UNITED STATES REPORTS

VOLUME 419

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1974

(BEGINNING OF TERM)

OCTOBER 9, 1974, THROUGH JANUARY 22, 1975

TOGETHER WITH IN-VACATION DISMISSALS AND OPINIONS
OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATUM

417 U. S. 8: an omission occurs in the second sentence of the first paragraph. That sentence should read as follows:

In *Tiidee,* the Board refused to order reimbursment of excess organizational costs because " 'no nexus between [the employer's] unlawful conduct . . . and the Union's preelection organizational expenses' " had been proved.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

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

OFFICERS OF THE COURT

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

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, William H. Rehnquist, Associate Justice.

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

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

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

January 7, 1972.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1974

UNITED STATES *v.* MICHIGAN NATIONAL CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

No. 73–1737. Decided October 21, 1974

Appellee bank holding company's planned acquisition of additional banks was governed by both the Bank Holding Company Act requiring the Federal Reserve Board's approval of the acquisition and the Bank Merger Act requiring the Comptroller of the Currency's approval. Both statutes provide that an antitrust suit challenging a transaction approved by the designated agency must be brought within 30 days of such approval. Within 30 days after the Board had approved the planned acquisition but before the Comptroller had acted, the Government brought a Clayton Act suit to enjoin the acquisition, which the District Court dismissed without prejudice, ruling that the Government should bring a new suit if and when the Comptroller approved the acquisition. *Held:* The District Court erred in taking such action but should stay the suit until the Comptroller acts. Such procedure will conserve judicial resources and fully protect both parties, and avoid possible prejudice to the Government, which by being required to wait for the Comptroller's approval before filing suit would risk having complete relief barred by the time limitation of the Bank Holding Company Act.

Vacated and remanded.

PER CURIAM.

This is an appeal from an order of the District Court dismissing without prejudice the Government's suit under § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18, to enjoin a bank holding company's acquisition. Appellee Michigan National Corporation (MNC), a bank holding company that owns five Michigan banks, seeks control of four additional Michigan banks. The planned acquisition will take the following form. MNC will charter four "phantom" banks, initially having no assets or deposits, whose stock it will acquire. The four target banks will be merged with the phantom banks, thereby becoming subsidiary banks of the holding company.

The form of the transaction brings it within the purview of two regulatory statutes. Section 3 of the Bank Holding Company Act of 1956, 70 Stat. 134, as amended, 80 Stat. 237, 12 U. S. C. § 1842, requires that an acquisition of a subsidiary bank by a holding company be approved by the Board of Governors of the Federal Reserve System. Section 18 (c)(2)(A) of the Federal Deposit Insurance Act, as amended by the Bank Merger Act, 80 Stat. 7, 12 U. S. C. § 1828 (c)(2)(A), requires approval of bank mergers by a designated agency, which in the case of an acquisition by a national bank is the Comptroller of the Currency. Each regulatory statute provides time limitations for antitrust suits challenging transactions that have gained administrative approval. The Bank Holding Company Act, § 11, as amended, 80 Stat. 240, 12 U. S. C. § 1849, provides that an antitrust suit arising from a holding company acquisition must be brought within 30 days of approval by the Federal Reserve Board. The Bank Merger Act, 12 U. S. C. §§ 1828 (c) (6) and (7), establishes a similar 30-day period following approval of a merger by the designated administrative body.[1] Under both statutes,

[1] Shorter periods are prescribed by the Bank Merger Act when

transactions having administrative approval cannot go forward during the period within which an antitrust suit may be brought, or during the pendency of a timely antitrust suit unless the court otherwise orders. The expiration of the period without the filing of an antitrust suit, however, allows the transacting parties to consummate arrangements without fear of challenge.

MNC made applications to both the Federal Reserve Board and the Comptroller for approval of its proposed transactions. Disapproval by either body would prevent MNC from completing the entire acquisition as planned. In October 1973 the Federal Reserve Board approved the acquisitions by the holding company. Without awaiting action by the Comptroller, the Government filed complaints under the Clayton Act to enjoin the acquisition; the suit was brought within the 30-day period prescribed by § 11 of the Bank Holding Company Act. The District Court dismissed the complaints without prejudice, ruling that the Government should bring a new lawsuit if and when the Comptroller approved the merger of the target banks with the "phantoms." The Government took a direct appeal to this Court, 32 Stat. 823, 15 U. S. C. § 29.

The District Court reasoned that the Government's suit was "premature," since a disapproval by the Comptroller would moot the Clayton Act claim. Whether viewed as a dismissal for lack of a "case or controversy" or as an exercise of equitable discretion, we believe the District Court's action was error.

The view that the possibility of disapproval by the Comptroller deprived the District Court of an actual controversy to adjudicate, a position taken by appel-

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the designated agency finds that expedition of the transaction is necessary "to prevent the probable failure of one of the banks involved." 12 U. S. C. §§ 1828 (c)(4) and (6).

lees below, cannot be squared with the many decisions permitting a federal court to stay proceedings in a case properly before it while awaiting the decision of another tribunal. This is the holding of *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), which launched the abstention doctrine. *Pullman* held that where an order of the Texas Railroad Commission was challenged in a District Court as violative of the Fourteenth Amendment and as outside the Commission's authority under state law, the federal court should stay proceedings pending a resolution by the Texas courts of the state law question of the Commission's authority. In succeeding cases that have applied the *Pullman* doctrine, the common practice has been for the district court to retain jurisdiction but to stay proceedings while awaiting a decision in the state courts. See, *e. g., Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168 (1942); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944); *Government & Civic Employees Organizing Committee* v. *Windsor*, 353 U. S. 364 (1957); *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25 (1959); *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964); *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498 (1972). That a favorable decision in the state court might moot the plaintiff's constitutional claim brought to the federal court was never thought to create any jurisdictional impediment. For jurisdictional purposes, it suffices that there is a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241 (1937).

The same procedure has generally been followed when the resolution of a claim cognizable in a federal court

must await a determination by an administrative agency having primary jurisdiction. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213, 222–224 (1966); *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, 432–433 (1940); *Mitchell Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247 (1913). Dismissal rather than a stay has been approved where there is assurance that no party is prejudiced thereby.[2] See *Far East Conference* v. *United States,* 342 U. S. 570 (1952).

In the present case we cannot say with assurance that the Government will not be prejudiced by a dismissal. Section 11 of the Bank Holding Company Act provides that "[*a*]*ny* action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction" shall be commenced within the 30-day period following approval by the Board. 12 U. S. C. § 1849 (b) (emphasis added). By the time the Comptroller approves the mergers, the 30-day period following Board approval may have long since expired.[3] By waiting

[2] We may put to one side cases where the administrative agency has exclusive jurisdiction to consider the complaint initially brought in court, *e. g., Pan American World Airways* v. *United States,* 371 U. S. 296 (1963), or those in which Congress, by depriving the agency of a remedy, is deemed to have withheld it from the courts as well, *e. g., Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U. S. 246 (1951). In such cases, the court must of course dismiss the action.

[3] On May 16, 1974, nearly three months after the District Court dismissed the case, the Comptroller approved the merger of two target banks with their corresponding "phantoms." The Government filed a new Clayton Act complaint against the approved mergers within the period prescribed by the Bank Merger Act. The District Court has not yet ruled on a motion by MNC to dismiss that complaint because of the pendency of this appeal. The Comptroller has made no decision on MNC's proposed mergers involving the two remaining target banks.

for approval of the Comptroller before filing its lawsuit, the Government runs the risk that complete relief will be barred by the provisions of § 11. MNC disputes this, arguing that so long as the Government brings suit following the Comptroller's approval within the time prescribed by the Bank Merger Act, it will be able to challenge the merger of the target banks with the "phantoms," the only event which gives the transaction competitive significance.

Congress does not appear to have considered expressly the application of the time limitations to transactions falling within both regulatory statutes.[4] While the question is not free from doubt, there is a procedure that preserves beyond doubt the Government's ability fully to pursue its Clayton Act suit and at the same time produces no hardship to the other party.[5] Where suit is brought after the first administrative decision and stayed until remaining administrative proceedings have concluded, judicial resources are conserved and both parties fully protected.

The judgment of the District Court is vacated and the case remanded for the entry of further orders consistent with this opinion.

So ordered.

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[4] Though the two statutes of limitations were enacted in the same year, there is no indication in the legislative history that Congress considered their relationship in the case of a transaction within the purview of both regulatory acts. See S. Rep. No. 299, 89th Cong., 1st Sess. (1965), and H. R. Rep. No. 1221, 89th Cong., 2d Sess. (1966) (Bank Merger Act); S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), and H. R. Rep. No. 534, 89th Cong., 1st Sess. (1965) (Bank Holding Company Act).

[5] Because proceedings in the District Court would be stayed, MNC's assertion that the lawsuit "placed the defendants in the position of having to prepare to defend, in an antitrust action, transactions which they did not have regulatory approval to consummate," is simply a makeweight. (Motion to Affirm 6.)

UNITED STATES *v.* AMERICAN FRIENDS SERVICE COMMITTEE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 73–1791. Decided October 29, 1974

Appellee employees, conscientious objectors, pursuant to whose request appellee religious corporation, their employer, agreed to cease withholding under 26 U. S. C. § 3402 a portion of their wages deemed allocable to military expenditures, sought injunctive relief claiming that enforcement of § 3402 deprived them of their First Amendment rights to bear witness to their religious beliefs opposing war. The District Court entered judgment for the employees. *Held:* The Anti-Injunction Act, 26 U. S. C. § 7421 (a), which prohibits suits "for the purpose of restraining the assessment or collection of any tax," bars the relief granted to the employees, *Bob Jones University* v. *Simon,* 416 U. S. 725; *Commissioner* v. *"Americans United" Inc.,* 416 U. S. 752; and since the employees concededly cannot show that the Government would not prevail in a refund action, they do not qualify for a judicial exception to § 7421 (a) under the rules prescribed by *Enochs* v. *Williams Packing & Navigation Co.,* 370 U. S. 1.

368 F. Supp. 1176, reversed in part.

PER CURIAM.

Appellee American Friends Service Committee (employer) is a religious corporation, whose principal operation is philanthropic work and many of whose employees are conscientious objectors to war, performing alternative civilian service. Appellees Lorraine Cleveland and Leonard Cadwallader (employees) are present or past employees of the employer.

Because of their religious beliefs, the employees in 1969 requested their employer to cease withholding 51.6% [1]

[1] This figure represents their estimate of the percentage of the federal budget which is military related.

of the portion of their wages required to be withheld under § 3402 of the Internal Revenue Code.[2] Although they conceded that these amounts were legally due to the Government, they wished to bear witness to their beliefs by reporting the amounts as taxes owed on their annual income tax returns but refusing to pay such amounts. They would thus compel the Government to levy in order to collect the taxes.

In response to the employees' request, the employer ceased withholding from the employees' salaries 51.6% of that amount required to be withheld under § 3402, although it continued to pay the full amount required to be withheld under that provision to the Government. It then brought a suit for refund of the amount it had paid to the Government but not actually withheld from salaries. The appellee employees joined the employer's action, seeking on their own behalf an injunction barring the United States' enforcement of § 3402 against the employer with regard to 51.6% of the required withholding. They argued that, even though they were liable for these amounts, § 3402 as applied to this portion of their wages was unconstitutional as a deprivation of their right to free exercise of religion under the First Amendment since it did not allow them to bear witness to their beliefs by refusing to voluntarily pay a portion of their taxes.

The District Court ordered a refund of amounts tendered by the employer but not withheld by it, since the Government had also levied on the employees for these taxes and hence had received a double payment of the

[2] 26 U. S. C. § 3402. The provision provides in part that "[e]very employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. . . ." There is no dispute as to the applicability of the provision to the employees' wages.

amount due. The Government does not contest this portion of the District Court's judgment.[3]

The District Court also enjoined the United States from enforcing § 3402 against the employer with respect to 51.6% of the required withholding from the employees' salaries, holding that § 3402 as applied to this amount constituted an unconstitutional abridgment of the right to free exercise of religion. The United States appeals this portion of the judgment.[4] The District Court's opinion and order were entered before this Court handed down its opinions in *Bob Jones University* v. *Simon,* 416 U. S. 725 (1974), and *Commissioner* v. *"Americans United" Inc.,* 416 U. S. 752 (1974).

The Anti-Injunction Act, 26 U. S. C. § 7421 (a), provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[5] In *Bob Jones, supra,* we rejected an appeal to create judicial exceptions to § 7421 (a) other than that carved out in *Enochs* v. *Williams Packing & Navigation Co., Inc.,* 370 U. S. 1 (1962). We noted that *Williams Packing* was

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[3] Jurisdictional Statement 7 n. 3. We express no opinion as to the merits of the refund claim. The lower court's opinion is reported at 368 F. Supp. 1176.

[4] Since the District Court held that § 3402 was unconstitutional as applied to the facts of this case, this Court has jurisdiction over the appeal under 28 U. S. C. § 1252. *Fleming* v. *Rhodes,* 331 U. S. 100, 102–103 (1947); *United States* v. *Christian Echoes Ministry,* 404 U. S. 561, 563 (1972).

[5] See Act of Mar. 2, 1867, § 10, 14 Stat. 475; Rev. Stat. § 3224; Int. Rev. Code of 1939 § 3653. Section 7421 (a) of the Code states: "Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

the "capstone" of judicial construction of the Act and spelled an end to cyclical departures from the Act's plain meaning. *Bob Jones University* v. *Simon, supra,* at 742. In *"Americans United" Inc., supra,* we stated that a pre-enforcement injunction against the assessment or collection of taxes could be granted only if it were clear that the Government could in no circumstances ultimately prevail on the merits, and that equity jurisdiction existed. "Unless both conditions are met, a suit for preventive injunctive relief must be dismissed." 416 U. S., at 758.

The employees concede, and the District Court found, that § 3402 withholding is a method of collection of taxes within the meaning of § 7421 (a).[6] They further concede, as they must, that they are not within the *Williams Packing* exception; far from the Government's defense in a refund suit being meritless, the employees concede that the Government would undoubtedly prevail in such a refund action.

They contend, however, that since the District Court enjoined only one method of collection, and the Government is still free to assess and levy their taxes when due, the Act does not apply. But this contention ignores the plain wording of the Act which proscribes any "suit for the purpose of restraining the assessment or collection of any tax." The District Court's injunction against the collection of the tax by withholding enjoins the collection of the tax, and is therefore contrary to the express language of the Anti-Injunction Act.

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[6] The legislative history of this provision enacted in 1943 indicates that its purpose in part was to assist the Government in securing needed revenue without having to resort to levy. H. R. Rep. No. 268, 78th Cong., 1st Sess., 1–2 (1943); S. Rep. No. 221, 78th Cong., 1st Sess., 1 (1943). The District Court noted that relegating the Government to levying after returns were filed would be an inefficient process. 368 F. Supp., at 1180.

The employees also argue that the Anti-Injunction Act is inapplicable because they have no alternative legal remedy available. They contend that a refund suit would be an inadequate remedy, in view of the concession on their part that the taxes are due, since they would surely lose such an action. But this ignores the fact that inadequacy of available remedies goes only to the existence of irreparable injury, an essential prerequisite for traditional equity jurisdiction, but only one of the *two* parts of the *Williams Packing* test. *Commissioner* v. *"Americans United" Inc., supra,* at 762; *Bob Jones University* v. *Simon, supra,* at 745. Here as in *"Americans United" Inc., supra,* the employees will have a "full opportunity to litigate" their tax liability in a refund suit. 416 U. S., at 762. Even though the remitting of the employees to a refund action may frustrate their chosen method of bearing witness to their religious convictions, a chosen method which they insist is constitutionally protected, the bar of the Anti-Injunction Act is not removed:

> "[D]ecisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act." *Id.,* at 759.

See also *Lockerty* v. *Phillips,* 319 U. S. 182, 187 (1943).

In *Bob Jones* we left open the question of whether injunctive relief as to future collection would be proper as a form of ancillary relief in a refund suit where the taxpayer prevailed on the merits, in order to avoid the necessity of continuous subsequent "backward-looking refund suits." 416 U. S., at 748 n. 22. That situation is not presented here since the employees have never brought a refund action, much less prevailed on the merits of such an action. Their joinder in the employer's successful refund action, based on the receipt of double payment by

the Government, would afford no basis for injunctive relief based on their constitutional claim. The injunctive relief granted by the District Court in this case is plainly at odds with the dual objectives of the Act: efficient and expeditious collection of taxes with "a minimum of pre-enforcement judicial interference," and protection of the collector from litigation pending a refund suit. *Bob Jones, supra,* at 736–737.[7]

The judgment of the District Court is reversed insofar as it enjoins the collection of taxes by the Government and the withholding of wages by the employer.

Reversed in part.

MR. JUSTICE DOUGLAS, dissenting.

The sole question on the merits is whether the provision of the Internal Revenue Code, 26 U. S. C. § 3402, which requires employers to deduct and withhold from wages federal income taxes, is constitutional as applied to employees, who on religious grounds object to the withholding taxes on their salaries which represent that portion of the federal budget allocated to military expenditures.[1] They invoke the Free Exercise Clause of the First Amendment, as they are Quakers who are opposed to participation in war in any form and who claim that this method of collection directly forecloses their ability freely to

[7] Because we have concluded that the Anti-Injunction Act bars injunctive relief, we have not found it necessary to decide other threshold issues such as whether a three-judge District Court was required, whether the sovereign immunity of the United States barred the suit, and whether the requirements of 28 U. S. C. § 1331 were met.

[1] The District Court found that 51.6% was a reasonable estimate of the proportion of the federal budget expended for military and war purposes based on the appropriations made by Congress in the calendar year 1968, according to a computation by the Friends Committee on National Legislation.

express that opposition, *i. e.*, to bear witness to their religious scruples.

There is no evidence that questions the sincerity of the employees' religious beliefs. Nor is there any issue raised as to whether that religious belief would give the employees a defense against ultimate payment of the tax. The District Court held that the withholding was unconstitutional as to the employees, 368 F. Supp. 1176, a conclusion with which I agree.

The withholding process [2] forecloses the employees from bearing witness against the use of these monthly deductions for military purposes. Under the opinion of this Court, they are deprived of bearing witness to their opposition to war—these withheld portions of their salaries pay the entire tax and they therefore have "no alternative legal remedy," a circumstance which distinguishes both *Enochs* v. *Williams Packing Co.*, 370 U. S. 1, and *Bob Jones University* v. *Simon*, 416 U. S. 725.

Quakers with true religious scruples against participating in war may no more be barred from protesting the payment of taxes to support war than they can be forcibly inducted into the Armed Forces and required to carry a

[2] Objections to withholding are not restricted to Quakers. Some federal judges have passionately opposed the withholding of taxes on their salaries, not on the basis that the tax is unconstitutional as was once held (see *O'Malley* v. *Woodrough*, 307 U. S. 277, overruling *Miles* v. *Graham*, 268 U. S. 501), but rather on the ground that the loss of the use of the sums deducted during the year preceding the April 15 due date is a diminution of their compensation against the command of Art. III, § 1, which provides in part: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Whatever may be the merits of that contention, the command of the First Amendment permits of no exceptions, for it states: "Congress shall make no law . . . prohibiting the free exercise" of religion.

gun, and yet be denied all opportunity to state their religious views against participation. See *United States* v. *Seeger,* 380 U. S. 163. The Court misses the entire point of the present controversy. The employees are barred from protesting these monthly deductions under the Court's opinion. In *Enochs* v. *Williams Packing Co., supra,* and *Bob Jones University* v. *Simon, supra,* taxpayers sought to enjoin the collection of taxes by any means whatever, while the taxpayers litigated the question whether the taxes were due at all. Here the employees challenge the withholding law as depriving them of their one and only chance of contesting the constitutionality of the withholding of the tax as applied to them. So, unlike *Enochs* and *Bob Jones University,* there is no remedy by way of refund.[3]

The religious belief which the Government violates here is that the employees must bear active witness to their objections to their support of war efforts. Dr. Edwin Bronner, who qualified as an expert on the history of

[3] In *Bob Jones University,* the Court expressly stated: "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different." 416 U. S., at 746. Similarly, in *Commissioner* v. *"Americans United" Inc.,* 416 U. S. 752, the Court examined at length the claim that the respondent there had "no alternative legal remedy," ultimately concluding that the claim was untrue since a refund action for FUTA taxes, while slow and unsatisfactory from the taxpayer's point of view, would still provide a forum in which judicial review of the legality of the actions of the IRS could be obtained. *Id.,* at 761–762.

In the present case, since the taxpayers do not claim that they are entitled to a refund (conceding that the Government could legitimately collect the tax by *some* method), a refund suit would be summarily dismissed without ever reaching the merits of their claim that the particular method of collection violated their free exercise rights. This situation appears, then, to fall squarely within the question left open in *Bob Jones University, supra;* the Court now apparently resolves that question *sub silentio.*

Quakerism, gave testimony which, as summarized by the District Court, 368 F. Supp., at 1178, stated: "[M]ost Quakers have considered it an integral part of their faith [4] to bear witness to the beliefs which they hold. It has always been the prevailing view that simple preaching of one's beliefs is not sufficient, and that one's actions must accord with and give expression to one's beliefs. Many of the employees of the AFSC, including particularly appellees' Cleveland and Cadwallader, share this belief, and for these employees, the operation of the withholding tax, which leaves them no option as to the payment of the taxes which they conscientiously question, operates as a direct abridgment of the expression and implementation of deeply cherished religious beliefs."

If we are faithful to the command of the First Amendment, we would honor that religious belief. I have not bowed to the view of the majority that "some compelling state interest" will warrant an infringement of the Free Exercise Clause. *Sherbert* v. *Verner,* 374 U. S. 398, 406–407; *Braunfeld* v. *Brown,* 366 U. S. 599, 603. I have previously dissented from that position and opposed amending by judicial construction the plain command of the Free Exercise Clause. See *Sherbert* v. *Verner, supra,* at 410–413; *McGowan* v. *Maryland,* 366 U. S. 420, 575–576; *Arlan's Department Store* v. *Kentucky,* 371 U. S. 218.

The Anti-Injunction Act, 26 U. S. C. § 7421 (a), is no barrier. No "assessment or collection of any tax" is restrained, only one method of collection is barred, the

[4] "Friends will ever be concerned to relate their religious insights to the realities of international life. Opportunities for courageous action and for the expression of invincible good will remain under any political system. Whatever the system and whatever the situation that calls for decision, Friends are called upon to make their witness." Faith and Practice, the Book of Discipline of the New York Yearly Meeting of the Religious Society of Friends 42 (1968).

Government being left free to use all other means at its disposal. Moreover, to construe the Act as the Court construes it does not avoid a constitutional question but directly raises one. The Act, read as literally as the Court reads it, plainly violates the First Amendment as applied to the facts of this case, for "no law" prohibiting the free exercise of religion includes every kind of law, including a law staying the hand of a judge who enjoins a law for the collection of taxes that trespasses on the First Amendment.

The power of Congress to ordain and establish inferior courts (*Lockerty* v. *Phillips,* 319 U. S. 182, 187) has not to this date been assumed or held to mean that Congress could require a federal court to take action in violation of the Constitution. Thus suspension of the writ of habeas corpus is restricted to "Cases of Rebellion or Invasion" where "the public Safety may require it." Art. I, § 9, cl. 2. And when it comes to the First Amendment and the free exercise of religion, the mandate is that "Congress shall make no law . . . prohibiting" it. The Anti-Injunction Act is a "law"; and the Constitution gives no such preference to tax laws as to permit them to override religious scruples. May Congress enact a law that prohibits a minister from preaching if his taxes are in arrears? Or that disallows the making of a protest to a tax assessment even though the assessment and payment violate one's religious scruples? Until today, I would have thought not. The First Amendment, as applied to the States by the Fourteenth, bars a tax on the conduct of a religious exercise by a minority even though that religious exercise is obnoxious to the majority. *Murdock* v. *Pennsylvania,* 319 U. S. 105. Dicta to the effect that an allegation of unconstitutionality is irrelevant under the Anti-Injunction Act (*Bailey* v. *George,* 259 U. S. 16, 20)—which the Court today elevates to a holding—were based on the premise that there

was an alternative remedy to the unconstitutional actions. Here, as demonstrated, there is no other remedy. A refund suit is of no value, since the religious scruples which these taxpayers invoke relate to their inability to protest the payment, not to the use of the taxes themselves for military purposes.

I would affirm the judgment below.

RING *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73-6969. Decided November 11, 1974

Where the Assistant United States Attorney prosecuting petitioner denied during the trial that two counts of a three-count indictment against the Government's chief witness involving the same events for which petitioner was convicted had been dropped in return for the witness' cooperation and testimony, but the United States Attorney's records indicated that the Assistant had agreed to drop two counts in return for a guilty plea to the third count, the Court of Appeals' judgment affirming petitioner's conviction is vacated and the case is remanded to that court so that if on the basis of Government documentation it is unable to decide whether the Assistant "failed to make any required disclosure," it can remand the case to the District Court for further proceedings.

Certiorari granted; vacated and remanded.

PER CURIAM.

Petitioner was convicted on one count of conspiracy to import cocaine in violation of 84 Stat. 1260, 21 U. S. C. § 841 (a)(1), and 84 Stat. 1285, 21 U. S. C. § 952 (a). At trial, the Government's chief witness against petitioner testified on direct examination by the Assistant United States Attorney that no promises had been made to her with respect to three counts of an indictment that had been returned against her involving the same events for which petitioner stands convicted. At the time this witness testified, she had pleaded guilty to one count of that indictment, a fact which she acknowledged. On cross-examination, she repeated her statement to the effect that no promises had been made to her. During summation, petitioner's counsel indicated that the two other counts against the witness had been dropped in return for her cooperation and testimony in petitioner's case.

The Assistant United States Attorney, in her summation, stated categorically that the two other counts had not in fact been dropped. The Court of Appeals affirmed the conviction.

As the case comes to this Court, the Solicitor General states that the records of the United States Attorney in whose district the case was tried indicate that the same Assistant United States Attorney who tried the case had entered into an agreement with the witness whereby the Government had agreed to drop two counts of the indictment in return for a guilty plea on a third count. The witness had entered a guilty plea about one month prior to the petitioner's trial. The Solicitor General states that because "the existence of such an agreement, its terms, and [the witness] Rubio's knowledge of it, cannot be determined on the record before this Court . . . ," there is no occasion for this Court to consider whether the Assistant United States Attorney "failed to make any required disclosures." The better course, however, is to vacate the judgment of the Court of Appeals and remand the case to that court. If, on the basis of documentation offered by the Government on remand, that court is unable to dispose of the question presented for the first time here, that court would be free to remand the case to the District Court for further appropriate proceedings.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for proceedings consistent with this opinion.

ALLENBERG COTTON CO., INC. *v.* PITTMAN

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 73–628. Argued October 17, 1974—Decided November 19, 1974

Appellant, a cotton merchant with its principal office in Memphis, Tenn., in January 1971 negotiated a "forward" contract with appellee, a Mississippi farmer, for appellee's forthcoming cotton crop. The agreement was made through a Mississippi broker who arranged contracts for appellant for cotton to be resold in interstate and foreign markets. Appellant had contracted with mills outside Mississippi for sale of most of the cotton to be purchased in Mississippi, including that to be grown by appellee under this contract. Alleging refusal by appellee farmer to deliver the cotton, appellant brought suit for injunctive relief and damages. The Supreme Court of Mississippi, reversing the court below, dismissed the complaint, holding that appellant's contracts were wholly intrastate, being completed upon delivery of cotton at the warehouse, and upholding appellee's contention that the Mississippi courts could not be used to enforce the contract as appellant was doing business in Mississippi without the requisite certificate. Appellee moved to dismiss in this Court on the ground that the State Supreme Court did not pass on the federal question. *Held:*

1. A certificate executed by the Chief Justice of the State Supreme Court makes it clear that a federal question was raised and decided by that court on the validity of a state statute as applied to the facts of this case under the Commerce Clause of the Federal Constitution, and this Court has jurisdiction over the appeal. Pp. 22–23.

2. The Mississippi Supreme Court's refusal to enforce the contract contravened the Commerce Clause, since the cotton in the instant transaction, though to be delivered to appellant at a local warehouse, was to be there only temporarily for sorting and classification for out-of-state shipment and was thus already in the stream of interstate commerce. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. Pp. 25–34.

276 So. 2d 678, reversed and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and

POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 34.

John McQuiston II argued the cause and filed briefs for appellant.

George Colvin Cochran argued the cause for appellee. With him on the brief were *C. "Cliff" Finch* and *Anna C. Maddan.**

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of Mississippi, 276 So. 2d 678 (1973), which held that under the applicable Mississippi statute [1] appellant might not recover damages for breach of a contract to deliver cotton because of its failure to qualify to do business in the State. Appellant claims that that Mississippi statute as applied to the facts of this case is repugnant to the Commerce Clause of the Constitution. A motion to dismiss was made on the ground that the Mississippi Supreme Court did not pass on that federal question and that such question was not in fact raised. We accordingly postponed the question of probable jurisdiction to a hearing on the merits, 415 U. S. 988 (1974).

**James F. Blumstein* filed a brief for the American Cotton Shippers Assn. as *amicus curiae*.

[1] Mississippi Code Ann. § 79–3–247 (1972), formerly Miss. Code Ann. § 5309–239 (1942), provides in part:

"No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state."

I

On application of appellant (appellee below), the Chief Justice of the Supreme Court of Mississippi executed a certificate dated August 17, 1973, stating in part:

> "[T]his Court . . . hereby certifies . . . that in this appeal . . . and in the arguments both oral and by brief made in this Court on behalf of the appellee on the original appeal and the petition of appellee for rehearing and brief filed in support thereof, it was insisted by appellee that under the facts of this case, the contract sued upon by the appellee was made in 'interstate commerce' and that it was transacting business in interstate commerce, and thus entitled to protection as such under the applicable statutes of Mississippi and the Commerce Clause of the Federal Constitution; and that in its deliberation of this case, this Court both on the original appeal and the petition for rehearing considered these questions of interstate commerce; and it was the judgment of this Court that said contract was not made in interstate commerce, nor that the facts of the case showed appellee to be transacting business in interstate commerce within the meaning of the laws of Mississippi and that Mississippi Code 1942 Ann. Section 5309–239 (Supp. 1972) as applied by this Court in this case to the Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of this state was not repugnant to the Commerce Clause of the United States Constitution; and it was necessary to the Court's judgment in said case to determine said questions raised as to interstate commerce, and that such questions were determined adversely to the position of appellee."

The Chief Justice, speaking for the court, makes it clear that a federal question was raised and decided and that that question was the validity of the state statute as applied to the facts of this case under the Commerce Clause of the Federal Constitution. That certificate is adequate under our decisions.[2] So we proceed to the merits.

II

Appellant is a cotton merchant with its principal office in Memphis, Tenn. It had arranged with one Covington, a local cotton buyer in Marks, Miss., "to contract cotton" to be produced the following season by farmers in Quitman County, Miss. The farmer, Pittman, in the present case, made the initial approach to Covington, seeking a contract for his cotton; in other

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[2] See *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 661–662 (1936). As stated in *Herb* v. *Pitcairn*, 324 U. S. 117, 127 (1945):

"The practice has become common by which some state courts, such as the New York Court of Appeals, provide counsel on motion with a certificate of the court or of the Chief Judge that a stated federal question was presented and necessarily passed upon if such was the case. See, *e. g.*, cases cited in Robertson and Kirkham, Jurisdiction of the Supreme Court, § 75."

In *Whitney* v. *California*, 274 U. S. 357, 360–362 (1927), while the record did not show that the party raised or that the state court considered "any Federal question whatever," a supplemental order entered by the state court after the case had reached this Court, setting forth the federal question raised and decided by the state court, was given the same effect "as would be done if the statement had been made in the opinion of that court when delivered."

In cases where the certificate (*Honeyman* v. *Hanan*, 300 U. S. 14 (1937)) or supplemental opinion by one member of the state court (*Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182 (1945)) has been held to be insufficient, there were lingering doubts as to whether the precise federal question was necessarily decided. Here we have no remaining doubts.

instances Covington might contact the local farmers.[3] In either event, Covington would obtain all the information necessary for a purchase contract and telephone the information to appellant in Memphis, where a contract would be prepared, signed by an officer of appellant, and forwarded to Covington. The latter would then have the farmer sign the contract. For these services Covington received a commission on each bale of cotton delivered to appellant's account at the local warehouse.[4] When the farmers delivered the cotton, Covington would draw on appellant and pay them the agreed price.

The Supreme Court of Mississippi held that appellant's transactions with Mississippi farmers were wholly intrastate in nature, being completed upon delivery of the cotton at the warehouse, and that the fact that appellant might subsequently sell the cotton in interstate commerce was irrelevant to the federal question "as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion," 276 So. 2d, at 681. Under the contract which Covington negotiated with appellee, Pittman, the latter was to plant, cultivate, and harvest a crop of cotton on his land, deliver it to a named company in Marks, Miss., for ginning, and then turn over the ginned cotton to appellant at a local warehouse. The suit brought by appellant alleged a refusal of Pittman to deliver the cotton and asked for injunctive relief and damages. One defense tendered by Pittman was that appellant could not use the courts of Mississippi to enforce its contracts, as it was doing business in the State without the requisite certificate. The Supreme Court of Mississippi sustained that

[3] The latter practice seems to have been the more usual one. (App. 54, 102–105.)

[4] The commission was paid in some instances by appellant, in other instances by the individual farmer. (*Id.*, at 53, 68.)

plea, reversing a judgment in favor of appellant, and dismissed the complaint.

Appellant's arrangements with Pittman and the broker, Covington, are representative of a course of dealing with many farmers whose cotton, once sold to appellant, enters a long interstate pipeline. That pipeline ultimately terminates at mills across the country or indeed around the world, after a complex sorting and matching process designed to provide each mill with the particular grade of cotton which the mill is equipped to process.

Due to differences in soil, time of planting, harvesting, weather, and the like, each bale of cotton, even though produced on the same farm, may have a different quality.[5] Traders or merchants like appellant, with the assistance of the Department of Agriculture, must sample each bale and classify it according to grade, staple length, and color.[6] Similar bales, whether from different farms or even from different collection points, are then grouped in multiples of 100 into "even-running lots" which are uniform as to all measurable characteristics. This grouping process typically takes place in card files in the merchant's office; when enough bales have been pooled to make an even-running lot, the entire lot can be targeted for a mill equipped to handle cotton of that particular quality, and the individual bales in the lot will then be shipped to the mill from their respective collection points.[7] It is true that title often formally passes to

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[5] A. B. Cox, Cotton—Demand, Supply, Merchandising 4–5 (1953); A. Garside, Cotton Goes to Market 66–67 (1935).

[6] For a more detailed description of the classification process, see Cox, *supra,* n. 5, at 131–147; Garside, *supra,* n. 5, at 46–85.

[7] See Cox, *supra,* n. 5, at 4–5, 233–236. Virtually all cotton grown in Mississippi is shipped out of state, since there is no significant milling activity in Mississippi. U. S. Dept. of Agriculture (USDA), Statistical Bulletin No. 417—Statistics on Cotton and Related Data, 1930–1967, pp. 58, 77 (Supp. 1972).

the merchant upon delivery of the cotton at the warehouse, and that the cotton may rest at the warehouse pending completion of the classification and grouping processes; but, as the description above indicates, these fleeting events are an integral first step in a vast system of distribution of cotton in interstate commerce.

The contract entered into between appellant and Pittman was a standard "forward" contract, executed in January 1971 and covering the crop to be grown that year. Such contracts have become common in the American cotton-marketing system; they provide a ready way for the cotton farmer to protect himself against a price decline by ensuring that he will be able to sell his crop at a sufficient price to cover his expenses.[8] The merchant who has contracted to buy the cotton from the farmer must in turn protect himself against market fluctuations. In this case, appellant had entered into contracts for sale of cotton to customers outside Mississippi,[9] in quantities approximating the expected yield of the Pittman contract and appellant's other Mississippi contracts. A resale contract of this sort ensures that the merchant will be able to cover his own expenses and recoup a small profit; alternatively, the merchant may

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[8] See *Cone Mills Corp.* v. *Hurdle,* 369 F. Supp. 426, 430 (ND Miss. 1974); Cox, *supra,* n. 5, at 10. Government figures showed 32% of the 1972 crop and at least 45% of the 1973 crop being "forward" contracted. USDA, August 1973 Crop Production A–6; USDA, Cotton Situation (CS–265) p. 6 (Apr. 1974). Of course, there is always the possibility that the price will increase rather than decrease; such in fact was the case during 1971. Under these circumstances, the forward contract becomes relatively unprofitable, since the farmer is obligated to deliver his cotton for a lower price than it would bring on the spot market. This situation may generate a strong economic incentive for him to breach his contract and sell the cotton elsewhere.

[9] App. 79, 96. Cf. n. 7, *supra.*

protect himself by "hedging," *i. e.,* offsetting his purchases with a sale of futures contracts on the cotton exchange.[10] The stability of the position he has constructed for himself, however, clearly depends on the integrity and enforceability of his contracts for purchase and resale.[11]

A recent House report on the functioning of the commodity exchanges in connection with the marketing of agricultural products said:

> "The commodity futures markets are a very important part of our marketing system. Producers, processors, and merchandisers of commodities hedge the prices at which they buy or sell on a particular day. When the local elevator buys grain from a farmer he sells the same quantity on the futures market deliverable at about the same time he anticipates sale of the cash grain he has purchased. When the actual sale is made, he 'lifts' his hedge by buying the same quantity on the futures market in the same futures month he previously sold in. If the price of grain on the cash market fluctuates either up or down, the gain or

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[10] The New York Cotton Exchange is a designated contract market under the Commodity Exchange Act, 42 Stat. 998, 49 Stat. 1491, 7 U. S. C. § 1 *et seq.* For a more detailed discussion of the hedging mechanism, see Cox, *supra,* n. 5, at 303–315; Garside, *supra,* n. 5, at 206–226, 377–382; *Volkart Bros., Inc.* v. *Freeman,* 311 F. 2d 52, 54–56 (CA5 1962); and see the discussion of the wheat futures market quoted in the text, this page and 28–29.

