRETARY OF THE INTERIOR *v.* QUAKER ACTION GROUP ET AL. Upon consideration of the application of the Solicitor General of the United States for a stay herein and the opposition to such stay on behalf of the respondents presented to THE CHIEF JUSTICE as Circuit Justice for the District of Columbia Circuit at 6 p. m. on April 20, 1971, THE CHIEF JUSTICE entered an order, dated April 20, 1971, vacating the order of the United States Court of Appeals, dated April 19, 1971, which modified the preliminary injunction issued on April 16, 1971, by the United States District Court for the District of Columbia and reinstated the said order of the District Court, dated April 16, 1971, pending further order of the Court; and said matter being referred by THE CHIEF JUSTICE to the Court and the Court having considered the matter,

IT IS ORDERED

(1) that the Order of the United States Court of Appeals for the District of Columbia Circuit, dated April 19, 1971, modifying the preliminary injunction issued by the United States District Court for the District of Columbia on April 16, 1971, is vacated;

(2) that the preliminary injunction issued by the United States District Court herein on April 16, 1971, is reinstated with full force and effect.

MR. JUSTICE DOUGLAS took no part in the consideration of this matter.

APRIL 26, 1971

Miscellaneous Orders

No. 48, Orig. MISSISSIPPI *v.* ARKANSAS. [Motion to file complaint granted, 400 U. S. 1019.]

IT IS ORDERED that the Honorable Clifford O'Sullivan, Senior Circuit Judge of the United States Court of Ap-

peals for the Sixth Circuit, be, and he is hereby, appointed Special Master in this case. The Special Master shall have authority to fix the time and conditions for filing of additional pleadings and to direct subsequent proceedings, and 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 approve.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

No. 1285. UNITED STATES *v.* BASS. C. A. 2d Cir. [Certiorari granted, 401 U. S. 993.] Motion of respondent for appointment of counsel granted. It is ordered that William E. Hellerstein, Esquire, of New York, New York, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 5515. HUMPHREY *v.* CADY, WARDEN. C. A. 7th Cir. [Certiorari granted, 401 U. S. 973.] Motion of petitioner for appointment of counsel granted. It is ordered that Irvin B. Charne, Esquire, of Milwaukee, Wisconsin, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1395. DeSapio *v.* United States. C. A. 2d Cir. Motion of petitioner for leave to copy briefs for respondent in No. 825, October Term, 1970, granted. Mr. Justice White took no part in the consideration or decision of this motion.

No. 5798. Argersinger *v.* Hamlin, Sheriff. Sup. Ct. Fla. [Certiorari granted, 401 U. S. 908.] Motion of National Legal Aid & Defender Assn. to dispense with printing brief as *amicus curiae* granted.

No. 6046. Lego *v.* Twomey, Warden. C. A. 7th Cir. [Certiorari granted, 401 U. S. 992.] Motion of petitioner for appointment of counsel granted. It is ordered that Nathan Lewin, Esquire, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 6464. Eisenhardt *v.* United States; and

No. 6765. Davis *v.* California Adult Authority et al. Motions for leave to file petitions for writs of habeas corpus denied.

No. 6697. Dixon *v.* Gordon, U. S. District Judge, et al. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 1412. Schilb et al. *v.* Kuebel. Appeal from Sup. Ct. Ill. Probable jurisdiction noted. Reported below: 46 Ill. 2d 538, 264 N. E. 2d 377.

Certiorari Granted

No. 1420. National Labor Relations Board *v.* Nash-Finch Co., dba Jack & Jill Stores. C. A. 8th Cir. Certiorari granted. Reported below: 434 F. 2d 971.

Certiorari Denied

No. 1307. BELLAMY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 542.

No. 1343. GLUCKSMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1409. BARNETT *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 125 Ill. App. 2d 70, 260 N. E. 2d 303.

No. 1423. ELBEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 1430. BENEDICT ET AL. *v.* COUNTY OF PEORIA. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 166, 265 N. E. 2d 141.

No. 1431. HINGLE *v.* PEREZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1037.

No. 1439. ETHICON, INC. *v.* HANDGARDS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 438.

No. 1440. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 438 F. 2d 479.

No. 1444. YOUNG *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 57 N. J. 240, 271 A. 2d 569.

No. 1445. DORR *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 458, 265 N. E. 2d 601.

No. 1446. MCKOWN ET AL. *v.* PIERCE ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: —— Tenn. ——, 461 S. W. 2d 950.

No. 1450. POLSON *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 93 Idaho 912, 478 P. 2d 292.

No. 1451. MAXWELL *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 260 N. E. 2d 787.

No. 1464. UNITED MINE WORKERS OF AMERICA *v.* BLUE DIAMOND COAL CO. C. A. 6th Cir. Certiorari denied. Reported below: 436 F. 2d 551.

No. 1490. HOWARD MANUFACTURING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 581.

No. 1498. HUBBARD *v.* KIEFEL. C. A. 7th Cir. Certiorari denied.

No. 6217. GOULD *v.* ZELKER, WARDEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 6244. STARK *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 288 Minn. 286, 179 N. W. 2d 597.

No. 6600. VIRGA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 1320.

No. 6624. TATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6625. POTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6627. WILSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 436 F. 2d 850.

No. 6628. PARKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 142 U. S. App. D. C. 15, 439 F. 2d 525.

No. 6632. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6637. CHAPMAN *v.* COLLINS, SHERIFF, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 435 F. 2d 155.

No. 6642. CARRIZOZA-ISLAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 422.

No. 6643. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 1001.

No. 6647. EATON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 362.

No. 6653. EDMONDSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 435 F. 2d 1366.

No. 6654. PHILLIPS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 6671. MORALES *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 6677. WESTFALL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 6679. PALMER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 289, 265 N. E. 2d 627.

No. 6683. BRAXTON *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 6691. KITCHENS *v.* MCCULLOCH. C. A. 5th Cir. Certiorari denied.

No. 6693. COLBY *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 6699. LEIGHTY *v.* GOODWIN, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 6700. BRYANT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 143 U. S. App. D. C. 53, 442 F. 2d 775.

No. 6701. GRIFFITH *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 239 So. 2d 523.

No. 6706. HOWELL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 6708. HALPERN *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 6709. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 1074. PETKUS *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 110 N. H. 394, 269 A. 2d 123.

No. 1421. WEBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 437 F. 2d 327.

No. 1438. SCHMUTZ MANUFACTURING CO., INC. *v.* ATKINS. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 527.

No. 6389. CIMINO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 45 Ill. 2d 556, 257 N. E. 2d 97.

No. 6421. BURWELL *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 6590. JACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 317.

No. 6636. SHELTON *v.* UNITED STATES. Petition for certiorari before judgment to C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 1127. BURKE, WARDEN *v.* HAHN. C. A. 7th Cir. Motion to dispense with printing brief for respondent granted. Certiorari denied. Reported below: 430 F. 2d 100.

No. 1406. BROOM *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and judgment reversed in light of this Court's decision in *Whiteley* v. *Warden,* 401 U. S. 560. Reported below: 463 S. W. 2d 220.

No. 1424. GORNTO *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and judgment reversed. Reported below: 227 Ga. 46, 178 S. E. 2d 894.

No. 1467. ITT LAMP DIVISION OF INTERNATIONAL TELEPHONE & TELEGRAPH CORP. *v.* MINTER, COMMISSIONER OF DEPARTMENT OF PUBLIC WELFARE OF MASSACHUSETTS. C. A. 1st Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 435 F. 2d 989.

419-882 O - 72 - 51

No. 1436. HUMBLE OIL & REFINING CO. *v.* PRICE ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. Reported below: 432 F. 2d 165 and 435 F. 2d 772.

No. 6195. MARTINEZ *v.* PATTERSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 429 F. 2d 844.

No. 6447. MURRAY *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 429 F. 2d 1359.

No. 6310. KELM *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted.

Rehearing Denied

No. 325. NEGRE *v.* LARSEN ET AL., 401 U. S. 437;

No. 991. KOSERKOFF *v.* CHESAPEAKE & OHIO RAILWAY CO., 401 U. S. 947;

No. 1149. DAVENPORT *v.* CITY RENT AND REHABILITATION ADMINISTRATION OF THE CITY OF NEW YORK ET AL., 401 U. S. 956;

No. 1221. CATALDO *v.* UNITED STATES, 401 U. S. 977;

No. 6419. STEAD *v.* UNITED STATES, 401 U. S. 978; and

No. 6441. TILLI *v.* COUNTY OF NORTHAMPTON ET AL., 401 U. S. 978. Petitions for rehearing denied.

No. 272. CALARCO *v.* UNITED STATES, 400 U. S. 824. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied.

April 29, 1971

Dismissal Under Rule 60

No. 1317. Nor-Am Agricultural Products, Inc., et al. *v.* Hardin, Secretary of Agriculture, et al. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 435 F. 2d 1133 and 1151.

May 3, 1971

Affirmed on Appeal

No. 1136. Clark *v.* Ellenbogen et al. Affirmed on appeal from D. C. W. D. Pa. *Younger* v. *Harris,* 401 U. S. 37; *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell,* 401 U. S. 66. Mr. Justice Douglas is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 319 F. Supp. 623.

No. 1354. Nyquist, Commissioner of Education of New York, et al. *v.* Lee et al.; and

No. 1365. Chropowicki et al. *v.* Lee et al. Affirmed on appeals from D. C. W. D. N. Y. The Chief Justice, Mr. Justice Black, and Mr. Justice Harlan are of the opinion that probable jurisdiction should be noted and cases set for oral argument. Reported below: 318 F. Supp. 710.

Appeals Dismissed

No. 1193. Lane *v.* Texas. Appeal from County Ct. at Law No. 1, Travis County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Mr. Justice Douglas is of the opinion that probable jurisdiction should be noted.

No. 973. BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL. *v.* DOE; and

No. 6172. UNBORN CHILD OF DOE *v.* DOE ET AL. Appeals from D. C. N. D. Ga. Motion of appellee in No. 973 for leave to proceed *in forma pauperis* granted. Appeals dismissed for want of jurisdiction. *Gunn* v. *University Committee,* 399 U. S. 383 (1970). Reported below: 319 F. Supp. 1048.

No. 1457. MCMILLAN *v.* FEDERAL NATIONAL MORTGAGE ASSN. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

No. 1230. ABODEELY *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 179 N. W. 2d 347.

No. 5208.* BEVERLY *v.* SCOTLAND URBAN ENTERPRISES, INC. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 6367. CAMPBELL *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 240 So. 2d 298.

---

*For separate opinions of BLACK, J., and DOUGLAS, J., see No. 5048, *Meltzer* v. *LeCraw & Co., infra.*

Vacated and Remanded on Appeal

No. 5050.* FREDERICK ET AL. *v.* SCHWARTZ ET AL. Appeal from D. C. Conn. Judgment vacated and case remanded for reconsideration in light of this Court's decision in *Boddie* v. *Connecticut,* 401 U. S. 371. MR. JUSTICE DOUGLAS is of the opinion that judgment should be reversed. *Boddie* v. *Connecticut, supra.* Reported below: 296 F. Supp. 1321.

Certiorari Granted—Vacated and Remanded, or Reversed

No. 3. COBB ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decisions in *Leary* v. *United States,* 395 U. S. 6 (1969), and *United States* v. *United States Coin & Currency,* 401 U. S. 715. Reported below: 396 F. 2d 158.

No. 8. DEAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *United States* v. *United States Coin & Currency,* 401 U. S. 715. Reported below: 392 F. 2d 672.

No. 455. SCOTT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *United States* v. *United States Coin & Currency,* 401 U. S. 715. Reported below: 425 F. 2d 817.

No. 285. DECKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decisions in *Haynes* v. *United States,* 390 U. S. 85 (1968), and *United States* v. *United States Coin & Currency,* 401 U. S. 715. Reported below: 423 F. 2d 726.

---

*For separate opinion of BLACK, J., see No. 5048, *Meltzer* v. *LeCraw & Co., infra.*

No. 1073. UNITED STATES *v.* ZIZZO. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *Mackey* v. *United States,* 401 U. S. 667. MR. JUSTICE DOUGLAS dissents from this action of the Court. Reported below: 431 F. 2d 913.

No. 1150. BLOSS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari granted and judgment reversed. *Redrup* v. *New York,* 386 U. S. 767 (1967). THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE BLACKMUN would grant petition and set case for oral argument on issue whether seizure of the film without a warrant violated applicable constitutional standards. Reported below: See 18 Mich. App. 410, 171 N. W. 2d 455.

No. 5016. LAUCHLI *v.* UNITED STATES. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decisions in *Haynes* v. *United States,* 390 U. S. 85 (1968), and *United States* v. *United States Coin & Currency,* 401 U. S. 715.

No. 5052. GILLESPIE *v.* UNITED STATES. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decisions in *Haynes* v. *United States,* 390 U. S. 85 (1968), and *United States* v. *United States Coin & Currency,* 401 U. S. 715. Reported below: 409 F. 2d 511.

No. 5040. GRAHAM *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *United States* v. *United States Coin & Currency,* 401 U. S. 715. Reported below: 407 F. 2d 1313.

No. 5067.* SLOATMAN *v.* GIBBONS ET AL. Sup. Ct. Ariz. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *Boddie* v. *Connecticut,* 401 U. S. 371. MR. JUSTICE DOUGLAS is of the opinion that judgment should be reversed. *Boddie* v. *Connecticut, supra.* Reported below: 104 Ariz. 429, 454 P. 2d 574.

No. 5111. DROTAR *v.* UNITED STATES. C. A. 5th Cir. Reported below: 416 F. 2d 914;

No. 5927. WEBER *v.* UNITED STATES. C. A. 9th Cir. Reported below: 429 F. 2d 148;

No. 6306. COCHRAN *v.* UNITED STATES. C. A. 9th Cir. Reported below: 432 F. 2d 1356; and

No. 6645. MILLER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 437 F. 2d 1199. Motions for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for reconsideration in light of this Court's decisions in *Leary* v. *United States,* 395 U. S. 6 (1969), and *United States* v. *United States Coin & Currency,* 401 U. S. 715.

Miscellaneous Orders

No. —. PRUETT *v.* TEXAS. Ct. Crim. App. Tex. Application for stay denied. MR. JUSTICE STEWART is of the opinion that the application should be granted.

No. 48, Orig. MISSISSIPPI *v.* ARKANSAS. [Motion for leave to file bill of complaint granted, 400 U. S. 1019.] Application for stay of proceedings in Chancery Court of Chicot County, Arkansas, in *Arkansas Land & Cattle Co.* v. *Anderson-Tully Co.,* Civil Action No. 10,177, referred to Special Master for report and recommendation.

---

*For separate opinion of BLACK, J., see No. 5048, *Meltzer* v. *LeCraw & Co., infra.*

No. 45, Orig. WASHINGTON ET AL. *v.* GENERAL MOTORS CORP. ET AL. Motion for leave to file bill of complaint set for oral argument. One hour allowed for oral argument. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this matter.

No. 49, Orig. ILLINOIS *v.* CITY OF MILWAUKEE, WISCONSIN, ET AL. Motion for leave to file bill of complaint set for oral argument. One hour allowed for oral argument.

No. 50, Orig. VERMONT *v.* NEW YORK ET AL. Motion for leave to file bill of complaint set for oral argument. One hour allowed for oral argument.

No. 87. UNITED STATES *v.* DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE ET AL., 401 U. S. 520. Motion of Fort Mojave Tribe of Indians for leave to file suggestion of interest denied.

No. 812. UNITED STATES *v.* DISTRICT COURT IN AND FOR WATER DIVISION No. 5 ET AL., 401 U. S. 527. Motion of Fort Mojave Tribe of Indians for leave to file suggestion of interest denied.

No. 846. FIRST NATIONAL CITY BANK *v.* BANCO NACIONAL DE CUBA, 400 U. S. 1019. Motion of respondent for waiver of Clerk's costs denied. MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN are of the opinion that the motion should be granted.

No. 6458. HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Counsel for petitioner directed to file a brief in support of petition on or before May 20, 1971. The Attorney General of Texas is invited to file a responsive brief within 10 days from date of receipt of petitioner's brief.

No. 6459. CHACON *v.* NELSON, WARDEN;

No. 6495. KOHL *v.* PERINI, CORRECTIONAL SUPERINTENDENT, ET AL.; and

No. 6775. SZIJARTO *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 6913. FALLON *v.* WAGGONNER, SHERIFF, ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

Probable Jurisdiction Noted or Postponed

No. 808. ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Appeal from D. C. N. D. Tex. Probable jurisdiction postponed to hearing of case on the merits. Reported below: 314 F. Supp. 1217.

No. 971. DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL. Appeal from D. C. N. D. Ga. Probable jurisdiction postponed to hearing of case on the merits. Reported below: 319 F. Supp. 1048.

No. 876. MITCHUM, DBA BOOK MART *v.* FOSTER ET AL. Appeal from D. C. N. D. Fla. Probable jurisdiction noted. Reported below: 315 F. Supp. 1387.

No. 1495. COL-AN ENTERTAINMENT CORP. ET AL. *v.* HARPER ET AL. Appeal from D. C. N. D. Fla. Probable jurisdiction noted. Reported below: 325 F. Supp. 447.

No. 6158.* LINDSEY ET AL. *v.* NORMET ET AL. Appeal from D. C. Ore. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

---

*For separate opinion of BLACK, J., see No. 5048, *Meltzer* v. *LeCraw & Co.*, *infra*.

Certiorari Granted

No. 661. CHEVRON OIL CO. *v.* HUSON. C. A. 5th Cir. Certiorari granted. Reported below: 430 F. 2d 27.

No. 1114. UNITED STATES *v.* CALDWELL. C. A. 9th Cir. Certiorari granted. Reported below: 434 F. 2d 1081.

No. 1381. BRANZBURG *v.* HAYES ET AL., JUDGES. Ct. App. Ky. Certiorari granted. Reported below: 461 S. W. 2d 345.

No. 1286. UNITED STATES *v.* CHAS. PFIZER & CO., INC., ET AL. C. A. 2d Cir. Certiorari granted. MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 426 F. 2d 32.

No. 1389. UNITED STATES *v.* TUCKER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 431 F. 2d 1292.

No. 1454. PICARD *v.* CONNOR. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 434 F. 2d 673.

No. 1413. PARISI *v.* DAVIDSON ET AL. C. A. 9th Cir. Motion to dispense with printing petition and certiorari granted. Motion to advance oral argument denied. Reported below: 435 F. 2d 299.

No. 1434. IN RE PAPPAS. Sup. Jud. Ct. Mass. Motion of National Broadcasting Co., Inc., for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: —— Mass. ——, 266 N. E. 2d 297.

Certiorari Denied. (See also Nos. 1193, 1230, 1457, and 5208, *supra.*)

No. 16. HOSKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 406 F. 2d 72.

No. 23. FRANKE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 409 F. 2d 958.

No. 37. WALLACE ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 134 U. S. App. D. C. 50, 412 F. 2d 1097.

No. 100. IOZZI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 420 F. 2d 512.

No. 186. UNITED STATES *v.* LUCIA. C. A. 5th Cir. Certiorari denied. Reported below: 416 F. 2d 920 and 423 F. 2d 697.

No. 424. ALEXANDER ET AL. *v.* PASADENA CITY BOARD OF EDUCATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 1352.

No. 632. BOARD OF PUBLIC INSTRUCTION OF PINELLAS COUNTY, FLORIDA, ET AL. *v.* BRADLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 1377.

No. 745. BOARD OF PUBLIC INSTRUCTION OF MANATEE COUNTY, FLORIDA, ET AL. *v.* HARVEST ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 414.

No. 775. SCHOOL DISTRICT 151 OF COOK COUNTY, ILLINOIS, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1147.

No. 784. BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA, ET AL. *v.* YOUNGBLOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 625.

No. 823. RILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 983.

No. 839. JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* SINGLETON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 1364, 430 F. 2d 368, and 432 F. 2d 927.

No. 850. PORCELLI ET AL. *v.* TITUS, SUPERINTENDENT OF SCHOOLS OF THE CITY OF NEWARK, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 431 F. 2d 1254.

No. 902. KLEIN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 139 U. S. App. D. C. 368, 433 F. 2d 526.

No. 1191. ADLER *v.* UNITED STATES;
No. 1314. KROLL *v.* UNITED STATES; and
No. 1435. CAHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 1282.

No. 1333. MISSOURI PACIFIC RAILROAD CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 192 Ct. Cl. 318, 427 F. 2d 727.

No. 1378. GROUP LIFE & HEALTH INSURANCE CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 115.

No. 1392. LOS ANGELES POLICE DEPARTMENT ET AL. *v.* ROBINSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 1310.

No. 1433. FLINTKOTE CO. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 556.

No. 1443. CHAMBERS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 434 F. 2d 1312.

No. 1461. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 339.

No. 1456. PACE *v.* HAYMARKET CO-OPERATIVE BANK. C. A. 1st Cir. Certiorari denied.

No. 1463. DEKAR INDUSTRIES, INC., ET AL. *v.* BISSETT-BERMAN CORP. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 1304.

No. 1471. SAMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 728.

No. 1478. CHEMICAL CLEANING, INC., ET AL. *v.* DOW CHEMICAL CO. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1212.

No. 1482. BOLETTIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1487. HARTZELL PROPELLER FAN CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 435 F. 2d 562.

No. 1500. AMERICAN EXPORT INDUSTRIES, INC. *v.* FLUOR CORP., LTD. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 383.

No. 5003. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 90 Ill. App. 2d 310, 234 N. E. 2d 31.

No. 5005. MURPHY *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 221 Tenn. 351, 426 S. W. 2d 509.

No. 5008. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 400 F. 2d 92.

No. 5021. DAUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 405 F. 2d 312.

No. 5562. BLASSINGAME *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 427 F. 2d 329.

No. 5853. BRITT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. App. ——, 455 S. W. 2d 625.

No. 6185. GAITO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: See 217 Pa. Super. 125, 268 A. 2d 461.

No. 6280. DE LA ROSA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6427. MCBRIDE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 440 Pa. 81, 269 A. 2d 737.

No. 6445. STEVENSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 6521. HOYEL *v.* CITY OF JACKSON. Ct. App. Tenn. Certiorari denied. Reported below: —— Tenn. App. ——, 465 S. W. 2d 736.

No. 6535. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 230.

No. 6613. OLIVER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 160 Conn. 85, 273 A. 2d 867.

No. 6640. WAUFORD *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 6646. HAGGETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 396.

No. 6659. SARKIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6711. MAGGARD *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 941.

No. 6668. RIVERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 879.

No. 6682. ARDLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 861.

No. 6695. RODGERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 436 F. 2d 1380.

No. 6713. JACKSON *v.* DUTTON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 1284.

No. 6714. LI *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. Certiorari denied.

No. 6718. DAVIS *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 6719. BLACK *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 435 F. 2d 546.

No. 6721. FARR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 975.

No. 6722. CRISP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 354.

No. 6723. MCTYRE *v.* PEARSON. C. A. 8th Cir. Certiorari denied. Reported below: 435 F. 2d 333.

No. 6724. BOWEN *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 6726. JEWETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 438 F. 2d 495.

No. 6728. CORRADO ET UX. *v.* PROVIDENCE REDEVELOPMENT AGENCY. Sup. Ct. R. I. Certiorari denied. Reported below: — R. I. —, 269 A. 2d 551.

No. 6737. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 6729. BROWN *v.* PETERSON, HOSPITAL SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. Reported below: 429 F. 2d 585.

No. 6730. LIND *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 1313.

No. 6739. PETERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6. COX, PENITENTIARY SUPERINTENDENT *v.* MAY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 398 F. 2d 476.

No. 94. UNITED STATES *v.* MEADOWS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 420 F. 2d 795.

No. 993. UNITED STATES *v.* LIGUORI. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 430 F. 2d 842.

No. 17. COX, PENITENTIARY SUPERINTENDENT *v.* PENNINGTON. C. A. 4th Cir. Motion for leave to dispense with printing respondent's brief granted. Certiorari denied. Reported below: 405 F. 2d 623.

No. 21. KORAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 408 F. 2d 1321.

No. 22. KORAN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 213 So. 2d 735.

No. 32. SULLIVAN *v.* UNITED STATES; and

No. 33. TELLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 412 F. 2d 374.

No. 34. MARCHESE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 411 F. 2d 410.

No. 38. DONOHUE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 134 U. S. App. D. C. 50, 412 F. 2d 1097.

No. 50. KORAN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 219 So. 2d 449.

No. 64. PROVENZANO ET AL. *v.* FOLLETTE, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 67. DIPIAZZA *v.* UNITED STATES; and

No. 68. DEMING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 415 F. 2d 99 and 111.

No. 70. WEISER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 428 F. 2d 932.

No. 943. WRIGHT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

419-882 O - 72 - 52

No. 103. ROVIARO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 420 F. 2d 304.

No. 126. DEVORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 1069.

No. 369. TIKTIN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 427 F. 2d 1027.

No. 496. DILORENZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 429 F. 2d 216.

No. 630. BIRNS *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 426 F. 2d 1288.

No. 917. JACOBS *v.* UNITED STATES; and

No. 6199. SPIELER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 431 F. 2d 754.

No. 920. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 140 U. S. App. D. C. 70, 433 F. 2d 1176.

No. 1175. KERR *v.* STATE PUBLIC WELFARE COMMISSION. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 3 Ore. App. 27, 470 P. 2d 167.

No. 1195. GREENE *v.* MAXWELL, JUDGE; and

No. 6414. SOSA *v.* MAXWELL, JUDGE. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 234 So. 2d 690.

No. 5045. GIBSON ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 23 N. Y. 2d 618, 246 N. E. 2d 349.

No. 5070. MALLORY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5071. DANIELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 412 F. 2d 317.

No. 5088. KUHN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 415 F. 2d 111.

No. 5102. CHATFIELD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 272 Cal. App. 2d 141, 77 Cal. Rptr. 118.

No. 5555. MARTINEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 428 F. 2d 86.

No. 6075. ESCOBEDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 430 F. 2d 14 and 603.

No. 5217. GROZE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5820. SINGLETON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 6648. EDWARDS *v.* SELECTIVE SERVICE LOCAL BOARD NO. 111 ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 287.

No. 358. HANON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 428 F. 2d 101.

No. 409. BOARD OF EDUCATION OF LITTLE ROCK SCHOOL DISTRICT ET AL. *v.* CLARK ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 426 F. 2d 1035. [For earlier order herein, see 401 U. S. 971.]

No. 1496. DILL *v.* GREYHOUND CORP. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 435 F. 2d 231.

No. 749. BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, ET AL. *v.* ALLEN ET AL.; and

No. 891. BLANCHE ELY PARENT TEACHERS ASSN. ET AL. *v.* BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of these petitions. Reported below: 432 F. 2d 362.

No. 6621. THERIAULT *v.* BLACKWELL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 437 F. 2d 76.

No. 936. DADE COUNTY SCHOOL BOARD ET AL. *v.* PATE ET AL.; and

No. 6139. CORBETT ET AL. *v.* DADE COUNTY SCHOOL BOARD. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of these petitions. Reported below: 430 F. 2d 1175.

No. 982. ECKELS ET AL. *v.* ROSS ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted, judgment vacated, and case remanded for reconsideration in light of *Swann* v. *Charlotte-Mecklenburg Board of Education, ante,* p. 1, and its companion cases. Reported below: 434 F. 2d 1140.

No. 1272. CALDWELL ET AL. *v.* CRAIGHEAD ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 432 F. 2d 213.

No. 1334. SILVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 430 F. 2d 106.

No. 1449. IPPOLITO *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 438 F. 2d 417.

No. 1455. BALISTRIERI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 436 F. 2d 1212.

No. 5048. MELTZER ET AL. *v.* C. BUCK LECRAW & CO. Sup. Ct. Ga. Certiorari denied. Reported below: 225 Ga. 91, 166 S. E. 2d 88.

MR. JUSTICE BLACK.*

On March 2, 1971, this Court decided *Boddie* v. *Connecticut,* 401 U. S. 371, holding that Connecticut could not consistently with the Due Process and Equal Protection Clauses deny access to its divorce courts to indigents unable to pay relatively small filing and service of process fees.[1] We now have eight other cases pending on appeal or on petition for writ of certiorari in which indigents were denied access to civil courts because of their poverty.

One case, *Sloatman* v. *Gibbons,* No. 5067, is distinguishable from *Boddie* only by the fact that Arizona permits an extension of time for an indigent to pay the statutory fee when filing for a divorce. *In re Garland,* No. 5971, involves the right of a bankrupt to file a petition for discharge in bankruptcy without payment of the $50 statutory fee. *Meltzer* v. *LeCraw & Co.,* No. 5048, involves a slightly more subtle form of handicap to the indigent seeking judicial resolution of a dispute. In that case a tenant who fights his eviction by resort to

*This opinion also applies to No. 5050, *Frederick et al.* v. *Schwartz et al., supra;* No. 5208, *Beverly* v. *Scotland Urban Enterprises, Inc., supra;* No. 6158, *Lindsey et al.* v. *Normet et al., supra;* No. 5971, *In re Garland et al., infra;* No. 5054, *Bourbeau* v. *Lancaster, infra;* No. 5067, *Sloatman* v. *Gibbons et al., supra;* and No. 6375, *Kaufman* v. *Carter, infra.*

[1] I dissented in *Boddie* v. *Connecticut,* 401 U. S. 371, 389 (1971), but now believe that if the decision in that case is to continue to be the law, it cannot and should not be restricted to persons seeking a divorce. It is bound to be expanded to all civil cases. Persons seeking a divorce are no different from other members of society who must resort to the judicial process for resolution of their disputes. Consistent with the Equal Protection Clause of the Constitution, special favors cannot and should not be accorded to divorce litigants.

the judicial process risks the penalty of a judgment for double the rent due during the litigation if he loses. Two other cases, *Frederick* v. *Schwartz,* No. 5050, and *Bourbeau* v. *Lancaster,* No. 5054, involve indigents who have lost civil cases—a welfare claim and child guardianship claim—and who cannot afford to pay the fees for docketing an appeal. *Beverly* v. *Scotland Urban Enterprises, Inc.,* No. 5208, and *Lindsey* v. *Normet,* No. 6158, involve indigents who cannot post the penalty bonds required to appeal from adverse judgments in housing-eviction cases. And finally, *Kaufman* v. *Carter,* No. 6375, is perhaps the most surprising of all eight cases because in that case an indigent mother was denied court-appointed counsel to defend herself against a state civil suit to declare her an unfit mother and take five of her seven children away from her.

The Court has decided to note probable jurisdiction in No. 6158, *Lindsey* v. *Normet.* Review will be denied in five of the other cases—Nos. 5048, 5208, 5054, 5971, and 6375—while the judgments in the two remaining cases are to be vacated and the cases remanded for reconsideration in light of the decision in *Boddie.* I agree with my Brethren that *Lindsey* v. *Normet* should be set for argument, but I cannot understand why that case is singled out for special treatment and why distinctions are made between the other cases. For the reasons set out below, I would grant the petitions or note probable jurisdiction in each of the other cases and set them for argument or reverse them outright on the basis of the decision in *Boddie.*

In my view, the decision in *Boddie* v. *Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a

bond, risk a penalty, or afford to hire an attorney. Some may sincerely believe that the decision in *Boddie* was far more limited in scope—that is, applies only to divorce cases. Other people might recognize that this constitutional decision will eventually extend to all civil cases but believe that it can only be enforced slowly step by step, so that the country will have time to absorb its full import. But in my judgment *Boddie* cannot and should not be limited to either its facts or its language, and I believe there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes.

The opinion in *Boddie* attempts to draw two distinctions between divorce and other disputes. The Court there stated that access to the judicial process in divorce matters is the "exclusive precondition to the adjustment of a fundamental human relationship." *Supra,* at 383. The two elements, then, that require open access to the courts are that the judicial mechanism be the "exclusive" means of resolving the dispute and that the dispute involve "fundamental" subject matter. The first element—the "exclusiveness" of the judicial process as a remedy—is no limitation at all. The States and the Federal Government hold the ultimate power of enforcement in almost every dispute. Every law student learns in the first semester of law school that property, for instance, is "valuable" only because the State will enforce the collection of rights that attach to its ownership. Thus, the State holds the ultimate remedy in almost every property dispute. Similarly, the wrong that gives rise to a right of damages in tort exists only because society's lawmakers have created a standard of care and a duty to abide by that standard. The alternatives to resort to the judicial process in tort cases are negotiation and settlement, abandonment of recovery, private self-

help, and perhaps insurance. With the exception of insurance, the alternatives are exactly the same as in a divorce case—negotiate a separation agreement, decide to continue the marriage relationship, or violate the law. Likewise, contracts are valuable only because society will enforce them. Indeed, marriage itself when analyzed in purely legal terms is a contract that cannot be revoked without governmental approval.[2] Thus, the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force.

The other distinction between divorce and different kinds of controversies suggested in the *Boddie* opinion is the degree to which the disputes are regarded as "fundamental." The extent to which this requirement limits the holding of *Boddie* is found in the very facts of that decision—the right to seek a divorce is simply not very "fundamental" in the hierarchy of disputes. Marriage is one of the cornerstones of our civilized society. Society generally places a high value on marriage and a low value on the right to divorce. And since *Boddie* held that the right to a divorce was "fundamental," I can only conclude that almost every other kind of legally

---

[2] By "exclusive precondition" the Court in *Boddie* might have been suggesting that divorce is constitutionally different from all other kinds of disputes because even when the two parties to the marriage agree to end their relationship they still must seek judicial approval. But *Boddie* by its terms is not limited to divorces in which the parties have agreed to terminate their marriage. And the plaintiff in a contested tort case finds resort to the judicial process every bit as necessary as the litigant seeking a contested divorce.

Even if "exclusive precondition" meant that the formality of judicial approval was mandatory, the *Boddie* rationale would go far beyond divorce. Citizens generally must resort to courts for adoptions, to probate a will, to obtain a discharge in bankruptcy, for child custody determinations, to clear title to land *in rem*, to obtain an adjudication of incompetency, to change a name, and for other matters. It would be extremely arbitrary to limit *Boddie* to these particular kinds of disputes.

enforceable right is also fundamental to our society. Society generally *encourages* people to seek recompense when they suffer damages through the fault of others. And I cannot believe that my Brethren would find the rights of a man with both legs cut off by a negligent railroad less "fundamental" than a person's right to seek a divorce. Even the need to be on the welfare rolls or to file for a discharge in bankruptcy seems to me to be more "fundamental" than a person's right to seek a divorce. Society provides welfare to ensure the survival of the unfortunate. And bankruptcy is designed to permit a man to make a new start unhampered by overwhelming debts in hopes of achieving a useful life. For this Court to have first provided for governmental assumption of civil court costs in a divorce case seems to me a most unfortunate point of departure. But since that step has now been taken, I would either overrule *Boddie* at once or extend the benefits of government-paid costs to other civil litigants whose interests are at least as important to an orderly society.

In my judgment, the crucial foundation on which *Boddie* rests also forbids denial of an indigent's right of appeal in civil cases merely because he is too poor to pay appeal costs. Once the right to unhampered access to the judicial process has been established, that right is diluted unless the indigent litigant has an opportunity to assert and obtain review of the errors committed at trial. Since *Boddie* rejected distinctions between the civil and the criminal process in determining the permissibility of restrictions upon access to the courts, we need only apply to civil cases our long line of holdings that indigent criminals cannot because of their indigency be denied an appeal or the right to a state-furnished record on appeal. See *Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Draper* v. *Washington,* 372 U. S. 487 (1963); *Long* v. *District Court of Iowa,* 385 U. S. 192 (1966); *Roberts* v. *LaVallee,* 389

U. S. 40 (1967); *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969). See also *Douglas* v. *California,* 372 U. S. 353 (1963).

Finally, there cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel. Cf. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Douglas* v. *California, supra.* Of course, not every litigant would be entitled to appointed counsel no matter how frivolous his claims might be. See *Ellis* v. *United States,* 356 U. S. 674 (1958). But the fundamental importance of legal representation in our system of adversary justice is beyond dispute. Since *Boddie* held that there must be meaningful access to civil courts in divorce cases, I can only conclude that *Boddie* necessitates the appointment of counsel for indigents in such cases. In fact, this Court has held that attorneys' fees are part of the costs of litigation and may be taxed as costs. *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 (1939). And as with fees and transcripts, I will never agree to limit the advantages of free counsel to divorce cases. See n. 1, *supra.* The necessity of state-appointed counsel is particularly acute in cases like one of those before us, *Kaufman* v. *Carter,* where the State initiates a civil proceeding against an individual to deprive her of the custody of her children. Here the State is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. The case by its very nature resembles a criminal prosecution. The defendant is charged with conduct—failure to care properly for her children—which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society. And the cost of being unsuccessful is dearly high—loss of the companionship of one's children. Indeed, *Boddie* held that an indigent was entitled to state-paid court costs in a divorce contest, and such cases almost always

involve the custody of children. Certainly, if the State must provide funds for an indigent mother's court costs for a divorce, the State should also provide her with counsel to protect her rights to something far more important to most mothers and to society—her right to custody of her children.

For the reasons expressed above and given in the decision in *Boddie* I would set each of these cases for argument or reverse them outright and hold that citizens cannot be barred from their courts because they are too poor to afford the required fees and bonds or because they cannot hire the professional legal help essential to turn the wheels of justice. There is simply no fairness or justice in a legal system which pays indigents' costs to get divorces and does not aid them in other civil cases which are frequently of far greater importance to society.

MR. JUSTICE DOUGLAS.*

The facts of these cases are set out by MR. JUSTICE BLACK. All of them except No. 6375, *Kaufman* v. *Carter,* involve people who are denied access to the judicial process solely because of their indigency. *Kaufman* presents a distinctly different problem. There the State commenced a civil suit in 1963, declared petitioner an unfit mother and took five of her seven children away from her. The status of the children is reviewed annually as required by state law. She did not initially seek counsel; but in the 1968 review proceedings she did. The State is enforcing its view of proper public policy. That procedure has consequences for the citizen so great that it is hardly an extension to say the rationale of *Douglas* v. *California,* 372 U. S. 353, demands that she be provided counsel. I would grant certiorari and reverse in this case.

*This opinion also applies to No. 5208, *Beverly* v. *Scotland Urban Enterprises, Inc., supra;* No. 5971, *In re Garland et al., infra;* No. 5054, *Bourbeau* v. *Lancaster, infra;* and No. 6375, *Kaufman* v. *Carter, infra.*

I believe a proper application of the Equal Protection Clause also requires that the access cases be reversed. Courts ought not be a private preserve for the affluent. All of these cases contain an invidious discrimination based on poverty, a suspect legislative classification. See *Griffin* v. *Illinois*, 351 U. S. 12; *Boddie* v. *Connecticut*, 401 U. S. 371, 383 (DOUGLAS, J., concurring).

Today's decisions underscore the difficulties with the *Boddie* approach. In *Boddie* the majority found marriage and its dissolution to be so fundamental as to require allowing indigents access to divorce courts without costs. When indigency is involved I do not think there is a hierarchy of interests. Marriage and its dissolution are of course fundamental. But the parent-child relationship is also of sufficient importance to require appointment of counsel when the State initiates and maintains proceedings to destroy it. Similarly, obtaining a fresh start in life through bankruptcy proceedings or securing adequate housing and the other procedures in these cases seemingly come within the Equal Protection Clause, as suggested by my separate opinion in *Boddie*.

No. 1520. PINTO, PRISON FARM SUPERINTENDENT *v.* MITCHELL. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 814.

No. 5004. VERDUGO *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to supplement petition granted. Certiorari denied. Reported below: 402 F. 2d 599.

No. 5053.* LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 409 F. 2d 1351.

---

*For dissenting opinion of DOUGLAS, J., see No. 5795, *Hudson* v. *United States*, *infra*.

No. 5210. DEAL ET AL. *v.* CINCINNATI BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 419 F. 2d 1387.

MR. JUSTICE DOUGLAS, dissenting.

The court below held in this school segregation case that the " 'District Court correctly excluded evidence of alleged racial discrimination in the public and private housing markets.' " 419 F. 2d 1387, 1392.

I would remand this case so that that evidence can be made part of the record and the lower courts can rule on the issues of *de jure* and *de facto* segregation of the races that are presented.

It is true that this petition arrived one working day after a time extension granted by MR. JUSTICE WHITE expired. Unlike some types of cases where the time for filing is prescribed by our rules,[1] Congress has stated that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall be taken or applied for within ninety days* after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." 28 U. S. C. § 2101 (c). (Italics added.)