[11] The merchant's ability to secure financing will also depend on the extent to which banks and other sources of credit perceive these contracts as being reliable. In some situations, up to 90% of the cost of the raw cotton may be financed by borrowing against futures contracts and warehouse receipts as collateral, since a viable hedging system drastically reduces the risk to both merchants and lenders. See Cox, *supra,* n. 5, at 181.

loss should be approximately offset by the hedged position.

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". . . [I]n this situation if the market price of the cash commodity drops 15 cents per bushel between the time the elevator operator purchases the grain and the time he resells it 6 months later, he would incur a loss of $1,500 on each 10,000 bushels. If, however, at the time he purchased the grain from the farmer he had sold the same amount of grain on the futures market in a contract which matured 6 months later, the futures price should also decrease a similar 15 cents per bushel and the elevator operator would profit $1,500 on each 10,000 bushels he sold on the futures market. The net effect, of course, of these offsetting purchases and sales would be to guard the elevator operator against loss, thereby permitting him to continue in business without regard to price fluctuation, providing the futures market operates in the normal historical manner.

"Such use of the futures market by a producer, buyer, or seller of the commodity takes the gamble of commodity price fluctuation out of his operation for him and enables him to lock in a relatively small margin of profit. This system has worked well most of the time, but whenever the supplies of commodities are short or the number of speculators becomes excessive, there exist opportunities for manipulations and distortions in the marketing system to such a great extent that the market no longer reflects supply and demand, and during part of the marketing season, prices can either be artificially raised or lowered.

"In the past year, fluctuations in the market have been so wide and erratic as to indicate the possibility of price manipulation and squeezing. Businessmen

who handle commodities on some occasions have been unable to buy back contracts the day they sell the commodity and many of them have found that the commodities markets such as the Chicago Board of Trade and the Chicago Mercantile Exchange do not always provide a dependable place to hedge their business deals. With the compromising of this kind of price insurance, many businessmen who handle commodities have felt compelled to substantially increase the amount they charge for their part in the marketing system and some have lost vast sums of money. Some now feel compelled to triple or quadruple the normal margin to cover new risks or to act only on a commission basis.

"Consumers are also greatly affected by any breakdown in our marketing system. When the futures markets are manipulated or become undependable, wider margins required at each level add to the price of the final product. Historically, erratic swings in prices result in retail prices going up more than they ever come back down. So consumers also have a great stake in preventing excessive speculation or manipulation from causing wide fluctuations in commodity prices." H. R. Rep. No. 93–963, pp. 2–4 (1974).

While that discussion covers grain, there is no essential difference, relevant here, when it comes to cotton.

We deal here with a species of control over an intricate interstate marketing mechanism. The cotton exchange, like the livestock-marketing regime involved in *Swift & Co.* v. *United States,* 196 U. S. 375 (1905), and in *Stafford* v. *Wallace,* 258 U. S. 495 (1922), has federal protection under the Commerce Clause. In *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921), wheat raised in Kentucky was purchased by a miller in Tennessee,

payment and delivery to a common carrier being made in Kentucky. There, as here, a suit against the farmer in a Kentucky court was defended on the grounds that the buyer had not qualified to do business in Kentucky and that, therefore, the contract was unenforceable. The Court held that the Kentucky statute could not be applied to defeat this transaction which, though having intrastate aspects, was in fact "a part of interstate commerce," *id.*, at 292. The same observation is pertinent here. Delivery of the cotton to a warehouse, taken in isolation, is an intrastate transaction. But that delivery is also essential for the completion of the interstate transaction, for sorting and classification in the warehouse are essential before the precise interstate destination of the cotton, whether in this country or abroad, is determined. The determination of the precise market cannot indeed be made until the classification is made. The cotton in this Mississippi sale, like the wheat involved in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 33 (1923), though temporarily in a warehouse, was still in the stream of interstate commerce. As the Court stated in the *Olsen* case:

> "The fact that the grain shipped from the west and taken from the cars may have been stored in warehouses and mixed with other grain, so that the owner receives other grain when presenting his receipt for continuing the shipment, does not take away from the interstate character of the through shipment any more than a mixture of the oil or gas in the pipe lines of the oil and gas companies in West Virginia, with the right in the owners to withdraw their shares before crossing state lines, prevented the great bulk of the oil and gas which did thereafter cross state lines from being a stream or current of interstate commerce." *Id.*, at 33–34.

The Court held in *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189 (1925), that a pervasive state regulatory scheme governing the purchase of wheat for interstate shipment was not permissible, since the "[b]uying for shipment" was "as much a part of [interstate commerce] as the shipping." *Id.*, at 198. And it added:

> "Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nation-wide. The right to buy it for shipment, and to ship it, in interstate commerce is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution." *Id.*, at 198–199 (footnote omitted).

In *Hood & Sons* v. *Du Mond*, 336 U. S. 525 (1949), we held that a State might not deny a license to a milk distributor serving the interstate market on the ground that the new facilities would reduce the supply of milk for local markets. In expressing the philosophy of the Commerce Clause to federalize the regulation of interstate and foreign commerce, we said:

> "The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the mean-

ing it has given to these great silences of the Constitution." *Id.*, at 534–535.

And we added:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." *Id.*, at 539.

Much reliance is placed on *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U. S. 276 (1961), for sustaining Mississippi's action. The case is not in point. There the Court found that the foreign corporation had an office and salesmen in New Jersey selling drugs intrastate. Since it was engaged in an intrastate business it could be required to obtain a license even though it also did an interstate business.

Reliance is also placed on *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944), which is likewise not in point. It is true that the customhouse broker in that case was in the business of dealing with goods in interstate transit. Nevertheless, we expressly noted that "[the broker's] activities are not confined to its services at the port of entry. It has localized its business, and to function effectively it must have a wide variety of dealings with the people in the community." *Id.*, at 210. As in *Eli Lilly*, this element of localization was held to be distinguishable from cases such as *Dahnke-Walker* in which a foreign corporation enters the State "to con-

tribute to or to conclude a unitary interstate transaction." *Id.*, at 211. In this respect we have found appellant's transactions, when viewed against the background of customary trade practices in the cotton market, to be indistinguishable from the activities in *Dahnke-Walker* in any significant regard.

The Mississippi Supreme Court, as noted, ruled that appellant was doing business in Mississippi. Appellant, however, has no office in Mississippi, nor does it own or operate a warehouse there. It has no employees soliciting business in Mississippi or otherwise operating there on a regular basis; [12] its contracts are arranged through an independent broker, whose commission is paid either by appellant or by the farmer himself and who has no authority to enter into contracts on behalf of appellant.[13] These facts are in sharp contrast to the situation in *Eli Lilly,* where Lilly operated a New Jersey office with 18 salaried employees whose job was to promote use of Lilly's products. 366 U. S., at 279–281. There is no indication that the cotton which makes up appellant's "perpetual inventory" in Mississippi is anything other than what appellant has claimed it to be, namely, cotton which is awaiting necessary sorting and classification as a prerequisite to its shipment in interstate commerce.

In short, appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a State seeks to require a foreign corporation to qualify to do business. Whether there were local tax incidents of those contacts which could be reached is a different question on which

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[12] One of appellant's Memphis employees, Jerry Hill, came to Mississippi on two or three occasions to deliver contracts to the broker, Covington. The more usual practice, however, appears to have been for the contracts to be mailed. (App. 56–57, 66–67, 72–76.)

[13] *Id.*, at 60–61, 65–66, 106–107. See also n. 4, *supra.*

we express no opinion. Whether the course of dealing would subject appellant to suits in Mississippi is likewise a different question on which we express no view. We hold only that Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause.

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

So ordered.

MR. JUSTICE REHNQUIST, dissenting.

The question in this case is whether Mississippi may require appellant, a Tennessee corporation, to qualify as a foreign corporation under Mississippi law before it may sue in the courts of Mississippi to enforce a contract. The Supreme Court of Mississippi summarized the facts of the transaction, which it stated were "without substantial dispute," as follows:

> "It is apparent that these transactions of Allenberg in each case, including that with Pittman, took place wholly in Mississippi. The contract was negotiated in Mississippi, executed in Mississippi, the cotton was produced in Mississippi, delivered to Allenberg at the warehouse in Mississippi, and payment was made to the producer in Mississippi. All interest of the producer in the cotton terminated finally upon delivery to Allenberg at the warehouse in Marks. The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg . . . ." 276 So. 2d 678, 681 (1973).

The Supreme Court of Mississippi might have added that through an exclusive agent, who was a Mississippi

resident, Allenberg entered into over 20 similar contracts in 1971 with farmers in Quitman County alone, contracts covering cotton production from over 9,000 acres in this one county. Allenberg's total 1971 purchases of cotton grown in Mississippi under substantially identical contracts exceeded 25,000 bales. When cotton grown under these contracts arrived at Mississippi warehouses designated by Allenberg the cotton was compressed and sorted by warehousemen acting at Allenberg's direction. It was then stored at the warehouse as a part of a perpetual revolving inventory of cotton, maintained by Allenberg at cotton concentration points throughout Mississippi to await future shipping orders.[1]

For reasons which are not entirely clear to me, the Court holds that Mississippi may not require Allenberg to qualify as a foreign corporation as a condition of using Mississippi courts to enforce its contract with appellee Pittman.[2]

The Court says that "[d]elivery of the cotton to a warehouse, taken in isolation, is an intrastate transaction. But that delivery is also essential for the completion of the interstate transaction, for sorting and classification in the warehouse are essential before the precise interstate destination of the cotton, whether in this country or abroad, is determined." *Ante,* at 30. Yet in *Parker* v. *Brown,* 317 U. S. 341, 361 (1943), this Court stated

[1] App. 92; Brief for Appellant 11. The record does not disclose the turnover time of the inventory but this is not material in light of Allenberg's admission that it maintains *perpetual* inventories in Mississippi.

[2] In its concluding paragraph the Court states: "We hold only that Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause." The Court offers no definition or analysis as to why this particular contract was "made for interstate or foreign commerce," and the language is traceable to none of our previous cases dealing with the Commerce Clause.

that "no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce." But putting aside such uncertainties engendered by the Court's language, its holding seems to me quite inconsistent with our previous cases applying the Commerce Clause to this kind of factual situation.

The most recent case from this Court dealing with this question is *Eli Lilly & Co.* v. *Sav-On-Drugs,* 366 U. S. 276 (1961), where the Court said:

> "[I]f Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business. In such a situation, Lilly could not escape state regulation merely because it is also engaged in interstate commerce." *Id.,* at 279 (footnote omitted).

In *Lilly,* the facts supporting a "corporate presence" in New Jersey were probably stronger than the facts supporting a conclusion that Allenberg was "doing business" in Mississippi in this case. But it is of some importance to note that the intrastate contacts between Lilly and New Jersey had no apparent connection with the suit which Lilly sought to bring against Sav-On-Drugs; the Court held that there were sufficient intrastate activities of Lilly so that it could be required generally to qualify to do business in New Jersey, rather than that Lilly's business with Sav-On was intrastate. Here the very dealings of Allenberg which are concededly intrastate are the dealings between it and Pittman revolving around the contract upon which it seeks to sue in the Mississippi courts.

But even if I were able to agree with the Court that

Allenberg's activities in Mississippi were purely "interstate," I do not believe that our cases, properly understood, prevent Mississippi from exacting qualification from a foreign corporation as a condition for use of the Mississippi courts.

It has been settled since Mr. Chief Justice Taney's opinion for the Court in *Bank of Augusta* v. *Earle,* 13 Pet. 519 (1839), that a corporation organized in one State which seeks to do business in another State may be required by the latter to qualify under its laws before doing such business. An exception to this general rule was established in cases such as *Crutcher* v. *Kentucky,* 141 U. S. 47 (1891), in which the Court held that such a license might not be required of an express company engaged only in interstate commerce. *Id.,* at 56–57. That exception was subsequently applied in *International Textbook Co.* v. *Pigg,* 217 U. S. 91 (1910), and expanded in *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921), and *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189 (1925).

The Court today excerpts a paragraph from *Shafer* dealing with wheat, and cites it for the apparent proposition that trading in agricultural commodities, whether wheat or cotton, is a form of interstate commerce which may not be regulated by the States. But *Shafer* invalidated, not a statute requiring a foreign corporation to qualify to do business before using the courts, but instead a comprehensive statutory scheme regulating the method by which grain might be sold. The Court in its opinion in *Shafer* was careful to distinguish other situations in which state regulation of trade in agricultural commodities which concededly went across state lines had been upheld. *Id.,* at 201–202.

Dahnke-Walker Milling Co., supra, did deal with a statute requiring foreign corporations to qualify, and the

Court held the state statute could not be applied consistently with the Commerce Clause, but its reasoning in reaching this conclusion in no way supports the result the Court reaches today.

> "This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to be on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. *They show that what otherwise seemed an intrastate transaction was a part of interstate commerce.*" 257 U. S., at 292. (Emphasis added.)

Here, unlike the situation which the *Dahnke-Walker* Court regarded as critical there, Allenberg chose to store cotton owned by it in Mississippi warehouses for varying lengths of time in order that it might have a perpetual revolving inventory of cotton available for future shipment orders. Here, too, Allenberg had contracted with Mississippi farmers, including Pittman, to grow the cotton from seed.

Cases such as *Shafer, supra,* and *Dahnke-Walker, supra,* were decided during a period of this Court's history when the approved judicial technique "was to decide whether a subject was or was not interstate commerce; if it was, Congress alone could regulate it, and

if not, only the states could." [3] This doctrine of mutual exclusivity was largely dispelled in later cases beginning with *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (1938), and followed in a long line of succeeding cases.[4] The rule stated by the Court in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), is quite different from that found in cases such as *Shafer* and *Dahnke-Walker:*

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

In *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944),[5] this Court upheld Minnesota's denial of access to its courts to a North Dakota customhouse broker, whose sole business in Minnesota was interstate commerce, where the

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[3] Stern, The Commerce Clause and the National Economy, 1933–1946, 59 Harv. L. Rev. 645, 648 (1946). See also P. Benson, The Supreme Court and the Commerce Clause, 1937–1970 (1970).

[4] In addition to *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189 (1925), and *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921), the Court today relies on *Swift & Co.* v. *United States*, 196 U. S. 375 (1905); *Stafford* v. *Wallace*, 258 U. S. 495 (1922); and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (1923). These cases upheld *federal* regulatory legislation applied to commodities exchanges as justified by the commerce power. Unless the Court today takes a giant step backwards, these are not relevant to the question of the constitutionality of Mississippi's statute. See, *e. g.*, *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 37 (1927) (Brandeis, J., joined by Holmes, J., dissenting), a case later overruled in *California* v. *Thompson*, 313 U. S. 109, 116 (1941).

[5] The Court distinguishes *Union Brokerage* on the ground that the activities of the broker there were "localized" interstate commerce, but a comparison of the facts of that case with the facts here suggests that Allenberg's activities in Mississippi were every bit as "localized" as those of Union Brokerage in Minnesota.

broker had failed to qualify as required of such foreign corporations:

> "[T]he Commerce Clause does not cut the States off from all legislative relation to foreign and interstate commerce. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 . . . . The incidence of the particular state enactment must determine whether it has transgressed the power left to the States to protect their special state interests although it is related to a phase of a more extensive commercial process." *Id.*, at 209–210.

See *Parker* v. *Brown*, 317 U. S. 341, 361 (1942).

Mississippi's qualification statute is concededly not discriminatory. Domestic corporations organized under her laws must submit themselves to her taxing jurisdiction, to service of process within the State, and to a number of other incidents of corporate existence which state law may impose. *Union Brokerage* recognized that qualification statutes were important in the collection of state taxes by identifying foreign corporations operating within the State [6] and in the protection of citizens

[6] Most commentators studying qualification statutes have concluded that a major purpose of such statutes is facilitation of the assessment and collection of state ad valorem and franchise taxes. See, *e. g.*, Comment, Foreign Corporations-State Boundaries for National Business, 59 Yale L. J. 737, 746 (1950). Cases such as *Chassaniol* v. *Greenwood*, 291 U. S. 584 (1934); *Federal Compress Co.* v. *McLean*, 291 U. S. 17 (1934); and *Kosydar* v. *National Cash Register Co.*, 417 U. S. 62 (1974), make it clear that the cotton stored in Mississippi is subject to state taxation. Mississippi Code Ann. § 27–13–7 (1972) imposes a franchise tax on foreign corporations operating within the State measured by the amount of capital located in Mississippi. A portion of the information required to be filed with the Mississippi Secretary of State in order to qualify within the State is an estimate of capital located within Mississippi. The information is essential to the identification of foreign corporations subject to the tax. The Court today leaves the tax standing but illogically deprives Mississippi of its sole means of enforcement of the tax.

within the State through insuring ready susceptibility of the corporation to service of process.[7] The qualification statute also serves an important informational function making available to citizens of the State who may deal with the foreign corporation details of its financing and control.[8] Although the result of Allenberg's failure to comply with the qualification statute is a drastic one,[9] our

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[7] Although it may be possible to assert jurisdiction over an unqualified foreign corporation doing business in the State under a long-arm statute since minimum contacts with the State will normally exist, the absence of a registered agent in the State creates substantial problems for any potential plaintiff since he will be required to prove the existence of such minimum contacts—often in the absence of any subpoena power over the foreign corporation. See, *e. g.*, Note, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 138, 140 (1961). In this area such qualification statutes provide a rough form of reciprocity (a guarantee of susceptibility of suit in exchange for the right to bring suit) and operate as security for performance of the foreign corporation's obligations owed to citizens of the State. Cf. *Paul* v. *Virginia*, 8 Wall. 168, 181 (1869). See, *e. g.*, Comment, *supra*, n. 6, 59 Yale L. J., at 742–745.

[8] See, *e. g.*, Comment, The *Lilly* Case: Dictum, Holding, and Finding, 57 Nw. U. L. Rev. 306, 321 (1962). While state and federal securities laws may on occasion provide parallel disclosures, they will often not. For example, in the immediate case, there is no indication that Allenberg was subject to any disclosure requirements other than those provided by the qualification statute. Mississippi requires such foreign corporations to update information in their certificates through annual reports. Miss. Code Ann. § 79–3–249 (1972). This information is available to all citizens of the State through payment of a nominal fee to the Secretary of State's office. § 79–3–257. Information such as the financial structure and control of the foreign corporation is obviously highly relevant to any citizen of Mississippi who is considering doing business with the corporation.

[9] The large variety of possible sanctions imposed by the States was discussed at length in Note, Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation, 63 Col. L. Rev. 117, 122–123 (1963). "Because of the difficulties involved in discovery and enforcement by state officials, denial of access to state

decisions hold that the burden imposed on interstate commerce by such statutes is to be judged with reference to the measures required to comply with such legislation, and not to the sanctions imposed for violation of it. *Eli Lilly,* 366 U. S., at 282–283; *Railway Express Co.* v. *Virginia,* 282 U. S. 440, 444 (1931). The steps necessary in order to comply with this statute are not unreasonably burdensome.[10]

I would not expand the holdings of *Shafer* and *Dahnke-Walker* in the face of so substantial a body of subsequent case law which leaves their reasoning, if not their holdings, suspect. I would affirm the judgment of the Supreme Court of Mississippi.

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courts is an essential element of a statutory scheme designed to encourage compliance with qualification requirements." *Id.*, at 129–130 (footnote omitted). The denial-of-a-forum sanction utilized by Mississippi is also used by five other States. Ala. Code, Tit. 10, § 21 (89) (1973 Cum. Supp.); Ariz. Rev. Stat. Ann. § 10–482 (1956); Ark. Stat. Ann. § 64–1202 (1966); Vt. Stat. Ann., Tit. 11, § 2120 (1973). The rule is applied in Montana by case law. Note, Right of a Foreign Corporation to Sue upon Contracts in Montana Courts—Doing Business—Failure to Qualify—Subsequent Qualification, 26 Mont. L. Rev. 218 (1965). There may certainly be a dispute as to the wisdom of Mississippi's choice of this sanction but unless substantive due process now clothed in Commerce Clause garb once more elevates the Court into an arbiter of legislative wisdom, this consideration is irrelevant to our disposition of the case.

[10] The principal requirements are the filing of certain information with the Mississippi Secretary of State and the payment of a fee ranging between $20 and $500 depending on the amount of stated capital of the foreign corporation. Miss. Code Ann. §§ 79–3–219 and 79–3–255 (q) (1972). When the required information is provided and the fee is paid, the Secretary of State issues the requested certificate. § 79–3–221. The burden of qualifying appears small, particularly when compared to Allenberg's activities in the State. See *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 210 (1944).

Syllabus

OTTE, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES ET AL.

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

No. 73–375. Argued October 15, 1974—Decided November 19, 1974

1. A trustee in bankruptcy for an employer is required by the withholding provisions of the Internal Revenue Code of 1954 (IRC) and similar provisions of the New York City Administrative Code to withhold taxes from the payment of priority claims for wages earned by employees prior to the employer's bankruptcy, but unpaid at the inception of the bankruptcy proceeding. The payment of the wage claims is "payment of wages" under IRC § 3402 (a) requiring withholding of income taxes, and is wages under IRC § 3102 (a) requiring withholding of social security taxes, and an "employer," defined by IRC § 3401 (d) (1) to include "the person having control of the payment" of wages, is present under § 3402 (a). The same rationale applies to the withholding of city income taxes under the similar City Code provisions. Pp. 48–52.
2. From the obligation to withhold it follows that the trustee is also required to prepare and submit to the wage claimants and to the taxing authorities the reports and returns required of employers under IRC §§ 6051 (a), 6001, and 6011 and similar provisions of the City Code. P. 52.
3. Requiring the trustee to withhold, report, and file returns does not unduly burden the administration of bankrupt estates so as to contravene the spirit of the Bankruptcy Act, for the burden is the same as any employer, or receiver, arrangement debtor, or other fiduciary, with a like number of employees must bear; moreover, both the IRC and the City Code allow the trustee to withhold taxes at a flat rate, thus facilitating the tax computation. Pp. 52–54.
4. Proofs of claim by the United States and New York City with respect to the withholding taxes on the priority wage claims are not required. Since tax liability accrues only when the wage is paid, and since the wages subject to the wage claims here, although earned before bankruptcy, were not paid prior thereto, so that the

bankrupt employer's tax liability came into being only during bankruptcy, the taxes are not like debts of the bankrupt for which proofs of claim must be filed. Pp. 54–55.

5. The federal and city withholding taxes are entitled, as are the priority wage claims from which they emerge, to second priority of payment under § 64a (2) of the Bankruptcy Act. Such taxes are not within the fourth priority under § 64a (4), since they did not become due and owing by the bankrupt until after the wage claims were paid following bankruptcy. Nor are such taxes entitled to first priority under § 64a (1), since they are not costs or expenses of administration of the bankrupt estate, but are part of the wage claims themselves and are carved out of the payment of those claims. Pp. 55–58.

480 F. 2d 184, affirmed.

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

Howard Karasik argued the cause and filed a brief for petitioner.

Keith A. Jones argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Crampton,* and *Crombie J. D. Garrett. Samuel J. Warms* argued the cause for respondent city of New York. With him on the brief were *Adrian P. Burke, Raymond Herzog,* and *Cornelius F. Roche.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This bankruptcy case raises issues (a) as to whether priority claims for wages earned by employees prior to an employer's bankruptcy, but unpaid at the inception of the bankruptcy proceeding, are subject to withholding taxes, and, if so, (b) as to whether the taxing entities must file proofs of claim, and (c) as to which priority of payment, if any, the withholding taxes enjoy under

§ 64a of the Bankruptcy Act (the Act), 11 U. S. C. § 104 (a).[1]

I

On September 15, 1964, Freedomland, Inc., a New York corporation, filed a petition with the United States District Court for the Southern District of New York for an arrangement under Chapter XI of the Act, 11 U. S. C. §§ 701–799. The arrangement failed, and on August 30, 1965, Freedomland was adjudicated a bankrupt. Petitioner, William Otte, was appointed and qualified as the trustee.

During the statutorily prescribed six-month period for the filing of proofs of claim against the estate, see §§ 57 and 63 of the Act, 11 U. S. C. §§ 93 and 103, 413 former employees of Freedomland filed proofs for unpaid wages (each claim in the amount of $600 or less and all the claims aggregating approximately $80,000) that had been earned within three months preceding the filing of the Chapter XI petition. These wage claims concededly were entitled to a second priority of payment under § 64a (2). No proofs for any federal income or Federal Insurance Contributions Act taxes on these wage claims, withholdable under Chapters 24 and 21, respectively, of the Internal Revenue Code of 1954, 26 U. S. C. §§ 3401–3404

[1] "§ 104. Debts which have priority.

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition . . . ; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen . . . ; (4) taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof which are not released by a discharge in bankruptcy . . . ."

and 3101–3126, were filed by the United States, and no proofs for any New York City personal income tax, withholdable under Chapter 46, Titles T and U, of the New York City Administrative Code, were filed by the city.

In November 1969 the trustee filed a motion for an order directing distribution to the 413 priority wage claimants without deduction for any federal, state, or city withholding taxes. He also asked that the referee declare that the trustee was not required to withhold or pay any such tax or to file any report or return relative thereto with the respective taxing authorities. The State of New York, although served, filed no response to the trustee's motion. The United States and the city did respond. The referee issued an order granting the trustee the relief he requested. App. 48a–50a. In a supporting memorandum decision, the referee stated that the withholding and reporting requirements of the federal and city statutes "would impose a further burden on the administration of these estates which is entirely inconsistent with the objective of efficient expeditious economic administration of bankrupt estates," and that "compliance with withholding and reporting requirements . . . is utterly inconsistent with the spirit and the letter of the Bankruptcy Act." *Id.*, at 36a, 37a.

The United States and the city filed petitions with the United States District Court to review the referee's order and decision. After a hearing, the District Court reversed the order and decision insofar as they pertained to federal taxes. It directed the withholding of federal taxes on the priority wage claims, and also concluded that the amounts to be withheld were "taxes which became legally due and owing by the bankrupt," within the language of § 64a (4), and, therefore, were to be paid as tax claims of the *fourth* priority. The court observed that little more than a simple bookkeeping effort would be involved in withholding 25% of the wage distribu-

tions.[2] It held that proofs of claim were not required because the employees' proofs gave notice to the trustee and other creditors of the total amounts distributable on account of the claims. The District Court, however, ruled against the city on the ground that the city's personal income tax did not become effective until 1966, and thus no city tax was due and owing by the bankrupt in 1964 when the Chapter XI petition was filed. *In re Freedomland, Inc.*, 341 F. Supp. 647 (1972).

The trustee, the United States, and the city all appealed. The United States Court of Appeals for the Second Circuit affirmed in part and reversed in part. It held that the trustee was obligated to withhold, to report, and to pay over the withholding taxes on the wage claims, and that the taxing entities were not required to file proofs of claim. It further held, however—and thus to this extent disagreed with the District Court—that both the United States and the city were entitled to be paid as *second* priority claimants under § 64a (2). *In re Freedomland, Inc.*, 480 F. 2d 184 (1973).

We granted the trustee's petition for certiorari (unopposed by the United States) primarily because the circuits are in disarray as to the priority to be accorded to withholding taxes on prebankruptcy wage claims.[3] 414

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[2] Under Internal Revenue Service directives, a trustee in bankruptcy, upon paying priority wage claims, has the option of withholding income and FICA taxes either at a combined flat rate of 25% or at the rates prescribed by §§ 3101 and 3402 of the Code, 26 U. S. C. §§ 3101 and 3402.

[3] First priority: *United States* v. *Fogarty*, 164 F. 2d 26, 33 (CA8 1947); *Lines* v. *California Dept. of Employment*, 242 F. 2d 201, 203, reh. den., 246 F. 2d 70 (CA9), cert. denied, 355 U. S. 857 (1957). Second priority: *In re Freedomland, Inc.*, 480 F. 2d 184, 190 (CA2 1973). Fourth priority: *In re Connecticut Motor Lines, Inc.*, 336 F. 2d 96, 102–106, 108 (CA3 1964).

In *In re John Horne Co.*, 220 F. 2d 33, 35 (CA7 1955), a case concerning wages paid prior to bankruptcy, the court stated: "We

U. S. 1156 (1974). No cross-petition was filed by either the United States or the city of New York.

II

Withholding, Reports, and Returns

Every Court of Appeals which has faced the issue, including the Second Circuit in the present case, has held, contrary to the ruling of the referee, that the withholding provisions of the Internal Revenue Code, and of state or municipal tax statutes, require that a trustee in bankruptcy withhold income and social security taxes from payments of wage claims, and that he prepare and submit to the wage claimants and to the taxing authorities the reports and returns statutorily required of employers. *United States* v. *Fogarty,* 164 F. 2d 26, 30–33 (CA8 1947); *United States* v. *Curtis,* 178 F. 2d 268, 269 (CA6 1949), cert. denied, 339 U. S. 965 (1950); *Lines* v. *California Dept. of Employment,* 242 F. 2d 201, 202, reh. den., 246 F. 2d 70 (CA9), cert. denied, 355 U. S. 857 (1957); *In re Connecticut Motor Lines, Inc.,* 336 F. 2d 96 (CA3 1964). To the same effect is *In re Daigle,* 111 F. Supp. 109, 111 (Me. 1953).

A. The requirement of withholding. Section 3402 (a) of the Internal Revenue Code, 26 U. S. C. § 3402 (a), requires "[e]very employer making payment of wages" to "deduct and withhold upon such wages . . . a tax determined . . . ." Section 3401 (a) defines "wages" for withholding purposes to mean, with certain exceptions, "all remuneration . . . for services performed by an employee for his employer," and § 3401 (d) defines "employer" as

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are not impressed with the reasoning of the court in the Fogarty case." See also Note, 56 Mich. L. Rev. 631 (1958); Comment, Bankruptcy—Priorities—Fourth Priority Assigned Payroll Taxes on Second Priority Wages, 40 N. Y. U. L. Rev. 360 (1965); Note, 19 Rutgers L. Rev. 546 (1965).

"the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person." The latter section makes an exception where "the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services"; in that case, "employer" means "the person having control of the payment of such wages." Sections T46–51.0 (a) and U46–8.0 of the New York City Administrative Code are generally to the same effect.[4]

The trustee contends that the payment of wage claims under the Bankruptcy Act, although for "wages" within the meaning of that Act, is not the "payment of wages" under § 3402 (a), and that, in any event, the trustee is not the wage claimant's "employer" to whom § 3402 (a) relates.

The payments to the wage claimants who filed in this case are payments for services performed by them for their former employer, Freedomland, before the commencement of the proceeding under the Act. There is, and can be, no dispute as to this. The fact that the services were performed for the bankrupt, rather than for the trustee, and the fact that payment is made after the employment relationship terminated, do not convert the remuneration into something other than "wages," as defined by § 3401 (a) of the Internal Revenue Code. That statute, as has been noted, broadly defines "wages" to include, with stated exceptions not material here, "all remuneration." And § 3401 (d), in defining "employer," twice refers to services that the employee "performs or performed." It thus speaks in the past tense as well as

[4] The terms "wages" and "employer," as they appear in Titles T and U of the City Code are given the same meanings they have in the Internal Revenue Code. New York City Administrative Code §§ T46–1.0 (c) and U46–1.0 (b), (e), and (*l*) (1971).

the present and thereby plainly reveals that a continuing employment relationship is not a prerequisite for a payment's qualification as "wages." The income tax withholding regulations since 1943 have so provided in specific terms. 26 CFR § 31.3401 (a)–1 (a)(5); Treas. Reg. 120 § 406.205 (b) (1954); Treas. Reg. 116 § 405.105 (1944 and 1951 eds.); Treas. Reg. 115 § 404.101 (a) (1943). The regulations are not in conflict with the statute; they further the statutory purpose and are reasonable; and they are a valid exercise of the rule-making power. *Cammarano* v. *United States,* 358 U. S. 498, 507–512 (1959).[5]

The payment of the wage claims is thus "payment of wages" under § 3402 (a) of the Internal Revenue Code.

The fact that in bankruptcy payment of wage claims is effected by one other than the bankrupt former employer does not defeat any withholding requirement. Although § 3402 (a) refers to the "employer making payment of wages," § 3401 (d)(1), as also has been noted, provides that if the person for whom the services were performed "does not have control of the payment of the wages for such services," the term "employer" then means "the person having control of the payment of such wages." This obviously was intended to place responsibility for withholding at the point of control. The petitioner trustee suggests that control rests in the referee rather than in the trustee, because of the former's duty, under § 39a (5) of the Act, 11 U. S. C. § 67

[5] We see nothing to the contrary in *United States* v. *Embassy Restaurant, Inc.,* 359 U. S. 29 (1959), which is pressed upon us by the trustee. The issue there was whether contributions by an employer to a union welfare fund, as required under a collective-bargaining agreement, were entitled to second priority as "wages . . . due to workmen." There is no such issue here, for the trustee acknowledges, as he must, that the present claims are, indeed, for "wages," within the meaning of the Bankruptcy Act.

(a)(5), to "declare dividends." We need not determine whether it is the trustee, with his responsibility, under §§ 47a (8) and (11) of the Act, 11 U. S. C. §§ 75 (a)(8) and (11), for making recommendations and actual payments, or the referee, with his supervision over the general administration of the bankrupt estate, or the estate itself, that has "control of the payment of such wages," within the meaning of § 3401 (d)(1) of the Internal Revenue Code. One of them is the "employer" and, as such, has the duty to withhold or to order the withholding, as the case may be.[6] An "employer," under § 3402 (a), is thus present.

The situation is the same with respect to FICA withholding. Section 3102 (a) of the Internal Revenue Code, 26 U. S. C. § 3102 (a), provides that the tax is to be collected by the employer by deducting "from the wages as and when paid." Here, too, the payments clearly are "wages" under that statute, even though again, at the time of payment, the employment relationship between the bankrupt and the claimant no longer exists. And here, also, the regulations long and consistently have been to this effect. 26 CFR § 31.3121 (a)–1 (i); Treas. Reg. 128 § 408.226 (a) (1951); Treas. Reg. 106 § 402.-227 (a) (1940). The fact that the FICA withholding provisions of the Code do not define "employer" is of no significance, for that term is not to be given a narrower construction for FICA withholding than for income tax withholding.

Because of the identity of definition already observed, n. 4, *supra,* the same rationale necessarily applies to the New York City withholding tax.

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[6] "The result would be no different if it is argued that the bankruptcy court rather than its trustee is 'the person having control of the payment of such wages.' There is no provision excepting a court from the requirement of withholding on amounts paid an employee." *United States* v. *Fogarty,* 164 F. 2d, at 32.

The trustee finally suggests that the placing of a withholding obligation upon the trustee amounts to the imposition of a penalty barred by § 57j of the Act, 11 U. S. C. § 93 (j). This argument, however, rests upon the presence of § 6672 of the Internal Revenue Code, 26 U. S. C. § 6672, and §§ T46–65.0 (g) and U46–35.0 (g) of the New York City Administrative Code, all of which impose a penalty, apart from the tax, on a person who willfully fails to fulfill his obligation to withhold or who willfully attempts to evade or defeat any tax. That, obviously, is not this case.

B. The requirement of reports and returns. This routinely follows from the obligation to withhold. Section 6051 (a) of the Internal Revenue Code, 26 U. S. C. § 6051 (a), provides that a person required to withhold must furnish the employee a written statement showing the wages subject to withholding and the amount withheld on account of each tax. A duplicate of that statement is to be available for filing with the Internal Revenue Service. § 6051 (d). Sections 6001 and 6011 require every person responsible for payment or collection of taxes to keep such records and make such returns as the Secretary prescribes. The applicable regulations respond to these statutes. 26 CFR §§ 31.6001–1, 31.6001–2, 31.6001–5, 31.6011 (a)–6 (a)(1), and 31.6051–1; Rev. Proc. 71–18, 1971–1 Cum. Bull. 684. It is undisputed that the petitioner trustee must comply with these provisions if he is subject to the withholding requirements of §§ 3402 and 3102. *Nicholas* v. *United States,* 384 U. S. 678, 693 (1966).

The New York City Administrative Code provisions are to similar effect, §§ T46–52.0 and T46–54.0, U46–9.0 and U46–11.0, and we reach the same conclusions with respect to reports and returns thereunder.

C. Expense and delay. The trustee argues, as the referee held, that the imposition of obligations to withhold,

report, and file returns places a burden on the administration of bankrupt estates that is at odds with economic and expeditious administration and with the spirit of the Act. He places some reliance, as did the referee, on the paper by Referee Hiller, The Folly of the Fogarty Case, 32 Ref. J. 54 (1958), where the author states that "the application of the Fogarty rule is sheer nonsense" and that the case is "out of harmony with sound bankruptcy law." *Id.*, at 54, 56.

There is, of course, an overriding concern in the Act with keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors. 3A W. Collier, Bankruptcy ¶¶ 62.05 [1], 62.02 [5] (14th ed. 1972). And it cannot be denied that paperwork takes time and occasions expense. In this particular case, withholding must be computed on the 413 wage claims; returns (Forms W–2, W–3, and 941) must be prepared and furnished the claimant and the Internal Revenue Service; records must be maintained; and the taxes withheld must be remitted to the respective taxing entities.