The question here is whether a petition arriving at the Clerk's Office one day after the statutory period expires is jurisdictionally barred from a determination on the merits. MR. JUSTICE BLACK has pointed out that early cases under the predecessor sections to § 2101 (c) "made clear that this Court had power to waive the time requirement of these provisions under appropriate circumstances." *Teague* v. *Regional Commissioner of Customs*, 394 U. S. 977, 982 (dissenting opinion). And in *Ray* v.

[1] See our Rule 22. We can and do waive time requirements under the Rules. See *Durham* v. *United States*, 401 U. S. 481.

Pierson (No. 94, October Term, 1966), 386 U. S. 547, we decided on the merits a cross-petition for certiorari that was substantially out of time under § 2101 (c).[2] We offered no explanation.[3] Even under the companion sections to § 2101 (c) our practice has not been consistent. We have dismissed for failure to file appeals in the time set by Congress, *e. g., Ward* v. *Winstead,* 400 U. S. 1019, while not always dismissing for untimely docketing under our rules even though the time limitations were also set by Congress, *e. g., United Public Workers* v. *Mitchell,* 330 U. S. 75, 84–86.

Naturally, past inconsistencies are no justification for overturning a congressional bar if one exists. But one does not exist in this case. The statute states a petition "for review shall be taken or applied for" within certain specified times. That phrase is not free from ambiguity. What constitutes applying for review? A majority of the Court apparently feel it is receipt of the petition for certiorari by the Clerk's Office. *Teague, supra.* Yet I can see no reason why mailing or other transmission to this Court should not be construed as an application for relief

---

[2] The judgment below in that case was entered on October 25, 1965, but a time extension was granted petitioner Pierson until February 24, 1966. Ray's response in opposition and cross-petition for certiorari was filed on March 25. It was timely as a response, but not as a cross-petition, for a cross-petition must satisfy the requirements of a petition except that the cross-petitioner need not file a certified copy of the record which is already on file. Thus the time requirements are the same for both a petition for certiorari and a cross-petition for certiorari.

[3] It has been suggested that the "most tenable theory for entertaining such an out-of-time cross-petition is that the Court may regard its jurisdiction over the whole case as attaching upon the timely filing of a petition by any party, giving the Court discretion to allow any other party at any time thereafter to file an additional petition involving the same judgment." R. Stern & E. Gressman, Supreme Court Practice 312 (4th ed. 1969).

within the meaning of the time provisions of § 2101 (c). When two potential interpretations of a statute are possible, we should not adopt a technical rule, much like common-law pleading, solely to defeat claims.

Petitioners here did not use the mails, but I believe the situation is analogous. The following appears from a motion to proceed *in forma pauperis* and from an affidavit of counsel for petitioners: Up until two days before the time extension was to expire he was led to believe by a third party that the petition would be printed and filed on time. Then without any advance warning the third party who was in New York and had all of petitioners' papers called and told counsel that the papers would not be printed or filed. Counsel immediately began to prepare a new petition and sufficient copies from his notes. Then on the day the petition was due he forwarded it prepaid on Piedmont Airlines to Washington and arranged to have someone deliver it to the Court. But the airline lost all the papers. Counsel then made a new set of papers and filed them with the Clerk on the next working day. How can we possibly say that it does injustice to § 2101 (c) to conclude that these efforts for review were not "taken or applied for within ninety days" as extended within the meaning of § 2101 (c)? I would grant the petition and remand the case for perfection of the record in the manner indicated.

No. 5054.* BOURBEAU *v.* LANCASTER. Super. Ct. Conn., Fairfield County. Certiorari denied.

No. 6375.* KAUFMAN *v.* CARTER. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 8 Cal. App. 3d 783, 87 Cal. Rptr. 678.

---

*For separate opinions of BLACK, J., and DOUGLAS, J., see No. 5048, *Meltzer* v. *LeCraw & Co., supra.*

No. 5795. HUDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 1311.

MR. JUSTICE DOUGLAS, dissenting.*

The facts of these three cases are virtually identical. With minor variations in each case an informer placed a telephone call to the petitioner. The informer also consented to a Government agent's either listening to or recording the conversation without the knowledge of the petitioner. In no case did the Government attempt to obtain a search warrant. Then at the trials the recording of the conversation was either played or the agent testified to the substance of the conversation he overheard.

Perhaps the Court denies certiorari because any claim under the Federal Communications Act was eliminated in *Rathbun* v. *United States,* 355 U. S. 107. But it is time we re-examined that decision under the Fourth Amendment, because of the increasing surveillance under which we all live.

In *Katz* v. *United States,* 389 U. S. 347, 359, we said: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Yet in these cases all the episodes were prearranged and, in spite of ample time to obtain warrants, none was sought.

I dissent from the doctrine that an individual begins to lose his constitutional rights the minute he answers the telephone.

Though I dissented in *United States* v. *White,* 401 U. S. 745, 756, the Court emphasized that where there was connivance of one party to the conversation who wears the recording device, the search could not be considered unreasonable. But here a third person, not a party to the

*This opinion also applies to No. 5053, *Lopez* v. *United States, supra,* and No. 5986, *Hickman* v. *United States, infra.*

419-882 O - 72 - 53

conversation, is the interceptor. Thus does the law grow imperceptibly but surely toward creating in this Nation the totalitarian type of surveillance we profess to abhor.

I would grant certiorari and reverse these judgments.

No. 5971.* IN RE GARLAND ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BRENNAN is of the opinion that certiorari should be granted. Reported below: 428 F. 2d 1185.

No. 5986.† HICKMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 2d 515.

No. 6514. HORTENCIO *v.* WHITEHEAD. Sup. Ct. Utah. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from denial of petition. Reported below: 25 Utah 2d 73, 475 P. 2d 1011.

Rehearing Denied

No. 5999. HOWARD *v.* CRAVEN, WARDEN, ET AL., 401 U. S. 983;

No. 6052. FANALE *v.* ANDERSON ET AL., 401 U. S. 915;

No. 6489. LIPSCOMB *v.* UNITED STATES, 401 U. S. 980;

No. 6516. YOUNG *v.* UNITED STATES, 401 U. S. 995;

No. 6522. TRACY ET UX. *v.* UNITED STATES ET AL., 401 U. S. 980; and

No. 6598. YODER *v.* UNITED STATES, 401 U. S. 1002. Petitions for rehearing denied.

No. 6044. POLESE *v.* UNITED STATES ET AL., 400 U. S. 1011. Motion for leave to file petition for rehearing denied.

---

*For separate opinions of BLACK, J., and DOUGLAS, J., see No. 5048, *Meltzer* v. *LeCraw & Co.*, *supra*.

† For dissenting opinion of DOUGLAS, J., see No. 5795, *Hudson* v. *United States*, *supra*.

No. 123. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL–CIO *v.* HARDEMAN, 401 U. S. 233. Motion to dispense with printing petition granted. Petition for rehearing denied.

MAY 17, 1971

Affirmed on Appeal

No. 728. HODGSON ET AL. *v.* RANDALL ET AL. Affirmed on appeal from D. C. Minn. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 314 F. Supp. 32.

No. 1501. KOLLAR ET AL. *v.* CITY OF TUCSON ET AL. Affirmed on appeal from D. C. Ariz. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 319 F. Supp. 482.

No. 1514. LEITCHFIELD MANUFACTURING CO., INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. W. D. Ky. Reported below: 318 F. Supp. 1214.

Appeals Dismissed

No. 1510. AIRWICK INDUSTRIES, INC., ET AL. *v.* CARLSTADT SEWERAGE AUTHORITY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 57 N. J. 107, 270 A. 2d 18.

No. 6750. GRAY *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 441 Pa. 91, 271 A. 2d 486.

No. 729. HODGSON *v.* MINNESOTA. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 1273. STAFFORD *v.* MICHIGAN. Appeal from Ct. App. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BLACK dissents from this action of the Court.

No. 1473. G & M EMPLOYMENT SERVICE, INC., ET AL. *v.* DEPARTMENT OF LABOR AND INDUSTRIES ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: —— Mass. ——, 265 N. E. 2d 476.

No. 1538. PASSEL ET AL. *v.* FORT WORTH INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from Ct. Civ. App. Tex., 2d Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 453 S. W. 2d 888.

No. 6054. VASQUEZ *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 1st Jud. Dept., dismissed. *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970). MR. JUSTICE BRENNAN is of the opinion that probable jurisdiction should be noted and case set for oral argument.

Vacated and Remanded on Appeal

No. 6778. TORRES ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL. Appeal from D. C. S. D. N. Y. Judgment vacated and case remanded for reconsideration in light of this Court's decision in *California Department of Human Resources* v. *Java*, *ante*, p. 121. Reported below: 321 F. Supp. 432.

No. 707. UNITED STATES *v.* 119 CARTONS CONTAINING 30,000 OBSCENE MAGAZINES (SCAN IMPORTS, CLAIMANT). Appeal from D. C. C. D. Cal. Judgment vacated and case remanded for reconsideration in light of this Court's decision in *United States* v. *Thirty-Seven (37) Photographs (Luros, Claimant)*, *ante*, p. 363. MR. JUSTICE DOUGLAS dissents from this action of the Court.

Certiorari Granted—Vacated and Remanded

No. 111. UNITED STATES *v.* HOLMES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *Ehlert* v. *United States*, *ante*, p. 99. MR. JUSTICE DOUGLAS dissents from this action of the Court. Reported below: 426 F. 2d 915.

No. 611. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* CAPOBIANCO. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *Ehlert* v. *United States*, *ante*, p. 99. MR. JUSTICE DOUGLAS dissents from this action of the Court. Reported below: 424 F. 2d 1304.

No. 928. EVCO, DBA EVCO INSTRUCTIONAL DESIGNS *v.* JONES, COMMISSIONER OF BUREAU OF REVENUE OF NEW MEXICO, ET AL. Ct. App. N. M. In view of concessions made in brief in opposition filed by the Attorney General of New Mexico, and on examination of the record, certiorari granted, judgment vacated, and case remanded for reconsideration in light of position asserted by the Attorney General in the brief in opposition. THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART are of the opinion that certiorari should be denied. Reported below: 81 N. M. 724, 472 P. 2d 987.

No. 6584. GRIFFIN *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* granted. Pursuant to suggestion of the Solicitor General, certiorari granted, judgment vacated, and case remanded for reconsideration in light of the position asserted by the Solicitor General in the Memorandum for the United States. Reported below: 434 F. 2d 740.

Miscellaneous Orders

No. —. TURPIN ET AL. *v.* RESOR, SECRETARY OF THE ARMY, ET AL. D. C. N. D. Cal. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the stay should be granted.

No. —. KERR *v.* OHIO. Sup. Ct. Ohio. Application for stay presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. 109. TIME, INC. *v.* PAPE, 401 U. S. 279. Motion of respondent to be relieved from payment of costs assessed on reversal of judgment denied.

No. 1009. UNITED STATES *v.* UNICORN ENTERPRISES, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 401 U. S. 907.] Application for suspension of stay of mandate of the United States Court of Appeals for the Second Circuit pending judgment of this Court, presented to MR. JUSTICE HARLAN, and by him referred to the Court, granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 1042. DIFFENDERFER ET AL. *v.* CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INC., ET AL. Appeal from D. C. S. D. Fla. [Probable jurisdiction noted, 401 U. S. 934.] Motion of Protestants and Other Americans United for Separation of Church and State for leave to file a brief as *amicus curiae* granted. Reported below: 316 F. Supp. 1116.

No. 1681. HOLMES *v.* ARIZONA. Ct. App. Ariz. Application for stay presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the stay should be granted. Reported below: 13 Ariz. App. 357, 476 P. 2d 878.

No. 6623. MCKENZIE *v.* TEXAS. Ct. Crim. App. Tex. Counsel for petitioner is directed to file a brief in support of petition on or before June 3, 1971. The Attorney General of Texas is invited to file a responsive brief within 10 days from date of receipt of petitioner's brief. Reported below: 450 S. W. 2d 341.

No. 6885. SMITH *v.* WINGO, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 1647. SPILLERS *v.* SLAUGHTER ET AL. Motion for leave to dispense with printing motion for leave to file and petition for writ of mandamus granted. Motion for leave to file petition for writ of mandamus denied.

No. 6536. BROOKS *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 706. UNITED STATES *v.* VARIOUS ARTICLES OF "OBSCENE" MERCHANDISE (CHERRY, CLAIMANT). Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 315 F. Supp. 191.

Certiorari Granted

No. 1398. S&E CONTRACTORS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari granted. Reported below: 193 Ct. Cl. 335, 433 F. 2d 1373.

No. 1562. KASTIGAR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 440 F. 2d 954.

Certiorari Denied. (See also Nos. 729, 1273, 1510, 1538, and 6750, *supra.*)

No. 179. PIETERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 1200.

No. 261. ROBLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 613.

No. 275. SWIERENGA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 425 F. 2d 696.

No. 715. DESTAFANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 344.

No. 1022. BERGENTHAL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 47 Wis. 2d 668, 178 N. W. 2d 16.

No. 1111. MANARITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 1069.

No. 1165. EUBANK *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 383, 263 N. E. 2d 869.

No. 1209. HAIRSTON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 348, 263 N. E. 2d 840.

No. 1239. GLORIOSO *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 10 Md. App. 81, 267 A. 2d 812.

No. 1246. CARTER, WARDEN, ET AL. *v.* MILLER. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 824.

No. 1397. DROWN *v.* PORTSMOUTH SCHOOL DISTRICT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 435 F. 2d 1182.

No. 1259. FIORE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 434 F. 2d 966.

No. 1448. KLAGES COAL & ICE CO., DBA ROYAL CROWN BOTTLING CO. *v.* HODGSON, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 435 F. 2d 377.

No. 1453. HARFLINGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 928.

No. 1459. STRIBLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 437 F. 2d 765.

No. 1460. STATE NATIONAL BANK OF ALABAMA ET AL. *v.* ELLIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1182.

No. 1465. FRANCO *v.* STEIN STEEL & SUPPLY CO. Sup. Ct. Ga. Certiorari denied. Reported below: 227 Ga. 92, 179 S. E. 2d 88.

No. 1472. FIDUCIARY COUNSEL, INC. *v.* HODGSON, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied.

No. 1477. CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO *v.* CHICAGO TRIBUNE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 470.

No. 1481. IANNONE ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 10 Md. App. 81, 267 A. 2d 812.

No. 1485. TEX TAN WELHAUSEN CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 405.

No. 1489. DAVENPORT ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 436 F. 2d 395.

No. 1492. BERING ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 46.

No. 1499. TATE, MAYOR OF PHILADELPHIA, ET AL. *v.* PENNSYLVANIA EX REL. JAMIESON, JUDGE. Sup. Ct. Pa. Certiorari denied. Reported below: 442 Pa. 45, 274 A. 2d 193.

No. 1502. FRANK ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 452.

No. 1505. MID-SOUTH TOWING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 393.

No. 1513. AERO ENGINEERING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 433 F. 2d 1311.

No. 1515. AMITY FABRICS, INC. *v.* UNITED STATES. C. C. P. A. Certiorari denied. Reported below: —— C. C. P. A. (Cust.) ——, 435 F. 2d 569.

No. 1517. MEHCIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 145.

No. 1519. WHITEHEAD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 123.

No. 1524. MORRIS ET AL. *v.* LEONARD, TRUSTEE, ET AL. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 457 S. W. 2d 653.

No. 1529. ALMENDAREZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 460 S. W. 2d 921.

No. 1539. ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 180.

No. 1555. AMERICAN ELECTRIC, INC. *v.* OLDENKOTT. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 14 Cal. App. 3d 198, 92 Cal. Rptr. 127.

No. 5187. ARRIAGA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5269. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 559.

No. 5484. SMITH *v.* BRANTLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 5559. CAMPBELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 892.

No. 5962. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 2d 524.

No. 6108. KONTOS *v.* CREAMER, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 6317. STREULE *v.* GULF FINANCE CORP. C. A. D. C. Cir. Certiorari denied.

No. 6342. KLEIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: See 27 N. Y. 2d 543, 261 N. E. 2d 261.

No. 6451. WINEGAR *v.* BUCHKOE, WARDEN. Sup. Ct. Mich. Certiorari denied.

No. 6470. COTHRAN ET AL. *v.* SAN JOSE WATER WORKS ET AL. C. A. 9th Cir. Certiorari denied.

No. 6518. ALLEN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 6467. BROWN *v.* HENDRICK, PRISONS SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 431 F. 2d 436.

No. 6533. RAGUSE ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6554. JOHNSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 172, 265 N. E. 2d 144.

No. 6565. GAYLORD *v.* WOLKE, SHERIFF. C. A. 7th Cir. Certiorari denied.

No. 6664. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 676.

No. 6685. HALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 737.

No. 6686. IACHINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 92.

No. 6687. KNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 437 F. 2d 248.

No. 6688. GINSBURG *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 436 F. 2d 1146.

No. 6689. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 787.

No. 6705. HASLAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 362.

No. 6715. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 937.

No. 6745. CORCINO *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 438 F. 2d 329.

No. 6716. CASTRO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 438 F. 2d 468.

No. 6717. PAIGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6725. STONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 1402.

No. 6738. REDD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 438 F. 2d 335.

No. 6740. SANDERS *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 6741. FUKUMOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 6742. DREW ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 529.

No. 6747. MARXUACH *v.* PUERTO RICO SECRETARY OF JUSTICE ET AL. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 6748. LUCAS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 6749. ADCOX *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6753. SMITH *v.* BUCCI DETECTIVE AGENCY ET AL. C. A. 3d Cir. Certiorari denied.

No. 6756. RAMOS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 6761. MANZANARES *v.* WARDEN, NEVADA STATE PRISON. Sup. Ct. Nev. Certiorari denied.

No. 6763. PRIONAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 438 F. 2d 1049.

No. 11. WASHINGTON ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 402 F. 2d 3.

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

Petitioner Othello Washington was convicted of engaging in the wagering business without payment of the special occupational tax. This took place prior to our decision in *Grosso* v. *United States,* 390 U. S. 62, holding unconstitutional against a claim of self-incrimination a conviction under the same statute. In the course of that prosecution a search warrant was obtained and evidence was obtained on the basis of which the present civil suit for excise taxes, fraud penalties, and interest was brought.

The central question is whether the evidence obtained by a warrant in the criminal case, which retrospectively contained the constitutional infirmity noted in *Grosso,* may be used in this civil case.

Since, as we held in *United States* v. *Coin & Currency,* 401 U. S. 715, our decisions in *Grosso* and its companion, *Marchetti* v. *United States,* 390 U. S. 39, are retroactive, I do not see how evidence obtained by use of a search warrant, issued under the old regime which *Grosso* and *Marchetti* put into the discard, can do service for process in this new and wholly different civil proceeding.

There are means of discovery provided by the Rules of Civil Procedure* and by a special procedure, 26 U. S. C. § 7602, applicable to civil suits to collect federal taxes. The United States would never dare ask for a search warrant to ferret out the facts necessary for its civil suit. The fact that it obtained evidence by a warrant issued in a procedure incident to an unconstitutional prosecution should not now be turned into a windfall. The Government should turn square corners, not taxpayers alone.

*Fed. Rules Civ. Proc. 26–38.

In retrospect the warrant should not have issued, though under then-existing law it may have been wholly proper. We should hold the Government to the maxim expressed by Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

I would grant this petition for certiorari.

MR. JUSTICE BRENNAN, dissenting.

The courts below have ordered a sale of petitioner Othello Washington's farm to satisfy a tax lien. The extent of his liability was determined on the basis of evidence seized by Internal Revenue agents under a search warrant grounded upon the determination that there was probable cause to believe that he was engaged in the wagering business without having registered and paid the required occupational tax. We subsequently held that the Fifth Amendment prohibits the Government from requiring such registration of a gambler who justifiably fears that he will thereby incriminate himself, and who does not waive his privilege against self-incrimination. *Marchetti* v. *United States,* 390 U. S. 39 (1968). And we have just this Term held that prohibition applicable whether the failure to register took place before or after *Marchetti* was decided. *United States* v. *United States Coin & Currency,* 401 U. S. 715 (1971).

Under these cases, therefore, there is substantial doubt whether the Government could constitutionally punish petitioner for his failure to register.[1] By the same token,

[1] The Government does not dispute that petitioner's gambling activities were illegal under state law, and points to nothing in the record that would indicate petitioner would intelligently and knowingly waive his right against self-incrimination.