We are not persuaded, however, that this burden would be so undue as to be inconsistent with or violative of the spirit of the Act. It is the same burden, no more and no less, that any employer of the same size must bear, and it is the same burden that is borne by any receiver or arrangement debtor or any other fiduciary with a like number of employees. The burden is not disproportionate.[7] Further, the Internal Revenue Service has endeavored to lighten the load by its alternative 25% combined bank-

[7] The District Court, on review of the referee's order and decision, received evidence with respect to costs of compliance. It concluded that compliance "adds only slightly to the trustee's inescapable task and cost of verifying each claim before payment." 341 F. Supp. 647, 654 (SDNY 1972).

ruptcy withholding rate for income and FICA taxes. See n. 2, *supra.* New York City has done the same with its 1% withholding rate. Neither should the burden make it necessary, as is so often and so easily suggested, to employ an accountant. Computations at the rates of 25% and 1%, respectively, are simple and elementary arithmetic exercises, hardly worthy of an accountant's talent; a high school student is able to make those computations as is any bookkeeper, clerk, or the trustee himself. The added tasks of withholding, reporting, returning, and remitting are contemplated, in our view, by the Act. The interests of the taxing entities, who are creditors, too, and, through them, the interests of the public, outweigh the minuscule added burden for the estate. See *Swarts* v. *Hammer,* 194 U. S. 441, 444 (1904). If relief is to be considered for bankrupt estates in this respect, it is a matter for legislative, not judicial, concern. There is nothing in the Act or in the Internal Revenue Code that relieves the trustee of these duties. Cf. §§ 7507, 108 (b), 371, and 372 of the Internal Revenue Code, 26 U. S. C. §§ 7507, 108 (b), 371, and 372.

III

Proofs of Claim

The trustee asserts that because the United States and the city failed to file proofs of claim for the taxes at issue, payment thereof is barred. It is said that these taxing entities were on notice, by reason of Freedomland's bankruptcy schedules, that the bankrupt owed the priority wage claims; that these claims were to be filed within six months; that the entities could obtain an extension of time, under § 57n of the Act, 11 U. S. C. § 93 (n), in which to compute and file their claims; and that they chose to ignore the referee's bar order directed, among others, to "taxing authorities and agencies," App. 24a.

This argument, in our view, misconceives the nature of the taxes that are to be withheld. Liability for the taxes accrues only when the wage is paid. Sections 3402 (a) and 3101 (a) of the 1954 Code; New York City Administrative Code §§ T46–51.0 (a) and U46–8.0. The wages that are the subject of the wage claims, although earned before bankruptcy, were not paid prior to bankruptcy. Freedomland had incurred no liability for the taxes. Liability came into being only during bankruptcy. The taxes do not partake, therefore, of the nature of debts of the bankrupt for which proofs of claim must be filed.

Furthermore, the filing of proofs by the United States and New York City obviously would serve no purpose here. Proofs apprise the trustee and other creditors of the existence of claims against the estate. The priority wage claims themselves, however, cover the gross wages earned and unpaid. These include any tax that is to be withheld. The tax is not an added increment.

We conclude, therefore, that proofs of claim on the part of the United States and of New York City with respect to withholding taxes on priority wage claims are not required.

IV

With withholding taxes thus determined as properly applicable to priority wage claims, their placement in the payment scale under § 64a must be determined.[8] The choice lies between the first priority (costs and ex-

[8] The trustee has paid the priority wage claims, with the taxes withheld and set aside. This was done, however, pursuant to an agreement that the rights of the parties would not be affected thereby. The United States, therefore, is not in a position to claim that a trust fund has been established under § 7501 (a) of the Internal Revenue Code, 26 U. S. C. § 7501 (a). See *United States* v. *Randall,* 401 U. S. 513 (1971); *Nicholas* v. *United States,* 384 U. S. 678, 690–691 (1966).

penses of administration), urged by the United States; the second priority (wages and commissions, limited as the statute specifies), urged by the city of New York; the fourth priority ("taxes which became legally due and owing by the bankrupt"), urged by none of the parties here; and no priority at all. The third and fifth priorities clearly have no possible application to these taxes.

We readily reject the fourth priority. The withholding taxes are not taxes which became due and owing by the bankrupt. As has been noted above, the taxes did not become due and owing at all until the claims, constituting wages, were paid. This took place after bankruptcy, not before. The situation, thus, differs from that where the bankrupt paid wages prior to bankruptcy, but the taxes withheld were not remitted to the taxing entities by the time of the inception of the bankruptcy proceeding. The latter would be taxes "which became legally due and owing by the bankrupt." See *In re John Horne Co.*, 220 F. 2d 33 (CA7 1955); *Pomper* v. *United States*, 196 F. 2d 211 (CA2 1952).

We similarly reject the first priority, although we recognize that this appears to be the favorite conclusion reached by those courts that have passed upon the issue. See n. 3, *supra*. The leading case for this approach is *United States* v. *Fogarty, supra*. The Court there, however, without a statement of underlying reasons, merely concluded that the taxes "should be allowed and classified as an expense of administration," 164 F. 2d, at 33. In *Lines* v. *California Dept. of Employment, supra*, the court followed *Fogarty* and held that, because the tax accrued "subsequent to the filing of the petition in bankruptcy, such tax had the character of an expense of administration." 246 F. 2d, at 71.

We think that more than a general observation that the taxes arose during bankruptcy is required to dignify

withholding taxes with the prime status of first priority. We grant that the very language of § 64a (1) ("including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition") necessarily indicates that first priority items include some in addition to those that preserve or develop the bankrupt estate. Withholding taxes, however, do not strike us as costs or expenses of doing business. They are attributable in their entirety to the availability of funds for the payment of priority wage claims. They accrue only as those claims are paid and, to the extent of that payment, the payment of the taxes should be assured. In addition, it is anomalous to accord withholding taxes a higher priority than the wage claims to which they so directly relate. They can be computed only upon the amount of funds available for payment of the wage claims and should not have a computational base greater than those payments. The withholding taxes are, in full effect, part of the claims themselves and derive from and are carved out of the payment of those claims. We therefore fully agree with the Second Circuit's observation, 480 F. 2d, at 190: "Conceptually the tax payments should be treated in the same way as the wages from which they derive and of which they are a part."

We see nothing in *United States* v. *Randall,* 401 U. S. 513 (1971), with its observation, *id.,* at 515, that the Bankruptcy Act "is an overriding statement of federal policy on this question of priorities," that is contrary to the result we reach here. That case concerned § 7501 (a) of the Internal Revenue Code, 26 U. S. C. § 7501 (a), with its provision for a trust fund for withheld taxes, and the impact of that statute, when not complied with, upon payment of first priority costs and expenses of administration. *Randall* is not a holding, as the trustee would claim, Brief for Petitioner 18–19, that the withholding

taxes do not have the same priority as the wage claims themselves.

We therefore conclude that these federal and city withholding taxes are entitled, as are the priority wage claims from which they emerge, to second priority of payment under § 64a (2) of the Act, 11 U. S. C. § 104 (a).[9]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[9] This conclusion makes it unnecessary for us to consider whether, if the Government were to prevail in its first-priority argument, the judgment of the Court of Appeals here could be modified in the absence of a cross-petition by the United States. We are advised that the bankrupt estate's assets are sufficient to pay all first- and second-priority claims in full. Tr. of Oral Arg. 28–29. Whether the withholding taxes have first- rather than second-priority status is, therefore, of no practical consequence to the Government in the present case.

FRANCISCO *v.* GATHRIGHT, CORRECTIONAL SUPERINTENDENT

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

No. 73–5768. Argued October 15, 1974—
Decided November 19, 1974

Petitioner brought this federal habeas corpus action, claiming the unconstitutionality of a state statute under which he had been convicted of a drug violation. The Court of Appeals upheld the District Court's ruling that petitioner's challenge should be resubmitted to the state courts in the light of a State Supreme Court decision (issued after that court had declined to review petitioner's conviction on direct appeal but before petitioner had filed his habeas petition) holding the state statute constitutionally invalid. *Held:* Since the state courts had a full opportunity to determine the federal constitutional issue before petitioner resorted to the federal forum, no substantial state interest would be served by requiring petitioner to resubmit his constitutional claim to the state courts. *Roberts* v. *LaVallee,* 389 U. S. 40.

Reversed and remanded.

Daniel C. Kaufman argued the cause and filed a brief for petitioner.

Robert E. Shepherd, Jr., argued the cause for respondent. On the brief were *Andrew P. Miller,* Attorney General of Virginia, and *Gilbert W. Haith,* Assistant Attorney General.

PER CURIAM.

Petitioner was convicted in a Virginia state court of possession of heroin with intent to distribute,[1] and was

[1] Petitioner was convicted of violating Va. Code Ann. § 54–524.-101 (a) (1950). At the time he was charged, that statute provided in relevant part:

"Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally: (1) To distribute, or to possess

sentenced to eight years in prison. The Supreme Court of Virginia denied review and affirmed the conviction by order, and petitioner then sought federal habeas corpus in the United States District Court for the Eastern District of Virginia.

In that court he contended that the judgment of conviction under which he was held was subject to two constitutional infirmities. His first claim was that the state statute under which he had been convicted violated his Fourteenth Amendment rights insofar as it permitted the jury to base the conviction "solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed." [2] His second claim was that evidence admitted at his trial had been obtained as a result of an unlawful search and seizure in violation of his rights under the Fourth and Fourteenth Amendments.

Respondent conceded that petitioner had "exhausted his State court remedies," App. 11, but nevertheless urged the District Court to dismiss the petition in order to permit the petitioner to present his due process argument to the state courts for reconsideration in light of the decision of the Supreme Court of Virginia in *Sharp* v. *Commonwealth,* 213 Va. 269, 192 S. E. 2d 217 (1972). In *Sharp,* which was decided after the Virginia Supreme Court had declined to review petitioner's conviction on direct appeal, but before he had filed his petition for a writ of habeas

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with intent to distribute, a controlled drug . . . . A conviction for a violation of this § 54–524.101 (a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

The statute has since been repealed. Va. Acts 1972, c. 798.

[2] The trial court instructed the jury:

"The Court instructs the jury that a conviction for possession of a controlled drug with intent to distribute may be based solely upon the evidence as to the quantity of the controlled drug unlawfully possessed." App. 19.

corpus in the District Court,[3] the Virginia Supreme Court held § 54–524.101 (a) to be violative of both the State and Federal Constitutions.[4]

The District Court ruled against petitioner on the merits of his search-and-seizure claim, and agreed with respondent that the challenge to the statute should be resubmitted to the Virginia state courts. It therefore granted summary judgment in favor of respondent without passing on petitioner's claim that the statute was invalid under the Fourteenth Amendment.[5]

Petitioner appealed to the Court of Appeals for the Fourth Circuit. That court, in an unreported decision,

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[3] The habeas petition, accompanied by a motion to proceed *in forma pauperis*, was actually received by the United States District Court on October 5, 1972, four days before *Sharp* was decided. On October 26 petitioner's motion to proceed *in forma pauperis* was denied. Upon receipt of the filing fee on October 31, the clerk of the United States District Court filed the habeas petition.

[4] The Supreme Court of Virginia found the statute unconstitutionally vague because "a person of ordinary intelligence in possession of a quantity of marijuana could not with reasonable certainty know whether he was guilty of the misdemeanor of mere possession or the felony of possession with intent to distribute." 213 Va., at 271, 192 S. E. 2d, at 218. The court also concluded that the "statutory inference or presumption of possession with intent to distribute did not have sufficient rational connection with the fact of possession of a quantity of a controlled drug." *Ibid.* The Virginia court cited federal and state decisions to support its holding, and at oral argument the parties agreed that *Sharp* rests on both state and federal constitutional grounds. We, of course, express no view on the correctness of this holding insofar as it rests on an interpretation of the Fourteenth Amendment.

[5] Since petitioner had presented the issue once to the state courts, the District Court granted him leave to reinstitute the petition in federal court unless the State granted him a hearing within 45 days. The State sought to initiate state habeas proceedings the following day, but petitioner refused to file a habeas petition in state court and indicated that he would not cooperate with state authorities.

agreed that the state court should have an opportunity to re-examine petitioner's claim in the light of *Sharp, supra,* and went on to hold that the District Court had acted prematurely in reaching the independent federal claim of unlawful search and seizure. It said:

> "If relief is granted under *Sharp,* the state will have the option of releasing Francisco or retrying him. In either event the possibility exists that this claim for relief will be mooted." App. 51.

The court vacated that portion of the District Court's opinion ruling on the merits of petitioner's second claim, and remanded the case to the District Court with instructions to dismiss the petition without prejudice. We granted certiorari. 415 U. S. 957 (1974).

Petitioner presents two contentions here. He first contends that the District Court and the Court of Appeals were wrong in requiring him to resubmit his constitutional attack on the Virginia statute to the state courts. We agree with petitioner on this point, since we believe that the proper disposition of his claim of statutory invalidity is controlled by *Roberts* v. *LaVallee,* 389 U. S. 40 (1967). In *Roberts* the petitioner was denied a transcript of his preliminary hearing because he was unable to pay the fee required under New York law. When his equal protection challenge to the New York statute was rejected on direct appeal, he sought habeas relief in federal court. After the United States District Court denied the writ, in another case the New York Court of Appeals found the statute unconstitutional under both the Federal and State Constitutions. The Court of Appeals for the Second Circuit dismissed the petition in order to permit Roberts to apply to the state courts for relief under the intervening state court decision. This Court reversed, saying:

> "Petitioner has already thoroughly exhausted his

> state remedies, as the Court of Appeals recognized. Still more state litigation would be both unnecessarily time-consuming and otherwise burdensome. This is not a case in which there is any substantial state interest in ruling once again on petitioner's case." *Id.*, at 43.

The only distinction between the present case and *Roberts* is that here the intervening state court decision came down before petitioner filed his petition for habeas relief in federal court, whereas in *Roberts* the state decision issued after the habeas petition had been acted upon by the District Court. This distinction does not alter the result as to the exhaustion requirement. In both cases the state courts had a full opportunity to determine the federal constitutional issues before resort was made to a federal forum, and the policies served by the exhaustion requirement would not be furthered by requiring resubmission of the claims to the state courts.[6] *Roberts, supra; Brown* v. *Allen,* 344 U. S. 443, 447–450 (1953); *Picard* v. *Connor,* 404 U. S. 270, 275 (1971).

The second question presented by petitioner in this Court is "[w]hether a person . . . who claims that [his] custody is, in two independent respects, in violation of the Constitution of the United States, must await federal habeas corpus relief on one ground merely because the other ground should have been presented to the State courts." Brief for Petitioner 2. Petitioner apparently attributes the refusal of the Court of Appeals to rule on the merits of his second claim to its conclusion that petitioner was required again to submit his first claim to the state courts. Since we have held that petitioner's claim of statutory invalidity need not be presented again to the

[6] We are not presented with a case "in which an intervening change in federal law cast the legal issue in a fundamentally different light." *Picard* v. *Connor,* 404 U. S. 270, 276 (1971).

state courts before being adjudicated by the federal habeas court, the case in its present posture no longer presents the question framed by petitioner, and we have no occasion to address it.

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

Reversed and remanded.

SAXBE, ATTORNEY GENERAL, ET AL. *v.* BUSTOS ET AL.

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

No. 73–300. Argued October 17, 1974—Decided November 25, 1974*

Some aliens who live in Mexico and Canada commute to work in the United States. The Immigration and Naturalization Service has approved this practice with respect to both daily and seasonal commuters, and has classified such aliens as immigrants "lawfully admitted for permanent residence" who are "returning from a temporary visit abroad," a category of "special immigrant" defined by the Immigration and Nationality Act, 8 U. S. C. § 1101 (a)(27)(B). Those with that classification have freedom from usual documentation and numerical requirements and from the labor certification requirements of 8 U. S. C. § 1182 (a)(14). Certain farmworkers and a collective-bargaining agent for farmworkers brought this suit for declaratory and injunctive relief against the practice of thus classifying such alien commuters. The District Court dismissed the action. The Court of Appeals upheld the classification as to daily commuters but rejected it as to seasonal commuters. *Held:* Alien commuters are immigrants who are "lawfully admitted for permanent residence," and are "returning from a temporary visit abroad" when they enter the United States, and this "special immigrant" classification is applicable to both daily and seasonal commuters. This has long been the administrative construction of the statute in the context of alien commuters, a factor which must be accorded great weight when, as here, Congress has considered the subject and has not seen fit to alter the administrative practice. Pp. 69–80.

156 U. S. App. D. C. 304, 481 F. 2d 479, affirmed in part and reversed in part.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 80.

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*Together with No. 73–480, *Cardona et al.* v. *Saxbe, Attorney General, et al.*, also on certiorari to the same court.

Mark L. Evans argued the cause for petitioners in No. 73–300 and respondents in No. 73–480. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Deputy Solicitor General Lafontant, Jerome M. Feit,* and *Charles Gordon.*

Bruce J. Terris argued the cause for respondents in No. 73–300 and petitioners in No. 73–480. With him on the brief were *John W. Karr* and *Joseph Onek.*†

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Some aliens who have their homes in Canada or Mexico commute *daily* to places of employment in this country and others do so on a *seasonal* basis, a practice permitted by the Immigration and Naturalization Service. The question is whether the practice on the facts of these cases conforms with the Immigration and Nationality Act. It turns on the meaning of § 101 (a)(27)(B), 66 Stat. 169, as amended, 79 Stat. 916, 8 U. S. C. § 1101 (a)(27)(B), which defines as one variety of "special immigrant" an immigrant "lawfully admitted for permanent residence, who is returning from a temporary visit abroad."

Those who qualify under § 1101 (a)(27)(B) may be permitted entry without the usual documentation requirements. 8 U. S. C. § 1181 (b). The regulations [1] implement § 1181 (b) by allowing such an immigrant to use an alien registration receipt card, normally called a "green card," in lieu of an immigrant visa and without

†Briefs of *amici curiae* were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations; by *Ronald H. Bonaparte, John A. Joannes, Milton C. Gelenian, Thomas F. Olson,* and *Allen Lauterbach* for the American Farm Bureau Federation et al.; and by *Richard D. Maltzman* and *Philip B. Bass* for Bud Antle, Inc.

[1] 8 CFR § 211.1 (b)(1).

regard to numerical limitations [2] if he is "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year."

The Act presumes that an alien is an immigrant "until he establishes . . . that he is entitled to a nonimmigrant status"; [3] and it defines "immigrant" as every alien who cannot bring himself into an enumerated class of nonimmigrants.[4] One class of nonimmigrants [5] is "an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country."

An alien does not qualify as a *nonimmigrant* under this class of nonimmigrants if he seeks to perform temporary labor at a time when unemployed persons capable of performing that labor can be found in this country.[6] If he cannot qualify as a nonimmigrant some other way, such an alien is subject to the Act's numerical limitations, unless he is included in the classes of "immediate relatives" of a United States citizen or "special immigrants." [7] On the other hand, as already noted, one variety of "special immigrant" is an alien "lawfully admitted for permanent residence, who is returning from a temporary visit abroad." [8] One who so qualifies is excluded

[2] 8 U. S. C. §§ 1181 (a) and 1151–1153.

[3] § 1184 (b).

[4] § 1101 (a)(15).

[5] § 1101 (a)(15)(H). Legislation proposed in 1973 would limit the stay of these nonimmigrants to one year with possible extension to two years. H. R. Rep. No. 93–461, p. 16 (1973).

[6] 8 U. S. C. § 1101 (a)(15)(H)(ii).

[7] § 1151 (a).

[8] § 1101 (a)(27)(B). The 1973 House Report, *supra*, n. 5, at 16, recognizes the difference between a "special immigrant" and nonimmigrants covered by § 1101 (a)(15)(H).

from the labor certification provisions in 8 U. S. C. § 1182 (a)(14).[9] The term "lawfully admitted for permanent residence" is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant . . . , such status not having changed." [10] An alien achieves that *status* in the first instance by complying with any applicable numerical limitations and with the Act's other requirements for admission, details not important here. After his initial admission on that basis, he is free to leave this country temporarily and to re-enter without regard to numerical limitations. The Act authorizes the Attorney General to re-admit such an alien without a visa or other formal documentation. § 1181 (b). He has exercised that authority, allowing such an immigrant to return with what was called in the briefs and oral argument the "green card."

This suit was brought by the United Farm Workers Organizing Committee [11] for declaratory and injunctive

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[9] Title 8 U. S. C. § 1182 (a)(14) provides:

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . . . .

"(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed."

[10] § 1101 (a)(20).

[11] A collective-bargaining agent for farmworkers. Two farm laborers were also plaintiffs and four more intervened in the District

relief against the practice of giving alien commuters the documentation and labor certification benefits of classification as immigrants "lawfully admitted for permanent residence" who are "returning from a temporary visit abroad." [12] The District Court dismissed the action without opinion. The Court of Appeals held that the admission of *daily* commuters was proper but that the admission of *seasonal* commuters was not, 156 U. S. App. D. C. 304, 481 F. 2d 479 (1973). We granted the petition and cross-petition in light of a conflict between the decision below and that of the Court of Appeals for the Ninth Circuit in *Gooch* v. *Clark,* 433 F. 2d 74 (1970).

Our conclusions are that commuters are immigrants, that they are "lawfully admitted for permanent residence," and that they are "returning from a temporary visit abroad" when they enter the United States. Moreover, the wording and legislative history of the statute and the long administrative construction indicate that the same treatment is appropriate for both daily and seasonal commuters. Commuters are thus different from those groups of aliens who can be admitted only on certification by the Secretary of Labor that unemployed persons cannot be found in this country and that the employment of the aliens "will not adversely affect the wages and working conditions of the workers in the United States." 8 U. S. C. § 1182 (a)(14). We thus agree with the con-

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Court. The parties herein are referred to as they were in the District Court.

[12] In the District Court and the Court of Appeals plaintiffs also argued that 8 CFR § 211.1 (b)(1) should be read to preclude the entry of a commuter to work at a place where a labor dispute exists, even if the commuter has previously been employed there. This claim was not decided by the Court of Appeals and was not presented in plaintiffs' petition for certiorari. Hence we offer no views on the merits of this claim.

clusion of the Ninth Circuit in *Gooch*. Accordingly, we affirm the judgment now before us as respects *daily* commuters and reverse it as respects *seasonal* commuters.

A main reliance of plaintiffs is on the provision of the Act [13] which in the much-discussed subsection (15)(H)(ii) provides that one category of alien nonimmigrant is "an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." Under the argument tendered, these alien commuters partially meet the definition of nonimmigrants in subsection (15)(H)(ii) in that they have a foreign residence which they do not intend to abandon and come here temporarily to perform temporary service, but fail to satisfy subsection (15)(H)(ii) completely in that they do not show that unemployed people capable of performing the services cannot be found in this Nation. That should invoke the presumption in the Act, already noted, that an alien is an immigrant until or unless he proves he is a nonimmigrant.[14]

We agree, moreover, with the Ninth Circuit that this provision "was intended to confer nonimmigrant status on certain aliens who were needed in the American labor force but who, unlike commuters, would be unable to achieve admittance under immigrant status." 433 F. 2d, at 78. The administrative construction of this subsection (15)(H)(ii) by the Immigration Service [15] has been that it does not cover an alien, like the commuter, who has a "permanent residence" here and who comes to perform a job of a permanent character, even though the

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[13] 8 U. S. C. § 1101 (a)(15)(H).

[14] § 1184 (b).

[15] *Matter of Contopoulos*, 10 I. & N. Dec. 654 (1964).

period of his service is limited. To repeat, the Act provides that "[e]very alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer . . . and the immigration officers . . . that he is entitled to a nonimmigrant status under section 1101 (a) (15)." [16] Before an alien can be classified as a *nonimmigrant* under subsection (15)(H)(ii) his prospective employer must submit a petition on his behalf under 8 U. S. C. § 1184 (c); and after the INS approves the petition, the alien must apply for *nonimmigrant* status and demonstrate that he in fact qualifies for that status.[17]

We conclude that commuters are not nonimmigrants under subsection (15)(H)(ii). None of the other categories of nonimmigrants are applicable, and thus under § 1184 (b) the commuters are immigrants.

The fact that an alien commuter who has not shown he must be classified as a *nonimmigrant* must be classified as an immigrant is not the end of our problem. The question remains whether he may properly be treated as one who is in the group defined as "special immigrants" under subsection (27)(B),[18] that is, whether commuters are "lawfully admitted for permanent residence" when they have no actual residence in this country.

Section 1101 (a)(20) defines "lawfully admitted for permanent residence" as "the *status* of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, such *status* not having changed" (italics added). The definition makes the phrase descriptive of a *status* or *privilege* which need not be reduced to a permanent residence to be satisfied, so long as that *status* has not changed.

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[16] 8 U. S. C. § 1184 (b).

[17] 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.14b (rev. ed. 1974).

[18] The subsection is in 8 U. S. C. § 1101 (a).

One argument of the plaintiffs is that the *status* has changed because residence in this country was never claimed. But we read the Act as did the Ninth Circuit in the *Gooch* case to mean that the change in *status* which Congress had in mind was a change from an immigrant lawfully admitted for permanent residence to the status of a *nonimmigrant* pursuant to 8 U. S. C. § 1257. 433 F. 2d, at 79.

The *status* referred to in § 1101 (a)(20) is acquired when an alien satisfies (1) any numerical limitations on the entry of immigrants,[19] (2) requirements as to qualitative matters such as health, morals, and economic status,[20] and (3) the need for an immigrant visa.[21] The applicant must also state whether he plans to remain in the United States permanently.[22] But the Act does not declare or suggest that the *status* will be denied him, if he does not intend to reside permanently here. As we read the Act, the "*status*" acquired carries several important privileges: He may remain in the United States indefinitely; he is free to work in this country; he may return to this country after a temporary absence abroad; and he has the privilege of establishing a permanent residence in the United States.

Thus we conclude that commuters are immigrants "lawfully admitted for permanent residence." As did both the majority and dissent in *Gooch,* we also find that commuters can be viewed as "returning from a temporary visit abroad." 433 F. 2d, at 79–81, 82 n. 1. The court below so agreed as respects daily commuters, disagreeing only as to seasonal commuters. Neither the court below nor the Court of Appeals in *Gooch* took the position now taken in dissent here.

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[19] 8 U. S. C. § 1151 (a).

[20] § 1182.

[21] §§ 1181 (a), 1201.

[22] § 1202 (a).

Our conclusion reflects the administrative practice, dating back at least to 1927 when the Bureau of Immigration was a part of the Department of Labor.[23] In 1940 the Bureau was transferred to the Department of Justice [24] where it remains today. On April 1, 1927, it issued General Order No. 86.[25] Under the order, commuters were

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[23] See 32 Stat. 826; 34 Stat. 596; c. 141, 37 Stat. 736.

[24] By then it was called the Immigration and Naturalization Service. Reorganization Plan No. V, 54 Stat. 1238.

[25] General Order No. 86 reads as follows:

"Subject: Land border crossing procedure

"1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the 'immigrant' class.

"2. However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessible [*sic*] on aliens entering permanently at the time of original admission and, provided further, that they are not coming to seek employment.

"A. Aliens whose original admission occurred prior to June 3, 1921.

"B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.

. . . . .

"3. Aliens of all nationalities of the 'immigrant' class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the 'immigrant' class. Aliens of this class already enjoying the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from July 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.

"4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.

"5. Aliens who have complied with the requirements of this General

required to gain admission as immigrants before they could have border crossing privileges. The order provides that "[a]liens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence." "Thus," said the Court of Appeals in the instant cases, "the daily commuter was born," 156 U. S. App. D. C., at 304, 481 F. 2d, at 485.

This longstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language. *Massachusetts Trustees* v. *United States,* 377 U. S. 235 (1964); *United States* v. *Midwest Oil Co.,* 236 U. S. 459 (1915). As the defendants below acknowledge, the meaning of the phrase "lawfully admitted for permanent residence" in § 1101 (a)(27)(B) may not be identical to the meaning of the same language in other sections of the

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Order governing permanent admission will be considered as having entered for permanent residence.

"6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.

"7. Identification cards held by or issued to aliens of the 'immigrant' class shall be rubber-stamped as follows:

"IMMIGRANT

. . . . . .

"10. All identification cards heretofore issued, held by aliens who cannot, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.

. . . . . .

"12. The status of holders of identification cards shall be inquired into periodically . . . . When the holder of a 'nonimmigrant' identification card qualifies as an 'immigrant,' a new identification card shall be issued, stamped to show the correct status."

Act where the same history of administrative construction is not present.

We see no difference in the treatment of *daily* commuters and *seasonal* commuters. The status of the *seasonal* commuter is the same as the status of the *daily* commuter because the identical statutory words cover each. The Court of Appeals, however, rested essentially on a different legislative history of *seasonal* commuters than had obtained in cases of *daily* commuters.

Prior to 1917 there were essentially no limitations on the practice of commuting from Mexico or Canada to the United States. Legislation was passed in 1917, 1921, and 1924.[26] But under those statutes commuters remained able freely to cross the border subject only to qualitative restrictions in the 1917 Act.

As already noted, the administrative approach changed in 1927 when the Bureau of Immigration issued its General Order No. 86. While the 1952 Act, 66 Stat. 163, made no mention of commuters and while the 1965 amendments of the 1952 Act, 79 Stat. 911, were likewise silent as respects commuters, the Court of Appeals assumed that the longstanding practice of allowing *daily* commuters was not repealed *sub silentio;* and we agree. The Court of Appeals, however, took quite a different view of the *seasonal* commuter problem because of its different history.

The *seasonal* commuter problem dates back at least to 1943 when this Government and Mexico agreed to the seasonal importation of Mexican agricultural workers. 56 Stat. 1759. Congress legislated on the problem in 1951,[27] requiring farmers in this Nation to make reasonable efforts to attract domestic workers prior to certification by the Secretary of Labor of the need for foreign labor.

[26] C. 29, 39 Stat. 874; 42 Stat. 5; c. 190, 43 Stat. 153.

[27] 65 Stat. 119.

That was known as the *bracero* program and the Court of Appeals called the *seasonal* commuter merely a new name for the former *bracero*. That is quite inaccurate. The *braceros* were at the start *nonimmigrants;* the *seasonal* commuters were immigrants. Some *braceros,* indeed quite a few, H. R. Rep. No. 722, 88th Cong., 1st Sess., 7 (1963), acquired permanent residence status. The *seasonal* commuter, like the *daily* commuter, has always been in that category.

In 1964 the *bracero* type of *seasonal* program lapsed; and the next year Congress amended the Immigration and Nationality Act by making stricter the certification by the Secretary of Labor of the need for foreign labor and requiring findings on the lack of any adverse effect of the employment of aliens on the wages and working conditions of workers in this country.

But that provision, which we have quoted,[28] does not apply to aliens lawfully admitted for permanent residence returning from a temporary visit abroad and to certain close relatives. An alien who first sought admission *after the effective date of the 1965 Amendment* would need a certificate of the Secretary of Labor; but if he already was an alien lawfully admitted to the United States for permanent residence and returning from a temporary visit abroad, the 1965 amendments would not affect him. The purpose of Congress was to limit *new* admissions of alien laborers, not to prejudice the *status* of aliens who, whether *daily* or *seasonal* commuters, had acquired permanent residence here and were returning to existing jobs.[29]

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[28] N. 9, *supra.* See 1 Gordon & Rosenfield, *supra,* n. 17, § 2.40.

[29] We find in the reports on the 1965 Act no suggestion that the commuter program was to be uprooted in its entirety, S. Rep. No. 748, 89th Cong., 1st Sess. (1965). That report emphasizes the purpose to prevent an "influx" of foreign labor, not to destroy existing labor arrangements. *Id.,* at 15.

We have mentioned General Order No. 86 issued on April 1, 1927, which treated the commuters as immigrants (not *nonimmigrants*), who on obtaining their admission cards would be "considered as having entered for permanent residence." [30] Cf. *Karnuth* v. *United States ex rel. Albro,* 279 U. S. 231, 244 (1929).[31] The thrust of General Order No. 86 was to lift aliens who were natives of Canada and Mexico from the quota provisions for *nonimmigrants.* Thus, they entered from that time down to date, with nonquota immigration documents. That regulation was carried forward in various regulations before 1952.[32] The practice was reviewed and sustained in various published administrative decisions.[33] Some suggested that the 1952 Act eliminated the alien commuter. The Board of Immigration Appeals, however, reaffirmed the validity of the practice. *Matter of H ——— O ———,* 5 I. & N. Dec. 716 (1954). Thereafter repeated administrative decisions [34] affirmed the adherence to the alien-commuter concept. We do not labor the administrative construction phase of these cases further, because when the 1952 Act was reported, the Senate Judiciary Committee tendered a voluminous report of

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[30] For the text of General Order No. 86 see n. 25, *supra.*

[31] The aliens in *Karnuth* wanted to be treated as nonimmigrants. One of the categories of nonimmigrants under § 3 of the Immigration Act of 1924, 43 Stat. 154, was defined as "an alien visiting the United States temporarily . . . for business or pleasure." The Court held they did not qualify as laborers for hire.

[32] Immigration Rules and Regulations, Jan. 1, 1930, Rule 3, Subd. C; 8 CFR § 3.6 (1939); 8 CFR § 110.6 (1947).

[33] *Matter of D ——— C ———,* 3 I. & N. Dec. 519 (1949); *Matter of L. ———,* 4 I. & N. Dec. 454 (1951).

[34] *Matter of M ——— D ——— S ———,* 8 I. & N. Dec. 209 (1958); *Matter of Bailey,* 11 I. & N. Dec. 466 (1966); *Matter of Burciaga-Salcedo,* 11 I. & N. Dec. 665 (1966); *Matter of Gerhard,* 12 I. & N. Dec. 556 (1967); *Matter of Wighton,* 13 I. & N. Dec. 683 (1971); *Matter of Hoffman-Arvayo,* 13 I. & N. Dec. 750 (1971).

nearly 1,000 pages touching on the alien commuters, describing the practice in some detail, and including the sections which we have discussed in this opinion. The commuters from Canada and Mexico were treated as lawfully admitted immigrants. No doubt as to the desirability of the practice was expressed. It is clear that S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) (the Omnibus Study Report), reveals a congressional acceptance of the system.

The changes relevant to commuters in the 1965 amendments were, as stated in *Gooch,* minor and technical and contain no suggestion of a change in the commuter problem, 433 F. 2d, at 80–81. H. R. Rep. No. 745, 89th Cong., 1st Sess. (1965); S. Rep. No. 748, 89th Cong., 1st Sess. (1965).

Since 1965 there have been numerous reports by committees of the Congress on the alien commuter problem which indicate that Congress is very knowledgeable about the problem and has not reached a consensus that the administrative policy reaching back at least to General Order No. 86 is wrong. We know from the Western Hemisphere Report [35] that the dimensions of the problem are considerable. Daily commuters from Mexico number more than 42,000 of whom 25,000 are engaged in occupations other than agriculture. The total of Canadian commuters exceeds 10,000. Seasonal commuters number at least 8.300 according to the Service's estimate. The United States Commission on Civil Rights estimates that if Mexican commuters were cut off, they would lose $50

[35] Report of Select Commission on Western Hemisphere Immigration 104 (1968). See S. Rep. No. 91–83, p. 65 (1969), stating that the alien commuter problem "can be resolved not by drastically putting an end to the commuter system, but by refining its current operations." See Hearings on H. R. 9112, H. R. 15092, H. R. 17370 before Subcommittee No. 1 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 205–207.

million annually.[36] The State Department estimates there are 250,000 family members dependent on income earned by commuters [37] and that commuters account for 25% to 30% of the income earned by the labor force in some Mexican border communities.[38] Termination of the alien commuter practice might well have a great impact on American border communities because the Mexicans who have the *status* of permanent residents could settle here, increasing the problems of housing and education in the border towns this side of the Rio Grande. Former Secretary of State Rogers submitted to the District Court an affidavit stating that any "sudden judicial termination of the commuter system, displacing the present immigrant commuters, would have a serious deleterious effect upon our relations with both Mexico and Canada."

Our conclusion is twofold. First, the provisions of the Act which sanction *daily* commuters are the ones that also support *seasonal* commuters. We would have to read the same language in two opposed ways to sanction the *daily* commuter program and strike down the *seasonal* commuter program. There is no difference in administrative treatment of the two classes of commuters.

Second, if alien commuters are to be abolished or if *seasonal* commuters are to be treated differently from *daily* commuters, the Congress must do it. The changes suggested implicate so many policies and raise so many problems of a political, economic, and social nature that it is fit that the Judiciary recuse itself. At times judges must legislate "interstitially" to resolve ambiguities in

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[36] Stranger in One's Land 12 (Clearinghouse Publication No. 19, 1970).

[37] Statement of Assistant Secretary of State Oliver to the Senate Subcommittee on Immigration, Sept. 25, 1967, p. 6.

[38] *Id.*, at 4.

laws. But the problem of taking all or some alien commuters engaging in farm work out of the Act is not "interstitial" or, as Mr. Justice Holmes once put it, "molecular." [39] It is a massive or "molar" action for which the Judiciary is ill-equipped.

We affirm the Court of Appeals insofar as it held *daily* commuters are lawfully admitted and reverse it insofar as *seasonal* commuters are concerned.

So ordered.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, dissenting.

The Court, in reaching an interpretation of the immigration statutes which permits a finding that daily and seasonal commuters from Mexico and Canada are "special immigrants" not subject to documentation and numerical restrictions upon entry to this country, contravenes one of the cardinal principles of statutory construction: "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315 (1933) (Cardozo, J.). Administrative construction over a long period of time is an available tool for judicial interpretation of a statute *only* when the statutory terms are doubtful or ambiguous. *United States* v. *Southern Ute Indians,* 402 U. S. 159, 173 n. 8 (1971); *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 52 (1939); *Norwegian Nitrogen Products Co.* v. *United States, supra.* In light of the characteristics of the aliens whose status is in question and the ordinary meaning of

[39] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 221 (1917) (dissenting opinion).

the very specific terms Congress used in these immigration statutes, this principle applies with force here.

I

Daily and seasonal commuters both reside *in fact* in either Mexico or Canada and cross the border into this country either daily or seasonally to work.[1] The daily commuter's defining characteristic is his limited presence in this country; he comes across the border to work each day and returns to his actual dwelling place in Mexico or Canada when his work is done. The seasonal commuter, in contrast, remains in this country continuously during the seasons in which he works here, but then absents himself completely for the remaining portions of the year. For the Court to reach its result, it must undertake the unlikely project of demonstrating that these aliens are in legal effect *permanent residents* of the United States under the immigration laws.

To qualify as a "special immigrant" given dispensations from normal documentation requirements and numerical limitations, a commuter must be "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." 8 U. S. C. § 1101 (a)(27)(B). The included phrase "lawfully admitted for permanent residence" means in turn "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." § 1101 (a)(20). The immigration laws define "perma-

[1] Counsel for the federal parties (hereinafter the Government) indicated at oral argument that commuters actually form a spectrum rather than two hard-and-fast categories. Some commuters stay in this country for whole seasons and then switch later to daily commuting. Some daily commuters come across the border less regularly than every workday, and sometimes seek only temporary employment and switch employers. Tr. of Oral Arg. 18, 52, 54.

nent residence" as "the place of general abode," a person's "principal, actual dwelling place in fact, without regard to intent," § 1101 (a)(33), with the relationship of the person to the place of residence being "of continuing or lasting nature, as distinguished from temporary . . . ." § 1101 (a)(31). Under the Immigration and Naturalization Service's own regulations, in order to be exempt from the normal documentation requirements upon entry, an alien must be returning to his "unrelinquished lawful permanent residence" from a "temporary absence abroad." 8 CFR § 211.1 (b)(1). On its face, the present practice of the Service is flatly contrary to its own regulation.

Confronted with the obvious difficulty that this statutory language defining permanent resident status and the regulations will not accommodate the daily and seasonal commuters,[2] the majority, without the aid of legislative history, contends that these plain words should be given special, technical meanings:

> "Section 1101 (a)(20) defines 'lawfully admitted for permanent residence' as 'the *status* of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, such *status* not having changed' (italics added). The definition makes the phrase descriptive of a *status* or *privilege* which need not be reduced to a permanent residence

[2] Strain between the statute and the administrative practice is also evident in the need for the Government to fit the daily commuter's trip each day from his *home* in Mexico or Canada to his workplace in this country as a return to this country "from a temporary *visit abroad*." 8 U. S. C. § 1101 (a)(27)(B) (emphasis added). As indicated in the text, the regulations refer to a return to "an unrelinquished lawful permanent residence" in this country from "a temporary absence abroad . . . ." 8 CFR § 211.1 (b).

to be satisfied, so long as that *status* has not changed." *Ante,* at 71 (italics supplied by the Court).

The use of italics will not alter the ordinary meaning of the statutory terminology, however, and the Court gives no basis for believing that Congress intended something other than the ordinary meaning of the words it used. No one could reasonably suggest that Congress was seeking to accommodate the commuters when it enacted these definitions and to provide special status to those who do not reside and do not intend to reside in this country. Clearly it was dealing with those aliens who seek permanent-resident status in this country and who fulfill that intention.

Since the language of the statute simply will not bend to allow the proposition which the Government and the Court adopt—that in defining "lawfully admitted for permanent residence" Congress meant to include persons who have never intended to reside permanently in this country, who do not currently reside in this country, and who never will become actual permanent residents [3]—the ultimate rationale for the decision must be that the plain

[3] In an effort to make the facts fit the statute, the Court of Appeals found that the commuter's place of work could be considered his permanent residence. 156 U. S. App. D. C. 304, 311, 481 F. 2d 479, 486 (1973). Others have noted the "logical inconsistency" and the lack of a precise fit between the practice and the law but have justified the discordance by citing "practical needs and considerations of foreign policy." 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.19, p. 2–105 (1973 Cum. Supp.). The practice has been viewed as an "amiable fiction" and the product of "administrative ingenuity." *Id.*, § 2.8b, p. 2–43 (1974). The Board of Immigration Appeals has similarly acknowledged that the commuter practice "manifestly does not fit into any precise category found in the immigration statutes" and that "[t]he status is an artificial one, predicated upon good international relations maintained and cherished between friendly neighbors." *Matter of M* ——— *D* ——— *S* ———, 8 I. & N. Dec. 209, 213 (1958).

meaning of the statute has been changed by a longstanding administrative practice accepted by Congress as the appropriate construction.[4]

II

Administrative construction of a statute which conflicts with the express meaning of the statutory terms can be viewed as authoritative only if it appears that Congress has in fact accepted that construction, and the burden of proof necessarily is on the proponent of the administrative view. Since "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis," *Zuber* v. *Allen*, 396 U. S. 168, 185–186, n. 21 (1969), congressional silence standing alone cannot constitute congressional acceptance of a continuing administrative practice. The Court, however, elevates such silence to acquiescence by stressing proof of the practice and the absence of any indication that Congress has "repealed" it. *Ante*, at 75.

The administrative practice of treating daily commuters as immigrant aliens began in 1927 with the Depart-

[4] The effect of the Court's decision is not only to stretch the meaning of the statute so as to include commuters within the permanent resident status, but also to throw into question the meaning of "permanent resident" throughout the immigration laws with obvious anomalous consequences. See *Gooch* v. *Clark*, 433 F. 2d 74, 83–85 (CA9 1970) (Wright, J., dissenting). For example, the "spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence" are included in the second preference group for immigration visas. 8 U. S. C. § 1153 (a)(2). Thus a commuter's immediate kin are perhaps eligible for a preference although the commuter may himself have been entitled to no preference. The Government suggests that the commuter's status for other purposes is not before the Court and need not be decided. Brief for Federal Parties 28. But the Court should be reluctant to accept an invitation to make an *ad hoc* decision with respect to one aspect of a statutory definition where it is clear that the definition is a central one which Congress has provided with the intent of having it applied generally.

ment of Labor's General Order No. 86.[5] Since Mexicans and Canadians were not subject to numerical limitations on entry into this country, this classification of the commuters had no practical effect upon them; informal documentation requirements were followed.[6] It was not until 1952 that Congress enacted a provision which could have limited the entry of commuters. Under § 212 (a)(14) of the 1952 Act, 66 Stat. 183, Congress provided that an immigrant could not enter if the Secretary of Labor certified that there were sufficient domestic workers available in his field of work or that his entry would have an adverse impact on the wages or working conditions of domestic workers. In 1965, Congress tightened this restriction by providing that aliens were inadmissible unless the Secretary of Labor certified that there were insufficient domestic workers available in the field and that the employment of aliens would not adversely affect wages and conditions of American workers. 8 U. S. C. § 1182 (a)(14).[7] In another 1965 amendment, Congress

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[5] See the relevant text of General Order No. 86, *ante,* at 73–74, n. 25.

[6] The Court's opinion suggests that General Order No. 86 removed commuters from quota restrictions applicable to nonimmigrants. *Ante,* at 77. But Mexican and Canadian commuters had not been subject to any quotas. The Immigration Act of 1924 imposed no quotas on nonimmigrants, and Mexicans and Canadians were not subject to immigrant quotas. 43 Stat. 153. The General Order was designed primarily to prevent *quota* aliens from entering this country through Canada and Mexico as nonimmigrants. Letter from Secretary of Labor, dated Nov. 26, 1928, in App. A of H. R. Rep. No. 2401, 70th Cong., 2d Sess., 5–10 (1929). Informal documentation was maintained despite the classification of the commuters as immigrants because the immigration authorities did not view Congress as intending to interfere with the practice of border crossings by commuters. Report of Select Commission on Western Hemisphere Immigration 101–102 (1968).

[7] The Secretary of Labor has not issued a certification allowing the entry of aliens seeking employment as farm laborers. 29 CFR §§ 60.2 (a)(2), 60.7 (Schedule B).

imposed the first quota on immigration from the Western Hemisphere, effective in 1968.[8]

There can be no reasonable presumption, therefore, that prior to 1952 Congress concerned itself with the propriety of the administrative classification of daily commuters under the immigration statutes.[9] Only with the passage of the 1952 legislation and subsequent amendments was there evidence of some possible concern on the part of Congress with the number of Mexican and Canadian aliens entering this country to work. Thus if Congress both expressed concern at the influx of alien workers but approved the commuter practice, then the Court's conclusion of congressional acquiescence in the administrative construction would have some persuasive force. Since that construction conflicts with the meaning of the statute on its face, however, something more than silence is required to establish acquiescence. Cf. *Leary* v. *United States*, 395 U. S. 6, 24–25 (1969). The only evidence of congressional acceptance cited by the Court is a brief description of the prior practice with respect to commuters contained in an extremely extensive report of an investigation of this Nation's immigration system published by the Senate Judiciary Committee in 1950.[10]

[8] § 21 (e), 79 Stat. 921.

[9] The Government refers to the inclusion in an early draft of a House bill, H. R. 5138, which ultimately became the Alien Registration Act of 1940, of a provision which would have prohibited any alien from entering this country from Mexico or Canada for the purposes of working or seeking employment. Hearing on H. R. 5138 before Subcommittee No. 3 of the House Committee on the Judiciary, 76th Cong., 1st Sess., ser. 3, p. 3 (1939). The deletion of that provision prior to the reporting of the bill does not signal congressional approval of the administrative classification of commuters, but rather, as with the absence of quotas restricting the entry of Mexicans and Canadians, an unwillingness to restrict such entry which persisted at least until 1952.

[10] S. Rep. No. 1515, 81st Cong., 2d Sess., 535–536, 616 (1950).

The fact that "[n]o doubt as to the desirability of the practice was expressed," *ante,* at 78, will not overcome the fact that the terms of the statute passed two years later are incompatible with that practice, and neither the Court nor the Government can point to any express congressional acceptance of that practice in spite of the incompatibility.[11] The Court does say that since 1965 there have been numerous committee reports indicating congressional knowledge of the commuter problem and that Congress "has not reached a consensus that the administrative policy . . . is wrong." *Ibid.* But the Court has clearly, and erroneously, placed the burden upon Congress to show that it has not accepted the practice rather than on the administrative agency to establish that Congress has acquiesced.

Very recently, in noting an exception to the principle of giving great weight to an administrative construction of a statute, we said that "an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *FMC* v. *Seatrain Lines, Inc.,* 411 U. S. 726, 745 (1973). But the Court has allowed an agency to do so in this case.[12]

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[11] The Government concedes that the seasonal commuter practice grew after the *bracero* program had lapsed. Tr. of Oral Arg. 53; Brief for Federal Parties 75. See also Gordon, The Amiable Fiction—Alien Commuters Under Our Immigration Laws, in Employment of "Green Card" Aliens During Labor Disputes, Hearings on H. R. 12667 before the Special Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st Sess., 181, 183 (1969). Therefore, there is even less reason for believing that Congress acquiesced in the administrative classification of seasonal commuters.

[12] The majority cites *Massachusetts Trustees* v. *United States,* 377 U. S. 235 (1964), and *United States* v. *Midwest Oil Co.,* 236 U. S. 459 (1915), in support of its rationale of statutory construction. *Ante,* at 74. A comparison of the statutes and facts of those cases

III

The majority acknowledges the many political, economic, and social implications of the issues in this case and the need for the Court to legislate only when interstitial ambiguities in a statute require resolution, but it then rests its rejection of these unambiguous provisions of the immigration laws upon legislative considerations: the economic consequences to the alien commuters and to their communities of finding that the administrative practice is not consistent with the statute, the possible impact upon American border communities if those commuters who are legally capable of doing so choose to

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with the situation here, however, graphically reveals the extent of the majority's departure from accepted canons of construction.

In *Massachusetts Trustees* the Court was faced with the problem of harmonizing apparently inconsistent sections of the same statute governing an agency's authority. The literal language of the statute was found insufficiently precise to dispose of the question. Under these circumstances, the Court looked to the agency's practice, which could be given "some weight"; but the successive extensions by Congress of the agency's authority in the face of the agency's prior practice was not, even then, to be controlling. 377 U. S., at 241–245.

In *Midwest Oil Co.* the Presidential power to withdraw public lands from private acquisition which Congress by legislation had made free and open to occupation and purchase was found in the hundreds of such withdrawal orders, beginning in the early years of the Government, which had not been repudiated by Congress. In addition, the Executive Order in question was issued seven years after the Secretary of the Interior, in response to a resolution of the Senate calling for information as to the authority for such withdrawals, sent to the Senate a report which cited the longstanding practice and the Executive's claim of authority. Congress took no action to repudiate that claim. Legislation soon after the order in question authorized such withdrawals by the President prospectively, expressed no intention on the part of Congress to repudiate past withdrawals, and left the question of the validity of past withdrawals to the courts. 236 U. S., at 469–471, 480–483. Nothing in this case remotely resembles the historical record upon which congressional acquiescence was premised in *Midwest Oil Co.*

take up actual residence in this country, and the need to avoid negative effects upon this country's relations with Mexico and Canada. *Ante*, at 78–79. But these interests, as well as the opposing interests of domestic labor, form part of the congressional calculus, and this Court is hardly equipped or authorized to predict by its decision the direction in which that balance of interests will ultimately tip. Because I believe that the Court has strayed from the neutral judicial function of applying traditional principles of statutory construction, I must respectfully dissent.

GONZALEZ *v.* AUTOMATIC EMPLOYEES CREDIT UNION ET AL.

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

No. 73–858. Argued October 21, 1974—Decided December 10, 1974*

Appellant brought this class action for injunctive and declaratory relief attacking the constitutionality of Illinois automobile repossession and resale statutory provisions and alleging that he had purchased a car on a retail installment contract later assigned to appellee bank which (assertedly without any default by appellant or notice to him) repossessed the car and resold it to a third party to whom title was transferred. A three-judge District Court held that appellant lacked "standing" to attack the constitutionality of the statutory scheme since the repossession and sale of the car had already taken place and that since appellant was allegedly not in default the complaint was directed, not at the constitutionality of the statutory provisions, but only at the bank's abuse of those provisions. Appellant sought review under 28 U. S. C. § 1253, which provides for an appeal to this Court from an order granting or denying an injunction in a civil action required by any Act of Congress to be heard and determined by a three-judge district court. Appellant contends, *inter alia,* that dismissal of his complaint "denied" him the injunctive relief that he sought, whereas appellee bank maintains that an injunction is not "denied" for purposes of § 1253 by a dismissal based on grounds short of a statute's constitutional validity. *Held:* When a three-judge district court denies a plaintiff injunctive relief on grounds that, if sound, would have justified dissolution of the court as to that plaintiff or a refusal to convene a three-judge court to begin with, review of the denial is available in the court of appeals; and since here the three-judge District Court's decision that the complaint was nonjusticiable for lack of "standing" was a ground upon which that court could have dissolved itself, leaving the complaint's disposition to a single judge, the Court of Appeals should determine

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*[Reporter's Note: This case was docketed under the caption shown. However, the Mercantile National Bank of Chicago is the appellee directly involved in the litigation before this Court and Automatic Employees Credit Union is no longer involved.]

the "standing" issue, which this Court has no jurisdiction under § 1253 to consider. Pp. 93–101.

363 F. Supp. 143, vacated and remanded.

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

James O. Latturner argued the cause and filed briefs for petitioner.

Albert E. Jenner, Jr., argued the cause for appellee Mercantile National Bank of Chicago. With him on the brief were *William B. Davenport, Keith F. Bode,* and *Daniel R. Murray.*

MR. JUSTICE STEWART delivered the opinion of the Court.

This is an appeal under 28 U. S. C. § 1253 from an order of a three-judge court dismissing the appellant's complaint for lack of "standing."[1] We deferred consideration of our jurisdiction until the hearing on the merits. 415 U. S. 947. For the reasons that follow, we have concluded that the District Court's order is not directly appealable to this Court.

I

The appellant Gonzalez and three other named plaintiffs brought a class action in the District Court attacking as unconstitutional various provisions of the Commercial Code and Motor Vehicle Code of Illinois governing repossession, retitling, and resale of automobiles purchased on an installment basis under security agreements.[2] The plaintiffs alleged that the statutory scheme violated a debtor-purchaser's rights—under the Fourteenth, Fourth, and Fifth Amendments to the United States Constitution—to notice, hearing, and impartial determination of contractual default prior to repossession of the car, trans-

[1] *Mojica* v. *Automatic Employees Credit Union,* 363 F. Supp. 143.

[2] Ill. Rev. Stat., c. 26, §§ 9–503 and 9–504, and Ill. Rev. Stat., c. 95½, §§ 3–114 (b), 3–116 (b), and 3–612.

fer of title to the secured party, or resale of the car by the secured party. The plaintiffs sought a declaratory judgment to this effect, a permanent injunction, and compensatory and punitive damages for past violations of their alleged constitutional rights. A three-judge court was convened pursuant to 28 U. S. C. § 2281.[3]

The named plaintiffs sought to represent the class of all debtor-purchasers, under security agreements involving motor vehicles, "who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State." The named defendants were the Secretary of State of Illinois, responsible for transferring title under the challenged statutes, and five organizations operating as secured creditors in the motor vehicle field. The complaint also designated a defendant class, consisting of all secured creditors who may, "upon their unilateral determination of default by debtor-obligees," seek to repossess, and to dispose of, motor vehicles under the challenged statutes.

The pleadings and supplementary documents showed that Gonzalez had purchased a car on a retail installment contract, which had later been assigned to the defendant-appellee, Mercantile National Bank of Chicago (Mercantile). Before Gonzalez joined this lawsuit, Mercantile had repossessed the car, resold it to a third party, and ar-

[3] Section 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

ranged a title transfer to that party through the office of the Secretary of State. The complaint alleged that all of this had been done without notice to Gonzalez, and that he had not in fact been in default under the installment contract. On the basis of these facts, the three-judge court dismissed the complaint.[4]

The court held that Gonzalez lacked "standing" to contest the constitutionality of the statutory scheme. First, the court observed that enjoining future enforcement of the scheme would be a "useless act" so far as Gonzalez was concerned, since the events of which he complained—the repossession and resale of his car—had already taken place.[5] Secondly, the court reasoned that the complaint, because it alleged that Gonzalez had not been in default, was directed, not at the constitutional validity of the statutory scheme, but only at Mercantile's abuse of the scheme. Noting that the statutory provisions authorized repossession and title transfer only upon default, and provided for injunctive relief and damages where creditors acted in the absence of default, the court held that Gonzalez lacked standing to litigate "the validity of these statutes when *properly* applied to debtors *actually in default.*" [6] The complaint was dismissed "[s]ince . . . all plaintiffs in this case fail to present a claim which can be reached on the merits." [7]

II

Appealing here individually and as a purported class representative, Gonzalez seeks reversal of the District

[4] Since only Gonzalez has sought review of the three-judge court's dismissal of the complaint, we confine our summary of that court's analysis to the specific facts of his case. The District Court's analysis was similar, however, with regard to each of the named plaintiffs.

[5] *Mojica* v. *Automatic Employees Credit Union, supra,* at 145–146.

[6] *Id.,* at 145.

[7] *Id.,* at 146.

Court's "standing" determination, and an order directing the reinstatement of his complaint. Our appellate jurisdiction is controlled by 28 U. S. C. § 1253:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Gonzalez' jurisdictional argument is very simple: The dismissal of his complaint did in fact "deny" him the permanent injunctive relief he requested, and the case was one "required . . . to be heard and determined" by three judges because the several conditions precedent to convening a three-judge court under 28 U. S. C. §§ 2281 and 2284 were met. That is, the constitutional question raised was substantial; [8] the action sought to enjoin a state official from executing statutes of statewide application; [9] and the complaint at least formally alleged a basis for equitable relief.[10]

Mercantile denies that all of these conditions were met, but places greater emphasis on an entirely different reading of § 1253. Mercantile argues that an injunction is not "denied" *for purposes of § 1253* unless the denial is based upon an adverse determination on the merits of the plaintiff's constitutional attack on the state statutes. In the present case, injunctive relief was denied, not because the court found the challenged statutes constitutionally sound, but only because the court found that Gonzalez lacked standing to make the challenge. Mercantile argues that a dismissal premised on grounds short of the constitutional merits should be reviewed in

[8] See *Goosby* v. *Osser,* 409 U. S. 512.

[9] See *Moody* v. *Flowers,* 387 U. S. 97.

[10] See *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713.

the first instance by the Court of Appeals, rather than by direct appeal to this Court.

It is an understatement to say that this argument is not wholly supported by precedent, for the fact is that the Court has on several occasions entertained direct appeals from three-judge-court orders denying injunctions on grounds short of the merits.[11] But it is also a fact that in the area of statutory three-judge-court law the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight. These procedural statutes are very awkwardly drafted,[12] and in struggling to make workable sense of them, the Court has not infrequently been induced to retrace its steps.[13] Writing

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[11] Cases in which the District Court had denied injunctive relief for want of standing, or of justiciability generally: *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U. S. 73; *Baker* v. *Carr,* 369 U. S. 186; *Flast* v. *Cohen,* 392 U. S. 83; *Richardson* v. *Kennedy,* 401 U. S. 901; *Granite Falls State Bank* v. *Schneider,* 402 U. S. 1006. Cases where denial was for want of subject-matter jurisdiction: *Lynch* v. *Household Finance Corp.,* 405 U. S. 538; *Carter* v. *Stanton,* 405 U. S. 669. Cases where denial was on grounds of abstention or for want of equitable jurisdiction: *Doud* v. *Hodge,* 350 U. S. 485; *Zwickler* v. *Koota,* 389 U. S. 241; *Mitchum* v. *Foster,* 407 U. S. 225; *American Trial Lawyers Assn.* v. *New Jersey Supreme Court,* 409 U. S. 467.

[12] Perhaps the oddest feature of § 1253 is that it conditions this Court's appellate jurisdiction on whether the three-judge court was correctly convened. But the Court has abjured this literalistic reading of the statute and has not hesitated to exercise jurisdiction "to determine the authority of the court below and 'to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes.'" *Bailey* v. *Patterson,* 369 U. S. 31, 34, quoting *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 18.

[13] For example: compare *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra,* with *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10 (whether review of a single judge's refusal to convene a three-judge court is available in the court of appeals); compare *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, with *FHA* v. *The Darlington,*

for the Court on one of these occasions, Mr. Justice Harlan noted:

> "Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co.* v. *Wickham,* 382 U. S. 111, 116.

The reading given to § 1253 by appellant Gonzalez is not "inexorably commanded by statute." For the statute "authorizes direct review by this Court . . . as a means of accelerating a final determination on the merits." *Swift & Co.* v. *Wickham, supra,* at 119. It is true that dismissal of a complaint on grounds short of the merits does "deny" the injunction in a literal sense, but a literalistic approach is fully persuasive only if followed without deviation. In fact, this Court's interpretation of the three-judge-court statutes has frequently deviated from the path of literalism.[14] If the opaque

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Inc., 358 U. S. 84, 87 (whether three judges are required where only declaratory relief is requested); compare *Swift & Co.* v. *Wickham,* 382 U. S. 111, with *Kesler* v. *Dept. of Public Safety,* 369 U. S. 153 (whether a three-judge court is required when a complaint seeks to enjoin a state statute on the ground that it violates the Supremacy Clause).

[14] Read literally, § 1253 would give this Court appellate jurisdiction over even a *single judge's* order granting or denying an injunction if the "action, suit, or proceeding" were in fact one "required . . . to be heard and determined" by three judges. But we have glossed the provision so as to restrict our jurisdiction to orders actually entered by three-judge courts. See *Ex parte Metropolitan Water Co.,* 220 U. S. 539, 545.

A single judge is literally forbidden to "dismiss the action, or enter a summary or final judgment" in any case required to be heard by three judges. 28 U. S. C. § 2284 (5). Read literally, this provision might be held to prohibit a single judge from dismissing

terms and prolix syntax of these statutes were given their full play, three-judge courts would be convened, and mandatory appeals would lie here, in many circumstances where such extraordinary procedures would serve no discernible purpose.

Congress established the three-judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge.[15] But some of

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a case unless he has determined that it fails to meet the requirements of § 2281 or § 2282. See Berueffy, The Three Judge Federal Court, 15 Rocky Mt. L. Rev. 64, 73–74 (1942), and Note, 28 Minn. L. Rev. 131, 132 (1944). But we have always recognized a single judge's power to dismiss a complaint for want of general subject-matter jurisdiction, without inquiry into the additional requisites specified in §§ 2281 and 2282. *Ex parte Poresky,* 290 U. S. 30, 31; *Bailey* v. *Patterson,* 369 U. S., at 33; *Idlewild Bon Voyage Liquor Corp.,* 370 U. S., at 715; *Goosby* v. *Osser, supra.*

While the literal terms of the three-judge-court statutes give us appellate jurisdiction over any three-judge-court order granting or denying an "interlocutory or permanent injunction," we have in fact disclaimed jurisdiction over interlocutory orders denying permanent injunctions, *Goldstein* v. *Cox,* 396 U. S. 471, and *Rockefeller* v. *Catholic Medical Center,* 397 U. S. 820.

While § 2281 requires a three-judge court where the injunction will operate against any state "statute," we have construed the term narrowly, to include only enactments of statewide application, *Moody* v. *Flowers,* 387 U. S., at 101. Cf. *King Mfg. Co.* v. *City Council of Augusta,* 277 U. S. 100, 103–104, construing far more broadly the term "statute" as used in the predecessor to 28 U. S. C. § 1257 (2).

While § 2281 calls for three judges to enjoin a statute "upon the ground" of its "unconstitutionality," we have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent, *Bailey* v. *Patterson, supra,* or where the constitutional challenge is grounded on the Supremacy Clause, *Swift & Co.* v. *Wickham, supra.* See also n. 12, *supra.*

[15] *Phillips* v. *United States,* 312 U. S. 246, 250–251; *Bailey* v. *Patterson, supra,* at 33. The Court sketched the legislative history of the three-judge-court statutes in *Swift & Co.* v. *Wickham,* 382 U. S., at 116–119. See also Currie, The Three-Judge District

the literal words of the statutory apparatus bear little or no relation to that underlying policy, and in construing these we have stressed that the three-judge-court procedure is not "a measure of broad social policy to be construed with great liberality." *Phillips* v. *United States,* 312 U. S. 246, 251. See also *Kesler* v. *Dept. of Public Safety,* 369 U. S. 153, 156–157; *Swift & Co.* v. *Wickham,* 382 U. S., at 124; *Allen* v. *State Board of Elections,* 393 U. S. 544, 561–562.

The words of § 1253 governing this Court's appellate jurisdiction over orders denying injunctions fall within this canon of narrow construction. Whether this jurisdiction be read broadly or narrowly, there will be no impact on the underlying congressional policy of ensuring this Court's swift review of three-judge-court orders that *grant* injunctions. Furthermore, only a narrow construction is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration.[16]

Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 3–12 (1964); Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 299–301 (1963).

[16] "[I]nasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements . . . would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket." *Phillips* v. *United States,* 312 U. S., at 250. See also *Goldstein* v. *Cox,* 396 U. S., at 478; *Gunn* v. *University Committee,* 399 U. S. 383, 387–388; *Allen* v. *State Board of Elections,* 393 U. S., at 562; *Board of Regents* v. *New Left Education Project,* 404 U. S. 541, 543.

"The history of latter-day judiciary acts is largely the story of restricting the right of appeal to the Supreme Court." F. Frankfurter & J. Landis, The Business of the Supreme Court 119 (1927). To this trend of reform, the Court's mandatory appellate jurisdiction under the three-judge-court statutes represents a major, and increasingly controversial, exception. The number of cases heard by three-

Mercantile argues that § 1253 should be read to limit our direct review of three-judge-court orders denying injunctions to those that rest upon resolution of the constitutional merits of the case. There would be evident virtues to this rule. It would lend symmetry to the Court's jurisdiction since, in reviewing orders granting injunctions, the Court is necessarily dealing with a resolution of the merits. While issues short of the merits—such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention—are often of more than trivial consequence, that alone does not argue for our reviewing them on direct appeal. Discretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals. Furthermore, the courts of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most mandatory appeals in summary fashion.[17]

But the facts of this case do not require us to explore the full sweep of Mercantile's argument. Here the three-

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judge courts has dramatically increased in the past decade. See Ammerman, Three-Judge Courts: See How They Run!, 52 F. R. D. 293, 304–306; Annual Report of the Director of the Administrative Office of the United States Courts, 1974, p. IX–44. In the 1972 Term, 43 of the Court's opinions—nearly a quarter of the total—were in three-judge-court cases. Symposium, The Freund Report: A Statistical Analysis and Critique, 27 Rutgers L. Rev. 878, 902 (1974). This marks a dilution of that control over our docket which Mr. Chief Justice Taft identified as the prime object of the 1925 Act. Taft, The Jurisdiction of the Supreme Court Under the Act of February 13, 1925, 35 Yale L. J. 1 (1925).

[17] This Court typically disposes summarily of between two-thirds and three-fourths of the three-judge-court appeals filed each term. Douglas, The Supreme Court and Its Case Load, 45 Cornell L. Q. 401, 410 (1960). See Symposium, 27 Rutgers L. Rev., *supra*, n. 9, at 902–903. It seems more than probable that many of these cases, while unworthy of plenary consideration here, would benefit from the normal appellate review available to single-judge cases in the courts of appeals.

judge court dismissed the complaint for lack of "standing." This ground for decision, that the complaint was nonjusticiable, was not merely short of the ultimate merits; it was also, like an absence of statutory subject-matter jurisdiction, a ground upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge.[18]

A three-judge court is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts. See *Ex parte Poresky,* 290 U. S. 30, 31. It is now well settled that refusal to request the convention of a three-judge court, dissolution of a three-judge court, and dismissal of a complaint by a single judge are orders reviewable in the court of appeals, not here.[19] If the three-judge court in the present case had dissolved itself on grounds that "standing" was absent, and had left subsequent dismissal of the complaint to a single judge, this Court would

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[18] See *Rosado* v. *Wyman,* 304 F. Supp. 1354, appeal dismissed, 395 U. S. 826; *Mengelkoch* v. *Industrial Welfare Comm'n,* 284 F. Supp. 950, vacated to permit appeal to Court of Appeals, 393 U. S. 83; *Crossen* v. *Breckenridge,* 446 F. 2d 833, 837; *American Commuters Assn.* v. *Levitt,* 279 F. Supp. 40, aff'd, 405 F. 2d 1148; *Hart* v. *Kennedy,* 314 F. Supp. 823, 824.

[19] Where a single judge refuses to request the convention of a three-judge court, but retains jurisdiction, review of his refusal may be had in the court of appeals, see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra,* and *Schackman* v. *Arnebergh,* 387 U. S. 427, either through petition for writ of mandamus or through a certified interlocutory appeal under 28 U. S. C. § 1292 (b). These also are the routes of review of a three-judge court's decision to dissolve itself, *Mengelkoch* v. *Industrial Welfare Comm'n,* 393 U. S. 83, and *Wilson* v. *Port Lavaca,* 391 U. S. 352. Where a single judge has disposed of the complaint through a final order, appeal lies to the court of appeals under 28 U. S. C. § 1291.

thus clearly have lacked appellate jurisdiction over both orders. The same would have been true if the dissolution and dismissal decisions had been made simultaneously, with the single judge merely adopting the action of the three-judge court.[20] The locus of appellate review should not turn on such technical distinctions.

Where the three-judge court perceives a ground justifying both dissolution and dismissal, the chronology of decisionmaking is typically a matter of mere convenience or happenstance. Our mandatory docket must rest on a firmer foundation than this. We hold, therefore, that when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio,* review of the denial is available only in the court of appeals.

In the present case, accordingly, the correctness of the District Court's view of Gonzalez' standing to sue is for the Court of Appeals to determine. We intimate no views on the issue, for we are without jurisdiction to consider it.[21] We simply vacate the order before us and remand the case to the District Court so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals.[22]

It is so ordered.

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[20] *Wilson* v. *Port Lavaca, supra.*

[21] It appears that Gonzalez and Mercantile settled the former's damage claim while this appeal was pending. The Court of Appeals will, of course, be free to consider this new development in appraising the correctness of the dismissal of the complaint. See *SEC* v. *Medical Committee for Human Rights,* 404 U. S. 403.

[22] 28 U. S. C. § 1291. See *Mengelkoch* v. *Industrial Welfare Comm'n,* 393 U. S., at 84.

REGIONAL RAIL REORGANIZATION ACT CASES*

Argued October 23, 1974—Decided December 16, 1974

As a comprehensive solution to a national rail crisis precipitated by the entry into reorganization proceedings under § 77 of the Bankruptcy Act of eight major railroads in the northeast and midwest region of the country, Congress supplemented § 77 with the Regional Rail Reorganization Act of 1973 (Rail Act). Each railroad under a § 77 reorganization must proceed under the Rail Act unless its reorganization court within specified times finds (a) that the railroad is reorganizable on an income basis within a reasonable time under § 77 and that the public interest would be better served by a § 77 rather than a Rail Act reorganization or (b) that the Rail Act does not provide a process that is fair and equitable to the estate of the railroad in reorganization (hereafter railroad). § 207 (b) of the Rail Act. Appeals from § 207 (b) orders are provided to a Special Court, whose decision is final. The Rail Act establishes a Government corporation, the United States Railway Association (USRA), which is directed to formulate a "Final System Plan" (Plan) by July 26, 1975, for restructuring the railroads into a "financially self-sustaining rail service system." The Plan must provide for transfer of designated railroad properties to the Consolidated Rail Corp. (Conrail), a private state-incorporated corporation, in return for Conrail securities, plus up to $500 million of federally guaranteed USRA obligations and the other benefits accruing to the railroad from the transfer. The Plan, which becomes effective if neither House of Congress disapproves it within 60 days, must be transmitted to the Special Court, which has exclusive jurisdiction of all proceedings concerning the Plan. § 209. Within 10 days after deposit

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*No. 74–165, *Blanchette et al., Trustees of Property of Penn Central Transportation Co.* v. *Connecticut General Insurance Corp. et al.;* No. 74–166, *Smith, Trustee of Property of New York, New Haven & Hartford Railroad Co.* v. *United States et al.;* No. 74–167, *United States Railway Assn.* v. *Connecticut General Insurance Corp. et al.;* and No. 74–168, *United States et al.* v. *Connecticut General Insurance Corp. et al.,* on appeal from the United States District Court for the Eastern District of Pennsylvania.

with it of Conrail securities and USRA obligations, the Special Court must order the railroad trustee to convey forthwith to Conrail the railroad's properties designated in the Plan. § 303 (b). The Special Court then determines under § 303 (c), with an appeal extending to this Court, whether the conveyance is fair and equitable to the railroad's estate under § 77 standards, or whether the transfer is more fair and equitable than a constitutional minimum requires (in which case necessary adjustments must be made). If the Special Court finds the conveyance not fair and equitable, the court must reallocate, or order issuance of additional Conrail securities and USRA obligations, enter a judgment against Conrail, or combine such remedies. Railroads may discontinue service and abandon properties not designated for transfer under the Plan, but until the Plan becomes effective may only discontinue service or abandon any line with USRA consent and absent reasonable state opposition. § 304 (f). Parties with interests in Penn Central Transportation Co. (Penn Central) brought suits attacking the constitutionality of the Rail Act, contending that the Act violates the Fifth Amendment by taking Penn Central property without just compensation, on the grounds (1) that the Conrail securities and USRA obligations and other benefits would not be the constitutionally required equivalent of the rail properties whose transfer is compelled by § 303 (b) (the "conveyance taking" issue), and (2) that § 304 (f) compels continuation of rail operations pending the Plan's implementation even if erosion, beyond constitutional limits, of Penn Central's estate occurs during the interim period (the "erosion taking" issue). While rejecting the "conveyance taking" issue as premature in view of a number of decisional steps required before the final conveyance, the District Court held that the "erosion taking" issue was not premature, and rejected the contention of the United States, USRA, and the Penn Central Trustees that if the constitutional limit of permissible uncompensated erosion should be passed, the plaintiffs would have an adequate remedy at law under the Tucker Act, which gives the Court of Claims jurisdiction to render judgment "upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . ," the District Court finding that the Rail Act precluded a Tucker Act remedy. The court therefore declared § 304 (f) invalid as violating the Fifth Amendment "to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad," and the court declared § 303 invalid to the extent

it failed to compensate for interim erosion pending final implementation of the Plan. In addition to other injunctive relief, the District Court enjoined USRA from certifying the Plan to the Special Court under § 209 (c). The court further determined that the provision of § 207 (b) requiring dismissal of certain reorganization proceedings is constitutionally invalid as a geographically nonuniform law on the subject of bankruptcies. *Held:*

1. The issue of the availability of a Tucker Act remedy if the Rail Act effects an "erosion taking" is ripe for adjudication in view of the distinct possibility that compelled continued rail operations by Penn Central, which in the past several years has sustained great losses and is not "reorganizable on an income basis within a reasonable time under [§ 77]," would injure plaintiffs below without any assurance before the Plan is implemented of their being compensated. Pp. 122–125.

2. The Tucker Act remedy is not barred by the Rail Act, but is available to provide just compensation for any "erosion taking" effected by the Rail Act. Pp. 125–136.