I think there is a substantial question whether the affidavits supporting the search warrant were sufficient to establish probable cause to believe that petitioner had committed an offense that the Government could constitutionally prohibit. For the affidavits on their face gave reason to believe that petitioner's gambling activities were in violation of local law,[2] and gave no reason to believe that petitioner would waive his right not to incriminate himself of such violations. I may assume that the Government, in showing probable cause to support a search warrant, need not negative any conceivable defense that might be raised by the suspect. Cf. *United States* v. *Ventresca,* 380 U. S. 102, 107–109 (1965). But where, as here, the affidavits in support of the warrant indicate the likely existence of an absolute defense to the crime charged that will be unavailing only if explicitly waived by the accused, it is surely not evident that the Fourth Amendment's requirement of probable cause to believe that an offense has been committed is satisfied. I would grant certiorari and set the case for argument.

No. 6768. MOLINA *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 554.

No. 6769. MCGREGOR *v.* WATTS, JUDGE. Sup. Ct. Wis. Certiorari denied.

No. 6773. ALEXANDER *v.* MICHIGAN PAROLE BOARD. C. A. 6th Cir. Certiorari denied.

No. 6798. MAKAREWICZ *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 438 F. 2d 474.

---

[2] Indeed, the affidavits and the District Court relied upon petitioner's past arrests on gambling charges to support the finding of probable cause.

No. 6776. ESCALANTE *v.* ZIRPOLI, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 6780. BECKER *v.* NEBRASKA. C. A. 8th Cir. Certiorari denied. Reported below: 435 F. 2d 157.

No. 6788. REYNOLDS *v.* FOLLETTE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 6791. EDGERTON *v.* BATTEN. C. A. 4th Cir. Certiorari denied.

No. 86. TERAN ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 275 Cal. App. 2d 119, 80 Cal. Rptr. 214.

No. 110. PORTER *v.* ASHMORE ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 421 F. 2d 1186.

No. 130. WENZEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 422 F. 2d 1325.

No. 132. MILLANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 713.

No. 141. BROSSARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 711.

No. 142. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

419-882 O - 72 - 54

No. 145. FLESCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 149. DILLON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 1121.

No. 151. POSNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 181.

No. 173. KEE MING HSU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 1286.

No. 228. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 426 F. 2d 480.

No. 284. BENDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 546.

No. 411. TUCK *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 1 Ore. App. 516, 462 P. 2d 175.

No. 542. MCKINNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 427 F. 2d 449.

No. 1041. DAVID *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 1293.

No. 1234. DELUTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 255.

No. 1242. LAWRENCE *v.* WOODS, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 1072.

No. 1371. VIVIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 437 F. 2d 295.

No. 1479. CONSOLIDATION COAL CO. *v.* SOUTH-EAST COAL CO.; and

No. 1483. UNITED MINE WORKERS OF AMERICA *v.* SOUTH-EAST COAL CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 434 F. 2d 767.

No. 1516. SILVERMAN ET UX. *v.* ROGERS, SECRETARY OF STATE, ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 437 F. 2d 102.

No. 5081. DONOVAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 272 Cal. App. 2d 413 and 426; 77 Cal. Rptr. 285 and 293.

No. 5062. ZITZER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5082. BANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 413 F. 2d 435.

No. 5096. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 409 F. 2d 888 and 415 F. 2d 1113.

No. 5113. CASTILLO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 274 Cal. App. 2d 508, 80 Cal. Rptr. 211.

No. 5116. LOCKLEAR *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5125. PARKER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 7 Md. App. 167, 254 A. 2d 381.

No. 5130. RANDAZZO *v.* FOLLETTE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 418 F. 2d 1319.

No. 5145. EASON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 420 F. 2d 1384.

No. 5199. SOYKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5155. KEITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 421 F. 2d 1295.

No. 5159. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 636.

No. 5186. BLASSICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 422 F. 2d 652.

No. 5341. GUITIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5358. WALKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 1069.

No. 5651. HAMILTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5664. ROBBINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 57.

No. 5669. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 428 F. 2d 365.

No. 5717. VERDUGO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5897. BIGSBY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 140 U. S. App. D. C. 188, 434 F. 2d 462.

No. 5918. LEACH ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 429 F. 2d 956.

No. 6037. HARRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 140 U. S. App. D. C. 270, 435 F. 2d 74.

No. 6090. OLIVA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 432 F. 2d 130.

No. 6228. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 6400. WEBSTER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 426 F. 2d 289.

No. 6777. RAGAN *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 239.

No. 104. WILD ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 422 F. 2d 34.

No. 6502. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 313. ORITO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 424 F. 2d 276.

No. 356. EVANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 425 F. 2d 302.

No. 1018. NORMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted.

No. 1537. EISENBERG ET AL. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 48 Wis. 2d 364, 180 N. W. 2d 529.

No. 1370. LAMP, ADMINISTRATRIX *v.* UNITED STATES STEEL CORP. ET AL.;

No. 1475. FUHRMAN, ADMINISTRATRIX, ET AL. *v.* UNITED STATES STEEL CORP. ET AL.; and

No. 1497. COOK, ADMINISTRATRIX *v.* UNITED STATES STEEL CORP. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 436 F. 2d 1256.

No. 1493. VERNITRON CORP. ET AL. *v.* BENJAMIN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 440 F. 2d 105.

No. 6051. SUTTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 140 U. S. App. D. C. 188, 434 F. 2d 462.

No. 1442. CLEMENT A. EVANS & CO., INC. *v.* A. M. KIDDER & CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 434 F. 2d 100.

No. 1469. HOMART DEVELOPMENT CO. *v.* DIAMOND ET AL. Sup. Ct. Cal. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 3 Cal. 3d 653, 91 Cal. Rptr. 501.

No. 1484. SCHOOP ET AL. *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: —— U. S. App. D. C. ——, 444 F. 2d 863.

No. 1491. HOFFA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 437 F. 2d 11.

No. 1494. HOBSON ET AL. *v.* BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, is of the opinion that certiorari should be granted on the basis of MR. JUSTICE BLACK's dissent in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 105 (1947). Reported below: —— U. S. App. D. C. ——, 444 F. 2d 874.

No. 1506. Boston & Providence Railroad Development Group *v.* Bartlett, Trustee, et al. C. A. 1st Cir. Motion to defer consideration of this petition denied. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this motion and petition. Reported below: 435 F. 2d 825.

No. 1561. Continental/Moss-Gordin et al. *v.* B–M–G Investment Co. et al. C. A. 5th Cir. Motion of respondents for damages for delay denied. Certiorari denied. Reported below: 437 F. 2d 892.

No. 5849. Pino *v.* United States. C. A. 2d Cir. Motion for leave to file supplemental petition granted. Certiorari denied. Reported below: 431 F. 2d 1043.

No. 6519. Brady *v.* Ohio. Sup. Ct. Ohio. Motion for leave to amend petition granted. Certiorari denied.

No. 6529. Maret *v.* United States. C. A. 8th Cir. Certiorari denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition. Reported below: 433 F. 2d 1064.

No. 6784. Barney *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

No. 6799. Grimes et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Mr. Justice Stewart is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 391.

Rehearing Denied

No. 169. Radich *v.* New York, 401 U. S. 531. Petition for rehearing denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 13. UNITED STATES *v.* WHITE, 401 U. S. 745;

No. 43. SHEVIN ET AL. *v.* LAZARUS, 401 U. S. 987;

No. 975. COLSON ET AL. *v.* MORTON, SECRETARY OF THE INTERIOR, 401 U. S. 911;

No. 1170. FARKAS *v.* TEXAS INSTRUMENTS, INC., 401 U. S. 974;

No. 1251. SOUTHLAND INCORPORATED *v.* COX ENTERPRISES, INC., ET AL., 401 U. S. 993;

No. 1284. BALC *v.* PARSONS ET AL., 401 U. S. 986;

No. 5257. LABINE, TUTRIX *v.* VINCENT, ADMINISTRATOR, 401 U. S. 532;

No. 5481. SCHLANGER *v.* SEAMANS, SECRETARY OF THE AIR FORCE, ET AL., 401 U. S. 487;

No. 5980. BROWN *v.* LAVALLEE, WARDEN, 401 U. S. 942;

No. 6297. WRIGHT *v.* DISTRICT COURT OF MONTGOMERY COUNTY, 401 U. S. 1011; and

No. 6517. BENOIT *v.* UNITED STATES, 401 U. S. 1011. Petitions for rehearing denied.

No. 993, October Term, 1968. UNIVERSITY OF ILLINOIS FOUNDATION *v.* WINEGARD CO., 394 U. S. 917. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 237. BEREND *v.* J. F. PRITCHARD & CO., 400 U. S. 823. Motion for leave to file petition for rehearing denied.

No. 1382. MACLEOD *v.* UNITED STATES, *ante*, p. 907. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 6200. EMMONS *v.* TAYLOR ET AL., 401 U. S. 1010. Petition for rehearing and other relief denied.

MAY 20, 1971

Miscellaneous Order

No. 6945. SPENCER *v.* GEORGIA. C. A. 5th Cir. Application for stay and/or injunction, referred to the Court by MR. JUSTICE BRENNAN, denied. Reported below: 441 F. 2d 397.

MAY 24, 1971

Affirmed on Appeal

No. 1262. WYMAN, COMMISSIONER OF NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* BODDIE ET AL. Appeal from C. A. 2d Cir. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. [For earlier order herein, see 401 U. S. 990.]

No. 1373. WYMAN, COMMISSIONER OF NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* ROSADO ET AL. Appeal from C. A. 2d Cir. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 437 F. 2d 619.

Appeals Dismissed

No. 1328. LASHLEY ET AL. *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 10 Md. App. 136, 268 A. 2d 502.

No. 6555. BURTON *v.* NEW YORK. Appeal from Ct. App. N. Y. It appears that sentences imposed under judgment sought to be reviewed were concurrent and appeal therefore dismissed. Reported below: 27 N. Y. 2d 198, 265 N. E. 2d 66.

No. 1504. GIANNATTI ET AL. *v.* COUNTY OF LOS ANGELES. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN concur, dissenting:

I would note probable jurisdiction of this appeal and set the case for argument.

Under California law a county is liable for damages for intentional assault and battery of a civilian by a member of the police force. Cal. Govt. Code § 815.2 (a) (1966), *Scruggs* v. *Haynes,* 252 Cal. App. 2d 256, 60 Cal. Rptr. 355. But the statute exempts any injury to "any prisoner." Cal. Govt. Code § 844.6 (a)(2) (Supp. 1971).

The California courts have sustained the constitutionality of the exemption of prisoners against the claim that it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Sanders* v. *County of Yuba,* 247 Cal. App. 2d 748, 55 Cal. Rptr. 852. The *Sanders* case was followed in the present one. While a prisoner loses some civil rights, nevertheless as stated by Judge, now MR. JUSTICE, BLACKMUN in *Jackson* v. *Bishop,* 404 F. 2d 571, 576, "he continues to be protected by the due process and equal protection clauses which follow him through the prison doors."

The equal protection question is a substantial one which we should decide only after oral argument.

No. 6588. PARDO *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 47 Ill. 2d 420, 265 N. E. 2d 656.

Miscellaneous Orders

No. 6911. JACKSON *v.* WARDEN, MARYLAND PENITENTIARY. Motion for leave to file petition for writ of habeas corpus denied.

No. 598, Misc., October Term, 1964. WILLIAMSON ET AL. *v.* GILMER ET AL., 379 U. S. 955. Motion to recall and amend order of this Court of January 18, 1965, denied. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 1. ANDERSON *v.* KENTUCKY. Ct. App. Ky. Motion for restraining order presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 353 S. W. 2d 381. [For earlier orders herein, see, *e. g.*, 371 U. S. 886 and 937.]

No. 910. ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1 *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL.; and

No. 961. NATIONAL LABOR RELATIONS BOARD *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL. C. A. 6th Cir. [Certiorari granted, 401 U. S. 907.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents likewise allotted 15 additional minutes for oral argument.

No. 1159. SUPERINTENDENT OF INSURANCE OF NEW YORK *v.* BANKERS LIFE & CASUALTY CO. ET AL. C. A. 2d Cir. [Certiorari granted, 401 U. S. 973.] Motion of the Solicitor General for leave to permit the Securities and Exchange Commission to participate in oral argument as *amicus curiae* in support of petitioner granted, and 15 minutes allowed for this purpose. Respondents allotted 15 additional minutes for oral argument.

No. 1454. PICARD *v.* CONNOR. C. A. 1st Cir. [Certiorari granted, *ante*, p. 942.] Motion for appointment of counsel granted. It is ordered that James J. Twohig, Esquire, of South Boston, Massachusetts, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 6568. McKINNEY *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 6744. CARTER ET AL. *v.* STANTON, DIRECTOR, MARION COUNTY DEPARTMENT OF PUBLIC WELFARE, ET AL. Appeal from D. C. S. D. Ind. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

No. 6966. EPPS ET AL. *v.* CORTESE ET AL. Appeal from D. C. E. D. Pa. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case set for oral argument immediately following No. 6060. [*Sub nom. Fuentes et al.* v. *Shevin, Attorney General of Florida, et al.*, probable jurisdiction noted, 401 U. S. 906.] Reported below: 326 F. Supp. 127.

Certiorari Granted

No. 1470. NORFOLK & WESTERN RAILWAY CO. *v.* NEMITZ ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 436 F. 2d 841.

No. 1480. SANTOBELLO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari granted. Reported below: 35 App. Div. 2d 1084, 316 N. Y. S. 2d 194.

No. 1536. WISCONSIN *v.* YODER ET AL. Sup. Ct. Wis. Certiorari granted. Reported below: 49 Wis. 2d 430, 182 N. W. 2d 539.

No. 1289. PIPEFITTERS LOCAL UNION No. 562 ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 434 F. 2d 1116 and 1127.

No. 6401. KIRBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented in the petition which reads as follows:

"(2) Whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment showup at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred." Reported below: 121 Ill. App. 2d 323, 257 N. E. 2d 589.

Certiorari Denied. (See also No. 1328, *supra.*)

No. 1414. GOOCH ET AL. *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 74.

No. 1429. FINCKE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 437 F. 2d 856.

No. 1447. ANDREWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 978.

No. 1518. KEENE *v.* JACKSON COUNTY ET AL. Ct. App. Ore. Certiorari denied. Reported below: 3 Ore. App. 551, 474 P. 2d 777.

No. 1527. ELDON INDUSTRIES, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CLOWES, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1530. ELVIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1535. FRANZESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 536.

No. 1544. SWANNEY-MCDONALD, INC. *v.* GRAY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 652.

No. 1566. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 6.

No. 1600. COMPANIA DE NAVEGACIONE ALMIRANTE S. A., PANAMA *v.* BEVERLY HILLS NATIONAL BANK. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 301.

No. 6440. THOMAS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 120 Ill. App. 2d 219, 256 N. E. 2d 870.

No. 6604. GREENE *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 30, 264 N. E. 2d 163.

No. 6615. PAPA *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 236 So. 2d 459.

No. 6657. DRIVER *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 6666. DUNN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 6751. SHOPA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 438 F. 2d 1062.

No. 6755. KIMBALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 437 F. 2d 921.

No. 6762. BOOKER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 6771. TAFT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 438 F. 2d 48.

No. 6772. SPARKS *v.* METZGER, SHERIFF. C. A. 6th Cir. Certiorari denied.

No. 6781. McPherson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 1066.

No. 6801. Ector *v.* Smith, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 975.

No. 6804. Wilson *v.* Follette, Correctional Superintendent. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 1197.

No. 6808. Clermont *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 1215.

No. 6811. Stallings *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 264 N. E. 2d 618.

No. 6812. Lo Cicero *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 525, 267 N. E. 2d 885.

No. 6814. Wade *v.* Haynes, Warden. Sup. Ct. App. W. Va. Certiorari denied.

No. 6816. Brown *v.* Brierley, Correctional Superintendent. C. A. 3d Cir. Certiorari denied. Reported below: 438 F. 2d 954.

No. 6818. Tracy et ux. *v.* Chandler et al., U. S. Circuit Judges. C. A. 10th Cir. Certiorari denied.

No. 6819. Skinner *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 6820. Stovall *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 42, 264 N. E. 2d 174.

No. 6822. Nelson *v.* Warden, Kansas State Penitentiary. C. A. 10th Cir. Certiorari denied. Reported below: 436 F. 2d 961.

419-882 O - 72 - 55

No. 6824. KING *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 6826. TIPPETT *v.* HAYNES, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 6830. WILLOUGHBY *v.* LASH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 6833. NEGRON *v.* WALLACE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 1139.

No. 6834. BOAG *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 6839. SCHLETTE *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 6841. MURRAY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 6846. JONES *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied.

No. 6850. GOODALE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: See 245 So. 2d 256.

No. 6851. WILLIAMS *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 6854. PELICIE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 780, 784, 315 N. Y. S. 2d 291.

No. 1199. COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, ET AL. *v.* BOARD OF JUNIOR COLLEGE DISTRICT No. 508, COUNTY OF COOK, ET AL. App. Ct. Ill., 1st Dist. Motion for leave to supplement petition granted. Certiorari denied. Reported below: 126 Ill. App. 2d 418, 262 N. E. 2d 125.

No. 1322. PENNSYLVANIA *v.* DAVIS. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 440 Pa. 123, 270 A. 2d 199.

No. 1355. MIDDLEWEST MOTOR FREIGHT BUREAU ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 433 F. 2d 212.

No. 1395. DESAPIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 435 F. 2d 272.

No. 1531. DAVIS *v.* MEMBERS OF SELECTIVE SERVICE BOARD NO. 30 OF DALLAS, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 433 F. 2d 736.

No. 1540. BERZANSKIS *v.* DALEY ET AL. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 47 Ill. 2d 395, 269 N. E. 2d 716.

No. 1543. NIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 437 F. 2d 746.

No. 5157. CHAMBERS ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 276 Cal. App. 2d 89, 80 Cal. Rptr. 672.

No. 6106. TARVER *v.* SMITH, SECRETARY OF DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON. Sup. Ct. Wash. Certiorari denied. MR. JUSTICE BRENNAN is of the opinion that certiorari should be granted. Reported below: 78 Wash. 2d 152, 470 P. 2d 172. [For earlier order herein, see 401 U. S. 906.]

MR. JUSTICE DOUGLAS, dissenting.

The ability of the Government and private agencies to gather, retain, and catalogue information on anyone for their unfettered use raises problems concerning the privacy and dignity of individuals.[1] Public and private agencies are storing more and more data. "If your name is not in the records of at least one credit bureau, it doesn't mean that you don't rate. What it does mean is that you are either under twenty-one or dead." [2]

A file may show that an individual was arrested. But will it show the arrest was unconstitutional because it was solely for purposes of investigation? Or that the charges were dropped? Or that a jury acquitted him?

Other "facts" may be in a file. Did he vote for Henry Wallace? Was he cited by HUAC? Is he subversive? Did he ever belong to any subversive organizations?

Private files amass similar irrelevancies and subjective information. Is he well regarded in his neighborhood as to character and habits? Does he have domestic difficulties? Is he "slow" in paying his bills?

---

[1] Law reviews have been devoting increasing attention to the problem. Recently two total issues have been devoted to the legal problems. See 15 U. C. L. A. L. Rev. 1374 and 31 Law & Contemp. Prob. 251. See also Symposium: Computers, Data Banks, and Individual Privacy, 53 Minn. L. Rev. 211; Note, Privacy and Efficient Government: Proposals for a National Data Center, 82 Harv. L. Rev. 400; Freed, A Legal Structure for a National Medical Data Center, 49 B. U. L. Rev. 79; Miller, Personal Privacy in the Computer Age, 67 Mich. L. Rev. 1091.

[2] H. Black, Buy Now, Pay Later 37 (1961).

The problems of a computerized society [3] with large data banks are immense. Who should have access to the files on an individual? For what purposes should access be allowed? Should an individual be informed each time information is passed on to new parties? How long should information be retained? What mechanisms ought there be for correcting factual errors?

This case presents the latter issue. A caseworker has prepared a highly critical report on petitioner setting forth in detail factual allegations and accusing petitioner of child neglect. The report recommends that petitioner be permanently deprived of the custody of her children. Custody was temporarily placed in juvenile court because petitioner was hospitalized. Subsequently a hearing in juvenile court was held and petitioner was exonerated and retained custody of her children. But the critical report—which petitioner alleges is false—remains in the files with the Department of Social and Health Services of the State of Washington.

Not surprisingly, petitioner would like the allegedly false information removed from those files. But her efforts to obtain a hearing to correct the information have failed.