(a) The correct issue is whether Congress intended to prevent recourse to the Tucker Act and not as the District Court held whether the Rail Act affirmatively manifests a congressional intent to permit such recourse. Pp. 126–127.

(b) Rail Act provisions relied on as evincing a congressional determination that no federal funds beyond those expressly committed by the Act were to be paid for the rail properties, equally support the inference that Congress felt that the Rail Act provided at least the minimum compensation and gave no consideration to withdrawal of the Tucker Act remedy. Pp. 127–129.

(c) Section 601 of the Rail Act, which specifically deals with other statutes inconsistent with the Rail Act, does not mention the Tucker Act. P. 129.

(d) There is no legislative history supporting the argument that the Rail Act should be construed to withdraw the Tucker Act remedy. Pp. 129–133.

(e) Applicable canons of construction fortify the conclusion that the Rail Act does not withdraw the Tucker Act remedy. Pp. 133–136.

3. Certain basic "conveyance taking" issues are now ripe for adjudication. Pp. 136–148.

(a) Since after the District Court's opinion the Special Court reversed the Penn Central reorganization court's determination that the Rail Act did not provide a process that would be fair

and equitable to the estate, some of the "conveyance taking" issues must now be decided. Pp. 138–140.

(b) Implementation of the Rail Act will now lead inexorably to the final conveyance though the exact date cannot now be determined, and the Special Court must order the conveyance of rail properties included in the Plan; since the conveyance is inevitable it is not relevant to the justiciable-controversy issue that there will be a delay before the transfer occurs. Pp. 140–143.

(c) Several factors militate against the Court's deferring resolution of the constitutional issues here until a time closer to the occurrence of the disputed event and the Court will be in no better position later than it is now to determine the validity of basic final-conveyance issues. However, resolution of other issues, such as those involving valuation, should be postponed. Pp. 143–148.

4. For the same reasons as obtained with respect to the "erosion taking" issue, a suit in the Court of Claims is available under the Tucker Act for a cash award to cover any shortfall between the consideration that the railroads receive for their rail properties finally conveyed under the Rail Act and the constitutional minimum. P. 148.

5. The Tucker Act guarantees an adequate remedy at law for any taking that might occur as a result of the final-conveyance provisions of the Rail Act. Pp. 148–156.

(a) Plaintiffs' argument that the Tucker Act remedy is inadequate because the "conveyance taking" is an exercise of the eminent domain power and requires full cash payment for the rail properties is without merit. The Rail Act coupled with the Tucker Act is valid as a reorganization statute and does not constitute an eminent domain statute by virtue of its provisions for federal representation on Conrail's board of directors (which does not constitute Conrail a federal instrumentality) and the provisions for conveyance and continuation of services pending the Plan's formulation; or because of any defects in the Act's provisions for judicial review. Pp. 152–155.

(b) Though the Rail Act differs from other reorganization statutes by mandating conveyance without any prior judicial finding that there will be adequate resources in the reorganized company to compensate the debtor estates and, eventually, their creditors, recourse to a Tucker Act suit for any shortfall provides adequate assurance that any taking will be compensated. Pp. 155–156.

(c) The Tucker Act also assures that the railroad estates and their creditors will eventually be made whole for the assets conveyed, and thus the Rail Act does not deprive plaintiffs of procedural due process. P. 156.

6. The Rail Act does not contravene the uniformity requirement of the Bankruptcy Clause. Pp. 156–161.

(a) This Court's holding that the Tucker Act remedy is available for any uncompensated taking under the Rail Act obviates the possibility that the Penn Central reorganization court will ever confront the provision for dismissal of a § 77 proceeding under § 207 (b) of the Rail Act, which the District Court held violative of the bankruptcy uniformity requirement. Pp. 156–158.

(b) Plaintiffs' argument that constitutional bankruptcy uniformity is violated because the Rail Act is restricted to a single statutorily defined region lacks merit since the uniformity requirement does not preclude Congress from fashioning legislation to resolve geographically isolated problems, and here Congress acted consistently with that requirement when it dealt with the national rail crisis centering in the problems of rail carriers in the region defined by the Rail Act and applied the Rail Act to every railroad in reorganization throughout the United States. Pp. 158–161.

383 F. Supp. 510, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 161. STEWART, J., filed a dissenting statement, *post*, p. 161.

Solicitor General Bork argued the cause for the United States et al. With him on the briefs were *Assistant Attorney General Hills, Keith A. Jones,* and *Jerome E. Sharfman. Lloyd N. Cutler* argued the cause for the United States Railway Assn. With him on the briefs were *William R. Perlik, William T. Lake,* and *Jordan Jay Hillman. Charles A. Horsky* argued the cause for Blanchette et al., Trustees of the property of Penn Central Transportation Co. With him on the briefs were *Brice M. Clagett* and *Paul R. Duke. Louis A. Craco* argued the cause for Connecticut General Insurance Corp. et al. With him on the briefs were *Frederic L.*

Ballard, Walter H. Brown, Jr., and *Thomas L. Bryan. David Berger* argued the cause and filed briefs for Penn Central Co. *Joseph Auerbach* argued the cause for Smith, Trustee of the property of New York, New Haven and Hartford Railroad Co. With him on the briefs were *James Wm. Moore, Morris Raker*, and *Charles W. Morse, Jr. Brockman Adams* argued the cause and filed a brief for certain United States Representatives as *amici curiae* urging reversal.†

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These direct appeals and the cross-appeal are from a judgment of a three-judge District Court for the Eastern District of Pennsylvania that declared the Regional Rail Reorganization Act of 1973 (Rail Act), 87 Stat. 985, 45 U. S. C. § 701 *et seq.* (1970 ed., Supp. III), unconstitutional in part and enjoined its enforcement.[1] 383 F.

†Briefs of *amici curiae* were filed by *Israel Packel*, Attorney General, and *Gordon P. MacDougall*, Special Assistant Attorney General, for the Commonwealth of Pennsylvania; by *David F. Maxwell* for Trustees of Reading Co.; and by *John F. Donelan* for the National Industrial Traffic League.

[1] The judgment was entered in three consolidated cases. One action was brought in the District Court for the Eastern District of Pennsylvania by Connecticut General Insurance Corp. and others against the United States, the United States Railway Association (USRA), and the Secretaries of Treasury and Transportation and the Chairman of the Interstate Commerce Commission in their capacities as incorporators and directors of USRA. A second action was brought in the District Court for the District of Columbia by Penn Central Co., a creditor and the sole stockholder of Penn Central Transportation Co. (Penn Central), now in reorganization under § 77 of the Bankruptcy Act, against the same defendants named in the first action. A third action was brought in the District Court for the District of Columbia by Richard J. Smith, Trustee of the property of the New York, New Haven & Hartford Railroad Co. (New Haven Trustee) against the United States, USRA,

Supp. 510 (1974). We noted probable jurisdiction, *post*, p. 801. We reverse.

I

Introduction

A rail transportation crisis seriously threatening the national welfare was precipitated when eight major railroads in the northeast and midwest region of the country [2] entered reorganization proceedings under § 77 of the Bankruptcy Act, 11 U. S. C. § 205.[3] After interim meas-

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and the Secretary of Transportation. Three-judge courts were convened in each suit but, by consent of the parties, the second and third actions were transferred to the Eastern District and consolidated for disposition before the three-judge court convened in that action. The Trustees of Penn Central intervened.

Three direct appeals and one cross-appeal from the District Court's judgment were consolidated for decision in this Court. No. 74–165 is the appeal of the Trustees of Penn Central; No. 76–167 is the appeal of USRA; No. 74–168 is the appeal of the United States; and No. 74–166 is the cross-appeal of the New Haven Trustee.

[2] The Rail Act defines "Region" as the "States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the [Interstate Commerce] Commission by order)." § 102 (13), 45 U. S. C. § 702 (13) (1970 ed., Supp. III). ICC Order *Ex parte* No. 293, approved January 14, 1974, delineated areas near Louisville, Ky.; St. Louis, Mo.; and Kewaunee and Manitowoc, Wis., as included in the Region. 39 Fed. Reg. 3605 (1974).

[3] In addition to Penn Central, the railroads are the Reading (*In re Reading Co.*, Bky. No. 71–828, ED Pa.), Erie Lackawanna (*In re Erie Lackawanna R. Co.*, No. B72–2838, ND Ohio), Central of New Jersey (*In re Central R. Co. of New Jersey*, No. B401–67, N. J.), Lehigh Valley (*In re Lehigh Valley R. Co.*, Bky. No. 70–432, ED Pa.), Boston & Maine (*In re Boston & Maine Corp.*, Bky. No. 70–250–M, Mass.), Ann Arbor (*In re Ann Arbor R. Co.*, Bky. No.

ures proved to be insufficient,[4] Congress concluded that solution of the crisis required reorganization of the railroads, stripped of excess facilities, into a single, viable system operated by a private, for-profit corporation. Since such a system cannot be created under § 77 rail reorganization law, and since significant federal financing would be necessary to make such a plan workable, Congress supplemented § 77 with the Rail Act, which became effective on January 2, 1974. The salient features of the Rail Act are:

1. Reorganization of each railroad in § 77 reorganization must proceed pursuant to the Rail Act unless the district court having jurisdiction over its reorganization (a) finds, within 120 days after January 2, 1974, "that the railroad is reorganizable on an income basis within a reasonable time under section [77] and that the public interest would be better served by such a reorganization

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74–90833, ED Mich.), and the Lehigh & Hudson River (*In re Lehigh & Hudson River R. Co.*, No. 72–B–419, SDNY).

The following lessors of leased lines of Penn Central also filed § 77 petitions in the District Court for the Eastern District of Pennsylvania in Bky. No. 70–347: United New Jersey Railroad & Canal Co.; Beech Creek Railroad Co.; Cleveland, Cincinnati, Chicago & St. Louis Railway Co.; Cleveland & Pittsburgh Railroad Co.; Connecting Railway Co.; Delaware Railroad Co.; Erie & Pittsburgh Railroad Co.; Michigan Central Railroad Co.; Northern Central Railway Co.; Penndel Co.; Philadelphia, Baltimore & Washington Railroad Co.; Philadelphia & Trenton Railroad Co.; Pittsburgh, Youngstown & Ashtabula Railway Co.; Pittsburgh, Fort Wayne & Chicago Railway Co.; and Union Railroad Co. of Baltimore.

[4] These included the Emergency Rail Services Act of 1970, 84 Stat. 1975, 45 U. S. C. § 661 *et seq.*, which authorized the Secretary of Transportation to guarantee up to $125 million in certificates issued by trustees of railroads in reorganization if he found, *inter alia*, that there was a threat of imminent cessation of essential rail services and that the only practicable means of meeting expenses necessary to continue such services was the issuance of such guaranteed certificates.

than by a reorganization under this chapter," [5] or (b) within 180 days after January 2, 1974, "finds that this chapter does not provide a process which would be fair and equitable to the estate of the railroad in reorganization . . . ." § 207 (b), 45 U. S. C. § 717 (b) (1970 ed., Supp. III).[6] Appeals from § 207 (b) orders may be taken within 10 days of entry to a Special Court constituted under § 209 (b), 45 U. S. C. § 719 (b) (1970 ed., Supp. III), and must be decided by the Special Court within 80 days after the appeal is taken. Section 207 (b) expressly provides that "[t]here shall be no review of the decision of the special court." [7]

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[5] The Erie Lackawanna and Boston & Maine reorganization courts each determined that its railroad is reorganizable on an income basis within a reasonable time; reorganization of those railroads will not proceed under the Rail Act. *In re Erie Lackawanna R. Co.*, — F. Supp. — (ND Ohio 1974); *In re Boston & Maine Corp.*, 378 F. Supp. 68 (Mass. 1974).

[6] Three reorganization courts found that the Rail Act does not provide a process that is fair and equitable to the estates of the railroads under their jurisdiction. *In re Penn Central Trans. Co.*, 382 F. Supp. 856 (ED Pa. 1974); *In re Lehigh Valley R. Co.*, 382 F. Supp. 854 (ED Pa. 1974); *In re Penn Central Trans. Co. (Secondary Debtors)*, 382 F. Supp. 821 (ED Pa. 1974); *In re Central R. Co. of New Jersey*, — F. Supp. — (NJ 1974); *In re Lehigh & Hudson River R. Co.*, 377 F. Supp. 475 (SDNY 1974). The Special Court established under § 209 (b), see n. 7, *infra*, on September 30, 1974, reversed the orders in those cases and directed reorganization under the Rail Act, 384 F. Supp. 895.

Two other reorganization courts held that the Rail Act does provide a fair and equitable process and ordered that reorganization proceed under the Rail Act. *In re Reading Co.*, 378 F. Supp. 481 (ED Pa. 1974); *In re Ann Arbor R. Co.*, — F. Supp. — (ED Mich. 1974).

[7] Section 209 (b) provides in pertinent part:

"Within 30 days after January 2, 1974, [USRA] shall make application to the judicial panel on multi-district litigation authorized by section 1407 of Title 28 for the consolidation

2. Appellant United States Railway Association (USRA) is established as a new Government corporation. § 201 (a), 45 U. S. C. § 711 (a) (1970 ed., Supp. III). USRA must prepare a "Final System Plan" for restructuring the railroads in reorganization into a "financially self-sustaining rail service system." § 206 (a)(1), 45 U. S. C. § 716 (a)(1) (1970 ed., Supp. III). See §§ 201, 202, 204–206, 45 U. S. C. §§ 711, 712, 714–716 (1970 ed., Supp. III). The Final System Plan must provide for transfer of designated rail properties by the railroads in reorganization to a private state-incorporated corporation, Consolidated Rail Corporation (Conrail), § 301 (a), 45 U. S. C. § 741 (a) (1970 ed., Supp. III), in return for securities of Conrail, plus up to $500 million of USRA obligations guaranteed by the United States, and "the other benefits accruing to such railroad by reason of such transfer." § 206 (d)(1), 45 U. S. C. § 716 (d)(1) (1970 ed., Supp. III); see also § 210, 45 U. S. C. § 720 (1970 ed., Supp. III).[8]

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in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. . . . Such proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel . . . . The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. . . ."

The Judicial Panel on Multidistrict Litigation selected Circuit Judge Henry J. Friendly, Circuit Judge Carl McGowan, and District Judge Roszel C. Thomsen to compose the Special Court.

[8] Section 206 (c) provides as follows for the designation of rail properties for the Final System Plan:

"(c) Designations.

"The final system plan shall designate—

"(1) which rail properties of railroads in reorganization in the

3. USRA must submit a proposed Final System Plan to Congress within 570 days after January 2, 1974, §§ 207 (c), 207 (d), 208 (a), 45 U. S. C. §§ 717 (c), 717 (d), 718

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region or of railroads leased, operated, or controlled by any railroad in reorganization in the region—

"(A) shall be transferred to [Conrail];

"(B) shall be offered for sale to a profitable railroad operating in the region and, if such offer is accepted, operated by such railroad; the plan shall designate what additions shall be made to the designation under subparagraph (A) of this paragraph in the event such profitable railroad fails to accept such offer;

"(C) shall be purchased, leased, or otherwise acquired from [Conrail] by the National Railroad Passenger Corporation . . . ;

"(D) may be purchased or leased from [Conrail] by a State or a local or regional transportation authority to meet the needs of commuter and intercity rail passenger service; and

"(E) if not otherwise required to be operated by [Conrail], a government entity, or a responsible person, are suitable for use for other public purposes, including highways, other forms of transportation, conservation, energy transmission, education or health care facilities, or recreation . . . ; and

"(2) which rail properties of profitable railroads operating in the region may be offered for sale to [Conrail] or to other profitable railroads operating in the region subject to paragraphs (3) and (4) of subsection (d) of this section."

Section 206 (d) provides as follows respecting transfers to Conrail:

"(d) Transfers.

"All transfers or conveyances pursuant to the final system plan shall be made in accordance with, and subject to, the following principles:

"(1) All rail properties to be transferred to [Conrail] by a profitable railroad, by trustees of a railroad in reorganization, or by any railroad leased, operated, or controlled by a railroad in reorganization in the region, shall be transferred in exchange for stock and other securities of [Conrail] (including obligations of [USRA]) and the other benefits accruing to such railroad by reason of such transfer."

Sections 210 (b), 213, 214, and 215 provide as respects federal funds as follows:

"(b) Maximum obligational authority.

"Except as otherwise provided in the last sentence of this subsec-

(a) (1970 ed., Supp. III), that is, by July 26, 1975.[9] The Plan becomes "effective" if neither House of Congress disapproves it within 60 continuous session days

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tion, the aggregate amount of obligations of [USRA] issued under this section which may be outstanding at any one time shall not exceed $1,500,000,000 of which the aggregate amount issued to [Conrail] shall not exceed $1,000,000,000. Of the aggregate amount of obligations issued to [Conrail] by [USRA], not less than $500,000,000 shall be available solely for the rehabilitation and modernization of rail properties acquired by [Conrail] under this chapter and not disposed of by [Conrail] pursuant to section 716 (c)(1)(C) of this title. Any modification to the limitations set forth in this subsection shall be made by joint resolution adopted by the Congress." § 210, 45 U. S. C. § 720 (1970 ed., Supp. III).

. . . . . .

"(a) Emergency assistance.

"The Secretary is authorized, pending the implementation of the final system plan, to pay to the trustees of railroads in reorganization such sums as are necessary for the continued provision of essential transportation services by such railroads. Such payments shall be made by the Secretary upon such reasonable terms and conditions as the Secretary establishes, except that recipients must agree to maintain and provide service at a level no less than that in effect on January 2, 1974.

"(b) Authorization for appropriations.

"There are authorized to be appropriated to the Secretary for carrying out this section such sums as are necessary, not to exceed $85,000,000, to remain available until expended." § 213, 45 U. S. C. § 723 (1970 ed., Supp. III).

. . . . . .

"(a) Secretary [of Transportation].

"There are authorized to be appropriated to the Secretary for purposes of preparing the reports and exercising other functions to be performed by him under this chapter such sums as are necessary, not to exceed $12,500,000, to remain available until expended.

"(b) Office.

"There are authorized to be appropriated to the [Interstate Commerce] Commission for the use of the Office in carrying out its func-

[*Footnote 9 is on p. 114*]

after submission. §§ 102 (4), 208 (a), 45 U. S. C. §§ 702 (4), 718 (a) (1970 ed., Supp. III).[10] USRA is required to transmit the Plan within 90 days after its effective

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tions under this chapter such sums as are necessary, not to exceed $5,000,000, to remain available until expended. . . .

"(c) Association.

"There are authorized to be appropriated to [USRA] for purposes of carrying out its administrative expenses under this chapter such sums as are necessary, not to exceed $26,000,000, to remain available until expended." § 214, 45 U. S. C. § 724 (1970 ed., Supp. III).

. . . . . .

"Prior to the date upon which rail properties are conveyed to [Conrail] under this chapter, the Secretary, with the approval of [USRA], is authorized to enter into agreements with railroads in reorganization in the region (or railroads leased, operated, or controlled by railroads in reorganization) for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan. Agreements entered into pursuant to this section shall specifically identify the type and quality of improvements to be made pursuant to such agreements. Notwithstanding section 720 (b) of this title, [USRA] shall issue obligations under section 720 (a) of this title in an amount sufficient to finance such agreements and shall require [Conrail] to assume any such obligations. However, [USRA] may not issue obligations under this section in an aggregate amount in excess of $150,000,000. . . ." § 215, 45 U. S. C. § 725 (1970 ed., Supp. III).

[9] The period of 450 days provided by § 207 (c) was extended 120 days by Pub. L. 93–488, 88 Stat. 1465, effective Oct. 26, 1974.

[10] Concerning congressional review of the Final System Plan, § 208 provides:

"(a) General.

"The Board of Directors of [USRA] shall deliver the final system plan adopted by [USRA] to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representa-

date to the Special Court which, under § 209 (b), is given exclusive jurisdiction of all "proceedings with respect to the final system plan." 45 U. S. C. § 719 (b) (1970 ed., Supp. III). The Special Court "within 10 days after deposit . . . of" Conrail securities and USRA obligations "shall . . . order the trustee or trustees of each railroad in reorganization . . . to convey forthwith" to Conrail "all right, title, and interest in the rail properties of such railroad in reorganization . . ." designated in the Final System Plan. § 303 (b), 45 U. S. C. § 743 (b) (1970 ed., Supp. III).

4. The Special Court next determines whether the conveyances of the rail properties to Conrail "(A) . . . are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization . . . under section [77] . . . [or] (B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum." § 303 (c), 45 U. S. C. § 743 (c)

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tives or the Senate passes a resolution during such period stating that it does not favor the final system plan.

"(b) Revised plan.

"If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, [USRA], with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section.

"(c) Computation.

"For purposes of this section—

"(1) continuity of session of Congress is broken only by an adjournment sine die; and

"(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period." § 208, 45 U. S. C. § 718 (1970 ed., Supp. III).

(1970 ed., Supp. III). If the Special Court finds that the transfer is not fair and equitable, the Special Court must reallocate, or order issuance of additional, Conrail securities and USRA obligations (subject to the overall $500 million limitation on USRA obligations for this purpose), or enter a judgment against Conrail, or decree a combination of these remedies. § 303 (c)(2). The Special Court is not authorized to enter a judgment against the United States. Section 303 provides also that if the Special Court decides that the consideration exchanged for the rail properties is "more fair and equitable than is required as a constitutional minimum," § 303 (c)(1)(B), it shall make necessary adjustments so that the "constitutional minimum" is not exceeded. § 303 (c)(3). Appeal from § 303 (c) determinations is to this Court. § 303 (d).[11]

5. Although railroads in reorganization subject to the Act are free to abandon service and dispose as they wish of any rail properties not designated for transfer under the Final System Plan, §§ 304 (a)–(c), 45 U. S. C. §§ 744

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[11] Section 303 (d) provides:

"(d) Appeal.

"A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of Title 28: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss."

We are not required to consider in this case the validity of this attempted congressional regulation of the Court's disposition of any appeal from a judgment entered by the Special Court pursuant to subsection (c).

(a)–(c) (1970 ed., Supp. III), until that Plan becomes effective none "may discontinue service or abandon any line of railroad . . . unless . . . authorized to do so by [USRA] and unless no affected State or local or regional transportation authority reasonably opposes such action . . . ." § 304 (f).

II

Proceedings in the District Court

Constitutional questions concerning the Act are raised in this litigation by parties with interests in the Penn Central Transportation Co. (Penn Central), the largest of the eight railroads in reorganization.[12] The principal

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[12] The suits here were brought by the major creditors and sole shareholder of Penn Central. Penn Central was the product of the merger of the Pennsylvania Railroad with the New York Central Railroad. *Penn-Central Merger Cases,* 389 U. S. 486 (1968). A condition of that merger was Penn Central's promise to take in the New York, New Haven & Hartford Railroad Co. as an operating entity, and that promise was fulfilled. *New Haven Inclusion Cases,* 399 U. S. 392 (1970).

The Penn Central operation dominates the northeast-midwest region. It serves 55% of the Nation's manufacturing plants employing 60% of the country's industrial employees. More than 20% of all freight cars loaded in the United States pass over Penn Central's 20,000 miles of track, and over 70% of Penn Central traffic involves other railroads. Rail Service in the Midwest and Northeast Region, 39 Fed. Reg. 5392, 5401 (1974); H. R. Rep. No. 93–620, p. 26 (1973) (hereinafter H. Rep.). Since 1973 Penn Central (including its leased lines) accounted for 94% of the operating mileage and 87% of the operating revenues of the six bankrupt railroads involved under the Rail Act. The merger failed to realize anticipated savings and Penn Central entered reorganization proceedings in 1970, two years after the merger was approved. Huge operating losses made reorganization inevitable and have continued. The Financial Collapse of the Penn Central Company, SEC Staff Report 86 (1972). The Penn Central Trustees in a Report of February 10, 1971, Concerning Premises for A Reorganization, Joint Documentary Submission No. 1, concluded that the

contention of the plaintiffs in the District Court was that the Rail Act in two respects effects a taking of rail properties of Penn Central without payment of just compensation, in violation of the Fifth Amendment. They contended, first, that the Conrail securities and USRA obligations and other benefits to be received would not be the constitutionally required equivalent of the rail properties compelled by § 303 (b) to be transferred. This is the "conveyance taking" issue. This claim was rejected by the District Court as premature. 383 F. Supp., at 517–518. They contended, second, that a taking of their property without just compensation will result from the severe inhibitions imposed upon discontinuance of service and abandonment of lines. In particular, they claimed that § 304 (f) compels continuation of rail operations pending implementation of the Final System Plan even if erosion of the Penn Central estate beyond constitutional limits occurs during this period. This is the "erosion taking" issue. The District Court agreed that § 304 (f) required continued operations to this extent, and viewed the huge operating losses already incurred by Penn Central as making this contention ripe for determination, saying:

> "[W]e are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that [the contention of plaintiffs below] of interim unconstitu-

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"overriding problem of Penn Central . . . is found in an obligation to perform as a public service company in certain areas and under certain conditions which simply do not lend themselves to profitable operations, no matter who the operator is, or how efficient. The only possible remedy here is for public authority to lend its hand to a speedy elimination of the conditions which produce the losses, or respond with adequate compensation if it insists upon a continuance of the conditions."

tional taking by continued loss operations is ripe for adjudication." 383 F. Supp., at 525.

The District Court rejected the argument of the United States, USRA, and the Penn Central Trustees that if in fact the constitutional limit of permissible uncompensated erosion should be passed, plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491. The District Court construed the Rail Act as precluding a Tucker Act remedy, stating:

> "We are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act. Article I, Section 9, Clause 7 [of the Constitution] provides that no money shall be drawn from the Treasury of the United States except in consequence of an appropriation made by law. Section 213 (b) [of the Rail Act], and section 214 entitled 'Authorization for Appropriations' place an express ceiling on expenditures. Section 210 describes the maximum obligational authority of [USRA], and the authorization for appropriation is limited to 'such amounts as are necessary to discharge the obligations of the United States arising *under this section.*' (Emphasis supplied.) Judicial review is delineated with specificity in Sections 209 (a) and 303 with no mention of the Court of Claims." 383 F. Supp., at 528–529.

The District Court therefore declared § 304 (f) governing interim abandonments

> "null and void as violative of the Fifth Amendment of the United States Constitution, to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad."

It consequently enjoined defendants below

> "from taking any action to enforce the provisions of Section 304 (f) . . . with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution."

The District Court also declared that § 303 relating to the final conveyance of rail properties pursuant to the Final System Plan is

> "null and void as contravening the Fifth Amendment . . . insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan . . . ."

Finally, the District Court enjoined USRA "from certifying a Final System Plan to the Special Court pursuant to Section 209 (c)." 383 F. Supp., at 530.

The Rail Act was also challenged in the District Court as not "uniform" within the requirement of Art. I, § 8, cl. 4, of the Constitution, which provides that Congress shall have the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." The District Court dismissed this contention as without merit except as to one provision of § 207 (b). The section provides that if any reorganization court determines in the 180-day proceedings under § 207 (b) that the Act does not provide a fair and equitable process for the reorganization of a debtor, the debtor shall not be reorganized pursuant to the Act, and the reorganization court "shall dismiss the reorganization proceeding." The District Court declared this part of § 207 (b) "null and void, as violative of Article I, Section 8, Clause 4 . . . ," [13] and en-

[13] For reasons stated in Part VI of this opinion, *infra,* we have no occasion to pass upon the correctness of this conclusion.

joined "all parties . . . from enforcing, or taking any action to implement, so much of Section 207 (b) . . . as purports to require dismissal of pending proceedings for reorganization under Section 77 of the Bankruptcy Act."

III

The Issues for Decision

The major issues dividing the parties are (1) whether an action at law in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, will be available to recover any deficiency of constitutional dimension in the compensation provided under the Rail Act for either the alleged "erosion taking" or the alleged "conveyance taking," and (2) if the Tucker Act remedy is available, whether it is an adequate remedy. The United States, USRA, and the Penn Central Trustees contend that if resort to a supplemental remedy under the Tucker Act is necessary, it is both available and adequate. The plaintiffs below contend that the Rail Act precludes resort to the Tucker Act remedy, and if it does not, that the remedy is inadequate.

The Special Court, speaking through Judge Friendly, comprehensively canvassed both issues, and in a thorough opinion, concluded that the Rail Act does not bar any necessary resort to the Tucker Act remedy and that the remedy is adequate. Our independent examination of the issues brings us to the same conclusion, substantially for the reasons stated by Judge Friendly in Parts VII and VIII–A of the Special Court opinion. 384 F. Supp. 895, 938–951 (1974).[14]

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[14] Part VIII–B of the Special Court opinion considers the arguments of investors of several of the smaller lines. But those investors are not parties to the cases before us.

Part VIII–C of the Special Court's opinion discusses the question whether the Court of Claims is free to deny the existence of the

Also disputed is the District Court's ruling on the uniformity of the Rail Act under the Bankruptcy Clause. We hold that the currently operable portions of the Act are uniform.

IV

A

The Alleged "Erosion Taking"

In its opening brief, the United States, speaking for all federal parties except USRA, argued that the case involved no "erosion taking" because, as a matter of law, compelled-loss operations pending implementation of the Final System Plan would not constitute a taking of the property of the claimants against the bankrupt railroad estates. The argument was that the general rule that if the railroad "be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss," *Brooks-Scanlon Co.* v. *Railroad Comm'n of Louisiana*, 251 U. S. 396, 399 (1920); see also *Bullock* v. *Florida ex rel. Railroad Comm'n*, 254 U. S. 513 (1921); *Railroad Comm'n of Texas* v. *Eastern Texas R. Co.*, 264 U. S. 79 (1924), is qualified by the requirement that a railroad estate suffer interim losses for a reasonable period pending good-faith efforts to develop a feasible reorganization plan if the public interest in continued

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Tucker Act remedy if its existence should be challenged before the Court of Claims. The fact that the District Court below concluded, contrary to the Special Court, that the Tucker Act remedy was not available was viewed as making the question a "puzzlement." 384 F. Supp., at 954. In consequence, the Special Court stayed its order remanding the Penn Central and four other cases for the entry of orders in the reorganization courts and affirming the orders directing that the Reading and Ann Arbor reorganizations proceed under the Rail Act until "after final determination by the Supreme Court" of the instant appeals. *Id.*, at 955.

rail service justifies the requirement. *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 677 (1935); see also *RFC* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 535–536 (1946); *New Haven Inclusion Cases*, 399 U. S. 392, 493 (1970). The United States maintained that the Rail Act represented just such a good-faith effort. In its Reply Brief 3–4, however, it abandoned the position that the Final System Plan was sure to be implemented within a reasonable period:

> "Difficulties now unforeseen and unanticipated could in fact delay final implementation of the final system plan. For example, Congress could, in theory, successively disapprove several proposed final system plans. Thus, whatever the probabilities, the parties and this Court have no absolute assurance that the plan will in fact be implemented within a reasonable time. For that reason, we have determined that a taking of property through interim erosion, although extremely unlikely, remains a theoretical possibility under the Rail Act.
>
> "Accordingly, we believe that an injunction preventing [USRA] from denying applications for discontinuance of service under Section 304 (f) in those circumstances might be appropriate unless, as we contend, a remedy for any otherwise uncompensated taking will be available under the Tucker Act. We are therefore persuaded that this Court must reach and decide the 'Tucker Act question' presented by these appeals." (Footnote omitted.)

We conclude in any event that the availability of a Tucker Act remedy if the Rail Act effects an "erosion taking" is ripe for adjudication. It is true that there has been no definitive determination that erosion of the Penn Central estate has reached unconstitutional dimen-

sions—that is, that the estate has suffered losses unreasonable even in light of the public interest in continued rail service pending reorganization. But the Penn Central Reorganization Court found that Penn Central is not "reorganizable on an income basis within a reasonable time under § 77 of the Bankruptcy Act." 382 F. Supp. 831, 842 (ED Pa. 1974). And it was stipulated in the District Court that Penn Central sustained ordinary net losses from mid-1970 through 1973 aggregating approximately $851 million, and that in the two months following enactment of the Rail Act on January 2, 1974, Penn Central had deficits in net railway operating income, total income, net income, and income available for fixed charges. It is therefore reasonable to conclude that compelled continued rail operations under these conditions pending implementation of the Final System Plan may accelerate erosion of the interests of plaintiffs below through accrual of post-bankruptcy claims having priority over their claims. Thus, failure to decide the availability of the Tucker Act would raise the distinct possibility that those plaintiffs would suffer an "erosion taking" without adequate assurance that compensation will ever be provided.[15] Yet there must be at the time of

[15] The severely limited funds available pursuant to §§ 213 and 215 for emergency assistance and plant maintenance pending implementation of the Final System Plan do not assure that adequate compensation will be available for any "erosion taking." Section 213 provides $85 million in emergency grants for continued essential transportation services while § 215 provides $150 million in USRA obligations for maintenance and improvement of plant.

Nor is adequate assurance provided by the possibility that Conrail securities and other benefits can be provided for unconstitutional erosion when the Special Court determines the proper consideration for the rail properties conveyed to Conrail. As the Special Court itself found:

"The Government parties [contend] that . . . this court could compensate for any unconstitutional erosion in the final system

taking "reasonable, certain and adequate provision for obtaining compensation." *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U. S. 641, 659 (1890); see also *Joslin Mfg. Co.* v. *City of Providence,* 262 U. S. 668, 677 (1923); *United States* v. *Dow,* 357 U. S. 17, 21 (1958). Therefore we must determine if the Tucker Act is available.

B

Availability of the Tucker Act Remedy for Any "Erosion Taking"

The Tucker Act, 28 U. S. C. § 1491, provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract

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plan, either by fixing a valuation date prior to the date of conveyance or by a specific award, § 303 (c)(2)(B), or a deficiency judgment against Conrail under § 303 (c)(2)(C). The earlier valuation date method would hardly be satisfactory even if permissible, [*] since this would not cure erosion with respect to rail properties that were not conveyed. It would be permissible for the final system plan to provide or for us to direct that compensation for erosion should be made in the case of any railroad some of whose properties are conveyed. However, if, as the opponents urge, the consideration now authorized is inadequate as compensation for the properties themselves, enlarging the amount of claims that may be made against it would be of no avail." 384 F. Supp., at 925–926.

"[*] The House version of the Act, as explained by the report accompanying it, provided that '[t]he value of consideration must equal the fair and equitable value of the rail properties as of the date of the conveyance.' House Report at 53. However, the Act contains no such limitation and the Conference Report, H. R. Rep. No. 93–774, 93d Cong., 1st Sess. (1973), makes no mention of the deletion."

> with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

A claim founded upon a taking of property for public use by operation of the Rail Act without just compensation in violation of the Fifth Amendment plainly would fall within the literal words of "any claim against the United States founded . . . upon the Constitution . . . ." The District Court, however, inquired whether the Rail Act affirmatively provided the Tucker Act remedy, and held that to "read a Tucker Act remedy into the [Rail] Act" would be "judicial legislation on a grand, if not arrogant, scale." 383 F. Supp., at 529.

The District Court made the wrong inquiry. The question is not whether the Rail Act expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy. Rather, it is whether Congress has in the Rail Act *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the Rail Act "founded . . . upon the Constitution." For we agree with the Special Court that

> "the true issue is whether there is sufficient proof that Congress intended to *prevent* such recourse. The [Rail] Act being admittedly silent on the point, the issue becomes whether the scheme of the [Rail] Act, supplemented by the legislative history, sufficiently evidences a Congressional intention to withdraw a remedy that would otherwise exist." 384 F. Supp., at 939.

Our decisions affirm that this is the correct inquiry. The general rule is that whether or not the United States so intended, "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States* v. *Causby,* 328 U. S. 256, 267 (1946). "[I]f the authorized action . . . does constitute a taking of property for

which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims." *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21 (1940).[16] See also *Hurley* v. *Kincaid*, 285 U. S. 95 (1932). In *Yearsley*, the Court, speaking through Mr. Chief Justice Hughes, went on to hold that "it cannot be doubted that the remedy to obtain compensation from the Government *is as comprehensive as the requirement of the Constitution* . . . ." 309 U. S., at 22. (Emphasis supplied.)

We turn then to the inquiry whether the Rail Act withdrew the Tucker Act remedy "that would otherwise exist." 384 F. Supp., at 939. The argument that it should be so read rests on provisions of the Rail Act said plainly to evince Congress' determination that no federal funds beyond those expressly committed by the Act were to be paid for the rail properties.

The first provision referred to is § 209 which provides for the impaneling of the Special Court and the consolidation before it of "all judicial proceedings with respect to the final system plan." The argument attaches significance to the omission in § 303 of any authority in the Special Court to enter a judgment against the United States. Reliance is also placed on two of the Act's funding provisions. Section 210 (b), captioned "Maxi-

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[16] As this passage from *Yearsley* indicates, the Government action must be authorized. "The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government," and hence recovery is not available in the Court of Claims. *Hooe* v. *United States*, 218 U. S. 322, 336 (1910). See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585 (1952). These cases are inapposite since the Government actions at issue here are authorized by the Rail Act.

mum obligational authority," provides that the "aggregate amount of [USRA] obligations . . . which may be outstanding at any one time shall not exceed $1,500,000,000 of which the aggregate amount issued to [Conrail] shall not exceed $1,000,000,000 . . . ," and that "[a]ny modification to [these] limitations . . . shall be made by joint resolution adopted by the Congress." Section 214 explicitly appropriates up to $12,500,000 to the Secretary of Transportation, to pay the expenses of "preparing the reports and exercising other functions to be performed by him under this chapter," appropriates up to $5,000,000 to the Interstate Commerce Commission for its use in carrying out its functions, and appropriates up to $26,000,000 to USRA "for purposes of carrying out its administrative expenses . . . ."

But these provisions at least equally support the inference that Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims. That this may very well have been the case is evident in a statement in the House Report:

> "The timely implementation of the Final System Plan cannot be obstructed by controversy over the payment for the properties. The Committee is of the opinion that provisions of this title of the [Rail] Act, and especially the provision for deficiency judgment and payment of obligations of [USRA] . . . are more than adequate to guarantee that the creditors of the bankrupt railroad will receive all that they may Constitutionally claim. In view of these extraordinary protections, no litigation should be permitted to delay the Final System Plan." H. Rep. 55.

That inference also finds support in the provision of

§ 303 (c)(3) that authorizes the Special Court to reduce payments to bankrupt estates if they "are fairer and more equitable than is required as a constitutional minimum." That provision suggests that Congress thought the compensation made possible by the Rail Act could well exceed that required by the Constitution, and gave no consideration to withdrawal of the Tucker Act remedy because it was sure the Rail Act itself provided at least the constitutional minimum compensation.

Finally, the manner in which Congress in § 601, 45 U. S. C. § 791 (1970 ed., Supp. III), expressly addressed the Rail Act's "Relationship to other laws" plainly implies that Congress gave no thought to consideration of withdrawal of the Tucker Act remedy. Section 601 (a)(2) provides that the "antitrust laws are inapplicable with respect to any action taken to formulate or implement the final system plan . . ."; § 601 (b) provides that "[t]he provisions of the Interstate Commerce Act and the Bankruptcy Act are inapplicable to transactions under this chapter to the extent necessary to formulate and implement the final system plan whenever a provision of any such Act is inconsistent with this chapter"; § 601 (c) provides that, "[t]he provisions of section 4332 (2)(C) of Title 42 [National Environmental Policy Act of 1969] shall not apply with respect to any action taken under authority of this chapter before the effective date of the final system plan." Yet despite this clear evidence that Congress was aware of the necessity to deal expressly with inconsistent laws, Congress nowhere addresses the Tucker Act question.

It is argued that any uncertainty in the scheme and text of the Rail Act is cleared up by legislative history from the House and the Senate that discloses that Congress meant the Rail Act to withdraw the jurisdiction of the Court of Claims under the Tucker Act. To the con-

trary, we read the legislative history as disclosing no more than a repeatedly emphasized belief that the Rail Act's provisions for compensation for the rail properties assured payment of the constitutional minimum. This is plainly the import of the oft-stated view that the taxpayers would not be unduly burdened by the sums provided, see, *e. g.*, 119 Cong. Rec. 36354 (1973) (remarks of Rep. Metcalfe); *id.*, at 36359 (remarks of Rep. Conte); and also of Senator Hartke's explanation of the Conference Report to the Senate, *id.*, at 43094–43095, which included the statement:

> "If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress that a number of these people could make a claim against the Government which could be sustained in the Court of Claims." [17]

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[17] "Mr. HARTKE. We are providing that the creditors of this corporation would be required to take common stock in the new quasi-government operation. In other words, they are exchanging their present security interest in the rail properties for common stock in the new corporation.

"The railroad properties then become the properties of the new corporation free and clear of liens and encumbrances. In other words, the assets are being transferred and the rights are being changed. The nonrailroad property will remain in the bankruptcy court to be dealt with by them. One can talk about what is available if the railroad is liquidated and put through the wringer, but even then the chances of these creditors getting their money is [*sic*] relatively slim, and this country cannot afford cessation of rail service while the railroads are put through the wringer. So what, in effect, is called the 'cram down' theory forces them to accept this kind of settlement and judges have ruled that this is fair. If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress that a number of these people could make a claim against the Government which could be sustained in the Court of Claims."

As the Special Court remarked, and we agree, this statement in context is "not inconsistent with the view that the Senator was so convinced that the bill, as amended in conference, contained such adequate compensation provisions that a suit in the Court of Claims could not prevail, particularly in view of what he had characterized as a 'rather slim' chance of the creditors getting their money through liquidation, rather than as meaning that such a claim could not be maintained." 384 F. Supp., at 941.

We do not think that the argument in support of reading the Rail Act to withdraw the Tucker Act remedy is aided by the colloquy on the House side between the House managers of the bill, 119 Cong. Rec. 42947 (1973).[18] That colloquy does not even concern the with-

[18] "Mr. KUYKENDALL. Mr. Speaker, I would like to ask the gentleman from Washington to clarify one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal court had the key to the Treasury.

"Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?

"Mr. ADAMS. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an act of Congress, to be signed by the President. It is defined as a joint resolution in the bill, and the statement of the managers, and it was the clear intent of the managers that any amount other than common stock was to be at the lowest possible limit to meet the constitutional guarantees.

"Mr. KUYKENDALL. Mr. Speaker, is it not true, I will ask the gentleman from Washington (Mr. ADAMS) that the creditors, of course, are given protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of stock of 100 million shares, whatever it is?

"Mr. ADAMS. The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an

drawal of Court of Claims jurisdiction. It concerns only the deficiency judgment against Conrail and the powers of the Special Court.

Finally, reliance is put upon what is referred to as "subsequent legislative history" in the form of statements by Congressmen during Oversight Hearings of the House Subcommittee on Transportation and Aeronautics on June 14, 1974, and on an *amicus* brief filed in this Court on behalf of 36 Congressmen. But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. See, *e. g., United States* v. *Mine Workers of America,* 330 U. S. 258, 282 (1947). Such statements "represent only the personal views of these legislators, since the statements were [made] after passage of the Act." *National Woodwork Manufacturers Assn.* v. *NLRB,* 386 U. S. 612, 639 n. 34 (1967). Moreover, during oral argument before this Court, Representative Adams, spokesman for the congressional group, expressly conceded that circumstances might arise when the Tucker Act remedy would be available:

> "QUESTION: So you do anticipate a situation where the Tucker Act would be available?
>
> "MR. ADAMS: Oh, yes. Let's say, for example, that after this is all over—and this is the three-judge court's problem—that if a party comes in and says,

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amount of obligation funds which the United States might, in any way ever, have to have anything to do with.

"During that period of time, it is controlled by a board of directors which consists of Government officials.

"Mr. KUYKENDALL. There is no way the Federal court may assess the taxpayers or this Congress on the judgments of the creditors; is that correct?

"Mr. ADAMS. The gentleman is correct.

"Mr. KUYKENDALL. There is no way they can assess the Congress for the money?

"Mr. ADAMS. The gentleman is correct."

you held us beyond the constitutional limit on erosion and at that point we are of the opinion that it went just too long, it was unreasonable, but that is a specific individual case at that point.

"QUESTION: And so the Tucker Act, you think, would be available in that situation?

"MR. ADAMS: Of course. *We did not repeal the Tucker Act.*" [19] (Emphasis supplied.)

In sum, we cannot find that the legislative history supports the argument that the Rail Act should be construed to withdraw the Tucker Act remedy. The most that can be said is that the Rail Act is ambiguous on the question. In that circumstance, applicable canons of statutory construction require us to conclude that the Rail Act is not to be read to withdraw the remedy under the Tucker Act.

One canon of construction is that repeals by implication are disfavored. See, *e. g., Mercantile National Bank* v. *Langdeau,* 371 U. S. 555, 565 (1963); *United States* v. *Borden Co.,* 308 U. S. 188, 198–199 (1939); *Amell* v. *United States,* 384 U. S. 158, 165–166 (1966). Rather, since the Tucker Act and the Rail Act are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to re-

[19] Tr. of Oral Arg. 50–51.

At three other times during oral argument Representative Adams implied that the Tucker Act was available for takings resulting from the Rail Act. See *id.,* at 48 ("As Justice White was asking in his question, is there a right to sue for some failure—maybe we hold a party too long, then they could"); *id*, at 49 ("Now as far as the *Causby* case is concerned, *Hurley* v. *Kincaid* and the other Tucker Act cases, we did not try to repeal the Fifth Amendment or certainly repeal the Tucker Act jurisdictional statements"); *id.,* at 50 ("If you decide, however, that there may be, some place along the line, in the lawful process, a mistake, then you reach and say the Tucker Act case will have to be decided when and if some party can decide that they have created a case on the merits").

gard each as effective." *Morton* v. *Mancari,* 417 U. S. 535, 551 (1974). Moreover, the Rail Act is the later of the two statutes and we agree with the Special Court:

> "A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled. . . . This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end. . . ." 384 F. Supp., at 943.

The other relevant canon of construction that comes into play is that when a statute is ambiguous, "construction should go in the direction of constitutional policy." *United States* v. *Johnson,* 323 U. S. 273, 276 (1944). There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself. In such case, as the Special Court observed, "[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way." 384 F. Supp., at 944. In other words our "task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *CSC* v. *Letter Carriers,* 413 U. S. 548, 571 (1973).

Lynch v. *United States,* 292 U. S. 571 (1934), fully sup-

ports our conclusion. *Lynch* presented a situation requiring this Court to determine whether a statute that effected an unconstitutional taking was also to be construed to withdraw a cause of action created by an earlier statute. The Economy Act of 1933, 48 Stat. 11, provided in § 17 that "all laws granting or pertaining to yearly renewable term insurance are hereby repealed . . . ." District Courts, affirmed by the Courts of Appeals for the Fifth Circuit, 67 F. 2d 490 (1933), and the Seventh Circuit, *Wilner* v. *United States,* 68 F. 2d 442 (1934), dismissed, on the basis of this provision, suits by beneficiaries of yearly renewable term policies brought under § 405 of the War Risk Insurance Act of 1917, 40 Stat. 410, expressly authorizing suits in the district courts respecting any "disagreement as to a claim under the contract of insurance." The beneficiaries' claim was that there was an actionable "disagreement" within the meaning of § 405 because the Government had violated the terms of the policies by failing to pay the premiums when the insureds became totally and permanently disabled and had refused payment of benefits after the insureds died. This Court unanimously reversed the dismissals. Section 17 of the Economy Act was held to effect an unconstitutional taking of vested property rights in the beneficiaries created by the insurance contracts. The question then became whether § 17 had repealed the remedy of a suit in the district court provided by § 405 of the Insurance Act. The Court held, speaking through Mr. Justice Brandeis, that § 17 would not be read as depriving the beneficiaries of that remedy in the absence of a clear indication from Congress that the remedy was taken away. The Court said:

> "*Fifth.* There is a suggestion that although, in repealing all laws 'granting or pertaining to yearly renewable term insurance,' Congress intended to take

away the contractual right, it also intended to take away the remedy; that since it had power to take away the remedy, the statute should be given effect to that extent, even if void insofar as it purported to take away the contractual right. The suggestion is at war with settled rules of construction. It is true that a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall. *Dorchy* v. *Kansas,* 264 U. S. 286, 288, 290. Here, both those essentials are absent. There is no separate provision in § 17 dealing with the remedy; and it does not appear that Congress wished to deny the remedy if the repeal of the contractual right was held void under the Fifth Amendment." 292 U. S., at 586.

Similarly, "[t]here is no separate provision in [the Rail Act] dealing with the [Tucker Act] remedy; and it does not appear [from the statute or its legislative history] that Congress wished to deny the remedy" if the Rail Act should cause an "erosion taking" that would require the payment of just compensation.

We accordingly hold that the Tucker Act remedy is not barred by the Rail Act but is available to provide just compensation for any "erosion taking" effected by the Rail Act.

V

A

The Alleged "Conveyance Taking"

The District Court declined to decide whether the provisions governing the procedures for and terms of the

final conveyance of rail properties to Conrail (the "conveyance taking" issue) violate the Fifth Amendment, thus rendering the Rail Act invalid in its entirety.[20] The District Court was "persuaded that these issues are premature." 383 F. Supp., at 517.

Briefly, the challenges to the final-conveyance provisions assert that the Rail Act is basically an eminent domain statute and, because compensation is not in cash but largely in stock of an unproved entity, will necessarily work an unconstitutional taking.[21] A variant of the argument is that, even if a reorganization statute, the Rail Act would be unconstitutional unless the Tucker Act remedy is now held to assure payment of any amount by which the *market value* of stocks and securities awarded by the Special Court is less than the value of the rail properties conveyed. The New Haven Trustee goes further; he argues that even if a reorganization statute, the Rail Act violates substantive due process by failing to assure the "fair and equitable equivalent" of the rail properties valued at their "highest and best use." The New Haven Trustee also contends that the conveyance provisions constitute a taking such as that threatened by interim erosion: they require operations of the railroad to continue, albeit in a different form, even if the liquidation value for "highest and best use" is greater than the value of the railroad as a going concern. Finally, the

[20] The conveyance provisions are the heart of the Rail Act. Thus, if it were clear that they were unconstitutional, a strong argument might be made that they are inseverable from the remainder of the Act and that the Act as a whole is void.

[21] The New Haven Trustee in his Reply Brief 45–46 seems to concede that valuation at market value of any Conrail stock may be sufficient. He then suggests, however, that it might be impossible, for legal and practical reasons, to offer Conrail stock publicly for many years. Thus, he claims, there will be no way to ascertain market value, and he implies that the market value will effectively be zero.

New Haven Trustee and the creditor parties contend that the conveyance provisions deny procedural due process, because they mandate the final conveyance before any meaningful determination of its fairness, and because no provision is made for creditor or stockholder consideration of or voting upon the Final System Plan.

All of the parties now urge that the "conveyance taking" issues are ripe for adjudication. However, because issues of ripeness involve, at least in part, the existence of a live "Case or Controversy," [22] we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the "Case or Controversy" sense. Further, to the extent that questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues,[23] the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties.

The District Court's holding of prematurity was influenced by the statutory scheme that requires several decisional steps before the final conveyance. The possibility that the reorganization court might determine under § 207 (b) that the Rail Act process is not fair and equitable to the railroad estate, or that Congress might disapprove the Final System Plan, § 208 (a), or that the Special Court would not order the final conveyance pursuant to § 303 (b), led the District Court to conclude that the question whether the final-conveyance provisions are constitutional was "too speculative to warrant anticipa-

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[22] *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–242 (1937); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273 (1941); *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 140–141 (1951); *id.,* at 154–155 (Frankfurter, J., concurring).

[23] *Ashwander* v. *TVA,* 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring); *Poe* v. *Ullman,* 367 U. S. 497, 502–503 (1961).

tory judicial determinations." *Eccles* v. *Peoples Bank,* 333 U. S. 426, 432 (1948).[24]

But subsequent to the District Court's opinion, the Penn Central Reorganization Court determined that the Rail Act did not provide a process that would be fair and equitable to the estate, *In re Penn Central Trans. Co.,* 382 F. Supp. 856 (ED Pa. 1974). On appeal to the Special Court under § 207 (b), that determination has been reversed, although the Special Court has not rendered its judgment, pending our decision of this case. 384 F. Supp., at 955. See n. 14, *supra.*

We agree with the parties that this change in circumstance has substantially altered the posture of the case as

[24] Judge Fullam disagreed with the majority below on the ripeness of some of the final-conveyance issues, 383 F. Supp., at 530–533. Among other things, he observed that the validity of the final-conveyance provisions was inextricably interwoven with the issues concerning interim erosion which the three-judge court did address. As suggested, *supra,* at 122–124, the constitutionality of requiring deficit railroad operations by a railroad in reorganization may depend in part upon the likelihood of a successful reorganization; if the provisions for the final conveyance were facially unconstitutional, there would be little likelihood of such reorganization, and it might be necessary to permit immediate abandonment for that reason alone. 383 F. Supp., at 530–533. We believe, unlike Judge Fullam, that the Tucker Act is available to compensate any unconstitutional taking which might arise from interim erosion. See *supra,* at 125–136. However, his observation about the interrelationship of the "erosion taking" and the "conveyance taking" issues is still pertinent. If it were entirely clear that no reorganization could take place under the Act because its conveyance provisions were unconstitutional, it might be pointless to permit continuing erosion of the estate and the inevitable buildup of a huge Tucker Act claim. Thus, we would have to decide whether those portions of the Act severely limiting abandonments are severable from the conveyance provisions. Because we find that some of the final-conveyance issues require resolution at this juncture for independent reasons, we need not determine whether we would have to confront any of them anyway in order completely to determine the validity of the abandonment provisions.

regards the maturity of the final-conveyance issues. Whatever may have been the case at the time of the District Court decision, there can be little doubt, for reasons to be detailed, that some of the "conveyance taking" issues can and must be decided at this time. And, since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern. [25]

First, the implementation of the Rail Act will now lead inexorably to the final conveyance, although the exact date of that conveyance cannot be presently determined. It is true that Congress can reject the first plan presented to it by the USRA, § 208 (a), and that the Rail Act, while prescribing with precision the timing of the presentation of that plan, §§ 207 (c) and (d), does not mandate the presentation of successive plans at any particular time. The Rail Act does, however, contemplate that USRA will continue to present plans, § 208 (b), until one becomes "effective," § 209 (a). Thus, we must assume there will be compliance with the Rail Act's mandatory terms in this respect and that a Final System Plan will at some time be certified to the Special Court. § 209 (c).[26]

[25] It might be appropriate under different circumstances only to decide that the issues are ripe, and to remand to the District Court for their determination on the merits. However, such a remand here would be both undesirable and unnecessary. The Rail Act provides a strict timetable for its implementation. Any delay occasioned by remanding to the District Court could seriously impede that timetable and frustrate the accomplishment of the Rail Act's objectives. Further, these issues have been fully ventilated by these same parties in the Special Court, which proceeded to decide them.

[26] The parties have stipulated that "[i]t is likely" that some of the rail properties of Penn Central will be designated for transfer, sale, or other conveyance in any Final System Plan executed under the Rail Act. App. 205, 318–319, 370–371. Since the Penn Central system holds an overwhelming percentage of the trackage, see n. 12,

Second, the Special Court is mandated to order the conveyance of rail properties included in the Final System Plan and is granted no discretion not to order the transfer.[27] While mandatory language does not necessarily deny a court of equity flexibility, *Hecht Co.* v. *Bowles,*

supra, to be reorganized under the Act, it is inconceivable that all of the Penn Central rail properties could be eliminated from the Final System Plan without destroying the possibility of achieving the goals of the Act. See §§ 101, 206 (a), 45 U. S. C. §§ 701, 716 (1970 ed., Supp. III). While the Act does contemplate that, under the Final System Plan, some of the rail properties may be designated for transfer to existing profitable railroads, §§ 206 (c)(1)(B), 206 (d)(2), 209 (c)(2), 303 (a)(2), 303 (b), 45 U. S. C. §§ 701 (c)(1)(B), 716 (d)(2), 719 (c)(2), 743 (a)(2), 743 (b) (1970 ed., Supp. III), no such transfer can occur unless the purchaser railroad agrees to the purchase. § 206 (d)(4). If any substantial portion of the Penn Central rail properties were an attractive investment for an existing railroad, the reorganization of the Penn Central presumably could have been accomplished under § 77, without recourse to the novel plan envisioned by the Act. Thus, we can properly assume that some Penn Central properties will be transferred to Conrail.

[27] Section 209 (a) provides: "Notwithstanding any other provision of law, the final system plan . . . is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 718 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

Section 303 (b)(1) commands that within 10 days after the compensation provided in the Final System Plan has been deposited with the Special Court pursuant to § 303 (a), the Special Court "shall" order the conveyance. Section 303 (b)(2) provides that the conveyance "shall not be restrained or enjoined by any court."

Finally, § 303 (c)(1) provides: "*After* the rail properties have been conveyed . . . the special court . . . shall decide . . . whether the transfers or conveyances . . . are in the public interest and are fair and equitable . . . ." (Emphasis added.) Thus, the statutory command is that once the Final System Plan has been presented to Congress and not disapproved, the Special Court can review it only after it has ordered the conveyance.

321 U. S. 321, 329 (1944), the central scheme of the Rail Act defers decision of any controversies over the terms of the transfer of rail properties until after the transfer has occurred. H. Rep. 55; S. Rep. No. 93–601, p. 34 (1973) (hereinafter S. Rep.).[28] The Special Court's opinion suggests that the mandatory order to convey probably could not prevent the Special Court from refusing to order the conveyance, indirectly if not by a direct injunction, if it were convinced that appellees' constitutional rights were certain to be violated. 384 F. Supp., at 931; *Marbury* v. *Madison,* 1 Cranch 137 (1803). But the possibility that a court may later decline to enforce the Rail Act as written because of its unconstitutionality cannot constitute a contingency itself pretermitting earlier consideration of the constitutionality of the Act. Cf. *Albertson* v. *SACB,* 382 U. S. 70, 76–77 (1965).

It appears, then, that the conveyance of Penn Central's rail properties to Conrail cannot be prevented by the debtor or its creditors or stockholder; and, while the exact terms of the conveyance remain to be decided, an order of the Special Court directing the conveyance is

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[28] The Senate bill contained a provision that might be read as authorizing the Special Court to refuse to order the conveyance if it found it not fair and equitable. S. 2767, § 303 (c)(2). See S. Rep. 35. However, this provision was deleted. It seems fundamentally at odds with §§ 303 (b) and (c)(1) of the Senate bill, and with the intent expressed by the Senate Committee Report, as cited in the text. We infer, therefore, that the provision was eliminated at conference precisely to make clear that the order of conveyance is mandatory, and that any litigation concerning valuation is to occur after the transfer. See H. R. Conf. Rep. No. 93–744, pp. 57, 58 (1973), which states that, except for certain provisions not pertinent here, the final bill follows the Senate version of the implementation scheme, "subject to technical and *clarifying* changes." (Emphasis added).

virtually a certainty. The Rail Act empowers no court, including this Court, to prevent it.

Thus, occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative. Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592–593 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 536 (1925); *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 287 (1936). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania* v. *West Virginia, supra,* at 593.[29]

True, there are situations where, even though an allegedly injurious event is certain to occur, the Court may delay resolution of constitutional questions until a time closer to the actual occurrence of the disputed event, when a better factual record might be available. Cf. *Public*

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[29] For this reason, decisions concerning justiciability of cases of apprehended criminal prosecution are not pertinent. Because the decision to instigate a criminal prosecution is usually discretionary with the prosecuting authorities, even a person with a settled intention to disobey the law can never be sure that the sanctions of the law will be invoked against him. Further, whether or not the injury will occur is to some extent within the control of the complaining party himself, since he can decide to abandon his intention to disobey the law. For these reasons, the maturity of such disputes for resolution before a prosecution begins is decided on a case-by-case basis, by considering the likelihood that the complainant will disobey the law, the certainty that such disobedience will take a particular form, any present injury occasioned by the threat of prosecution, and the likelihood that a prosecution will actually ensue. Compare *Golden* v. *Zwickler,* 394 U. S. 103 (1969), with *Albertson* v. *SACB,* 382 U. S. 70 (1965); *Steffel* v. *Thompson,* 415 U. S. 452, 459 (1974).

Affairs Press v. *Rickover,* 369 U. S. 111 (1962). Several factors militate, however, against that course in this case.

First, decisions to be made now or in the short future may be affected by whether or not the "conveyance taking" issues are now decided. The constitutionality of the final conveyance may be interwoven with the validity of the abandonment provisions. See n. 24, *supra.* The Penn Central Trustees may delay expending funds for maintenance in the interval before the final conveyance if constitutional doubts linger about ultimate reorganization under the Rail Act. See Reply Brief for Penn Central Trustees 12.

Second, the Act is a carefully structured method for planning and implementing a reorganization scheme. It necessitates the present denial to the railroads in reorganization of options otherwise available. For example, the New Haven Trustee filed in the District Court a motion to dismiss the § 77 proceeding, and to set up an equity receivership to liquidate Penn Central's assets. So long as reorganization under the Rail Act remains possible, an equity receivership is not available.

Third, and particularly significant, because of the structure of the Act there is no better time to decide the constitutionality of the Act's mandatory conveyance scheme to minimize or prevent irreparable injury. The precise contours of the Final System Plan will not be known until shortly before its certification to the Special Court.[30]

[30] The Final System Plan will become "effective" if it is not disapproved by either house of Congress within 60 calendar days of continuous session from the time it is transmitted to Congress. §§ 102 (4), 208 (a), 209 (a). After that, it may still have to be changed if USRA is unable to execute agreements with profitable railroads for purchases from the reorganized railroads (within 30 days of the effective date) or for sales to Conrail or to other profitable railroads (within 60 days of the effective date). § 206 (d) (4). Thus, it is possible that the Final System Plan to be certi-

Until that Plan has been finally developed, the courts will not have any more settled facts concerning the rail properties to be conveyed, the valuation of those properties, or the value of Conrail stock and other securities to be transferred to the Penn Central estate than they do now.

After the Final System Plan is effective, the Rail Act prohibits initial judicial review of its terms except by the Special Court. §§ 209 (a), 303 (b)(2). And this review is to occur after conveyance, not before.[31] Further, as all parties agree, the conveyance, because of its complexity and because of the long time lapse probable before valuation review is completed, in practical effect will be irreversible once it is made.

Thus, we will be in no better position later than we are now to confront the validity of the final-conveyance provisions. Rather, delay in decision will create the serious risk that consideration of the validity of those provisions may either be too hasty to afford protection of rights or too late to prevent the conveyance or assure compensation if the Rail Act were found unconstitutional.[32]

We hold, therefore, that the basic "conveyance taking" issues are now ripe for adjudication. This does not mean however that we need decide now all of the contentions pressed upon us. "Even where some of the provisions

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fied to the Special Court will not be known until 60 days after the effective date of the Plan. The Plan must be certified within 90 days of the effective date; however, it can be certified earlier. § 209 (c).

[31] The Special Court may have jurisdiction derived from the Constitution itself to refuse to convey if the terms of the transfer are clearly unconstitutional. See *supra,* at 142. But, as the Special Court noted, any such review would be hasty and made without adequate information. 384 F. Supp., at 931. Thus, while review at this stage is a theoretical possibility, it would not afford a better opportunity than the present one for an informed decision in light of well-developed facts.

[32] See also n. 36, *infra.*

of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality." *Communist Party* v. *SACB*, 367 U. S. 1, 71 (1961).

For example, the controversy over the proper valuation theory to be applied to both the rail properties and the stock of Conrail provided as compensation depends upon contingencies that argue forcefully for postponement of its resolution. The parties have stipulated that it will be impossible to ascertain until the Final System Plan is effective which rail properties will be transferred to Conrail, or their value on *any* valuation theory, or the value of the consideration to be exchanged for the rail properties. App. 205, 319, 371. Thus, it cannot be determined now what impact any particular theory of valuation may have when applied to either side of the equation, nor can we know where the interests of the various parties lie—that is, which methods of valuation would result in higher compensation to the estate or lower cost to Conrail. Rulings on these questions would plainly be rulings upon "hypothetical situations that may or may not [arise]." *Longshoremen's Union* v. *Boyd*, 347 U. S. 222, 224 (1954).

Moreover, valuation issues peculiarly require a much more developed record than has been prepared. Without evidence of actual figures supporting various valuation theories, a court is not able to discern "what legal issues it is deciding, what effect its decision will have on the adversaries, [or] some useful purpose to be achieved in deciding them." *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 244 (1952). Clearly the record on these issues does not yet provide the "confining circumstances of particular situations," *Communist Party* v. *SACB*, *supra*, at 72, which best inform constitutional adjudication.

Finally, there will be ample opportunity later to litigate valuation controversies after the factual record has matured. The Rail Act in terms vests the Special Court with the initial responsibility for valuation determinations,[33] subject to review by this Court. In that circumstance, we should surely await the Special Court's determinations. *Public Service Comm'n* v. *Wycoff Co., supra,* at 246. Were we to attempt decisions of valuation questions before the Special Court's determinations, we would necessarily be forced to a speculative interpretation of a statute not clear on the subject of valuation before the court entrusted with its construction has given us the benefit of its views.[34] Cf. *Public Service Comm'n* v. *Wycoff Co., supra; Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412 (1937).

In sum, of the "conveyance taking" issues, we hold ripe for adjudication the questions (a) of the availability of the Tucker Act remedy if the consideration exchanged upon final conveyance of the rail properties is less than the constitutional minimum, (b) whether stocks, however valued, can be part of the consideration for the rail properties, and (c) whether procedural due process will be denied by the statutory process for conveyance. We hold further that decision of the questions concerning the

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[33] The House bill attempted to define the valuation theory to be applied to the rail properties conveyed. H. R. 9142, § 102 (5); see H. Rep. 31. However, the definition of "fair and equitable value" is not in the Rail Act as adopted.

[34] The New Haven Trustee's contention that the conveyance provisions will constitute a taking because they mandate continuation of rail services indefinitely is similarly premature, because it is premised upon a hypothetical relationship between the railroad's liquidation value for "highest and best use" and its value as a going concern. Both of these values are by stipulation unknown, and the proper method of valuing the railroad properties is itself not justiciable now.

method of valuation to be applied to either the rail properties or the consideration therefor is premature.

B

Availability of Tucker Act Remedy for Any "Conveyance Taking"

Whether the Rail Act precludes the availability of the Tucker Act remedy for any amount by which the consideration exchanged for the rail properties finally conveyed falls short of the constitutional minimum need not detain us. The reasons that led to our conclusion that the Rail Act, insofar as it may work an unconstitutional taking due to interim erosion, does not render a Tucker Act remedy unavailable apply equally to the "conveyance taking" issue. No party has suggested that a difference in result can be supported. The Rail Act authorizes inclusion in the Final System Plan of different kinds of consideration in exchange for the rail properties, subject to adjustment by the Special Court to assure fairness and equity. Congress fully expected that this consideration would provide the minimum compensation required by the Constitution; it wished to provide no more. If, however, that hopeful expectation should not be fulfilled, and the consideration exchanged for the rail properties should prove to be less than the constitutional minimum, the Tucker Act will be available as the jurisdictional basis for a suit in the Court of Claims for a cash award to cover any constitutional shortfall.

C

Adequacy of the Tucker Act Remedy for "Conveyance Taking"

It is argued, however, that, even if a Tucker Act remedy remains open, the remedy is inadequate because it fails to cure basic deficiencies in the conveyance provisions of

the Rail Act.[35] We hold, to the contrary, that while the conveyance provisions of the Rail Act might raise serious constitutional questions if a Tucker Act suit were precluded, the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur as a result of the final-conveyance provisions. Further, with the Tucker Act remedy, the payment of "fair and equitable consideration" in compliance with the reorganization statutes is assured, and procedural due process is satisfied.

Primarily, it is contended that the Tucker Act remedy is inadequate because the "conveyance taking" is an exercise of the eminent domain power and therefore requires full cash payment for the rail properties.[36] Since our rea-

[35] It is also contended that the Tucker Act is inadequate since Congress may not appropriate the money awarded by the Court of Claims. But, as Mr. Justice Harlan wrote, "there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States." *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 571 (1962). See also *Albert Hanson Lumber Co.* v. *United States,* 261 U. S. 581, 587 (1923); *Silesian-American Corp.* v. *Clark,* 332 U. S. 469, 480 (1947).

We reject as well the suggestion that a Tucker Act remedy comes too late. See *Hurley* v. *Kincaid,* 285 U. S. 95 (1932). Interest on a just-compensation award runs from the date of the taking. See, *e. g., United States* v. *Thayer-West Point Hotel Co.,* 329 U. S. 585, 588 (1947). Finally, contrary to the suggestion of some of the plaintiffs below, we see no reason why a Tucker Act remedy is inadequate because the valuations involved may be complex. Cf. *Phillips* v. *Commissioner,* 283 U. S. 589, 596–601 (1931).

All of the arguments concerning inadequacy of the Tucker Act remedy are pressed with regard to both the alleged "erosion taking" and the alleged "conveyance taking." As with the availability of the Tucker Act remedy, see *supra,* at 148, there is no distinction between these arguments or their resolutions in the two contexts.

[36] To delay until any Court of Claims adjudication with respect to the *form* of consideration provided by the Act would be exceedingly irresponsible: while the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy, it does suggest that

sons supporting the availability of the Tucker Act remedy assume that the basic compensation scheme of the Act is valid but could result in payment of less than the constitutional minimum, it might indeed be inconsistent with the Rail Act to suppose that a Tucker Act suit would lie for the *entire* value, in *cash,* of the rail properties.

This argument fails, however, for two reasons. First, it is extremely questionable whether, even if the Rail Act were on its face an acquisition of private property for public use, the entire value of the property acquired would have to be paid in cash. More important, we believe that there is nothing in the Act fundamentally at odds with the expressed purpose of Congress to supplement the reorganization laws, see H. Rep. 29, and, with the Tucker Act, the Rail Act is valid as a reorganization statute.

No decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes. Statements can be found in opinions that the compensation "must be a full and perfect equivalent for the property taken," *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326 (1893); must reimburse "the full and perfect equivalent in money of the property taken," *United States* v. *Miller,* 317 U. S. 369, 373 (1943); and must be the "full monetary equivalent of the property taken," *United States* v. *Reynolds,* 397 U. S. 14, 16 (1970); see also *Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U. S. 470, 473 (1973).[37] Yet, in none of these cases was com-

Congress might wish to consider whether to abandon the whole Act if it turned out that the *entire* value of the rail properties must be paid in cash.

[37] At least two of the complaining parties agree that, to the extent compensation to the rail estates is paid in obligations of USRA backed by federal guarantees, the securities can be figured at face value as the perfect equivalent of money. Reply Brief for Cross-

pensation in a form other than cash at issue. The clear implication of other decisions is that consideration other than cash—for example, any special benefits [38] to a property owner's remaining properties—may be counted in the determination of just compensation. *Bauman* v. *Ross,* 167 U. S. 548, 584 (1897); see 3 P. Nichols, Eminent Domain § 8.62 *et seq.* (rev. 3d ed. 1974).[39]

We need not, however, determine whether compensation in the form of securities would be constitutional if the Rail Act were merely an eminent domain statute;

Appellant New Haven Trustee 45; Brief for Appellee Penn Central Co. 56. See §§ 206 (h), 210, 303 (c)(2).

[38] The special-benefits rule of compensation may later have direct relevance to the Penn Central reorganization. The Act provides that determination of the fairness and equity of the terms of the transfer should take into account "securities and *other benefits*" (emphasis added) provided to the railroad estate. § 303 (c)(2). See also § 206 (d)(1). The parties here disagree about what "other benefits" may be under the Act, and the extent to which any such may be counted as constitutional consideration. In particular, there is a dispute over whether the sums up to $250,000,000 in benefits to be paid Conrail as reimbursement for certain labor expenses are "other benefits" to be counted in evaluating the exchange. See § 509, 45 U. S. C. § 779 (1970 ed., Supp. III). For the reasons given *supra,* at 146–147, with respect to other valuation problems, this issue is presently premature.

[39] The claim is also made that, whatever the form of compensation proper under the Fifth Amendment, the legislature cannot specify the form of compensation but must leave the decision to the judiciary. This argument is based upon an erroneous reading of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327 (1893). *Monongahela* held only that the legislature could not, by setting either a fixed amount to be paid for property condemned or a principle for arriving at that amount, settle the constitutional right to just compensation. Thus, *Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands. It said nothing about whether Congress can dictate the mode of compensation rather than the amount.

for the arguments in favor of this construction have no merit.

First, it is contended that despite the express provision of § 301 (b) that Conrail "shall not be an agency or instrumentality of the Federal Government," 45 U. S. C. § 741 (b) (1970 ed., Supp. III), federal participation through federally appointed members of the board of directors constitutes Conrail a federal instrumentality.[40] From that premise the contention proceeds that the conveyance is an exercise of eminent domain. But Conrail is not a federal instrumentality by reason of the federal representation on its board of directors. That representation was provided to protect the United States' important interest in assuring payment of the obligations guaranteed by the United States. Full voting control of Conrail will shift to the shareholders if federal obligations fall below 50% of Conrail's indebtedness. The responsibilities of the federal directors are not different from those of the other directors—to operate Conrail at a profit for the benefit of its shareholders. Thus, Conrail will be basically a private, not a governmental, enterprise.

Second, it is contended that the Rail Act's provisions for a compelled conveyance and for the continuation of rail services pending formulation of the Final System Plan constitute the Act a condemnation statute. We see

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[40] Section 301 (d) provides:

"(d) Board of Directors.

"The Board of Directors of [Conrail] shall consist of 15 individuals selected in accordance with the articles and bylaws of [Conrail]: *Provided,* That so long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of [Conrail] consists of obligations of [USRA] or other debts owing to or guaranteed by the United States, three of the members of such board shall be the Secretary [of Transportation], the Chairman and the president of [USRA] and five of the members of such board shall be individuals appointed as such by the President, by and with the advice and consent of the Senate."

no significance in these features of the Act either. Congress, in enacting those provisions, clearly intended to legislate pursuant to the bankruptcy power. The Rail Act, like § 77 of the Bankruptcy Act, which the Rail Act supplements, merely "advances another step in the direction of liberalizing the law on the subject of bankruptcies," *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 671 (1935), and "far-reaching though [it] be, [it has] not gone beyond the limit of congressional power . . . ." *Ibid.* That is the teaching of *RFC* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495 (1946), where the Court sustained the "cram-down" provision of § 77 authorizing a reorganization court to confirm a plan despite its rejection by creditors. The Court said: "We think that the provisions for confirmation by the courts over the creditors' objection are within the bankruptcy powers of Congress. Those powers are adequate to eliminate claims by administrative valuations with judicial review and they are adequate to require creditors to acquiesce in a fair adjustment of their claims, so long as the creditor gets all the value of his lien and his share of any free assets." *Id.*, at 533.[41] Similarly, under

[41] An attempt is made to distinguish the "cram-down" provisions of § 77 (e) because § 77 (e) provides for a vote of all classes of creditors after the reorganization court has determined that a plan is fair and equitable. A "cram-down" is permitted only if the reorganization court finds any objection by a class of creditors "not reasonably justified." But the creditors' right to object to a plan approved by the court has a severely limited scope. "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection." *RFC* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 535 (1946). A "reasonable" objection must be based upon facts arising *after* the original approval of the plan by the court. *Ibid.* The omission in the Rail Act of this very limited right of objection cannot constitute the Act an eminent domain statute.

the Rail Act, the Special Court has the duty to provide the railroad estates with the "fair and equitable" equivalent in Conrail securities for the rail properties conveyed.