The State says that petitioner's file is "confidential and privileged" and under current state law the file may be disclosed only "for purposes directly connected with the administration of public assistance and specific investigatory purposes by legislative committees and properly authorized bodies." Respondent's Brief 6. Just how many people and agencies this includes is unclear. The only thing perfectly clear from this record is that

[3] "[T]he computer can also be an agent of oppression, if, for example, its fantastic memory is used to place indelibly on record all the events in a man's life, all his mistakes and weaknesses, precluding all hope of their effacement, every stimulating possibility of a new chance in life." R. Prebisch, Change and Development, Latin America's Great Task 209 (1970).

petitioner has no rights under state law to a hearing to correct the reports even if they are total lies. And it appears petitioner will never be informed prior to transmittal of her file to the various "authorized" groups.

The State contends that petitioner will suffer no harm from having the material in her files. We are told everyone will know the report is only an opinion; the decree of the juvenile court will be included; and the file will be treated confidentially. While, of course, we cannot know if the information is false and cannot tell which and how many uses will be made of the file, it is apparent that petitioner does raise some serious questions concerning its use. Participation "in the new Work-Incentive Programs is initiated by a referral by respondent's department of, among others, persons who are 'appropriate for referral.' R. C. W. 74.22.020; 74.23.040. Those who are referred receive substantial training benefits as well as increased cash benefits. R. C. W. 74.22.050, 060; R. C. W. 74.23.060, 070. Similarly, the availability of sheltered workshop programs depends upon a determination by the respondent's department that the subject, if a 'disadvantaged person,' 'can reasonably be expected to benefit from, or in his best interests reasonably requires' such a program. R. C. W. 28A.10.080 (2)." Petition 7 n. 2. The only answer that respondent gives to this is that any "information transmitted to the Employment Security Department under the Work Incentive Program is for the benefit of the recipient." How petitioner would benefit from the transmission of the allegedly false material we are not told.

The Washington State public assistance programs are designed to receive federal assistance whenever federal funds are available. Various provisions in the appropriate title of the Revised Code of Washington dealing with public assistance refer to conformity with and pri-

macy of federal law. *E. g.*, Wash. Rev. Code § 74.04.055 (Supp. 1970) (if more than one construction possible, favor that "most likely to satisfy federal laws"); Wash. Rev. Code § 74.23.005 (Supp. 1970) ("The legislature hereby expresses its intention to comply with the requirements under the federal social security act, as amended, creating a work incentive program" for mothers receiving Aid to Families with Dependent Children); Wash. Rev. Code § 74.23.900 (Supp. 1970) (if any part of the chapter conflicts with federal law it is to that extent inoperative). The record in this case is not clear as to which types of public assistance petitioner is receiving. Prior to the temporary unsuccessful attempt to remove her children from her custody she was receiving AFDC benefits. From the references in the briefs to eligibility for the AFDC Work Incentive Program it would appear that she is now again receiving AFDC benefits.

When federal funds are used, then standards are to be shaped and tested federally. *Helvering* v. *Davis,* 301 U. S. 619; *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275, 295; *Rosado* v. *Wyman,* 397 U. S. 397, 427 (concurring opinion).

If meanwhile she was denied a fair hearing under state law, an important question of procedural due process is raised under the Fourteenth Amendment. For petitioner's right to continued assistance—an important property interest—cannot be reduced or terminated without notice and an opportunity to be heard. Cf. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337.

If petitioner was at the time receiving federal assistance then under HEW Regulations, she was entitled to a fair hearing.

The Department's regulations require that provision be made for granting a fair hearing:

> "to any individual requesting a hearing because his claim for financial or medical assistance is de-

nied, or is not acted upon with reasonable promptness, *or because he is aggrieved by any other agency action affecting receipt, suspension, reduction, or termination of such assistance or by agency policy as it affects his situation.*" 45 CFR § 205.10 (a)(3), eff. April 14, 1971 (emphasis added). 36 Fed. Reg. 3034.

As the Solicitor General says in his brief, filed at our request:

> "One may say, quite simply, that the report which petitioner challenges threatens receipt of AFDC payments by threatening to deprive petitioner of her children, on which her receipt of AFDC benefits depends. One of the federal requirements for a state plan for AFDC is that it must:
>
> "(16) provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State, providing such data with respect to the situation it may have [42 U. S. C. (Supp. IV) 602 (a)(16)].
>
> "If any question were now to arise as to the suitability of the home for the children, the prior report might well have an effect on referral of the case to the courts and action by the courts, notwithstanding the 1967 decision of the Juvenile Court. Thus, the report retains a constant potential effect on petitioner's custody of her children and thereby on her receipt of assistance."

We cannot be sure of the exact posture of this case;

but whether or not the claim at the time was federally funded, a question of national importance is presented. Accordingly, I would grant the petition for certiorari.

No. 6527. FREEMAN *v.* JOINER ET AL. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted.

No. 6828. MOONEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 6223. IN RE DISBARMENT OF CHIPLEY, 401 U. S. 1010;

No. 6284. DONOVAN *v.* UNITED STATES ET AL., 401 U. S. 944;

No. 6319. NEY *v.* FIELD, MEN'S COLONY SUPERINTENDENT, *ante*, p. 904;

No. 6464. EISENHARDT *v.* UNITED STATES, *ante*, p. 928; and

No. 6510. COOKMEYER *v.* LOUISIANA DEPARTMENT OF HIGHWAYS, 401 U. S. 980. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit beginning October 12, 1971, and ending October 15, 1971, and for such additional time in advance thereof to prepare for the trial of cases, or thereafter as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JUNE 1, 1971

Affirmed on Appeal

No. 1394. GRANITE FALLS STATE BANK *v.* SCHNEIDER, DIRECTOR OF DEPARTMENT OF GENERAL ADMINISTRATION, ET AL. Affirmed on appeal from D. C. W. D. Wash. Reported below: 319 F. Supp. 1346.

Appeals Dismissed

No. 1574. LOWE *v.* YOUNG. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 123 Ga. App. 121, 179 S. E. 2d 546.

No. 6901. SWANEY *v.* NORTH CAROLINA. Appeal from Sup. Ct. N. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 277 N. C. 602, 178 S. E. 2d 399.

Certiorari Granted—Vacated and Remanded

No. 6662. NELSON *v.* UNITED STATES. C. A. 8th Cir. Motion for leave to proceed *in forma pauperis* granted. Pursuant to suggestion of the Solicitor General, certiorari granted, judgment vacated, and case remanded for reconsideration in light of position asserted by the Solicitor General in the Memorandum for the United States. Application for bail also referred to the United States Court of Appeals for the Eighth Circuit. Reported below: 434 F. 2d 748.

No. 6704. GAINES *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* granted. Pursuant to suggestion of the Solicitor General, certiorari granted, judgment vacated, and case remanded for reconsideration in light of position asserted by the Solicitor General in the Memorandum for the United States. Reported below: 436 F. 2d 1069.

Miscellaneous Orders

No. 910. ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION No. 1 *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL.; and

No. 961. NATIONAL LABOR RELATIONS BOARD *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL. C. A. 6th Cir. [Certiorari granted, 401 U. S. 907.] Motion of National Council of Senior Citizens to file a brief as *amicus curiae* granted.

No. 958. FEDERAL POWER COMMISSION *v.* FLORIDA POWER & LIGHT CO. C. A. 5th Cir. [Certiorari granted, 401 U. S. 907.] Motion of Gainesville Utilities Department et al. for leave to file a brief as *amici curiae* granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 1622. WHDH, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 1708. CHARLES RIVER CIVIC TELEVISION, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 1716. GREATER BOSTON TELEVISION CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Motion for expeditious treatment of petitions for writs of certiorari denied. Motion for conditional revocation of stay also denied. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. Reported below: —— U. S. App. D. C. ——, 444 F. 2d 841.

No. 1689. PRUETT *v.* TEXAS ET AL. Ct. Crim. App. Tex. Reapplication for stay and other relief denied. Reported below: 465 S. W. 2d 164.

No. 5850. TOWNSEND ET AL. *v.* SWANK, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL.; and

No. 6000. ALEXANDER ET AL. *v.* SWANK, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. Appeals from D. C. N. D. Ill. [Probable jurisdiction noted, 401 U. S. 906.] Motion for additional time for argument denied.

No. 6979. DAVIS *v.* POPE, MEDICAL FACILITY SUPERINTENDENT; and

No. 7034. RAY *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 6848. RUDERER *v.* REGAN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

Certiorari Granted

No. 1419. CALIFORNIA MOTOR TRANSPORT CO. ET AL. *v.* TRUCKING UNLIMITED ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 432 F. 2d 755.

No. 6810. MCCLANAHAN *v.* MORAUER & HARTZELL, INC., ET AL. C. A. D. C. Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 142 U. S. App. D. C. 40, 439 F. 2d 550.

Certiorari Denied. (See also Nos. 1574 and 6901, *supra.*)

No. 1476. FERRONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 438 F. 2d 381.

No. 1542. ALLEN *v.* VANCANTFORT. C. A. 1st Cir. Certiorari denied. Reported below: 436 F. 2d 625.

No. 1545. KARNES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 284.

No. 1547. GENERAL RADIO CO. *v.* KEPCO, INC. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 135.

No. 1551. WEBER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 1218.

No. 1553. CARPENTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 526.

No. 1559. ALONZO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 991.

No. 1567. GALLAGHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 1191.

No. 1568. BEAN ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 121 Ill. App. 2d 290, 257 N. E. 2d 558.

No. 1577. GERSTEIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 10 Md. App. 322, 270 A. 2d 331.

No. 1579. HARTFORD ACCIDENT & INDEMNITY CO. *v.* EASTERN AIRLINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 449.

No. 1580. CASCADE CAR WASH, INC. *v.* LAURENT WATCH CO., INC., DBA CASCADE CAR WASH. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 122.

No. 1582. STEINER *v.* OFFICER IN COMMAND, ARMED FORCES EXAMINING AND INDUCTION CENTER AT HOUSTON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 687.

No. 1631. NOE *v.* CHICAGO GREAT WESTERN RAILWAY CO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 263 N. E. 2d 889.

No. 6563. NORMAN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 57 N. J. 165, 270 A. 2d 409.

No. 6592. SMITH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 424, 263 N. E. 2d 860.

No. 6593. REYES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 6629. WOOD *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 436 F. 2d 1077.

No. 6630. MITCHELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 128 Ill. App. 2d 90, 262 N. E. 2d 798.

No. 6651. GREEN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 383 Mich. 812.

No. 6732. JIMINEZ-LOPEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 791.

No. 6785. MAXWELL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 439 F. 2d 135.

No. 6789. WAHLQUIST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 438 F. 2d 219.

No. 6797. EVANS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 141 U. S. App. D. C. 321, 438 F. 2d 162.

No. 6813. GONZALEZ-PARRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 694.

No. 6815. BROCATO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 437 F. 2d 1157.

No. 6821. FRIZER *v.* MCMANN, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 437 F. 2d 1309 and 1312.

No. 6823. GWYNN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 6825. FAULS *v.* UNITED STATES; and
No. 6827. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 1318.

No. 6843. FERGUSON *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 6844. FERREE *v.* FRYE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 6845. EBBS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 6849. PHILLIPS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 441 Pa. 343, 271 A. 2d 867.

No. 6858. GILL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 733.

No. 6859. POWERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 439 F. 2d 373.

No. 6861. ANDERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 6863. HOY *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 6865. BURKE *v.* ERICKSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 438 F. 2d 326.

No. 6866. SIMPSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 948.

No. 6869. SMITH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 528, 267 N. E. 2d 669.

No. 6897. EDWARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 1468. SCOTT ET AL. *v.* TEXAS. Sup. Ct. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 460 S. W. 2d 103.

No. 1575. MORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 436 F. 2d 938.

No. 6794. GRIJALVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 436 F. 2d 420.

No. 6809. AUSTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 434 F. 2d 1301.

No. 1474. MARCHESE *v.* UNITED STATES. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 438 F. 2d 452.

No. 1546. HOHENSEE ET AL. *v.* SCIENTIFIC LIVING, INC., ET AL. Sup. Ct. Pa. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 440 Pa. 280, 270 A. 2d 216.

No. 1550. SILK *v.* KLEPPE, ADMINISTRATOR OF SMALL BUSINESS ADMINISTRATION, ET AL. C. A. 1st Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 435 F. 2d 1266.

No. 1557. LAVALLEE, CORRECTIONAL SUPERINTENDENT *v.* BURNS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 436 F. 2d 1352.

No. 1526. UNITED STEELWORKERS OF AMERICA, AFL–CIO *v.* AUBURNDALE FREEZER CORP. ET AL. C. A. 5th Cir. Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 434 F. 2d 1219.

Rehearing Denied

No. 962. KOSTAMO *v.* NORTHERN CITY NATIONAL BANK, ADMINISTRATOR, ET AL., *ante*, p. 902;

No. 1348. LITTLEPAGE *v.* UNITED STATES, *ante*, p. 915;

No. 1352. CONSOLIDATED CARRIERS CORP. *v.* UNITED STATES ET AL., *ante*, p. 901;

No. 1368. FOREMAN *v.* CITY OF BELLEFONTAINE ET AL., *ante*, p. 901;

No. 1400. DROBNICK ET AL. (FIRST NATIONAL BANK OF WAUKEGAN, TRUSTEE) *v.* FOSS PARK DISTRICT, *ante*, p. 907;

No. 6182. BUSTOS *v.* CALIFORNIA, *ante*, p. 910;

No. 6459. CHACON *v.* NELSON, WARDEN, *ante*, p. 941;

No. 6665. LAUGHLIN *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, *ante*, p. 904;

No. 6671. MORALES *v.* CADY, WARDEN, *ante*, p. 931; and

No. 6700. BRYANT *v.* UNITED STATES, *ante*, p. 932. Petitions for rehearing denied.

No. 1021. TOLIVER *v.* UNITED STATES, 401 U. S. 913. Motion for leave to file petition for rehearing denied.

419-882 O - 72 - 56

INDEX

ABANDONMENT OF SCHOOLS. See **Civil Rights Act of 1964,** 2; **Constitutional Law,** III, 4; **School Desegregation,** 1, 6–9.

ABORTIONS. See also **Jurisdiction,** 1.

Vagueness—Burden of proof—"Health."—District of Columbia abortion statute is not unconstitutionally vague, as the burden is on the prosecution to plead and prove that an abortion was not "necessary for the preservation of the mother's life or health," and word "health," in accord with general usage and modern understanding, and a recent interpretation of the statute by the federal courts, includes psychological as well as physical well-being, and as thus construed is not overly vague. United States v. Vuitch, p. 62.

ABROAD AT NIGHT. See **Constitutional Law,** II, 4.

ABSOLUTE DISCRETION. See **Constitutional Law,** II, 2; VI, 2; **Juries; Procedure,** 1–2.

ACCIDENT LIABILITY. See **Automobile Accidents,** 1, 3; **Constitutional Law,** II, 1; VIII.

ACCIDENT REPORTS. See **Automobile Accidents,** 1–2; **Constitutional Law,** VI, 1; VIII.

ACIDS. See **Criminal Law.**

ACQUISITIONS. See **Antitrust Acts,** 4; **Meat Packers Consent Decree of 1920.**

ADMINISTRATIVE PROCEDURE. See also **Federal Power Commission; Labor Management Relations Act; Selective Service System; Social Security Act,** 1–2.

1. *Federal Power Commission—Substantial evidence—Judicial review.*—Since there was substantial evidence to support FPC's finding that benefits will accrue to respondent from the interconnection with small municipally owned utility, the Court of Appeals erred in not deferring to FPC's expert judgment. Gainesville Utilities v. Florida Power Corp., p. 515.

2. *Selective Service System—Noncooperation—Exhaustion of remedies.*—Petitioner's failure to exhaust remedies jeopardized interest of Selective Service System, as administrative agency responsible for classifying registrants, in developing facts and using its expertise to

ADMINISTRATIVE PROCEDURE—Continued.

assess his claims to exempt status, and thus bars his defense that he was erroneously classified. McGee v. United States, p. 479.

3. *Social Security Act—Disability benefits—Medical evidence.*—Written reports by physicians who have examined claimant for disability benefits under the Act constitute "substantial evidence" supporting nondisability finding within standard of § 205 (g), notwithstanding reports' hearsay character, absence of cross-examination (through claimant's failure to exercise subpoena rights), and directly opposing testimony by claimant and his medical witness; and procedure followed does not violate due process requirements. Richardson v. Perales, p. 389.

ADULTS. See **Constitutional Law,** IV, 3; **Obscenity,** 2.

ADVERTISEMENTS. See **Constitutional Law,** IV, 3; **Obscenity,** 2.

ADVISERS. See **Administrative Procedure,** 3; **Social Security Act,** 1.

AFFECTING COMMERCE. See **Constitutional Law,** I; **Consumers Credit Protection Act.**

AGE OF STUDENTS. See **Civil Rights Act of 1964,** 2; **Constitutional Law,** III, 4; **School Desegregation,** 1, 6–9.

AGREEMENTS. See **Aliens; Immigration and Nationality Act,** 1; **Naturalization; Norris-LaGuardia Act; Railway Labor Act.**

ALABAMA. See **School Desegregation,** 3.

ALIBI DEFENSES. See **Constitutional Law,** VII.

ALIENS. See also **Immigration and Nationality Act,** 1; **Naturalization.**

Exemption from military service—Subjection to draft—Naturalization.—Under § 315 of the Immigration and Nationality Act an alien who requests exemption from military service is to be held to his agreement to relinquish claim to naturalization only when he is completely and permanently exempt from service in the armed forces. Astrup v. Immigration Service, p. 509.

ALLOCUTION. See **Constitutional Law,** II, 2; VI, 2; **Juries; Procedure,** 1–2.

AMENDMENT OF PLEADINGS. See **Estoppel; Procedure,** 3; **Res Judicata.**

ANNOYING CONDUCT. See **Constitutional Law,** II, 3; IV, 1.

ANTENNAS. See **Estoppel; Procedure,** 3; **Res Judicata.**

ANTI-BUSING LAW. See **Constitutional Law,** III, 3; **Jurisdiction,** 2; **School Desegregation,** 4–5.

ANTITRUST ACTS. See also **Meat Packers Consent Decree of 1920.**

1. *Clayton Act—Competition—Control of 75% of business.*—Test of § 7 of the Act, whether the effect of an acquisition "may be substantially to lessen competition," is met here by Buffalo's control of 75% of the independent color comic supplement printing business. United States v. Greater Buffalo Press, p. 549.

2. *Clayton Act — Failing-company exception — Prospective purchasers.*—District Court erred in finding that the acquisition was within the "failing company" exception, as the two requirements, (a) that International's resources were "so depleted and the prospect of rehabilitation so remote that it faced the grave problem of a business failure," and (b) that there was no other prospective purchaser, were not satisfied. United States v. Greater Buffalo Press, p. 549.

3. *Clayton Act—Line of commerce—Color comic supplement printing business.*—Line of commerce here is color comic supplement printing business, which includes the printing of the supplements and their sale. While there may be submarkets within this broad market, "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." United States v. Greater Buffalo Press, p. 549.

4. *Consent decree—Meat Packers Consent Decree of 1920—Acquisition by Greyhound Corp.*—Ownership of majority of stock of Armour & Co., a meatpacker, by Greyhound Corp., which has retail food subsidiaries and accordingly engages in business that may be forbidden to Armour by the Decree, in itself and without any evidentiary showing as to consequences, does not violate the Decree's prohibition against Armour's "directly or indirectly . . . engaging in or carrying on" the forbidden business. United States v. Armour & Co., p. 673.

APPEAL BOARDS. See **Administrative Procedure,** 2; **Selective Service System.**

APPEALS. See also **Abortion; Administrative Procedure,** 2–3; **Jurisdiction,** 1–2; **School Desegregation,** 5; **Selective Service System; Social Security Act,** 1–2.

Subpoena duces tecum—Finality of order to produce—Documents in Kenya.—District Court's order denying respondent's motion to quash grand jury subpoena *duces tecum* requiring production of records under his control in Kenya was not final and thus not appeal-

APPEALS—Continued.

able; nor was it rendered an appealable temporary injunction by inclusion of provision requiring respondent to seek permission from Kenyan authorities to remove some documents, and if permission was denied, to grant United States agents access to the documents in Kenya. United States v. Ryan, p. 530.

APPLICATIONS FOR STAY. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

APPORTIONMENT. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

AREA OF EFFECTIVE COMPETITION. See **Antitrust Acts**, 1–3.

ARIZONA. See **Automobile Accidents**, 1; **Constitutional Law**, VIII.

ARMED FORCES. See **Administrative Procedure**, 2; **Aliens; Immigration and Nationality Act**, 1; **Naturalization; Selective Service Regulations; Selective Service System.**

ARMY REGULATIONS. See **Selective Service Regulations.**

ASSIGNMENT OF STUDENTS. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **School Desegregation**, 1–9.

ASYLUM. See **Immigration and Nationality Act**, 2.

ATTENDANCE ZONES. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 4; **School Desegregation**, 1–3, 6–9.

ATTORNEY GENERAL. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

AUSTIN NEIGHBORHOOD. See **Constitutional Law**, V.

AUTOMOBILE ACCIDENTS. See also **Constitutional Law**, II, 1; VI, 1; VIII.

1. *Bankruptcy Act—Arizona statute—Supremacy Clause.*—Provision that "discharge in bankruptcy following rendering of any such judgment [as result of automobile accident] shall not relieve judgment debtor from any of the requirements of this article," in Ariz. Rev. Stat., directly conflicts with § 17 of the Bankruptcy Act, which states that discharge in bankruptcy fully discharges all but certain specified judgments, and is thus violative of the Supremacy Clause. Perez v. Campbell, p. 637.

2. *Stop-and-report statute — Self-incrimination.* — California Supreme Court's holding that compliance with provision of Cal. Vehicle Code requiring driver of car involved in accident to stop and furnish

AUTOMOBILE ACCIDENTS—Continued.

his name and address would violate privilege against compulsory self-incrimination without a use restriction, is vacated and remanded as there is no conflict between the statute and the privilege. California v. Byers, p. 424.

3. *Suspension of license—Uninsured motorists—Procedural due process.*—Georgia's Motor Vehicle Safety Responsibility Act, which provides for suspension of registration and driver's license of uninsured motorist involved in accident unless he posts security for damages claimed and which excludes consideration of fault or responsibility for accident at pre-suspension hearing, violates due process. Before Georgia can deprive person of his license and registration, it must provide procedure to determine whether there is reasonable possibility of judgment being rendered against him as result of accident. Bell v. Burson, p. 535.

BACK SPRAINS. See **Administrative Procedure**, 3; **Social Security Act**, 1.

BACKUP SERVICE. See **Administrative Procedure**, 1; **Federal Power Commission.**

BANKRUPTCY ACT. See **Automobile Accidents**, 1; **Constitutional Law**, VIII.

BENEFITS. See **Administrative Procedure**, 1; **Federal Power Commission.**

BLOCKBUSTING. See **Constitutional Law**, V.

BOARDS OF EDUCATION. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **School Desegregation**, 1–9.

BORDER SEIZURES. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

BROKERS. See **Constitutional Law**, V.

BURDEN OF PROOF. See **Abortions**; **Constitutional Law**, V; **Jurisdiction**, 1.

BUSINESS VISITORS. See **Immigration and Nationality Act**, 2.

BUSING. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **Jurisdiction**, 2; **School Desegregation**, 1–9.

CALIFORNIA. See **Constitutional Law**, II, 2; VI, 2; **Juries**; **Procedure**, 1–2.

CALIFORNIA CONSTITUTION. See **Constitutional Law**, III, 2.

CALIFORNIA UNEMPLOYMENT INSURANCE CODE. See **Social Security Act**, 2.

CALIFORNIA VEHICLE CODE. See **Automobile Accidents**, 2; **Constitutional Law**, VI, 1.

CANDIDATES. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

CAPITAL PUNISHMENT. See **Constitutional Law**, II, 2; VI, 2; **Juries; Procedure**, 1–2.

CARRIERS. See **Norris-LaGuardia Act; Railway Labor Act.**

CASE OR CONTROVERSY. See **Jurisdiction**, 2; **School Desegregation**, 5.

CENSORSHIP. See **Constitutional Law**, IV, 2–3; **Obscenity**, 1–2.

CENSUS DATA. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

CERTIORARI.

Improvidently granted—Conspiracy to commit murder—Not charged or convicted of offense.—Writ of certiorari, granted to review Court of Appeals' affirmance of conviction of conspiracy to commit murder, dismissed as improvidently granted, since, contrary to that court's opinion and Government's representation, it now appears that petitioner was not charged with or convicted of that offense. Bostic v. United States, p. 547.

CESSION OF LAND. See **Indian Lands.**

CHANGE IN STATUS. See **Selective Service Regulations.**

CHARGES. See **Administrative Procedure**, 1; **Federal Power Commission.**

CHARLOTTE, NORTH CAROLINA. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 3–4; **Jurisdiction**, 2; **School Desegregation**, 1, 4–9.

CHICAGO SUBURBS. See **Constitutional Law**, V.

CHINESE NATIONALS. See **Immigration and Nationality Act**, 2.

CINCINNATI. See **Constitutional Law**, II, 3; IV, 1.

CITIZENSHIP. See **Aliens; Immigration and Nationality Act**, 1; **Naturalization.**

CIVIL RIGHTS ACT OF 1964. See also **Constitutional Law**, III, 4; **School Desegregation**, 1–2, 6–9.

1. *Assignment of students—Racial ratios.*—Title IV of the Act, a direction to federal officials, does not restrict state officials in assigning students within their systems. McDaniel v. Barresi, p. 39.

CIVIL RIGHTS ACT OF 1964—Continued.

2. *School desegregation—Remedies.*—Title IV of the Act does not restrict or withdraw from federal courts their historic equitable remedial powers. Proviso in 42 U. S. C. § 2000c–6 was designed simply to foreclose any interpretation of the Act as expanding existing powers of federal courts to enforce Equal Protection Clause. Swann v. Board of Education, p. 1.

CLAIMS FOR DISABILITY BENEFITS. See **Administrative Procedure**, 3; **Social Security Act**, 1.

CLARKE COUNTY. See **Civil Rights Act of 1964**, 1; **School Desegregation**, 2.

CLASSIFICATIONS. See **Administrative Procedure**, 2; **Criminal Law**; **Selective Service Regulations**; **Selective Service System.**

CLASS OF ACTIVITIES. See **Constitutional Law**, I; **Consumers Credit Protection Act.**

CLAYTON ACT. See **Antitrust Acts**, 1–3.

COCONSPIRATORS. See **Certiorari.**

CODEFENDANTS. See **Constitutional Law**, VII.

COERCION. See **Constitutional Law**, V.

COLLATERAL ESTOPPEL. See **Estoppel**; **Procedure**, 3; **Res Judicata.**

COLLECTIVE BARGAINING. See **Norris-LaGuardia Act**; **Railway Labor Act.**

COLORADO. See **Indian Lands.**

COLOR COMIC SUPPLEMENTS. See **Antitrust Acts**, 1–3.

COMBATANT TRAINING. See **Selective Service Regulations.**

COMIC SUPPLEMENTS. See **Antitrust Acts**, 1–3.

COMMERCE. See **Antitrust Acts**, 1–3.

COMMERCE CLAUSE. See **Constitutional Law**, I; **Consumers Credit Protection Act.**

COMMERCIAL USAGE. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

COMMUNIST COUNTRIES. See **Immigration and Nationality Act**, 2.

COMPELLED DISCLOSURE. See **Automobile Accidents**, 2; **Constitutional Law**, VI, 1.

COMPENSATION. See **Administrative Procedure**, 1; **Federal Power Commission**; **Social Security Act**, 2.

COMPENSATION FOR LAND. See **Indian Lands.**

COMPETITION. See **Antitrust Acts**, 1–4; **Meat Packers Consent Decree of 1920.**

CONDUCT. See **Constitutional Law**, II, 3; IV, 1.

CONFEDERATED BAND OF UTES. See **Indian Lands.**

CONFESSIONS. See **Constitutional Law**, VII.

CONFRONTATION CLAUSE. See **Constitutional Law**, VII.

CONSCIENTIOUS OBJECTORS. See **Administrative Procedure**, 2; **Selective Service Regulations**; **Selective Service System.**

CONSENT DECREES. See **Antitrust Acts**, 1–4; **Meat Packers Consent Decree of 1920.**

CONSENT JUDGMENTS. See **Indian Lands.**

CONSPIRACY TO COMMIT MURDER. See **Certiorari.**

CONSTITUTIONAL LAW. See also **Abortions**; **Administrative Procedure**, 3; **Automobile Accidents**, 1–3; **Civil Rights Act of 1964**, 2; **Consumers Credit Protection Act**; **Juries**; **Jurisdiction**, 1–2; **Obscenity**, 1–2; **Procedure**, 1–2; **School Desegregation**, 1, 4–9; **Social Security Act**, 1; **Voting Rights Act of 1965.**

I. Commerce Clause.

Loan sharking—Affecting commerce.—Title II of the Consumers Credit Protection Act is within Congress' power under the Commerce Clause to control activities affecting interstate commerce and Congress' findings are adequate to support its conclusion that loan sharks who use extortionate means to collect payments on loans are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Perez v. United States, p. 146.

II. Due Process.

1. *Automobile accidents—Suspension of license.*—Georgia's Motor Vehicle Safety Responsibility Act, which provides for suspension of registration and driver's license of uninsured motorist involved in accident unless he posts security for damages claimed and which excludes consideration of fault or responsibility for accident at pre-suspension hearing, violates due process. Before Georgia can deprive person of his license and registration, it must provide procedure to determine whether there is reasonable possibility of judgment being rendered against him as result of accident. Bell v. Burson, p. 535.

CONSTITUTIONAL LAW—Continued.

2. *Capital cases—Jury sentencing.*—The Constitution does not prohibit States from considering that compassionate purposes of jury sentencing in capital cases are better served by having issues of guilt and punishment resolved in single trial than by focusing jury's attention solely on punishment after guilt has been determined. McGautha v. California, p. 183.

3. *Vagueness—Cincinnati ordinance.*—Ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by," which has not been narrowed by Ohio Supreme Court construction, is violative on its face of the due process standard of vagueness and the constitutional right of free assembly and association. Coates v. City of Cincinnati, p. 611.

4. *Vagueness—Suspicious person ordinance.*—Euclid, Ohio's, suspicious person ordinance is unconstitutionally vague as applied to appellant since it gave insufficient notice that his conduct in parked car or in discharging passenger was enough to show him to be "without visible or lawful business." Palmer v. City of Euclid, p. 544.

III. Equal Protection of the Laws.

1. *Apportionment plans—Election districts.*—Single-member districts are generally preferable to large multi-member districts in court-fashioned apportionment plans. In view of availability of 1970 census data and the dispatch with which applicants devised their plans, the District Court is instructed, absent insurmountable difficulties, to devise and put into effect a single-member plan for Hinds County, Mississippi, by June 14, 1971, and to extend appropriately the filing date for candidates from that county. Connor v. Johnson, p. 690.

2. *California mandatory referendums—Low-cost housing.*—California procedure for mandatory referendums, which is not limited to proposals involving low-cost public housing, ensures democratic decisionmaking, and does not violate the Equal Protection Clause. James v. Valtierra, p. 137.

3. *North Carolina Anti-Busing Law—Assignment of students.*—North Carolina's Anti-Busing Law, which flatly forbids assignment of students on account of race or to create racial balance or ratio in schools and which prohibits busing for such purposes is invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. North Carolina Bd. of Ed. v. Swann, p. 43.

4. *School desegregation—Remedies.*—Today's objective is to eliminate from the public schools all vestiges of state-imposed segregation

CONSTITUTIONAL LAW—Continued.

that was held violative of equal protection guarantees by *Brown* v. *Board of Education*, 347 U. S. 483, in 1954; and in default by school authorities of their affirmative obligation to proffer acceptable remedies, the district courts have broad power to fashion remedies that will assure unitary school systems. Swann v. Board of Education, p. 1.

IV. First Amendment.

1. *Freedom of assembly and association—Cincinnati ordinance.*—Ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by," which has not been narrowed by Ohio Supreme Court construction, is violative of the due process standard of vagueness and the constitutional right of free assembly and association. Coates v. City of Cincinnati, p. 611.

2. *Importation of obscene material—Forfeiture proceedings.*—Three-judge court's ruling that 19 U. S. C. § 1305 (a), prohibiting the importation of obsence material and providing for its seizure at any customs office and retention pending judgment of a district court on forfeiture proceedings, is unconstitutional, is reversed and case remanded. United States v. Thirty-seven Photographs, p. 363.

3. *Obscenity—Use of mails.*—Section 1461 of Title 18, U. S. C., is not unconstitutional as applied to the distribution by mail of obscene materials to willing recipients who state that they are adults. United States v. Reidel, p. 351.

V. Freedom of the Press.

Distribution of leaflets—Prior restraint.—Respondent real estate broker has not met heavy burden of justifying imposition of prior restraint of petitioners' peaceful distribution of informational literature critical of respondent's alleged "blockbusting" activities in Austin area of Chicago. Organization for a Better Austin v. Keefe, p. 415.

VI. Self-Incrimination.

1. *Cal. Vehicle Code—Stop-and-report statute.*—California Supreme Court's holding that compliance with provision of Cal. Vehicle Code requiring driver of car involved in accident to stop and furnish his name and address would violate privilege against compulsory self-incrimination without a use restriction, is vacated and remanded as there is no conflict between the statute and the privilege. California v. Byers, p. 424.

CONSTITUTIONAL LAW—Continued.

2. *Capital cases—Testimony of defendant.*—Policies of privilege against self-incrimination are not offended when defendant in capital case yields to pressure to testify on issue of punishment at risk of damaging his case on guilt. McGautha v. California, p. 183.

VII. Sixth Amendment.

Confrontation Clause—Codefendants.—Where a codefendant takes the stand in own defense, denies making alleged out-of-court statement implicating defendant, and testifies in defendant's favor, defendant has been denied no rights protected by the Sixth and Fourteenth Amendments and in circumstances here respondent, who would have encountered greater difficulties if codefendant affirmed statement as his, was denied neither the opportunity nor the benefit of fully and effectively cross-examining codefendant. Nelson v. O'Neil, p. 622.

VIII. Supremacy Clause.

Automobile accidents—Bankruptcy Act.—Provision that "discharge in bankruptcy following rendering of any such judgment [as result of automobile accident] shall not relieve judgment debtor from any of the requirements of this article," in Ariz. Rev. Stat., directly conflicts with § 17 of the Bankruptcy Act, which states that discharge in bankruptcy fully discharges all but certain specified judgments, and is thus violative of the Supremacy Clause. Perez v. Campbell, p. 637.

CONSTRUCTION OF SCHOOLS. See **Civil Rights Act of 1964,** 2; **Constitutional Law,** III, 4; **School Desegregation,** 1, 6–9.

CONSUMERS CREDIT PROTECTION ACT. See also **Constitutional Law,** I.

Loan sharking—Commerce Clause.—Title II of the Act is within Congress' power under the Commerce Clause to control activities affecting interstate commerce and Congress' findings are adequate to support its conclusion that loan sharks who use extortionate means to collect payments on loans are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Perez v. United States, p. 146.

CONTEMPT. See **Appeals.**

CONTROL OF MEATPACKER. See **Antitrust Acts,** 4; **Meat Packers Consent Decree of 1920.**

CONVICTIONS. See **Certiorari.**

COPYRIGHTED FEATURES. See **Antitrust Acts,** 1–3.

CORPORATE ACQUISITIONS. See **Antitrust Acts**, 4; **Meat Packers Consent Decree of 1920.**

CORROSIVE LIQUIDS. See **Criminal Law.**

COURT DECREES. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

COURT OF APPEALS. See **Abortions**; **Certiorari**; **Jurisdiction**, 1.

COURT OF CLAIMS. See **Indian Lands.**

COURTS. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9.

CREDIT. See **Constitutional Law**, I; **Consumers Credit Protection Act.**

CRIMINAL APPEALS ACT. See **Abortions**; **Jurisdiction**, 1.

CRIMINAL LAW. See also **Abortions**; **Administrative Procedure**, 2; **Automobile Accidents**, 2; **Certiorari**; **Constitutional Law**, I; II, 2; IV, 3; VI, 1–2; **Consumers Credit Protection Act**; **Juries**; **Jurisdiction**, 1; **Obscenity**, 2; **Procedure**, 1–2; **Selective Service Regulations**; **Selective Service System.**

Shipping corrosive liquids—"Knowingly violates such regulation."—Statute does not signal an exception to general rule that ignorance of law is no excuse. Word "knowingly" pertains to knowledge of the facts, and where, as here, dangerous products are involved, probability of regulation is so great that anyone who is aware he is in possession of or dealing with them must be presumed to be aware of the regulation. U. S. v. International Min'ls Corp., p. 558.

CRITERIA FOR SENTENCING. See **Constitutional Law**, II, 2; VI, 2; **Juries**; **Procedure**, 1–2.

CROSS-EXAMINATION. See **Administrative Procedure**, 3; **Constitutional Law**, VII; **Social Security Act**, 1.

CUSTOMS AGENTS. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

DAMAGES. See **Automobile Accidents**, 3; **Constitutional Law**, II, 1.

DANGEROUS PRODUCTS. See **Criminal Law.**

DEATH PENALTY. See **Constitutional Law**, II, 2; VI, 2; **Juries**; **Procedure**, 1–2.

DECREES. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

DEFERMENTS. See **Administrative Procedure**, 2; **Selective Service System.**

DEMOCRATIC DECISIONMAKING. See **Constitutional Law**, III, 2.

DEMONSTRATIONS. See **Constitutional Law**, V.

DEPORTATION. See **Immigration and Nationality Act**, 2.

DESEGREGATION PLANS. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **Jurisdiction**, 2; **School Desegregation**, 1–9.

DIRECT APPEALS. See **Jurisdiction**, 2; **School Desegregation**, 5.

DIRECT OR INDIRECT INTEREST. See **Antitrust Acts**, 4; **Meat Packers Consent Decree of 1920.**

DISABILITY BENEFITS. See **Administrative Procedure**, 3; **Social Security Act**, 1.

DISCHARGE FOR CAUSE. See **Social Security Act**, 2.

DISCHARGE IN BANKRUPTCY. See **Automobile Accidents**, 1; **Constitutional Law**, VIII.

DISCHARGING PASSENGER. See **Constitutional Law**, II, 4.

DISCRETION. See **Constitutional Law**, II, 2; VI, 2; **Juries; Procedure**, 1–2.

DISCRIMINATION. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **Jurisdiction**, 2; **School Desegregation**, 1–9.

DISPLACED PERSONS. See **Immigration and Nationality Act**, 2.

DISTANCE TRAVELED. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9.

DISTRIBUTION OF LEAFLETS. See **Constitutional Law**, V.

DISTRICT COURT ORDERS. See **Appeals.**

DISTRICT COURTS. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 1, 4; **School Desegregation**, 1, 6–9; **Voting Rights Act of 1965.**

DISTRICT OF COLUMBIA CODE. See **Abortions; Jurisdiction**, 1.

DIVESTITURE OF STOCK. See **Antitrust Acts**, 1–3.

DOCTORS. See **Abortions; Jurisdiction**, 1.

DOCTORS' REPORTS. See **Administrative Procedure**, 3; **Social Security Act**, 1.

DOCUMENTS. See **Appeals.**

DRAFT BOARDS. See **Administrative Procedure,** 2; **Selective Service Regulations; Selective Service System.**

DRAFT LAWS. See **Aliens; Immigration and Nationality Act,** 1; **Naturalization.**

DRIVERS' LICENSES. See **Automobile Accidents,** 3; **Constitutional Law,** II, 1.

DUE PROCESS. See **Abortions; Administrative Procedure,** 3; **Automobile Accidents,** 3; **Constitutional Law,** II; **Juries; Jurisdiction,** 1; **Procedure,** 1–2; **Social Security Act,** 1.

ECONOMIC SIGNIFICANCE. See **Antitrust Acts,** 1–3.

ELECTION DISTRICTS. See **Constitutional Law,** III, 1; **Voting Rights Act of 1965.**

ELECTIONS. See **Constitutional Law,** III, 2.

ELECTRIC UTILITIES. See **Administrative Procedure,** 1; **Federal Power Commission.**

ELEMENTARY SCHOOLS. See **Civil Rights Act of 1964,** 1–2; **Constitutional Law,** III, 3–4; **School Desegregation,** 1–9.

ELIGIBILITY HEARINGS. See **Social Security Act,** 2.

EMPLOYER AND EMPLOYEES. See **Labor Management Relations Act; Norris-LaGuardia Act; Railway Labor Act.**

EMPLOYERS' APPEALS. See **Social Security Act,** 2.