Finally, it is argued that there are defects in the Rail Act's provisions for judicial review that identify the Act as an exercise of the eminent domain power. The argument is frivolous. Although the time has not yet arrived for the mandatory transfer to Conrail, the reorganization courts have had a full opportunity to assess the fairness of the Rail Act's scheme to the rail estates. § 207 (b). The Special Court has reviewed those determinations and under § 303 (c) will have an opportunity to review the terms of the transfer, although not the conveyance itself. In addition, neither the Rail Act itself nor the procedures thereunder finally determine the interests of the respective creditors. Those will be decided in the § 77 reorganization courts, which will distribute to creditors the consideration received for the rail properties. There are, therefore, ample adequate "[s]afeguards . . . to protect the rights of secured creditors . . . to the extent of the value of the property." *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 278 (1940); cf. *North American Co.* v. *SEC*, 327 U. S. 686 (1946).

We are not to be understood to intimate that the Rail Act proceeding could not result in a compensable taking. We hold only that, since the Rail Act does not on its face exceed the broad scope of congressional power under the Bankruptcy Clause, cf. *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, *supra*, at 670,[42] Congress has not formulated an unconstitutional reorganization plan in compelling a reorganization wherein the compensation to appellees consists of Conrail and USRA securities and other benefits "so long as the creditor gets

[42] *Continental Bank* expressly notes that § 77 does not represent the limits of the bankruptcy power. 294 U. S., at 671.

all the value of his lien and his share of any free assets." *RFC* v. *Denver & R. G. W. R. Co., supra,* at 533.

This Act does differ from other reorganization statutes such as § 77, however, in that it *requires* a conveyance before it is possible to ascertain whether this last condition will be met. Thus, the conveyance is mandated without any prior judicial finding that there will be adequate resources in the reorganized company of whatever kind to compensate the debtor estates and, eventually, their creditors. Because of this congressional insistence upon accomplishing the transfer whatever the ultimate equity of the compensation provisions, any deficiency of constitutional magnitude in the value of the limited compensation provided under the Act will indeed be a taking of private property for public use. Cf. *North American Co.* v. *SEC, supra,* at 710.[43] Since we have already determined, however, that there would then be recourse to a Tucker Act suit in the Court of Claims for a cash award to cover any constitutional shortfall, the Rail Act does provide adequate assurance that any taking will be compensated.

The remaining contentions regarding the validity of the final-conveyance provisions require little discussion in view of the availability of a Tucker Act suit.

The first contention is that, even if considered as a reorganization statute, the Rail Act fails to assure that creditors will receive the full value of their liens in stock or securities. However, we have already held that, because of the possibility that the Rail Act will work a taking, there must be assurance of consideration equal to any constitutional shortfall, and that a Tucker Act remedy is available to provide that assurance. Thus, the value of

[43] None of the parties question that any "taking" effected by the Rail Act will be for "public use." Cf. *Berman* v. *Parker,* 348 U. S. 26 (1954).

the stocks and securities provided under the Act is backed up by what is essentially a guarantee of cash payment for any lack of fairness and equity of constitutional dimensions. The Tucker Act remedy fulfills perfectly, then, the function of the underwriting provision approved in the *New Haven Inclusion Cases*, 399 U. S., at 486–488.

Similarly, the availability of the Tucker Act cures what might otherwise be a troublesome problem of procedural due process. The Tucker Act assures that the railroad estates and the creditors will eventually be made whole for the assets conveyed. Complainants evidence no interest in retaining their property for longer than the Rail Act requires. Indeed, their position is really that they want to be free to dispose of it sooner. Thus, there is no interest asserted in retaining the properties themselves; the only interest is in making sure that creditors receive fair compensation for those properties. On the other hand, the procedural sequence is vital to accomplishing the goals of the Act. If judicial review of the terms of the transfer was required before the conveyance could occur, the conveyance might well come too late to resolve the rail transportation crisis. As long as creditors are assured fair value, with interest, for their properties, the Constitution requires nothing more.

VI

Validity of the Rail Act Under Uniformity Requirement of Bankruptcy Clause

We consider finally the contention that, because the Rail Act's provisions apply only to railroads in reorganization in the "region," the statute lacks the uniformity required by Art. I, § 8, cl. 4, of the Constitution giving Congress power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

The District Court held that "recourse to the bank-

ruptcy clause to justify Congressional action is necessary only if that action impairs the obligation of contracts." 383 F. Supp., at 534 (Fullam, J., concurring). In that respect, the court found that the Rail Act adds virtually nothing to the powers already granted to reorganization courts under the "uniform and admittedly valid provisions of § 77 of the Bankruptcy Act. . . . Authority to order conveyances free and clear of liens, and to 'cram down' a plan of reorganization, already exists under § 77, and is not newly created or added by the [Rail] Act." *Ibid.*

The court determined, however, that one provision of the Rail Act is "newly created or added by the [Rail] Act." Section 207 (b) requires the reorganization court to dismiss the § 77 proceeding if it finds that the railroad is not reorganizable on an income basis within a reasonable time, *and* that the Rail Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization. The District Court noted that the *New Haven Inclusion Cases, supra,* held that inasmuch as the plan disposed of the New Haven's assets to the Penn Central for continued operations, § 77 could be used to reorganize the enterprise as an investment holding company, "at least where the plan contemplates that the bulk of the rail properties will continue to be operated as a railroad by someone." 383 F. Supp., at 534. The District Court held that § 207 (b) of the Rail Act precludes a like reorganization under § 77 by requiring dismissal of the § 77 proceedings, and to that extent violates the uniformity clause since this dismissal relates only to debtors within the region covered by the Rail Act.

We need not decide whether the District Court was correct in this respect. Following the decision of the District Court, the Penn Central Reorganization Court issued its 180-day order finding that, although Penn Central is not

reorganizable on an income basis under § 77, the Rail Act does not provide a process which would be fair and equitable to the debtor's estate. 382 F. Supp. 856, 870–871. Rather than dismiss the § 77 proceeding as required by § 207 (b), however, the court stayed its order pending an appeal to the Special Court. The Special Court found that the processes prescribed in the Rail Act are fair and equitable if a remedy exists under the Tucker Act, and reversed. 384 F. Supp., at 910–911. The Rail Act expressly provides that this holding is nonreviewable. § 207 (b). Although we need not address today the issue whether the judgment of the Special Court is subject to review, we do hold that the Tucker Act remedy is available for any uncompensated taking occurring under the Rail Act. That holding obviates the possibility that the Penn Central Reorganization Court will ever confront the provisions for dismissal of a § 77 proceeding under § 207 (b) of the Rail Act.

There remains, however, another aspect of the uniformity issue for decision. Appellees urge that the entire Rail Act violates the uniformity clause. The argument is that the uniformity required by the Constitution is geographic, *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 188 (1902), and since the Rail Act operates only in a single statutorily defined region, the Act is geographically nonuniform.

The argument has a certain surface appeal but is without merit because it overlooks the flexibility inherent in the constitutional provision. Section 77 was upheld against a like challenge on the ground of the "capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day." *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. &*

P. R. Co., 294 U. S., at 671. The Court therefore held that, though § 77 was a distinctive and far-reaching statute, treating railroad bankruptcies as a distinctive and special problem, it was not "beyond the limit of congressional power." [44]

The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems. "The problem dealt with [under the Bankruptcy Clause] may present significant variations in different parts of the country." *Wright* v. *Vinton Branch*, 300 U. S. 440, 463 n. 7 (1937). We therefore agree with the Special Court that the uniformity clause was not intended "to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions." 384 F. Supp., at 915.

The national rail transportation crisis that produced the Rail Act centered in the problems of the rail carriers operating in the region defined by the Act, and these were the problems Congress addressed.[45] No railroad reorga-

[44] The Court observed that it is not unusual for railroads to receive disparate treatment under the bankruptcy laws:

"Railway corporations had been definitely excluded from the operation of the law in 1910 (c. 412, § 4, 36 Stat. 838, 839), probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts as they mature.'" 294 U. S., at 671–672.

[45] H. Rep. 25–29; S. Rep. 6–14.

nization proceeding, within the meaning of the Rail Act, was pending outside that defined region on the effective date of the Act or during the 180-day period following the statute's effective date. Thus the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads.

The uniformity clause requires that the Rail Act apply equally to all creditors and all debtors, and plainly this Act fulfills those requirements. *Vanston Bondholders Protective Committee* v. *Green,* 329 U. S. 156, 172 (1946) (Frankfurter, J., concurring). "No provision of the Act restricts the right of any creditor wheresoever located to obtain relief because of regionalism." 383 F. Supp., at 519.

Our construction of the Bankruptcy Clause's uniformity provision comports with this Court's construction of other "uniform" provisions of the Constitution. The *Head Money Cases,* 112 U. S. 580 (1884), involved the levy on ships' agents or owners of a 50-cent tax for any passenger not a United States citizen who entered an American port from a foreign port "by steam or sail vessel." Individuals engaged in transporting passengers from Holland to the United States challenged the levy as contrary to Art. I, § 8, cl. 1, under which Congress is empowered to lay and collect "all Duties, Imposts and Excises [which] shall be uniform throughout the United States." The argument was that the head tax violated the uniformity clause because it was not also levied on noncitizen passengers entering this country by rail or other inland mode of conveyance. The Court upheld the tax, stating:

> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case . . . is uni-

> form and operates precisely alike in every port of the United States where such passengers can be landed." 112 U. S., at 594.

That the tax was not imposed on noncitizens entering the Nation across inland borders did not render the tax nonuniform since "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." *Id.*, at 595. Similarly, the Rail Act is designed to solve "the evil to be remedied," and thus satisfies the uniformity requirement of the Bankruptcy Clause. The argument that the Rail Act differs from the head tax statute because by its own terms the Rail Act applies only to one designated region is without merit. The definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies.

Reversed.

MR. JUSTICE STEWART dissents from the opinion and judgment of the Court, substantially for the reasons set out in Part II of the dissenting opinion of MR. JUSTICE DOUGLAS.

MR. JUSTICE DOUGLAS, dissenting.

These cases have created, as did the *Penn-Central Merger* cases,[1] that "hydraulic pressure" which, Mr. Justice Holmes once said, "makes what previously was clear

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[1] See *Baltimore & O. R. Co.* v. *United States*, 386 U. S. 372 (1967); *Penn-Central Merger Cases*, 389 U. S. 486 (1968); *New Haven Inclusion Cases*, 399 U. S. 392 (1970). In *Baltimore & O. R. Co.* v. *United States, supra*, I summarize in my dissent, 386 U. S., at 452–459, some of the financial chicanery behind the creation of the "new Frankensteins" with which we now deal, *id.*, at 455.

seem doubtful, and before which even well settled principles of law will bend." [2]

If the rule of law under a moral order is the measure of our responsibility, as I have always assumed, we can only hold that the Rail Act of January 2, 1974, 87 Stat. 985, 45 U. S. C. § 701 *et seq.* (1970 ed., Supp. III), undertakes to sanction a fraudulent conveyance, as those words were used in 13 Eliz.,[3] and in our Bankruptcy Act. I have been reluctant so to conclude, implicating as it does our legislative branch in a lawless maneuver of gigantic proportions. But, baldly put, the present law is a *tour de force* to that end.

Article I, § 10, of the Constitution bars the States from passing a law "impairing the Obligation of Contracts." Though the Federal Government is not so enjoined, it is restrained by the Fifth Amendment which provides that no person can be deprived of "property" without "due process of law." I assume it is conceded that Congress, apart from the bankruptcy power in Art. I, § 8, may not impair the obligation of contracts without violating the Due Process Clause.[4] But "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment," as Mr. Justice Brandeis, writing for the Court in *Louisville Bank* v. *Radford,* 295 U. S. 555, 589 (1935), held.

This does not mean that so far as rail carriers are concerned the creditors can exact their pound of flesh, dismembering or liquidating the debtor. The public in-

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[2] *Northern Securities Co.* v. *United States,* 193 U. S. 197, 401 (1904) (dissenting opinion).

[3] 13 Eliz., c. 5 (1570); G. Glenn, Fraudulent Conveyances & Preferences (rev. ed. 1940).

[4] *The Gold Clause* cases are on a different footing, for as Mr. Chief Justice Hughes wrote in *Norman* v. *Baltimore & O. R. Co.,* 294 U. S. 240 (1935), the power of Congress to regulate the currency and establish the monetary system was involved.

terest may not be subverted in that manner. As the Court said in *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 671 (1935), a case involving a rail reorganization under § 77 of the Bankruptcy Act, 11 U. S. C. § 205:

> "A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities can not be halted because its continuous, uninterrupted operation is necessary in the public interest . . . ."

Congress made such findings in these cases in § 101 (a) of the Act, 45 U. S. C. § 701 (a) (1970 ed., Supp. III). Hence the congressional objective in the Rail Act of preserving the assets of these six railroads [5] as part of a continuing enterprise in the form of a new corporation (for convenience called Conrail [6]) is well within the Bankruptcy Clause. The question remains, however, whether by the means it has chosen Congress has transgressed constitutional boundaries.

I

The property is "taken for public use" within the meaning of the Fifth Amendment. First is the mandate of Congress. The Rail Act provides for an obligatory transfer of the assets of these companies to Conrail. The creditors, the trustees, the stockholders, the reorganization judge have no other option. The record makes abundantly clear what all the parties concede, that Conrail, though dubbed "a for-profit corporation" by § 301

[5] Penn Central Transportation Co. and its subsidiaries; Lehigh Valley Railroad Co.; Central Railroad Co. of New Jersey; Lehigh & Hudson River Railway Co.; Reading Co.; Ann Arbor Railway Co.

[6] Consolidated Rail Corp. created by § 301 of the Act, 45 U. S. C. § 741 (1970 ed., Supp. III).

(b) of the Act, 45 U. S. C. § 741 (b) (1970 ed., Supp. III), shows no prospect of being an enterprise operating on a profitable basis.[7] Penn Central losses between June 21, 1970, and December 31, 1973, were $851 million, and the Reorganization Court,[8] whose judgment we are not reviewing, found that reorganization on an income basis was not possible. The values that ride on today's decisions are therefore not based on the prospect of future profitable operations.[9] The only consideration in the framework of the Act which provides "just compensation" for the taking is in the form of "securities" of Conrail, § 206 (d)(1), 45 U. S. C. § 716 (d)(1) (1970 ed., Supp. III). If those "securities" are common stock, they will have value only insofar as Conrail will be a viable entity which generates income in excess of costs and fixed charges. If the trustees under § 77 of the Bankruptcy Act, 11 U. S. C. § 205, cannot make ends meet, there is no reason to expect that Conrail can. Conrail, to be sure, is made eligible to receive obligations of the United States Railway Associa-

[7] The Reorganization Court found that Penn-Central (the debtor) was "not reorganizable on an income basis within a reasonable time"; and that ruling has not been appealed. *In re Penn-Central Trans. Co.*, 382 F. Supp. 831, 842 (ED Pa. 1974).

[8] Section 209 (b), 45 U. S. C. § 719 (b) (1970 ed., Supp. III), designates a Special Court of three federal judges which, *inter alia*, is to pass on the question whether the plan is "fair and equitable." § 303 (c)(2), 45 U. S. C. § 743 (c)(2) (1970 ed., Supp. III). A preliminary decision by the Special Court which in certain important aspects conflicts with that of the Reorganization Court was rendered September 30, 1974. *In re Penn Central Trans. Co.*, 384 F. Supp. 895.

[9] A study commissioned by the Penn Central Trustees, on file with the ICC, estimates for Penn Central assets as of December 31, 1970, a "continued railroad use" value of $13,585,493,000 and a "liquidation of non-rail uses" at $3,532,110,000. PCTC Physical Asset Valuation Study (Apr. 1973, revised May 30, 1973), ICC Fin. Docket No. 26241 (Joint Documentary Submission No. 40).

tion (USRA), an incorporated nonprofit association created by the Act to issue obligations not exceeding $1,500,000,000, which are guaranteed by the Secretary of the Treasury, § 210, 45 U. S. C. § 720 (1970 ed., Supp. III). But of this one billion and a half not more than one billion can be issued to Conrail; of the one billion "not less than $500,000,000 shall be available solely for the rehabilitation and modernization" of the rail properties, § 210 (b). Hence $500 million might be apportioned under a plan to creditors. But if the Special Court determines under § 303 (c), 45 U. S. C. § 743 (c) (1970 ed., Supp. III), that the value of the securities given creditors in exchange for the property pledged under prior law for payment of their claims is less than the fair value of the properties conveyed, the Special Court can under § 303 (c)(2) do only three things:

1. Reallocate the securities issued;
2. Require Conrail to issue additional securities;
3. Enter a deficiency judgment against Conrail.

The common stock of Conrail is plainly only token payment. Issuance of new and different securities by Conrail would have to have interest or dividend rights to be marketable and that would bring back into play some of the forces that plague the present trustees under § 77. Any securities issued by Conrail must "minimize any actual or potential debt burden" of Conrail, § 206 (i), 45 U. S. C. § 716 (i) (1970 ed., Supp. III). Moreover, § 301 (d) of the Rail Act provides that so long as more than half the debt of Conrail is guaranteed by the Government, a majority of the 15 directors are designated from outside—the Secretary of Transportation, the Chairman and the President of the USRA, and five others named by the President with the consent of the Senate. One cannot read the Rail Act and believe that Congress thought that federal money going

into Conrail could be made subordinate to any debt created by Conrail. A contrary assumption would make the watch-dog purpose of § 301 (d) quite superfluous. Yet, unless Conrail's new debt were serviced, it could not be marketed and even if it were, it could add no element of value to the compensation received by the creditors of these railroads under a reorganization plan. The upshot is that compensation for properties acquired by Conrail would be mostly paid for in Conrail stock with a sprinkling of the bonds of the Association issued to Conrail, assuming that they were not expended in the operations of Conrail between the time it started its operation and the date of the final plan of reorganization.

The value of the properties to be transferred has not yet been determined. We held in the *New Haven Inclusion Cases*, 399 U. S. 392, 489 (1970), where the New Haven road was being shut down and its assets sold, that just compensation was to be measured by the "highest and best value" of the assets sold. In that case that value was liquidation value. In light of the findings of the Reorganization Courts in the present cases, we cannot say that the $500 million of federally guaranteed bonds comes anywhere near any reasonably assured value.[10]

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[10] See n. 9, *supra*. In the case of Penn Central alone, the Reorganization Court said that "there is every reason to suppose that the included properties would be worth considerably more than $500 million." 382 F. Supp. 856, 864 (ED Pa. 1974) (Fullam, J.).

Judge Fullam's concurring opinion in the District Court noted:

"As a matter of simple maximization of values, if there is no 'going concern' value in the usual sense, there is no justification for continuing a reorganization proceeding, unless either or both of the following conditions are established: (1) a reasonable prospect that, because of streamlining, consolidations, and other changes in circumstances, earning power and profitability can be restored; or (2) a reasonable prospect that the public need for preserving the debtor's railroad is such that it will be appropriated for public use, and that the values inherent in its assemblage as an operating railroad will

Value of any substantial amount cannot be attributed to the common stock of Conrail, because most of the problems of the existing roads will be inherited by Conrail and its prospects of generating income in excess of costs and fixed charges are, if not nil, remote. It would be irony to call entry of a deficiency judgment against Conrail adequate to make up any deficiency. For that judgment would only eat away at any value which the common stock of Conrail had.

The vicious character of these legislative decisions is emphasized by the cram-down provision of the Rail Act. In § 77 proceedings there is a cram-down provision to prevent one class from a holdup of a fair and equitable plan. Section 77, however, allows a cram-down only if the Court *first* finds the plan fair and equitable and *after* the security holders have had their hearing. Under the Rail Act the assets are first transferred to Conrail *even before* the Special Court has made its "fair and equitable" finding. Moreover, the security holders never have a vote on the plan.

Congress has lowered all the procedural barriers and foisted on these rail carriers a conveyance of their assets which, if done by private parties in control of a bankrupt estate, would be a fraudulent conveyance. Here it is achieved by Congress' purporting to act in the "public interest." That is a taking for a public purpose; but by Fifth Amendment standards it is a taking of property without assurance of just compensation.

II

The Court relies, as do all parties who seek to sustain the statute, on the assumed availability of a suit in

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be recognized and paid for. *Cf.* Port Authority Trans. Hudson Corp. v. Hudson Rapid Tubes, 20 N. Y. 2d 457, 231 N. E. 734, cert. denied 390 U. S. 1002 (1967)." 383 F. Supp. 510, 537 (ED Pa. 1974). (Footnote omitted.)

the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, to recover any shortfall between fair liquidation value and the compensation the bankrupt roads receive under the Rail Act. The Solicitor General, while initially arguing that the judgment below could be reversed without reaching the Tucker Act question, now pitches his argument in support of the statute chiefly upon the availability of a Tucker Act suit.

The Tucker Act confers jurisdiction on the Court of Claims

> "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The Rail Act neither expressly permits nor expressly excludes a suit under § 1491. USRA says that "[o]ne searches the Rail Act in vain for a sentence such as 'The Court of Claims shall have no jurisdiction over any action alleging that the property of any person has been taken pursuant to this Act without just compensation.'" But this observation is only the beginning of analysis. It is not enough merely to note that the Rail Act carves out no exception to § 1491 in express words. "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys' Markets, Inc.* v. *Retail Clerks,* 398 U. S. 235, 250 (1970). This precept requires us to inquire whether provisions that are not mutually exclusive by their terms are so divergent in approach that they cannot co-exist in a particular setting. Congress may provide a mechanism for dealing with a particular problem that by its structure and purpose is inconsistent with a traditional avenue of relief applicable

to a broader class of cases. Under these circumstances, Congress may have supplanted the traditional remedy, albeit by implication. In my view, this is precisely what Congress has done in the Rail Act.

The Act provides a strict timetable for bringing Conrail into operation. USRA is expected to present the Final System Plan to Congress within 570 days of the enactment of the Rail Act.[11] The Plan is deemed approved unless Congress specifically disapproves within a specified period. § 208 (b). Once the plan is approved, USRA must certify it to the three-judge Special Court within 90 days, § 209 (c). Within 10 days after certification, Conrail must deposit its stock and securities with the Special Court, § 303 (a), and the court must direct the conveyance of properties to Conrail pursuant to the plan within 10 days thereafter, § 303 (b).

Congress plainly sought expedition in the process of creating Conrail. This is apparently the reason for deferring until after the transfer of the properties the question of valuation and distribution of stock to the contributing railroads.[12] The policy of expedition carries over into the provisions for judicial participation in this process. Appeals from decisions of the reorganization district courts concerning the inclusion of the debtor roads in the provisions of the Rail Act lie exclusively to

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[11] Section 207 (c), 45 U. S. C. § 717 (c) (1970 ed., Supp. III), required the executive committee of USRA to present the final system plan to USRA's board of directors for approval within 420 days after enactment of the Act, later extended to 540 days by Pub. L. 93–488. Within 30 days after presentation by the executive committee, the board shall "approve a final system plan which meets all of the requirments of section 716 [prescribing contents of the plan and the general goals]." The plan is then submitted to Congress, § 208 (a), 45 U. S. C. § 718 (a) (1970 ed., Supp. III).

[12] See H. R. Rep. No. 93–620, pp. 54–55 (1973) (hereinafter cited as H. Rep.).

the Special Court; its decision in these appeals must be made within 80 days, § 207 (b), 45 U. S. C. § 717 (b) (1970 ed., Supp. III). Once the Final System Plan is approved by Congress, § 209 (b) of the Act, 45 U. S. C. § 719 (b) (1970 ed., Supp. III), provides for consolidation in the Special Court of "all judicial proceedings with respect to the final system plan." The decision of the Special Court regarding the distribution of Conrail stock and securities pursuant to § 303 (c) is appealable directly to this Court. We are directed to give the appeal "the highest priority" and even to dismiss it within seven days if we conclude that its pendency "would not be in the interest of an expeditious conclusion of the proceedings." § 303 (d).

A suit in the Court of Claims would be quite an odd appendage to the streamlined judicial procedures just described. The language of § 209 (b) vesting in the Special Court "all judicial proceedings with respect to the final system plan" immediately raises doubt that a Tucker Act remedy is compatible with the Act.[13] The doubt is amplified when one looks at the entire scheme of judicial participation. I do not think that Congress, in setting up a Special Court, consolidating proceedings, limiting appeals, and demanding expeditious decisions, intended at the same time to permit yet another round of litigation on the compensation question to begin

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[13] This language originated in the Senate bill. The House bill had provided for consolidation in the Special Court of "all proceedings of any kind which arise or may arise concerning the final system plan or implementation thereof." (§ 501 (a)). The House Report explains that "Title V . . . guarantees the creditors their day in court and preserves their Constitutional right to a judicial determination of just compensation for their property." H. Rep. 47. The Senate language was incorporated in the final bill, and apparently no significance was attached to the disparity between the two versions. See H. R. Conf. Rep. No. 93–744, pp. 56–59 (1973).

in the Court of Claims after all the procedures mandated by the Rail Act had been exhausted.

Despite the obvious frustration of the policy of expedition, the inference that a Tucker Act remedy is available might still be justified were it not for the special features of the compensation arrangement that limit the infusion of federal funds. As will be seen, these features were important to Congress, and they are circumvented if a suit in the Court of Claims is allowed.

The Special Court, after it has directed the transfer to Conrail of "all right, title, and interest" in the properties of contributing roads designated in the Final System Plan, § 303 (b), must determine whether the transfers of property from the bankrupt roads are "fair and equitable to the estate." But the Special Court has only limited tools for rectifying any unfairness or inequity it finds, and the limitations on its powers quite clearly indicate congressional intent to limit the commitment of federal funds. The preferred form of compensation to the debtor roads is stock of Conrail. § 303 (c)(2)(A). If the stock is insufficient, the Special Court may next order distribution of Government-guaranteed obligations of Conrail, § 303 (c)(2)(B), but these are limited in face value to $500 million,[14] absent an authorization by joint resolution of Congress to exceed the limitation. If any shortfall remains after distribution of stock and Government-guaranteed obligations, the Special Court is directed to enter a deficiency judgment against Conrail, § 303

[14] Under § 210 (b), 45 U. S. C. § 720 (b) (1970 ed., Supp. III), USRA is authorized to issue Government-guaranteed obligations not exceeding $1.5 billion. Only $1 billion, however, may be issued to Conrail, and of this amount $500 million must be made available solely for rehabilitation and modernization of properties acquired from contributing roads. This leaves $500 million of obligations available to the Special Court for distribution to the estates under § 303 (c)(2)(B).

(c)(2)(C). The judgment is against the corporation and not the United States, with the apparent purpose of protecting the Treasury from a liability of unanticipated magnitude. As Representative Adams, one of the principal architects of the Rail Act in the House, explained when specific assurances about the federal exposure were sought early in debate on the bill:

> "Mr. ADAMS. There is a specific limitation in the final bill which says no more than $200 million [later raised to $500 million] of Government loan guarantees can be used for acquisition in any event, so if the court in 5 to 10 years should come in with a higher value, the only judgment would be against this new corporation that is there.
>
> "Under the New Haven case the court was placed in this kind of position that if it loads up that new corporation with a debt structure by requiring it to issue additional bonds, it lowers the value of the common stock, which is what it is being paid for in terms of these assets.
>
> "Mr RUPPE. Does it not have to deliver more stock? It seems to me from reading the language that we have to cause the corporation securities issued in payment of the properties to have a value which is a fair and equitable value as determined by the court.
>
> "Mr. ADAMS. That is correct, but that is this corporation's and not the taxpayers of the United States money." 119 Cong. Rec. 36355 (1973).

The possibility that there might be a large deficiency judgment was not unnoticed. See *id.*, at 36352 (remarks of Rep. Skubitz) and 36355 (remarks of Rep. Shoup). But those who adverted to this possibility noted that Congress would have an opportunity to consider later

whether to deal with it by relaxing the limitations on the amount of Government loan guarantees available to Conrail, by means of a joint resolution as provided in § 210 (b). Congress was thus to have a "second look" at the debt structure of Conrail after the Special Court valuation proceedings had concluded; at that point Congress might improve the corporation's balance sheet by an additional commitment from public funds. What is clear, however, is that Congress intended to preserve a choice whether to allow Conrail to begin life with a large deficiency judgment unalleviated by further federal aid.[15]

[15] Were Congress so to choose, the creditors of the bankrupt roads, armed with a large deficiency judgment, might cause a levy to be made upon Conrail's assets. Since the value of Conrail stock held would presumably reflect the value of the assets, a levy would not give the estates any additional value but would merely change its form. Liquidation would, at most, terminate further erosion of asset value due to continued unprofitable operations.

An *amicus* brief submitted by Representative Adams for himself and 35 other Representatives suggests that liquidation would allow the creditors to get back what they relinquished, involuntarily, to Conrail (p. 7). But, as the Special Court noted, this position ignores the probable erosion of asset value during the pendency of valuation proceedings, the possibility of new senior debt, and the difficulty of unscrambling the assets. *In re Penn Central Trans. Co.*, 384 F. Supp., at 930.

Appearing as *amicus curiae* at oral argument, Representative Adams made statements that the majority now reads as indicating a conclusion that a Tucker Act suit would be available to remedy an uncompensated "erosion taking." *Ante,* at 132–133. Yet this position is contrary to that taken in the brief Mr. Adams submitted, which urges us to decide the case without reaching the Tucker Act question and specifically cites the colloquy printed, *infra,* at 174–175. The Court properly notes that these post-enactment expressions should be treated with caution, a warning that applies as much to the "relatively spontaneous responses of counsel to equally spontaneous questioning from the Court," *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 170 (1972), as to the more considered statements that appear in written submissions. Viewed in their entirety, the post-

To hold that a Tucker Act remedy is available is, *first,* to leave just compensation of security holders to wholly speculative chances that Congress might grant it and, *second,* to deprive Congress of that opportunity to choose, since the bankrupt estates would be permitted to obtain a deficiency judgment against the United States after proceedings under the Rail Act have been exhausted. Assurances against such an eventuality were given in the following colloquy between two of the managers for the House, during debate on the conference report:

> "Mr. KUYKENDALL. Mr. Speaker, I would like to ask the gentleman from Washington to clarify one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal court had the key to the Treasury.
>
> "Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?
>
> "Mr. ADAMS. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an act of Congress, to be signed by the President. It is defined as a joint resolution in the bill, and the statement of the managers, and it was the clear intent of the managers that any amount other than common stock was to be at the lowest possible limit to meet the constitutional guarantees.
>
> "Mr. KUYKENDALL. Mr. Speaker, is it not

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enactment expressions are ambiguous and add little to the statute and legislative history. Moreover, Mr. Adams' remarks bear an interpretation fully consistent with the nonavailability of the Tucker Act. See *infra,* at 177.

true, I will ask the gentleman from Washington (Mr. Adams) that the creditors, of course, are given protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of stock of 100 million shares, whatever it is?

"Mr. ADAMS. The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an amount of obligation funds which the United States might, in any way ever, have to have anything to do with.

"During that period of time, it is controlled by a board of directors which consists of Government officials.

"Mr. KUYKENDALL. There is no way the Federal court may assess the taxpayers or this Congress on the judgments of the creditors; is that correct?

"Mr. ADAMS. The gentleman is correct.

"Mr. KUYKENDALL. There is no way they can assess the Congress for the money?

"Mr. ADAMS. The gentleman is correct." 119 Cong. Rec. 42947 (1973).

None of these comments refer expressly to the Court of Claims or to the Tucker Act. But the implication of depriving the courts of a "key to the federal Treasury" is powerful, and the reference to "assess[ing] Congress for the money" equally so, since that is in practical terms what the Court of Claims does. For me, the import of the words is clear: there was to be no possibility that an aggrieved party was to have recourse against the United States in such a way as to circumvent the limitations on federal funds embodied in the Rail Act.[16] On

[16] The House Report in its cost estimate specifically notes those cost elements as to which the ceiling is not fixed, such as the open-

oral argument as *amicus curiae,* Representative Adams stated that Congress had not repealed the Tucker Act. The majority seizes upon this statement as a concession that suit might be brought in the Court of Claims to

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ended authorization for a federal contribution to operating subsidies paid for local rail service. This authorization, originally contained in § 701 of the House bill, appears in § 402 of the Rail Act, 45 U. S. C. § 762 (1970 ed., Supp. III), subject to an annual limitation of $90 million. Significantly, there is no mention of a possible Court of Claims judgment of uncertain but potentially astronomical proportions. See H. Rep. 30. The Senate Report is similar. In a section entitled "Minimizing Taxpayer Expense" it explains:

"Although the amounts of money required to implement the rationalization and restructuring of the bankrupt railroads in the Northeast authorized by this legislation may seem substantial to the uninitiated, every effort has been made to design a bill which minimizes the direct cost to the U. S. taxpayer. Indeed, the very process by which the bill would create a new healthy railroad out of the bankrupt ones arose from this strong desire to limit the use of Federal money. The bill is thus written to permit the transfer of the required rail properties of the bankrupt estates in exchange for securities of the new corporation via a reorganization plan under the umbrella of a Section 77 proceeding under the Bankruptcy Act. In addition, the bill calls for the use of Federal loan guarantees rather than direct grants wherever possible. This procedure allows for the necessary funds to come from the private sector in exchange for loans which are to be repaid by the new Corporation or other recipients. The use of loan guarantees in this instance was felt to be particularly appropriate since they will support a new railroad with excellent earnings prospects." S. Rep. No. 93–601, p. 18 (1973).

In the section on cost estimates it is noted: "The obligational authority of the Association is limited to $150,000,000 to finance the Secretary's agreements with railroads in reorganization for the acquisition, maintenance and improvement of rail facilities prior to the completion of the final system plan. Under the bill any additional obligation authority necessary for the implementation of the final system plan must be designated in the final system plan and affirmatively approved by a joint resolution of Congress." *Id.,* at 125–126. Had Congress intended to allow a Tucker Act remedy in addition to all that was created by the Rail Act, all of the foregoing assurances would have been worthless.

supplement compensation. But that interpretation of his words is overborne by the manifestations of a contrary congressional intent reviewed above. Mr. Adams' remarks, however, have a straightforward import that accords with the colloquy cited above and with the position taken in the brief he filed with this Court, which urged us to uphold the Rail Act without reference to a Tucker Act remedy. His remarks confirm that the Tucker Act remains available to enforce obligations against the United States (and not merely against Conrail) created by the Act. For example, should the Government fail to make good on its guarantee of bonds issued under § 210, holders thereof could obtain relief in the Court of Claims.

We are asked to infer a Tucker Act remedy by applying the canon that favors interpretations of statutes that avoid substantial constitutional questions. See, *e. g., United States ex rel. Attorney General* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407–408 (1909); *United States* v. *Jin Fuey Moy,* 241 U. S. 394 (1916); *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331 (1928); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); *Screws* v. *United States,* 325 U. S. 91, 98 (1945). As originally stated, the proposition was that where a statute is "reasonably susceptible of two interpretations," the courts will choose the one that steers clear of collision with constitutional limitations. *United States ex rel. Attorney General* v. *Delaware & Hudson Co., supra,* at 407; *Texas* v. *Eastern Texas R. Co.,* 258 U. S. 204, 217 (1922). The principle is applied so as to preserve substantially the legislative purpose, even where a statute must be tailored to avoid a question of constitutional infirmity. See *Screws* v. *United States, supra; Crowell* v. *Benson, supra; FTC* v. *American Tobacco Co.,* 264 U. S. 298 (1924). In more recent applications, however, the Court has on occasion abandoned any fidelity to congressional intent in

order to avoid a constitutional question. See *United States* v. *Rumely,* 345 U. S. 41 (1953); *United States* v. *CIO,* 335 U. S. 106, 130 (1948) (Rutledge, J., concurring). In those cases, I believe, the Court engaged in a judicial rewriting of the relevant congressional Acts, and I concurred in the result only after reaching the constitutional questions the Court avoided. Today's decision, however, goes well beyond what was done in *Rumely* and *CIO.* In those cases, as in most that have applied the canon of construction, the Court has narrowed the congressional regulatory scheme in order to avoid confronting the possibility of overreaching. See *United States ex rel. Attorney General* v. *Delaware & Hudson Co., supra; United States* v. *Jin Fuey Moy, supra; Texas* v. *Eastern Texas R. Co., supra; FTC* v. *American Tobacco Co., supra; Blodgett* v. *Holden,* 275 U. S. 142, 148 (1927) (Holmes, J., concurring); *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466 (1926). Today, however, the Court expands the opportunities for correcting unfairness in the congressional program, foisting upon Congress a device it never chose and indeed thought it had rejected. Today's holding thus represents a sheer *tour de force.* Cf. *United States* v. *Seeger,* 380 U. S. 163, 188 (1965) (DOUGLAS, J., concurring). This judicial legislation transgresses the bounds of our responsibility to avoid unnecessary constitutional questions. What Mr. Justice Cardozo said in *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373 (1933), bears repeating:

> " 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' [Citation omitted.] But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it . . . . The problem must be faced and answered." *Id.,* at 379.