ENTRY PERMITS. See **Immigration and Nationality Act,** 2.

EQUALITY OF SCHOOLS. See **Civil Rights Act of 1964,** 2; **Constitutional Law,** III, 4; **School Desegregation,** 1, 6–9.

EQUAL PROTECTION OF THE LAWS. See **Civil Rights Act of 1964,** 1–2; **Constitutional Law,** III; **Jurisdiction,** 2; **School Desegregation,** 1–9; **Voting Rights Act of 1965.**

EQUITY POWERS. See **Civil Rights Act of 1964,** 2; **Constitutional Law,** III, 4; **School Desegregation,** 1, 6–9.

ESTOPPEL. See also **Indian Lands; Procedure,** 3; **Res Judicata.**

Patent infringement—Res judicata.—Holding in *Triplett* v. *Lowell,* 297 U. S. 638, that determination of patent invalidity is not *res judicata* against patentee in subsequent litigation against different defendant overruled to extent that it forecloses estoppel plea by one facing charge of infringement of patent that has once been declared invalid. Blonder-Tongue v. University Foundation, p. 313.

EUCLID, OHIO. See **Constitutional Law,** II, 4.

EVIDENCE. See **Administrative Procedure**, 3; **Automobile Accidents**, 2; **Constitutional Law**, II, 2; VI, 1–2; VII; **Estoppel**; **Juries**; **Procedure**, 1–3; **Res Judicata**; **Social Security Act**, 1.

EXEMPTION FROM MILITARY SERVICE. See **Aliens**; **Immigration and Nationality Act**, 1; **Naturalization.**

EXEMPTIONS. See **Administrative Procedure**, 2; **Aliens**; **Immigration and Nationality Act**, 1; **Labor Management Relations Act**; **Naturalization**; **Selective Service Regulations**; **Selective Service System.**

EXHAUSTION OF REMEDIES. See **Administrative Procedure**, 2; **Selective Service System.**

EXHORTATION. See **Norris-LaGuardia Act**; **Railway Labor Act.**

EXPERTISE. See **Administrative Procedure**, 1–2; **Federal Power Commission**; **Selective Service System.**

EXPERTS. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9.

EXTENSION OF CREDIT. See **Constitutional Law**, I; **Consumers Credit Protection Act.**

EXTORTIONATE CREDIT TRANSACTIONS. See **Constitutional Law**, I; **Consumers Credit Protection Act.**

FACULTY DESEGREGATION. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9.

FAILING COMPANY. See **Antitrust Acts**, 1–3.

FAIR SHARE ACT OF 1960. See **Immigration and Nationality Act**, 2.

FAIR TRIALS. See **Constitutional Law**, II, 2; VI, 2; **Juries**; **Procedure**, 1–2.

FAULT. See **Automobile Accidents**, 3; **Constitutional Law**, II, 1.

FEAR OF PERSECUTION. See **Immigration and Nationality Act**, 2.

FEDERAL OBSCENITY STATUTE. See **Constitutional Law**, IV, 3; **Obscenity**, 2.

FEDERAL POWER COMMISSION. See also **Administrative Procedure**, 1.

Electric utilities interconnection—Backup service charge—Judicial review.—Since there was substantial evidence to support FPC's finding that benefits will accrue to respondent from the interconnection with small municipally owned utility, the Court of Appeals erred in not deferring to FPC's expert judgment. Gainesville Utilities v. Florida Power Corp., p. 515.

419-882 O - 72 - 57

FEDERAL-STATE RELATIONS. See **Automobile Accidents**, 1; **Civil Rights Act of 1964**, 2; **Constitutional Law**, I; III, 4; VIII; **Consumers Credit Protection Act**; **School Desegregation**, 1, 6–9; **Social Security Act**, 2.

FIFTH AMENDMENT. See **Abortions**; **Automobile Accidents**, 2; **Constitutional Law**, II, 2; VI, 1–2; **Juries**; **Jurisdiction**, 1; **Procedure**, 1–2.

FILING DATES. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

FINAL ORDERS. See **Appeals.**

FINAL SETTLEMENTS. See **Indian Lands.**

FINANCIAL RESPONSIBILITY. See **Automobile Accidents**, 1–3; **Constitutional Law**, II, 1; VI, 1; VIII.

FINDINGS. See **Administrative Procedure**, 1; **Federal Power Commission.**

FIRMLY RESETTLED. See **Immigration and Nationality Act**, 2.

FIRST AMENDMENT. See **Constitutional Law**, IV–V; **Obscenity**, 1–2.

FLIGHT TO AVOID PERSECUTION. See **Immigration and Nationality Act**, 2.

FOOD BUSINESS. See **Antitrust Acts**, 4; **Meat Packers Consent Decree of 1920.**

FOREIGN DOCUMENTS. See **Appeals.**

FORFEITURE PROCEEDINGS. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

FOURTEENTH AMENDMENT. See **Automobile Accidents**, 3; **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, II–III; VI, 2; VII; **Juries**; **Jurisdiction**, 2; **Procedure**, 1–2; **School Desegregation**, 1–9; **Voting Rights Act of 1965.**

FREEDOM OF ASSEMBLY. See **Constitutional Law**, II, 3; IV, 1.

FREEDOM OF ASSOCIATION. See **Constitutional Law**, II, 3; IV, 1.

FREEDOM OF THE PRESS. See **Constitutional Law**, IV, 2–3; V; **Obscenity**, 1–2.

GAINESVILLE, FLORIDA. See **Administrative Procedure**, 1; **Federal Power Commission.**

GENERATING CAPACITY. See **Administrative Procedure**, 1; **Federal Power Commission.**

GEOGRAPHIC ZONES. See **School Desegregation**, 3.

GEORGIA. See **Automobile Accidents**, 3; **Civil Rights Act of 1964**, 1; **Constitutional Law**, II, 1; **School Desegregation**, 2.

GOVERNMENT'S REPRESENTATION. See **Certiorari.**

GRAND JURY SUBPOENAS. See **Appeals.**

GREYHOUND CORP. See **Antitrust Acts**, 4; **Meat Packers Consent Decree of 1920.**

GROUPING OF ATTENDANCE ZONES. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9.

HAZARDOUS MATERIALS. See **Criminal Law.**

HEALTH. See **Abortions**; **Jurisdiction**, 1.

HEARINGS. See **Administrative Procedure**, 3; **Automobile Accidents**, 3; **Constitutional Law**, II, 1; **Social Security Act**, 1.

HEARSAY. See **Administrative Procedure**, 3; **Constitutional Law**, VII; **Social Security Act**, 1.

HINDS COUNTY. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

HIT-AND-RUN STATUTES. See **Automobile Accidents**, 2; **Constitutional Law**, VI, 1.

HONG KONG. See **Immigration and Nationality Act**, 2.

HOUSING. See **Constitutional Law**, III, 2.

HYDROFLUOSILICIC ACID. See **Criminal Law.**

IGNORANCE OF THE LAW. See **Criminal Law.**

IMMIGRANT VISAS. See **Immigration and Nationality Act**, 2.

IMMIGRATION AND NATIONALITY ACT. See also **Aliens**; **Naturalization.**

1. *Aliens—Exemption from military service—Naturalization.*—Under § 315 of the Act an alien who requests exemption from military service is to be held to his agreement to relinquish claim to naturalization only when he is completely and permanently exempt from service in the armed forces. Astrup v. Immigration Service, p. 509.

2. *Refugees—Asylum—"Firmly resettled."*—Whether a refugee has already "firmly resettled" in another country is relevant to determin-

IMMIGRATION AND NATIONALITY ACT—Continued.
ing the availability to him of the asylum provision of § 203 (a) (7), since Congress did not intend to grant asylum to a refugee who has found permanent shelter in another country, and the § 203 (a) (7) (iii) nationality requirement is no substitute for the "resettlement" concept. Rosenberg v. Yee Chien Woo, p. 49.

IMPORTATION OF OBSCENE MATERIALS. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

IMPROVIDENTLY GRANTED. See **Certiorari.**

INDIAN CLAIMS COMMISSION. See **Indian Lands.**

INDIAN LANDS.

Final settlement—Consent judgment—Res judicata.—Indian tribe's claims for compensation and accounting are barred by *res judicata* since they relate to land "formerly owned or claimed by [the Confederated Band of Utes] in western Colorado, ceded to [the United States] by the Act of June 15, 1880," and were thus subject to a final settlement reduced to a consent judgment, to which respondent tribe was a party, made in 1950. United States v. Southern Ute Indians, p. 159.

INDIRECT INTEREST. See **Antitrust Acts**, 4; **Meat Packers Consent Decree of 1920.**

INDUCTION. See **Administrative Procedure**, 2; **Selective Service System.**

INDUCTION NOTICE. See **Selective Service Regulations.**

INELIGIBILITY FOR CITIZENSHIP. See **Aliens; Immigration and Nationality Act**, 1; **Naturalization.**

INFORMATIONAL LITERATURE. See **Constitutional Law**, V.

INFRINGEMENT SUITS. See **Estoppel; Procedure**, 3; **Res Judicata.**

INJUNCTIONS. See **Appeals; Constitutional Law**, III, 2; **Jurisdiction**, 2; **Norris-LaGuardia Act; Railway Labor Act; School Desegregation**, 5.

IN-SERVICE DETERMINATIONS. See **Selective Service Regulations.**

INSPECTION OF DOCUMENTS. See **Appeals.**

INSTRUCTIONS TO JURY. See **Constitutional Law**, II, 2; VI, 2; **Juries; Procedure**, 1–2.

INTEGRATED NEIGHBORHOODS. See **Constitutional Law**, V.

INTENT. See **Criminal Law.**

INTERCONNECTIONS. See **Administrative Procedure**, 1; **Federal Power Commission.**

INTERSTATE COMMERCE. See **Constitutional Law**, I; **Consumers Credit Protection Act**; **Criminal Law.**

INTERVIEWS. See **Social Security Act**, 2.

INTIMIDATION. See **Constitutional Law**, V.

INVALIDITY OF PATENTS. See **Estoppel**; **Procedure**, 3; **Res Judicata.**

JOINT TRIALS. See **Constitutional Law**, VII.

JUDGMENTS. See **Automobile Accidents**, 1; **Constitutional Law**, VIII; **Estoppel**; **Indian Lands**; **Procedure**, 3; **Res Judicata.**

JUDICIAL DETERMINATIONS. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

JUDICIAL REVIEW. See **Administrative Procedure**, 1; **Federal Power Commission.**

JURIES. See also **Constitutional Law**, II, 2; VI, 2; **Procedure**, 1–2.

Capital cases—Sentencing discretion.—In light of history, experience, and limitations of human knowledge in establishing definitive standards, it is impossible to say that leaving to the untrammeled discretion of the jury the power to pronounce life or death in capital cases violates any provision of the Constitution. McGautha v. California, p. 183.

JURISDICTION. See also **Abortions**; **Indian Lands**; **Norris-LaGuardia Act**; **Railway Labor Act**; **School Desegregation**, 5.

1. *Appeals—District of Columbia abortion statute.*—Although statute applies only to the District of Columbia, this Court has jurisdiction of the appeal under 18 U. S. C. § 3731, which provides for direct appeals from district court judgments "in all criminal cases . . . dismissing any indictment where such decision is based upon the invalidity . . . of the statute upon which the indictment . . . is founded." Once the appeal is properly here, this Court should not refuse to consider it because it might have been taken to the Court of Appeals. United States v. Vuitch, p. 62.

2. *Case or controversy—Direct appeal—North Carolina Anti-Busing Law.*—Since both parties in this action challenging school desegregation plan seek same result, *viz.*, a holding that North Carolina's Anti-Busing Law is constitutional, there is no Art. III case or controversy. Additionally, on facts here, no direct appeal to this Court lies under 28 U. S. C. § 1253. Moore v. Board of Education, p. 47.

JURY SENTENCING. See **Constitutional Law,** II, 2; VI, 2; **Juries; Procedure,** 1–2.

JUSTICIABILITY. See **Norris-LaGuardia Act; Railway Labor Act.**

KENYA. See **Appeals.**

KNOWING VIOLATIONS. See **Criminal Law.**

KNOWLEDGE OF THE FACTS. See **Criminal Law.**

LABOR. See **Labor Management Relations Act; Norris-LaGuardia Act; Railway Labor Act.**

LABOR MANAGEMENT RELATIONS ACT.

Employers—Political subdivision exemption—Natural Gas Utility District.—Federal, rather than state, law governs the determination whether an entity is a "political subdivision" within meaning of § 2 (2) of the Act; and while NLRB's construction is entitled to great respect, there is no "warrant in the record" and "no reasonable basis in law" for its conclusion that respondent was not a political subdivision. NLRB v. Natural Gas Utility District, p. 600.

LAND CLAIMS. See **Indian Lands.**

LEAFLETS. See **Constitutional Law,** V.

LEGAL OBLIGATIONS. See **Norris-LaGuardia Act; Railway Labor Act.**

LIABILITY. See **Automobile Accidents,** 1, 3; **Constitutional Law,** II, 1; VIII.

LICENSORS. See **Antitrust Acts,** 1–3.

LINES OF COMMERCE. See **Antitrust Acts,** 1–3.

LOAN SHARKS. See **Constitutional Law,** I; **Consumers Credit Protection Act.**

LOW-COST HOUSING. See **Constitutional Law,** III, 2.

LOW-INCOME PERSONS. See **Constitutional Law,** III, 2.

MAILS. See **Constitutional Law,** IV, 3; **Obscenity,** 2.

MAINLAND CHINESE. See **Immigration and Nationality Act,** 2.

MAJORITY-TO-MINORITY TRANSFERS. See **Civil Rights Act of 1964,** 2; **Constitutional Law,** III, 4; **School Desegregation,** 1, 6–9.

MANDATORY REFERENDUMS. See **Constitutional Law,** III, 2.

MEAT PACKERS CONSENT DECREE OF 1920. See also **Antitrust Acts**, 4.

Acquisition of meatpacker by Greyhound Corp.—Retail food subsidiaries.—Ownership of majority of stock of Armour & Co., a meatpacker, by Greyhound Corp., which has retail food subsidiaries and accordingly engages in business that may be forbidden to Armour by the Decree, in itself and without any evidentiary showing as to consequences, does not violate the Decree's prohibition against Armour's "directly or indirectly . . . engaging in or carrying on" the forbidden business. United States v. Armour & Co., p. 673.

MEDICAL ADVISERS. See **Administrative Procedure**, 3; **Social Security Act**, 1.

MEDICAL EVIDENCE. See **Administrative Procedure**, 3; **Social Security Act**, 1.

MENS REA. See **Criminal Law.**

MILITARY SELECTIVE SERVICE ACT OF 1967. See **Selective Service Regulations.**

MILITARY SERVICE. See **Administrative Procedure**, 2; **Aliens; Immigration and Nationality Act**, 1; **Naturalization; Selective Service Regulations; Selective Service System.**

MINISTERIAL STUDENTS. See **Administrative Procedure**, 2; **Selective Service System.**

MISSISSIPPI. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

MOBILE, ALABAMA. See **School Desegregation**, 3.

"MOTHER'S LIFE OR HEALTH." See **Abortions; Jurisdiction**, 1.

MOTOR VEHICLE REGISTRATION. See **Automobile Accidents**, 2–3; **Constitutional Law**, II, 1; VI, 1.

MOTOR VEHICLE SAFETY RESPONSIBILITY ACT. See **Automobile Accidents**, 1–3; **Constitutional Law**, II, 1; VI, 1; VIII.

MULTI-MEMBER DISTRICTS. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

MUNICIPAL CORPORATIONS. See **Labor Management Relations Act.**

MUNICIPALLY OWNED UTILITY. See **Administrative Procedure**, 1; **Federal Power Commission.**

MUNICIPAL ORDINANCES. See **Constitutional Law,** II, 3–4; IV, 1.

MUTUALITY OF ESTOPPEL. See **Estoppel; Procedure,** 3; **Res Judicata.**

NAME AND ADDRESS OF DRIVER. See **Automobile Accidents,** 2; **Constitutional Law,** VI, 1.

NATIONAL LABOR RELATIONS BOARD. See **Labor Management Relations Act.**

NATIONAL MEDIATION BOARD. See **Norris-LaGuardia Act; Railway Labor Act.**

NATIONALS. See **Immigration and Nationality Act,** 2.

NATURAL GAS UTILITY DISTRICTS. See **Labor Management Relations Act.**

NATURALIZATION. See also **Aliens; Immigration and Nationality Act,** 1.

Aliens—Exemption from military service—Subjection to draft.—Under § 315 of the Immigration and Nationality Act an alien who requests exemption from military service is to be held to his agreement to relinquish claim to naturalization only when he is completely and permanently exempt from service in the armed forces. Astrup v. Immigration Service, p. 509.

NEGROES. See **Civil Rights Act of 1964,** 1–2; **Constitutional Law,** III, 3–4; **Jurisdiction,** 2; **School Desegregation,** 1–9.

NEIGHBORHOOD SCHOOL ZONES. See **School Desegregation,** 3.

NEWSPAPER SYNDICATES. See **Antitrust Acts,** 1–3.

NIGHTTIME WANDERING. See **Constitutional Law,** II, 4.

NONCONTIGUOUS ATTENDANCE ZONES. See **Civil Rights Act of 1964,** 2; **Constitutional Law,** III, 4; **School Desegregation,** 1, 6–9.

NONCOOPERATION. See **Administrative Procedure,** 2; **Selective Service System.**

NORRIS-LaGUARDIA ACT. See also **Railway Labor Act.**

Railway Labor Act—Strike injunction.—Section 4 of the Norris-LaGuardia Act does not prohibit use of a strike injunction where that remedy is the only practical, effective means of enforcing the duty imposed by § 2 First of the Railway Labor Act. Chicago & N. W. R. Co. v. Transportation Union, p. 570.

NORTH CAROLINA. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 3–4; **Jurisdiction**, 2; **School Desegregation**, 1, 4–9.

NOTICE AND HEARING. See **Social Security Act**, 2.

OBSCENITY. See also **Constitutional Law**, IV, 2–3.

1. *Importation of photographs—Seizure by Customs agents—Forfeiture proceedings.*—Three-judge court's ruling that 19 U. S. C. § 1305 (a), prohibiting the importation of obscene material and providing for its seizure at any customs office and retention pending judgment of a district court on forfeiture proceedings, is unconstitutional, is reversed and case remanded. United States v. Thirty-seven Photographs, p. 363.

2. *Mail delivery of booklet—Willing recipients—Adults.*—Section 1461 of Title 18, U. S. C., is not unconstitutional as applied to the distribution by mail of obscene materials to willing recipients who state that they are adults. United States v. Reidel, p. 351.

OFFENSES. See **Certiorari; Criminal Law.**

OHIO. See **Constitutional Law**, II, 2; VI, 2; **Juries; Procedure**, 1–2.

ONE-RACE SCHOOLS. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9.

ORDERS. See **Appeals.**

ORDINANCES. See **Constitutional Law**, II, 3–4; IV, 1.

ORGANIZED CRIME. See **Constitutional Law**, I; **Consumers Credit Protection Act.**

OUT-OF-COURT STATEMENTS. See **Constitutional Law**, VII.

OVERBREADTH. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

PAIRING OF ATTENDANCE ZONES. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9.

PAMPHLETEERING. See **Constitutional Law**, V.

PANIC PEDDLING. See **Constitutional Law**, V.

PARKED CAR. See **Constitutional Law**, II, 4.

PASSAGE OF TIME. See **Antitrust Acts**, 1–3.

PATENTS. See **Estoppel; Procedure**, 3; **Res Judicata.**

PAYMENT OF COMPENSATION. See **Social Security Act**, 2.

PENALTIES. See **Constitutional Law**, II, 2; VI, 2; **Juries; Procedure**, 1–2.

PERSECUTION. See **Immigration and Nationality Act**, 2.

PHOTOGRAPHS. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

PHYSICAL WELL-BEING. See **Abortions**; **Jurisdiction**, 1.

PHYSICIANS. See **Abortions**; **Jurisdiction**, 1.

PHYSICIANS' REPORTS. See **Administrative Procedure**, 3; **Social Security Act**, 1.

PLEADINGS. See **Estoppel**; **Procedure**, 3; **Res Judicata.**

POLITICAL SUBDIVISIONS. See **Labor Management Relations Act.**

POOR PERSONS. See **Constitutional Law**, III, 2.

PORNOGRAPHY. See **Constitutional Law**, IV, 2–3; **Obscenity**, 1–2.

POSTING SECURITY. See **Automobile Accidents**, 3; **Constitutional Law**, II, 1.

PREFERENCES. See **Immigration and Nationality Act**, 2.

PRESERVATION OF LIFE. See **Abortions**; **Jurisdiction**, 1.

PRESUMPTIONS. See **Criminal Law.**

PRE-SUSPENSION HEARINGS. See **Automobile Accidents**, 3; **Constitutional Law**, II, 1.

PRINTING COLOR COMIC SUPPLEMENTS. See **Antitrust Acts**, 1–3.

PRIOR RESTRAINT. See **Constitutional Law**, V.

PRIVACY. See **Constitutional Law**, V.

PRIVATE USAGE. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

PROCEDURE. See also **Abortions**; **Administrative Procedure**, 1–3; **Appeals**; **Automobile Accidents**, 3; **Certiorari**; **Constitutional Law**, II, 1–2; IV, 2; VI, 2; VII; **Estoppel**; **Federal Power Commission**; **Juries**; **Jurisdiction**, 1; **Obscenity**, 1; **Res Judicata**; **Selective Service Regulations**; **Selective Service System**; **Social Security Act**, 1–2.

1. *Capital cases—Allocution—Addressing jury.*—Ohio does provide for common-law ritual of allocution, but State need not provide petitioner an opportunity to speak to jury free from any adverse consequences on issue of guilt. McGautha v. California, p. 183.

2. *Capital cases—Jury sentencing discretion.*—In light of history, experience, and limitations of human knowledge in establishing definitive standards, it is impossible to say that leaving to the untrammeled discretion of the jury the power to pronounce life or

PROCEDURE—Continued.

death in capital cases violates any provision of the Constitution. McGautha v. California, p. 183.

3. *Patent infringement—Res judicata—Collateral estoppel.*—Holding in *Triplett* v. *Lowell,* 297 U. S. 638, that determination of patent invalidity is not *res judicata* against patentee in subsequent litigation against different defendant overruled to extent that it forecloses estoppel plea by one facing charge of infringement of patent that has once been declared invalid, and in this infringement suit where because of *Triplett* petitioner did not plead estoppel and patentee had no opportunity to challenge appropriateness of such plea, parties should be allowed to amend pleadings and introduce evidence on estoppel issue. Blonder-Tongue v. University Foundation, p. 313.

PRODUCTION OF RECORDS. See **Appeals.**

PROMPT DETERMINATIONS. See **Constitutional Law,** IV, 2; **Obscenity,** 1.

PROSPECTIVE PURCHASERS. See **Antitrust Acts,** 1–3.

PSYCHOLOGICAL WELL-BEING. See **Abortions; Jurisdiction,** 1.

PUBLIC CORPORATIONS. See **Labor Management Relations Act.**

PUBLIC HOUSING. See **Constitutional Law,** III, 2.

PUBLIC INTEREST. See **Administrative Procedure,** 1; **Federal Power Commission.**

PUBLIC SCHOOLS. See **Civil Rights Act of 1964,** 1–2; **Constitutional Law,** III, 3–4; **School Desegregation,** 1–9.

PUNISHMENT. See **Constitutional Law,** II, 2; VI, 2; **Juries; Procedure,** 1–2.

PURCHASERS. See **Antitrust Acts,** 1–3.

RACIAL RATIOS. See **Civil Rights Act of 1964,** 1–2; **Constitutional Law,** III, 3–4; **Jurisdiction,** 2; **School Desegregation,** 1–2, 4–9.

RAILROADS. See **Norris-LaGuardia Act; Railway Labor Act.**

RAILWAY LABOR ACT. See also **Norris-LaGuardia Act.**

Legal obligations—Collective bargaining—Justiciability.—Section 2 First of the Act was intended to be, not just a mere exhortation, but an enforceable legal obligation on carriers and employees alike; and the obligation, central to the effective working of the Act, is enforceable by the courts rather than by the Mediation Board. Chicago & N. W. R. Co. v. Transportation Union, p. 570.

REAL ESTATE BROKERS. See **Constitutional Law**, V.

REAL PROPERTY. See **Constitutional Law**, V.

REAPPORTIONMENT. See **Constitutional Law**, III, 1; **Voting Rights Act of 1965.**

REASONABLE EFFORTS. See **Norris-LaGuardia Act**; **Railway Labor Act.**

RECLASSIFICATIONS. See **Administrative Procedure**, 2; **Selective Service Regulations**; **Selective Service System.**

RECORDS. See **Appeals.**

REFERENDUMS. See **Constitutional Law**, III, 2.

REFUGEE RELIEF ACT OF 1953. See **Immigration and Nationality Act**, 2.

REFUGEES. See **Immigration and Nationality Act**, 2.

REFUSAL TO BARGAIN. See **Labor Management Relations Act.**

REGISTRATION OF AUTOMOBILES. See **Automobile Accidents**, 2–3; **Constitutional Law**, II, 1; VI, 1.

REGULATIONS. See **Criminal Law**; **Selective Service Regulations.**

REGULATORY STATUTES. See **Automobile Accidents**, 2; **Constitutional Law**, VI, 1.

REIMBURSEMENT. See **Administrative Procedure**, 1; **Federal Power Commission.**

REMEDIES. See **Administrative Procedure**, 2; **Antitrust Acts**, 1–3; **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9; **Selective Service System.**

RESERVATIONS. See **Indian Lands.**

RESETTLEMENT. See **Immigration and Nationality Act**, 2.

RESIDENCE. See **Immigration and Nationality Act**, 2.

RES JUDICATA. See also **Estoppel**; **Indian Lands**; **Procedure**, 3.

Patent infringement—Collateral estoppel.—Holding in *Triplett* v. *Lowell*, 297 U. S. 638, that determination of patent invalidity is not *res judicata* against patentee in subsequent litigation against different defendant overruled to extent that it forecloses estoppel plea by one facing charge of infringement of patent that has once been declared invalid. Blonder-Tongue v. University Foundation, p. 313.

RESPONSIBILITY FOR ACCIDENT. See **Automobile Accidents**, 3; **Constitutional Law**, II, 1.

RESTRAINT OF TRADE. See **Antitrust Acts**, 1–3.

RETAIL FOOD SUBSIDIARIES. See **Antitrust Acts**, 4; **Meat Packers Consent Decree of 1920.**

REVIEW. See **Appeals**; **Certiorari.**

RIGHT OF PRIVACY. See **Constitutional Law**, V.

SATISFACTORY EXPLANATION. See **Constitutional Law**, II, 4.

SCHOOL BOARDS. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **School Desegregation**, 1–9.

SCHOOL DESEGREGATION. See also **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **Jurisdiction**, 2.

1. *Attendance zones—Pairing or grouping of zones.*—Remedial altering of attendance zones is not, as an interim corrective measure, beyond remedial powers of district court. Student assignment plan is not acceptable merely because apparently neutral, for it may fail to counteract continuing effects of past segregation. Pairing and grouping of noncontiguous zones is a permissible tool; judicial steps going beyond contiguous zones should be examined in light of objectives sought. Swann v. Board of Education, p. 1.

2. *Attendance zones—Racial ratios.*—In compliance with its duty to convert to unitary system, school board properly took race into account in fixing attendance lines. McDaniel v. Barresi, p. 39.

3. *Geographic zones—Use of available techniques.*—Court of Appeals erred in treating eastern part of metropolitan Mobile in isolation from rest of school system, and in not adequately considering possible use of all available techniques to achieve maximum amount of practicable desegregation. Davis v. School Comm'rs of Mobile County, p. 33.

4. *North Carolina Anti-Busing Law—Assignment of students—Racial ratios.*—North Carolina's Anti-Busing Law, which flatly forbids assignment of students on account of race or to create racial balance or ratio in schools and which prohibits busing for such purposes is invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. North Carolina Bd. of Ed. v. Swann, p. 43.

5. *North Carolina Anti-Busing Law—Jurisdiction.*—Since both parties in this action challenging school desegregation plan seek same result, *viz.*, a holding that North Carolina's Anti-Busing Law is constitutional, there is no Art. III case or controversy. Additionally, on facts here, no direct appeal to this Court lies under 28 U. S. C. § 1253. Moore v. Board of Education, p. 47.

SCHOOL DESEGREGATION—Continued.

6. *Racial quotas—One-race schools.*—Desegregation does not mean that every school in community must always reflect racial composition of system as a whole; here District Court's very limited use of racial ratio—not as inflexible requirement, but as starting point in shaping a remedy—was within its equitable discretion. While existence of small number of one-race, or virtually one-race, schools does not in itself denote a system that still practices segregation by law, court should scrutinize such schools and require authorities to assure that racial composition does not result from present or past discriminatory action. Swann v. Board of Education, p. 1.

7. *Responsibility of authorities—Racial distinctions—Equality of schools.*—Policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities are among most important indicia of segregated system, and first remedial responsibility of school authorities is to eliminate invidious racial distinctions in those respects. Normal administrative practice should then produce schools of like quality, facilities, and staffs. Swann v. Board of Education, p. 1.

8. *State-imposed segregation—Equal protection of the laws—Remedies.*—Today's objective is to eliminate from the public schools all vestiges of state-imposed segregation that was held violative of equal protection guarantees by *Brown* v. *Board of Education,* 347 U. S. 483, in 1954; and in default by school authorities of their affirmative obligation to proffer acceptable remedies, the district courts have broad power to fashion remedies that will assure unitary school systems. Swann v. Board of Education, p. 1.

9. *Transportation of students—Travel time—Age of students.*—Remedial technique of requiring bus transportation as tool of school desegregation was within District Court's equitable powers. Objection to transportation may have validity when time or distance of travel is so great as to risk health of children or seriously impinge on educational process; limits on travel time will vary with many factors, but probably with none more than age of the students. Swann v. Board of Education, p. 1.

SECONDARY SCHOOLS. See **Civil Rights Act of 1964,** 1–2; **Constitutional Law,** III, 3–4; **School Desegregation,** 1–9.

SECURITY FOR DAMAGES. See **Automobile Accidents,** 3; **Constitutional Law,** II, 1.

SEGREGATION. See **Civil Rights Act of 1964,** 1–2; **Constitutional Law,** III, 3–4; **Jurisdiction,** 2; **School Desegregation,** 1–9.

SEIZURE OF OBSCENE MATERIALS. See **Constitutional Law,** IV, 2; **Obscenity,** 1.

SELECTIVE SERVICE ACT. See **Selective Service Regulations.**

SELECTIVE SERVICE ACT OF 1948. See **Aliens; Immigration and Nationality Act,** 1; **Naturalization.**

SELECTIVE SERVICE REGULATIONS.

Conscientious objector—Timeliness of claim—In-service determination.—Refusal of local board to reopen classification and pass on conscientious objector claim, made after mailing of induction notice but before induction, on basis of regulation that permitted such reopening only for "change in the registrant's status resulting from circumstances over which the registrant had no control," was not unreasonable as limitation on time within which local board must act on such claim, in light of Government's assurance that one whose beliefs assertedly crystallize after mailing of notice will have full opportunity to obtain in-service determination of claim without having to perform combatant training or service. Ehlert v. United States, p. 99.

SELECTIVE SERVICE SYSTEM. See also **Administrative Procedure,** 2; **Aliens; Immigration and Nationality Act,** 1; **Naturalization.**

Exhaustion of remedies—Noncooperation by registrant.—Petitioner's failure to exhaust remedies jeopardized interest of Selective Service System, as administrative agency responsible for classifying registrants, in developing facts and using its expertise to assess his claims to exempt status, and thus bars his defense that he was erroneously classified. McGee v. United States, p. 479.

SELF-INCRIMINATION. See **Automobile Accidents,** 2; **Constitutional Law,** II, 2; VI; **Juries; Procedure,** 1–2.

SELF-REPORTING. See **Automobile Accidents,** 2; **Constitutional Law,** VI, 1.

SENTENCES. See **Constitutional Law,** II, 2; VI, 2; **Juries; Procedure,** 1–2.

SETTLEMENTS. See **Indian Lands.**

SHERMAN ACT. See **Antitrust Acts,** 1–4; **Meat Packers Consent Decree of 1920.**

SHIPPING PAPERS. See **Criminal Law.**

SIDEWALKS. See **Constitutional Law,** II, 3; IV, 1.

SINGLE-MEMBER DISTRICTS. See **Constitutional Law,** III, 1; **Voting Rights Act of 1965.**

SIXTH AMENDMENT. See **Constitutional Law,** VII.

SOCIAL SECURITY ACT. See also **Administrative Procedure,** 3.

1. *Disability benefits—Medical evidence—Administrative procedure.*—Written reports by physicians who have examined claimant for disability benefits under the Act constitute "substantial evidence" supporting nondisability finding within standard of § 205 (g), notwithstanding reports' hearsay character, absence of cross-examination (through claimant's failure to exercise subpoena rights), and directly opposing testimony by claimant and his medical witness; and procedure followed does not violate due process requirements. Richardson v. Perales, p. 389.

2. *Unemployment insurance—California Unemployment Insurance Code—Payment of benefits.*—California Unemployment Insurance Code § 1335, providing for withholding of insurance benefits upon an employer's appeal from initial eligibility determination, must be enjoined because it conflicts with the requirements of § 303 (a) (1) of the Act to "insure full payment of unemployment compensation when due." California Human Resources Dept. v. Java, p. 121.

SOUTHERN UTES. See **Indian Lands.**

SPLIT ZONING. See **School Desegregation,** 3.

STANDARDS FOR SENTENCING. See **Constitutional Law,** II, 2; VI, 2; **Juries; Procedure,** 1–2.

STANDARDS OF CONDUCT. See **Constitutional Law,** II, 3; IV, 1.

STANDARDS OF GUILT. See **Constitutional Law,** II, 4.

STANDBY CHARGES. See **Administrative Procedure,** 1; **Federal Power Commission.**

STANDING TO SUE. See **Constitutional Law,** IV, 2; **Obscenity,** 1.

STATEMENTS. See **Constitutional Law,** VII.

STATUTORY CONSTRUCTION. See **Constitutional Law,** IV, 2; **Obscenity,** 1.

STAYS. See **Constitutional Law,** III, 1; **Voting Rights Act of 1965.**

STOCK OWNERSHIP. See **Antitrust Acts,** 4; **Meat Packers Consent Decree of 1920.**

STOP-AND-REPORT STATUTES. See **Automobile Accidents,** 2; **Constitutional Law,** VI, 1.

STRIKES. See **Norris-LaGuardia Act; Railway Labor Act.**

STUDENT DEFERMENTS. See **Administrative Procedure**, 2; **Selective Service System.**

STUDENT DESEGREGATION. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **Jurisdiction**, 2; **School Desegregation**, 1–9.

SUBJECTION TO DRAFT. See **Aliens; Immigration and Nationality Act**, 1; **Naturalization.**

SUBMARKETS. See **Antitrust Acts**, 1–3.

SUBPOENA DUCES TECUM. See **Appeals.**

SUBPOENAS. See **Administrative Procedure**, 3; **Social Security Act**, 1.

SUBSIDIARIES. See **Antitrust Acts**, 4; **Meat Packers Consent Decree of 1920.**

SUBSTANTIAL EVIDENCE. See **Administrative Procedure**, 1, 3; **Federal Power Commission; Social Security Act**, 1.

SUCCESSIVE SUITS. See **Estoppel; Procedure**, 3; **Res Judicata.**

SULFURIC ACID. See **Criminal Law.**

SUNDAY COMICS. See **Antitrust Acts**, 1–3.

SUPREMACY CLAUSE. See **Automobile Accidents**, 1; **Constitutional Law**, VIII.

SUPREME COURT. See **Abortions; Jurisdiction**, 2; **School Desegregation**, 5.

Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Second Circuit, pp. 925 and 1005.

SUSPENSION OF LICENSES. See **Automobile Accidents**, 3; **Constitutional Law**, II, 1.

SUSPICIOUS PERSONS. See **Constitutional Law**, II, 4.

TELEVISION ANTENNAS. See **Estoppel; Procedure**, 3; **Res Judicata.**

TEMPORARY INJUNCTIONS. See **Appeals.**

TENNESSEE. See **Labor Management Relations Act.**

TESTIMONIAL EVIDENCE. See **Automobile Accidents**, 2; **Constitutional Law**, VI, 1.

TESTIMONY. See **Administrative Procedure**, 3; **Constitutional Law**, VII; **Social Security Act**, 1.

TESTIMONY OF DEFENDANT. See **Constitutional Law**, II, 2; VI, 2; **Juries; Procedure**, 1–2.

THEOLOGICAL EXEMPTION. See **Administrative Procedure**, 2; **Selective Service System.**

THREATENED STRIKES. See **Norris-LaGuardia Act**; **Railway Labor Act.**

THREATS OF VIOLENCE. See **Constitutional Law**, I; **Consumers Credit Protection Act.**

THREE-JUDGE COURTS. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

TIME LIMITS. See **Constitutional Law**, IV, 2; **Obscenity**, 1.

TIMELINESS. See **Selective Service Regulations.**

TRANSFER PLANS. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **School Desegregation**, 1–9.

TRANSPORTATION. See **Norris-LaGuardia Act**; **Railway Labor Act.**

TRANSPORTATION OF STUDENTS. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **Jurisdiction**, 2; **School Desegregation**, 1–9.

TRAVEL TIME. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 4; **School Desegregation**, 1, 6–9.

TRIALS. See **Constitutional Law**, II, 2; VI, 2; **Juries**; **Procedure**, 1–2.

UNEMPLOYMENT INSURANCE. See **Social Security Act**, 2.

UNFAIR LABOR PRACTICES. See **Labor Management Relations Act.**

UNIFIED GEOGRAPHIC ZONES. See **School Desegregation**, 3.

UNINSURED MOTORISTS. See **Automobile Accidents**, 3; **Constitutional Law**, II, 1.

UNIONS. See **Norris-LaGuardia Act**; **Railway Labor Act.**

UNITARY SCHOOL SYSTEMS. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, III, 3–4; **School Desegregation**, 1–9.

UNITARY TRIALS. See **Constitutional Law**, II, 2; VI, 2; **Juries**; **Procedure**, 1–2.

UNITED STATES HOUSING ACT. See **Constitutional Law**, III, 2.

USE OF MAILS. See **Constitutional Law**, IV, 3; **Obscenity**, 2.

USE RESTRICTIONS. See **Automobile Accidents**, 2; **Constitutional Law**, VI, 1.

UTE INDIANS. See **Indian Lands.**

UTILITY DISTRICT LAW. See **Labor Management Relations Act.**

UTILITY INTERCONNECTIONS. See **Administrative Procedure,** 1; **Federal Power Commission.**

VAGUENESS. See **Abortions; Constitutional Law,** II, 3–4; IV, 1; **Jurisdiction,** 1.

VEHICLE CODE. See **Automobile Accidents,** 2; **Constitutional Law,** VI, 1.

VISAS. See **Immigration and Nationality Act,** 2.

VISITORS' PERMITS. See **Immigration and Nationality Act,** 2.

VOTING RIGHTS ACT OF 1965. See also **Constitutional Law,** III, 1.

District Court decree—Apportionment plan.—Decree of district court is not within reach of § 5 of the Act, and does not require approval of the Attorney General or the District Court for the District of Columbia. Connor v. Johnson, p. 690.

WAIVERS. See **Constitutional Law,** II, 2; VI, 2; **Indian Lands; Juries; Procedure,** 1–2.

WANDERING ABOUT THE STREETS. See **Constitutional Law,** II, 4.

WESTCHESTER, ILLINOIS. See **Constitutional Law,** V.

"WHEN DUE." See **Social Security Act,** 2.

WILLING RECIPIENTS. See **Constitutional Law,** IV, 3; **Obscenity,** 2.

WITHHOLDING OF BENEFITS. See **Social Security Act,** 2.

WITHOUT VISIBLE BUSINESS. See **Constitutional Law,** II, 4.

WORDS.

1. *"Knowingly violates such regulation."* 18 U. S. C. § 834 (f). U. S. v. International Min'ls Corp., p. 558.

2. *"Political subdivision."* § 2 (2), Labor Management Relations Act, 29 U. S. C. § 152 (2). NLRB v. Natural Gas Utility District, p. 600.

3. *"When due."* § 303 (a)(1), Social Security Act, 42 U. S. C. § 503 (a)(1). California Human Resources Dept. v. Java, p. 121.

WRITTEN REPORTS. See **Administrative Procedure,** 3; **Social Security Act,** 1.

U. S. GOVERNMENT PRINTING OFFICE : 1972 O - 419-882