See also *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515 (1964); *United States* v. *CIO, supra,* at 129–130 (Rutledge, J., concurring).

The drafters of the Rail Act wrote against a background of reorganization law, in which the Tucker Act has never before been regarded as a device for escaping constitutional questions. Challenges to bankruptcy legislation as permitting unconstitutional deprivations of property have occurred before. Our cases until today have faced these challenges without adverting to any Tucker Act remedy. See *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Corp.,* 294 U. S. 648 (1935); *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935); *Wright* v. *Vinton Branch,* 300 U. S. 440 (1937); *Ecker* v. *Western Pacific R. Co.,* 318 U. S. 448 (1943).[17] In construing the Rail Act to embrace a Tucker Act remedy, the Court disregards this tradition, and in this case opens up the possibility which Congress sought diligently to avoid—the imposition of a large financial burden upon the Treasury for the Conrail acquisition.

The Court of Claims is without power to enforce its judgments. While those amounting to less than $100,000 are paid from a general appropriation, the payment of judgments exceeding this sum require special action by Congress. Ordinarily, of course, Congress pays these

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[17] *Louisville Joint Stock Land Bank* v. *Radford,* held that the first Frazier-Lemke Act, which provided special relief to farm mortgagors in bankruptcy, was an unconstitutional taking of the mortgagee's security. Had the theory offered here by the Government been applied there, the Court could have avoided the issue by inferring a Tucker Act remedy. The possibility of such a course could not have escaped the Court's attention; *Hurley* v. *Kincaid,* 285 U. S. 95 (1932), had been decided just three years earlier, and Mr. Justice Brandeis, author of the *Radford* opinion, had written *Lynch* v. *United States,* 292 U. S. 571 (1934), only the previous Term.

judgments as a matter of routine. See *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 570–571 (1962). But this is an exceptional case, involving the possibility of judgments in the billions of dollars.

The construction the Court gives the Rail Act today will amaze the legislators who drafted and voted for this statute. I cannot believe that Congress would have enacted this law had it been told that in the end it might have to dig into taxpayers' pockets not for the one billion appropriated but for unknown billions—perhaps 10 or 12 billion—for "just compensation" for property it authorized to be "taken."

III

Article I, § 8, cl. 4, of the Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." This Court held many years back that that requirement required "geographical" uniformity. Its main purpose was to treat claimants against debtors the same in one area as in another. As stated by Mr. Justice Frankfurter, concurring in *Vanston Bondholders Protective Committee* v. *Green,* 329 U. S. 156, 172–173 (1946): [18]

> "The Constitutional requirement of uniformity is a requirement of geographic uniformity. It is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the State in which the bankruptcy court sits. See *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 190. To estab-

[18] The requirement of "uniformity" does not preclude local variations that make rights of creditors or debtors depend on peculiarities of state law relating, *e. g.,* to dower exemptions, validity of mortgages, and the right to enforce through bankruptcy state remedies against fraudulent conveyances. *Stellwagen* v. *Clum,* 245 U. S. 605, 613–615 (1918); *Wright* v. *Vinton Branch,* 300 U. S. 440, 463 n. 7 (1937).

> lish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court. In the absence of bankruptcy such differences are the familiar results of a federal system having forty-eight diverse codes of local law. These differences inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after."

The Solicitor General makes the curious argument that the Commerce Clause power which supports the continuance of this rail system requires no uniformity. But it is the bankruptcy power that gives Congress power to cut down on the obligation of contracts. Recourse to the Bankruptcy Clause is necessary to sustain this statute, for, as noted below, it authorizes significant impairment beyond that permitted under § 77.

The Act applies not across the Nation but only in the midwest and northeast region of the United States. Section 102 (13), 45 U. S. C. § 702 (13) (1970 ed., Supp. III), indeed so defines "region." It is to that "region" that USRA is confined by § 202 (b), 45 U. S. C. § 712 (b) (1970 ed., Supp. III), in the performance of its various duties. Reporting features of the Act reach only railroads in this "region." § 203 (a), 45 U. S. C. § 713 (a) (1970 ed., Supp. III). The Secretary of Transportation is likewise so confined. § 204 (a), 45 U. S. C. § 714 (a) (1970 ed., Supp. III). So is the new office—Rail Services Planning Office—in the Interstate Commerce Commission. §§ 205 (a), (d), 45 U. S. C. §§ 715 (a), (d) (1970 ed., Supp. III). The "final system plan" covers

only rail service in this "region." §§ 206 (a), (c), (d), 45 U. S. C. §§ 716 (a), (c), (d) (1970 ed., Supp. III). In short, the Act would have to be amended to make its procedure applicable to rail carriers not in the midwest and northeast region. The Solicitor General is therefore quite wrong when he says that the Rail Act applies with the same force and effect wherever railroad reorganizations are found.

The Special Court is a bankruptcy court, for Congress has given it "such powers" as "a reorganization court" has. § 209 (b), 45 U. S. C. § 719 (b) (1970 ed., Supp. III). And, "a railroad in reorganization" as defined in § 102 (12) includes those in § 77 of the Bankruptcy Act. That means that a railroad in § 77 proceedings but not located in the midwest and northeast region has more benign treatment than the six rail carriers before us in these cases. The importance of that difference is felt among the ranks of security holders: security holders of rail carriers who now or in the future are in a § 77 reorganization in the South or West will receive more considerate treatment than plaintiffs below in these cases. The differences are not minor but exceedingly substantial.

(1) Under § 77, as we held in the *New Haven Inclusion Cases, supra,* a plan was approved whereby the rail assets were disposed of with a view to reorganizing the remaining enterprise as an investment company. Under the Rail Act, § 207 (b) mandates a dismissal if "this chapter does not provide a process which would be fair and equitable to the estate of the railroad." 45 U. S. C. § 717 (b) (1970 ed., Supp. III). As the Reorganization Court held, the plan approved in the *New Haven Inclusion Cases* would not be permissible under the Rail Act, as the Rail Act nowhere envisages a bifurcated reorganization, one for nonrail assets and another for rail assets. The only choice is between an overall reorganization on

the one hand and a dismissal whereupon all the diversities of the old equity receivership can be explored. Thus, security holders of companies reorganized under the Act are deprived of advantages which security holders of other rail carriers in § 77 proceedings enjoy.

(2) In a sale or conveyance of assets pursuant to a plan under § 77, any lien on those assets is transferred to the proceeds. § 77 (o). But by reason of § 303 (b)(2) of the Rail Act the transfer is "free and clear of any liens or encumbrances."

(3) Under § 77 (d) *before* a plan can be consummated, the judge (as well as the Interstate Commerce Commission) must find it to be "fair and equitable." Under the Rail Act, § 303 (c), that finding is made only *ex post facto.* Thus the pressures are on to consummate the plan with no alternatives open to the Special Court except dismissal. The choice under § 77, which the *New Haven Inclusion Cases* illustrate, is barred; and the security holders here lack the benefit of the expertise of the Interstate Commerce Commission to which the courts give very great deference. See *Ecker* v. *Western Pacific R. Corp.,* 318 U. S. 448, 472–475 (1943). The *ex post facto* finding on the "fair and equitable" prerequisite of this plan robs these security holders of protective measures that security holders enjoy in reorganizations of rail carriers in other geographical areas.

(4) While the Rail Services Planning Office is directed to hold public hearings on the "preliminary system plan," § 207 (a)(2), it is USRA that prepares the final system plan, §§ 207 (c), (d), and submits it to the Congress. § 208. That submission to Congress is, however, perfunctory in the sense that the plan clears that hurdle *unless* Congress disapproves it. Under § 77 (e) the security holders ("all parties in interest") have a right to be heard before the court approves a plan. Under the

Rail Act no like hearing is granted. The denial of the right to be heard may at times amount to a denial of due process. I intimate no opinion on whether such a right could be constitutionally eliminated from all § 77 rail reorganizations.[19] But where the security holders of some rail carriers under § 77 are given that right and those who are claimants against plaintiffs below are denied it, that provision of this Rail Act obviously lacks that "uniformity" which the Constitution mandates.

While we have heretofore recognized that local variations by reason of state law governing the rights of creditors and debtors may be honored in bankruptcy without violating the uniformity clause,[20] we have never sanctioned a harsher bankruptcy procedure for the same class of debtors in one region than is applied to the same class in a different region. The bankruptcy court may, of course, be empowered to make its orders turn on the availability of credit which may be existent in one area but not in another.[21] But down to this day we have never dreamed of allowing debtors in the same class and their creditors to be treated more leniently in one region than in another.[22]

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[19] Under § 77 (e) a two-thirds vote of each class of security holders affected by the plan is normally required. The bankruptcy court, however, may nevertheless approve the plan even though the two-thirds vote is lacking if it finds that the plan is fair and equitable and the rejection of it by a class of security holders "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." For an instance where we sustained a bankruptcy court in approving a plan that a class of security holders had rejected, see *RFC* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 531–535 (1946).

[20] N. 18, *supra.*

[21] *Wright* v. *Vinton Branch,* 300 U. S. 440 (1937).

[22] *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648 (1935), cited by the majority, *ante,* at 158–159, involved no question of geographical nonuniformity; § 77, upheld

My conclusion that this Rail Act does not have that "uniformity" required by Art. I, § 8, cl. 4, of the Constitution does not mean that it is unconstitutional in its entirety. It does mean, however, that the four ways in which "uniformity" is lacking must be remedied before the present group of security holders can be made to suffer both from § 207 (b) of the Act and from the cramdown provisions in § 303, including the absence of any meaningful right of the security holders to be heard on the fairness of a law.

We are urged to bow to the pressure of events and expedite in the public interest the reorganization of these six rail carriers. An emergency often gives Congress the occasion to act. But I know of no emergency that permits it to disregard the Just Compensation Clause of the Fifth Amendment or the uniformity requirement of the Bankruptcy Clause of the Constitution.

I fear that the "hydraulic pressure" generated by this case will have a serious impact on a historic area of the law, jealously protected over the centuries by courts of equity in the interests of justice.

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in that case, adopted special procedures for all railroad bankruptcies. Similarly inapposite are the *Head Money Cases*, 112 U.S. 580 (1884), which involved the uniformity requirement of Art. I, § 8, cl. 1. Although the head tax classified persons by citizenship and mode of entry, it applied "alike in every port of the United States where such passengers can be landed." *Id.*, at 594.

GULF OIL CORP. ET AL. *v.* COPP PAVING CO., INC., ET AL.

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

No. 73–1012. Argued October 21–22, 1974—
Decided December 17, 1974

Respondent operators of a California "hot plant," at which asphaltic concrete for surfacing highways is manufactured and sold entirely intrastate, alleging violations of, *inter alia*, § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (hereafter § 2 (a)), and §§ 3 and 7 of the Clayton Act, brought suit against petitioner liquid asphalt producers and two of their subsidiaries, to which such asphalt is sold and which use it to manufacture and sell asphaltic concrete in competition with respondents. Section 2 (a) forbids "any person engaged in commerce, in the course of such commerce" to discriminate in price "where either or any of the purchases involved in such discrimination are in commerce" and the discrimination has substantial anticompetitive effects "in any line of commerce." Section 3 makes it unlawful "for any person engaged in commerce, in the course of such commerce" to make tie-in sales or enter exclusive-dealing arrangements where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." And § 7 forbids certain acquisitions by a corporation "engaged in commerce" of the assets or stock "of another corporation engaged also in commerce" where the effect may be substantially to lessen competition "in any line of commerce in any section of the country." The District Court held that it had no jurisdiction of the claims because the market for asphaltic concrete is exclusively and necessarily local, but the Court of Appeals reversed, holding that the jurisdictional requirements of §§ 2 (a), 3, and 7 were satisfied by the fact that sales of asphaltic concrete are made for use in interstate highways. *Held:*

1. The fact that interstate highways are instrumentalities of commerce does not render petitioners' conduct with respect to a material sold for use in constructing these highways "in commerce" as a matter of law for purposes of §§ 2 (a), 3, and 7 of the Clayton Act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, and *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, distinguished. Pp. 193–199.

2. The "in commerce" language of the Robinson-Patman and Clayton Act provisions in question does not extend on an "effects on commerce" theory to petitioners' sales and acquisitions. Pp. 199–203.

(a) In face of the longstanding judicial interpretation of the language of § 2 (a) requiring that "either or any of the purchases involved in such discrimination [be] in commerce," as meaning that § 2 (a) applies only where " 'at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line,' " *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F. 2d 4, 9; *Belliston* v. *Texaco, Inc.*, 455 F. 2d 175, 178, and the continued congressional silence on the subject, this Court is not warranted in extending § 2 (a) beyond its clear language to reach a multitude of local activities hitherto left to state and local regulation. Pp. 199–201.

(b) The "effects on commerce" theory, whereby §§ 3 and 7 of the Clayton Act would be held to extend to acquisitions and sales having substantial effects on commerce, even if legally correct, fails here for want of proof, since respondents presented no evidence of effect on interstate commerce from the use of asphaltic concrete in interstate highways. Pp. 201–203.

487 F. 2d 202, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 203. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 204.

Moses Lasky argued the cause for petitioners. With him on the briefs were *Richard Haas* and *George A. Cumming, Jr.*

Martin M. Shapero argued the cause for respondents. With him on the brief was *Jack Corinblit.**

**Solicitor General Bork, Assistant Attorney General Kauper, William L. Patton,* and *Carl D. Lawson* filed a brief for the United States as *amicus curiae*.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the jurisdictional requirements of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526,[1] 15 U. S. C. § 13 (a), and of §§ 3 and 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. §§ 14 and 18. It presents the questions whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation "in commerce" within the meaning of each of these sections, and whether such sales are "in commerce" and "in the course of such commerce" within the meaning of §§ 2 (a) and 3 respectively. The Court of Appeals for the Ninth Circuit held these jurisdictional requirements satisfied, without more, by the fact that sales of asphaltic concrete are made for use in construction of interstate highways. 487 F. 2d 202 (1973). We reverse.

I

Asphaltic concrete is a product used to surface roads and highways. It is manufactured at "hot plants" by combining, at temperatures of approximately 375° F, about 5% liquid petroleum asphalt with about 95% aggregates and fillers. The substance is delivered by truck to construction sites, where it is placed at temperatures of about 275° F. Because it must be hot when placed and because of its great weight and relatively low value, asphaltic concrete can be sold and delivered profitably only within a radius of 35 miles or so from the hot plant.

Petitioners Union Oil Co., Gulf Oil Corp., and Edgington Oil Co., defendants below, produce liquid petroleum

[1] Hereafter, for simplicity, cited as § 2 (a) of the Robinson-Patman Act.

asphalt from crude oil at their California refineries. The companies sell liquid asphalt to their subsidiaries and other firms throughout the Western States. The market in liquid asphalt is interstate, and each oil company concedes that it engages in interstate commerce.

Petitioner Union Oil sells some of its liquid asphalt to its wholly owned subsidiary, Sully-Miller Contracting Co., which uses it to manufacture asphaltic concrete at 11 hot plants in Los Angeles and Orange Counties, Cal. Gulf Oil sells all of its liquid asphalt to its wholly owned subsidiary, petitioner Industrial Asphalt, Inc. Industrial distributes the liquid asphalt to third parties and also uses it to produce asphaltic concrete at 55 hot plants in California, Arizona, and Nevada. Edgington Oil sells its liquid asphalt to, *inter alia,* Sully-Miller, Industrial, and respondents.

Respondents, Copp Paving Co., Inc., Copp Equipment Co., Inc., and Ernest A. Copp,[1a] operate a hot plant in Artesia, Cal., where they produce asphaltic concrete both for Copp's own use as a paving contractor and for sale to other contractors. Copp's operations and asphaltic concrete sales are limited to the southern half of Los Angeles County, where it competes with Sully-Miller and Industrial in the asphaltic concrete market. All three firms sell a more than *de minimis* share of their asphaltic concrete for use in the construction of local segments of the interstate highway system. Neither Copp, Industrial, nor Sully-Miller makes any interstate sales of the product.[2]

[1a] Respondents are collectively referred to hereinafter as Copp.

[2] Although Industrial's Nevada hot plant is sufficiently close to the California and Arizona borders to allow sales and deliveries to those States, Industrial has disavowed such sales, without contradiction. App. 117.

Copp filed this complaint in the District Court for the Central District of California against the oil companies, Sully-Miller, and Industrial, seeking injunctive relief and treble damages.[3] The complaint, as amended, alleged that the various defendants had committed a catalog of antitrust violations with respect to both the asphalt oil and asphaltic concrete markets. Claiming harm to itself as a consumer of liquid asphalt, Copp alleged: that the defendants had fixed prices and allocated the asphalt oil market geographically, in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1; that they had sold liquid asphalt at discriminatory prices to Copp and other purchasers, in violation of § 2 (a) of the Robinson-Patman Act; and that Gulf Oil had violated § 7 of the Clayton Act by acquiring Industrial. Also claiming harm to itself as a competitor in the asphaltic concrete market, Copp further alleged: that the defendants had fixed prices, divided the market geographically, and employed various methods of monopolizing and attempting to gain a monopoly in the Los Angeles area market, in violation of §§ 1 and 2 of the Sherman Act; that, in violation of § 3 of the Clayton Act, Industrial and Sully-Miller had conditioned sales of asphaltic concrete in areas where Copp did not compete on customers' agreeing to buy only from the defendants in areas where Copp did compete, and had "tied" sales of asphaltic concrete to sales of other commodities and to favorable extensions of credit; that, in violation of § 7 of the Clayton Act, Gulf Oil had acquired Industrial and Union Oil had acquired Sully-Miller, these acquisitions apparently having the effect of lessening competition in the Los Angeles asphaltic concrete market; and, finally, that Industrial and Sully-Miller had discriminated in the prices at which they sold asphaltic concrete, charging

[3] 15 U. S. C. § 15.

higher prices in areas where Copp did not compete, this in violation of § 2 (a).

Because of the liquid asphalt claims, the case was one of the *Western Liquid Asphalt* cases transferred, pursuant to 28 U. S. C. § 1407, to the District Court for the Northern District of California for coordinated pretrial proceedings.[4] The defendants thereafter moved for summary judgment in favor of Sully-Miller, against which Copp had alleged only violations arising from conduct in the asphaltic concrete market. The motion also sought to limit the issues as to the other defendants to those involving liquid asphalt.

The District Court ordered full discovery as to jurisdiction over Copp's asphaltic concrete claims. At the conclusion of discovery, Copp's jurisdictional showing rested solely on the fact that some of the streets and roads in the Los Angeles area are segments of the federal interstate highway system, and on a stipulation that a greater than *de minimis* amount of asphaltic concrete is used in their construction and repair. The District Court thereupon entered an order dismissing all claims against Sully-Miller and those claims against the other defendants involving the marketing of asphaltic concrete.

In its opinion accompanying this order the court explicitly discussed only the jurisdictional requirements of the Sherman Act.[5] On the facts presented to it, the court found that asphaltic concrete is made wholly from components produced and purchased intrastate and that

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[4] *In re Western Liquid Asphalt,* 303 F. Supp. 1053 (JPML 1969); *In re Western Liquid Asphalt,* 309 F. Supp. 157 (JPML 1970). As explained *infra,* the case here concerns only asphaltic concrete, not liquid asphalt.

[5] 1972 CCH Trade Cases ¶ 74,013.

The court held the asphalt oil claims against the oil companies and Industrial within its jurisdiction because of the interstate character of that market. That ruling is not before us.

the product's market is exclusively and necessarily local. Because of these factors, the court concluded that the alleged restraints of trade in asphaltic concrete could not be deemed within the flow of interstate commerce, despite use of the product in interstate highways. Moreover, Copp had failed to show, either by deduction from the evidence or by the evidence itself, that the alleged restraints as to asphaltic concrete would affect any interstate market. It had neither shown a necessary or probable adverse consequence to the construction of interstate highways and hence to the flow of commerce, nor had it suggested or supported a theory by which restraints on local trade in asphaltic concrete affect the interstate liquid asphalt market. The court held that it lacked jurisdiction of Copp's asphaltic concrete claims under the Sherman Act and therefore that Copp also had failed to support jurisdiction under the Robinson-Patman and Clayton Acts.

On Copp's interlocutory appeal, 28 U. S. C. § 1292 (b), the Ninth Circuit reversed, holding as to the Sherman Act claims "that the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law." 487 F. 2d, at 204. Having so concluded, the court held that jurisdiction properly attached to Copp's Clayton and Robinson-Patman Act claims as well, since those Acts were intended to supplement the purpose and effect of the Sherman Act. *Id.*, at 205–206.[6]

We granted certiorari, despite the interlocutory character of the Ninth Circuit's judgment, because of the importance of the issues both to this litigation and to

[6] The court reserved the question of summary judgment in favor of defendant Sully-Miller, holding that question not properly before it under Fed. Rule Civ. Proc. 54 (b).

proper interpretation of the jurisdictional reach of the antitrust laws, and because of ostensible conflicts with decisions of other circuits.[7] We limited the grant, however, to the questions arising under the Clayton and Robinson-Patman Acts.[8] 415 U. S. 988 (1974).

II

The text of each of the statutory provisions involved here is set forth in the margin.[9] In brief, § 2 (a) of the

[7] 28 U. S. C. § 1254 (1). See *Hawaii* v. *Standard Oil Co. of California,* 405 U. S. 251 (1972).

[8] Because of our limited grant and because of the Ninth Circuit's reservation of judgment as to Sully-Miller, see n. 6, *supra,* Union Oil and Industrial are the only defendants who have participated in argument here.

[9] Robinson-Patman Act, § 2 (a), Act of June 19, 1936, c. 592, 49 Stat. 1526, 15 U. S. C. § 13 (a):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ."

Clayton Act, Act of Oct. 15, 1914, c. 323, 38 Stat. 730, as amended:

Section 3 (15 U. S. C. § 14):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 7 (15 U. S. C. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capi-

Robinson-Patman Act forbids "any person engaged in commerce, in the course of such commerce" to discriminate in price "where either or any of the purchases involved in such discrimination are in commerce" and where the discrimination has substantial anticompetitive effects "in any line of commerce." Section 3 of the Clayton Act makes it unlawful "for any person engaged in commerce, in the course of such commerce" to make tie-in sales or enter exclusive-dealing arrangements, where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Section 7 of the Clayton Act forbids certain acquisitions by a corporation "engaged in commerce" of the assets or stock "of another corporation engaged also in commerce," where the effect may be substantially to lessen competition "in any line of commerce in any section of the country."

The explicit reach of these provisions extends only to persons and activities that are themselves "in commerce," the term "commerce" being defined in § 1 of the Clayton Act, insofar as relevant here, as "trade or commerce among the several States and with foreign nations . . . ." 15 U. S. C. § 12. This "in commerce" language differs distinctly from that of § 1 of the Sherman Act, which includes within its scope all prohibited conduct "in restraint of trade or commerce among the several States, or with foreign nations . . . ." The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods. Moreover, our cases have recognized that in enacting § 1 Congress "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . ."

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tal . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ."

United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, however local its immediate object, a "contract, combination . . . or conspiracy" nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce. *E. g., Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234 (1948). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460, 464 (1949).

In contrast to § 1, the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce. Unless it appears (i) that Sully-Miller engages in interstate commercial activities (§ 7), (ii) that Industrial's alleged exclusive-dealing arrangements and discriminatory sales occur in the course of its interstate activities (§§ 2 (a) and 3), and (iii) that at least one of Industrial's allegedly discriminatory sales was made in interstate commerce (§ 2 (a)), Copp's claims must fail.

Copp argues, and the Court of Appeals for the Ninth Circuit agreed, that it had made exactly this sort of "in commerce" showing. Copp does not contend that Industrial and Sully-Miller in fact make interstate asphaltic concrete sales or are otherwise directly involved in na-

tional markets. Cf. *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 336 n. 12 (1963). Nor does it contend that the local market in asphaltic concrete is an integral part of the interstate market in other component commodities or products. Instead, Copp's "in commerce" argument turns entirely on the use of asphaltic concrete in the construction of interstate highways.

In support of this argument, Copp relies primarily on cases decided under the Fair Labor Standards Act.[10] In the first of these, *Overstreet* v. *North Shore Corp.,* 318 U. S. 125 (1943), the Court held that because interstate roads and railroads are indispensable instrumentalities of interstate commerce, employees engaged in the construction or repair of such roads are employees "in commerce" to whom, by its terms, the Fair Labor Standards Act extends. Subsequently in *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13 (1953), the Court held that since interstate highways are instrumentalities of commerce, employees engaged in the manufacture of materials used in their construction are properly deemed to be engaged "in the production of goods for commerce," within the meaning of that phrase in the Fair Labor Standards Act. Copp reasons that since the connection between manufacture of road materials and interstate commerce was enough for application of the Fair Labor Standards Act, it also should be sufficient to warrant invocation of the Clayton and Robinson-Patman Act provisions against sellers and sales of such materials.

But we are concerned in this case with significantly different statutes. As in *Overstreet* and *Alstate,* there is no question of Congress' power under the Commerce Clause to include otherwise ostensibly local activities within the reach of federal economic regulation, when

[10] 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*

such activities sufficiently implicate interstate commerce.[11] The question, rather, is how far Congress intended to extend its mandate under the Clayton and Robinson-Patman Acts.[12] The answer depends on the statutory language, read in light of its purposes and legislative history. See *FTC* v. *Bunte Bros.*, 312 U. S. 349 (1941).

Congress has deemed interstate highways critical to the national economy and has authorized extensive federal participation in their financing and regulation. Nothing, however, in the Federal-Aid Highway Act[13] or other legislation evinces an intention to apply the full range of antitrust laws to persons who, as part of their local business, supply materials used in construction of local segments of interstate roads. Nor does the fact that interstate highways are instrumentalities of commerce somehow render the suppliers of materials instrumentalities of commerce as well, in the sense used in *Overstreet*. No different conclusion can be drawn from *Alstate*. The statute involved there explicitly reached persons employed "in the production of goods for commerce." Congress could and, according to the Court in *Alstate*, did find that the federal concerns embodied in the Fair Labor Standards Act required its application to employees pro-

[11] *E. g., Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, 249–258 (1964).

[12] The jurisdictional inquiry under general prohibitions like these Acts and § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation. Compare *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 232–233 (1947), with, *e. g., Perez* v. *United States*, 402 U. S. 146 (1971); *Maryland* v. *Wirtz*, 392 U. S. 183 (1968); and *Katzenbach* v. *McClung*, 379 U. S. 294 (1964).

[13] 23 U. S. C. § 101 *et seq.*

ducing materials for use in interstate highways. But neither this nor the Court's holding in *Alstate* places such employees, or the sellers and sales of such materials, "in commerce" as a matter of law for purposes of the Clayton and Robinson-Patman Acts.

Copp's "in commerce" argument rests essentially on a purely formal "nexus" to commerce: the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is *per se* "in commerce." Copp thus would have us expand the concept of the flow of commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities. But whatever merit this categorical inclusion-and-exclusion approach may have when dealing with the language and purposes of other regulatory enactments, it does not carry over to the context of the Robinson-Patman and Clayton Acts. The chain of connection has no logical endpoint. The universe of arguably included activities would be broad and its limits nebulous in the extreme. See *Alstate Construction Co.* v. *Durkin, supra,* at 17–18 (DOUGLAS, J., dissenting). More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws. See *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 231 (1947).

In short, assuming, *arguendo,* that the facially narrow language of the Clayton and Robinson-Patman Acts was intended to denote something more than the relatively restrictive flow-of-commerce concept, we think the nexus approach would be an irrational way to proceed. The justification for an expansive interpretation of the "in commerce" language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts

reach all practices, even those of local character, harmful to the national marketplace. This justification, however, would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets. We hold, therefore, that Sully-Miller's and Industrial's sales to interstate highway contractors are not sales "in commerce" as a matter of law within the jurisdictional ambit of Robinson-Patman Act § 2 (a) and Clayton Act §§ 3 and 7.

III

Our rejection of the "nexus to commerce" theory requires that the Ninth Circuit's judgment be reversed. Copp also advances, somewhat obliquely, a second theory to support that judgment. It contends that, despite the facially narrow "in commerce" language of the Robinson-Patman and Clayton Act provisions, Congress intended those provisions to manifest the full degree of its commerce power. Therefore, it is argued, the language should not be limited to the flow-of-commerce concept defined by this Court and other courts, but rather should be held to extend, as does § 1 of the Sherman Act, to all persons and activities that have a substantial effect on interstate commerce. We find this theory equally unavailing on the record here.

A

As to § 2 (a) of the Robinson-Patman Act at least, the extraordinarily complex legislative history fails to support Copp's argument. When the Patman bill was passed by the House, it contained, in addition to the present narrow language of § 2 (a), the following provision:

> "[I]t shall also be unlawful for any person, *whether in commerce or not,* either directly or indirectly, to

> discriminate in price between different purchasers . . . where . . . such discrimination may substantially lessen competition . . . ." [14]

The Conference Committee, however, deleted this "effects on commerce" provision, leaving only the "in commerce" language of § 2 (a).[15] Whether Congress took this action because it wanted to reach only price discrimination in interstate markets or because of its then understanding of the reach of the commerce power,[16] its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact. Moreover, even if the legislative history were ambiguous, the courts in nearly four decades of litigation have interpreted the statute in a manner directly contrary to an "effects on commerce" approach. With almost perfect consistency, the Courts of Appeals have read the language requiring that "either or any of the purchases involved in such discrimination [be] in commerce" to mean that § 2 (a) applies only where " 'at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line.' " [17] In the face of this long-

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[14] H. R. 8442, 74th Cong., 2d Sess. (1936) (emphasis added).

[15] H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. (1936).

[16] Compare F. Rowe, Price Discrimination under the Robinson-Patman Act 77–83 (1962) with Note, Restraint of Trade—Robinson-Patman Act, 86 Harv. L. Rev. 765, 770–772 (1973).

[17] *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F. 2d 4, 9 (CA5), cert. denied, 396 U. S. 901 (1969); *Belliston* v. *Texaco, Inc.*, 455 F. 2d 175, 178 (CA10), cert. denied, 408 U. S. 928 (1972).

No decision of this Court implies any contrary approach. In *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954), the plaintiff sold bread locally, in competition with Mead's, a firm with bakeries in several States. Moore alleged that Mead's sold bread in his town at a price lower than that which it charged for bread delivered from its in-state plant to customers in an adjoining State. The Tenth Circuit held that Mead's activities were essentially local, and that if

standing interpretation and the continued congressional silence, the legislative history does not warrant our extending § 2 (a) beyond its clear language to reach a multitude of local activities that hitherto have been left to state and local regulation. See *FTC* v. *Bunte Bros.*, 312 U. S. 349 (1941).

B

With respect to §§ 3 and 7 of the Clayton Act, the situation is not so clear. Both provisions were intended to complement the Sherman Act and to facilitate achievement of its purposes by reaching, in their incipiency, acts and practices that promise, in their full growth, to impair competition in interstate commerce. *E. g., United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 589 (1957); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922). The United States argues in its *amicus* brief that, given this purpose, the "in commerce" language of §§ 3 and 7 should be seen as no more than a historical anomaly. When these sections were originally enacted, it was thought that Congress' Commerce Clause power reached only those subjects within the flow of commerce, then defined rather narrowly by the Court. Thus, it is argued, the "in commerce" language was thought to be coextensive with the reach of the Commerce Clause and to bring within the ambit of the Act all activities over which Congress could exercise its constitutional authority. Since passage of the Act, this Court's decisions

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§ 2 (a) applied to them it would exceed Congress' commerce power. The Court (DOUGLAS, J.) unanimously reversed, stating that Congress clearly has power to reach the local activities of a firm that finances its predatory practices through multistate operations. This language, however, spoke to the commerce power rather than to jurisdiction under § 2 (a). In fact, Mead's did have interstate sales and its price discrimination thus fell within the literal language of the statute.

have read Congress' power under the Commerce Clause more expansively, extending it beyond the flow of commerce to all activities having a substantial effect on interstate commerce. See *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S., at 229–233. The United States concludes that the scope of the Clayton Act, like that of the Sherman Act, should be held to have expanded correspondingly, both because of Congress' clear intention to reach as far as it could and because Congress' purpose to foster competition in interstate commerce could not otherwise wholly be achieved.

This argument from the history and practical purposes of the Clayton Act is neither without force nor without at least a measure of support.[18] But whether it would justify radical expansion of the Clayton Act's scope beyond that which the statutory language defines—expansion, moreover, by judicial decision rather than amendatory legislation—is doubtful. In any event, this case does not present an occasion to decide the question. Even if the Clayton Act were held to extend to acquisitions and sales having substantial effects on commerce, a court cannot presume that such effects exist. The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions. See *United States* v. *Yellow Cab Co.*, 332 U. S., at 230–234.

Copp was allowed full discovery as to all interstate commerce issues. It relied primarily on the nexus theory rejected above, and presented no evidence of effect on interstate commerce. Instead it argued merely that such effects could be presumed from the use of asphaltic concrete in interstate highways. The District Court con-

[18] See *Standard Oil Co.* v. *United States*, 337 U. S. 293, 314–315 (1949).

cluded, on the basis of the record before it, that petitioners' alleged antitrust violations had no "substantial impact on interstate commerce." [19] There may be circumstances in which activities, like those of Sully-Miller and Industrial, would have such effects on commerce. On the record in this case, however, the conclusion of the District Court that no such circumstances existed here cannot be considered erroneous. This being so, the "effects on commerce" theory, even if legally correct, must fail for want of proof.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL, concurring.

I join in the judgment and opinion of the Court, with one qualification. Part III–B of the opinion correctly notes that we have no occasion today to pass upon the

[19] 1972 CCH Trade Cases ¶ 74–013, p. 92,208. Copp makes no specific objection here to the District Court's use of summary judgment procedure, see Brief for Respondents 11–12, nor to the form of the judgment. Moreover, there is no indication that Copp was foreclosed from presenting all available evidence concerning the interstate commerce issues, at least as to §§ 3 and 7. Cf. *McBeath* v. *Inter-American Citizens for Decency Comm.*, 374 F. 2d 359, 363 (CA5 1967). In any event, assuming that the interstate commerce requirements of §§ 3 and 7 are properly deemed issues of subject-matter jurisdiction, rather than simply necessary elements of the federal claims, cf., *e. g.*, *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186 (1954); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948); 5 J. Moore, Federal Practice ¶ 38.36 [2.–2], p. 299 (2d ed. 1974), there is, as the dissenting opinion by MR. JUSTICE DOUGLAS notes, an identity between the "jurisdictional" issues and certain issues on the merits, and hence, under *Land* v. *Dollar*, 330 U. S. 731 (1947), no objection to reserving the jurisdictional issues until a hearing on the merits. By the same token, however, there is no objection to use, in appropriate cases, of summary judgment procedure to determine whether there is a genuine issue of material fact as to the interstate commerce elements.

applicability of the Clayton Act to activities having a substantial effect on commerce although not "in commerce," since no such effects are present in this case. For the same reason, we ought not to characterize the construction offered by the United States as a "radical expansion of the Clayton Act's scope." As the Court itself says, "the situation is not so clear." Until the issue is properly presented by a case requiring its resolution, I would express no opinion on it.

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

I suppose it would be conceded that if one person or company acquired all the asphaltic concrete plants in the United States, there might well be a violation of § 2 of the Sherman Act, which makes unlawful a monopoly of "any part of the trade or commerce among the several States." 26 Stat. 209, as amended, 15 U. S. C. § 2. Moreover, even though their sales were all intrastate, they would come within the ban of § 1 of the Sherman Act, if they substantially affected interstate commerce. For in the Sherman Act, we held, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . ." *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944).

While the Clayton Act modified the Sherman Act by restricting possible application of the antitrust laws to labor unions,[1] and by expanding the scope of those laws to cover the aggregation of economic power through stock acquisitions,[2] there is not a word to suggest that

[1] 38 Stat. 731, 15 U. S. C. § 17. See H. R. Rep. No. 627, 63d Cong., 2d Sess., 14–16 (1914); *United States* v. *Hutcheson*, 312 U. S. 219 (1941).

[2] 15 U. S. C. § 18; H. R. Rep. No. 627, *supra*, at 17. See also *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 170–171

when Congress defined the term "commerce" it desired to contract the scope of that term.[3] The legislative history does not furnish even a bare suggestion or inference that "commerce" under the Clayton Act meant something less than it meant under the Sherman Act. The Clayton Act became the law in 1914; and prior to that time the Court had held over and over again that acts or conduct wholly intrastate might be "in restraint of trade or commerce" as that phrase was used in the Sherman Act. *Swift & Co.* v. *United States,* 196 U. S. 375, 397 (1905); *United States* v. *Patten,* 226 U. S. 525, 541–543 (1913). These holdings were reflected in the "affecting commerce" standard of the *Shreveport Rate Cases, Houston & Texas R. Co.* v. *United States,* 234 U. S. 342, 353–355 (1914). The primary definition of commerce, for Clayton Act purposes, is "trade or commerce among the several States." [4] In the years just preceding passage of

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(1964); *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 597 (1957).

[3] The definition of "antitrust laws" as used in the Clayton Act includes the Sherman Act. 15 U. S. C. § 12. The definition of "commerce" was actually "broadened so as to include trade and commerce between any insular possessions or other places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman antitrust law or other laws relating to trusts." H. R. Rep. No. 627, *supra,* at 7.

The Sherman Act declares illegal every contract, combination, or conspiracy "in restraint of trade or commerce among the several States . . . ." 15 U. S. C. § 1. It also makes a misdemeanor a monopoly of "any part of the trade or commerce among the several States . . . ." 15 U. S. C. § 2.

[4] "Commerce" as used in the Clayton Act is defined in § 1 as follows:

" 'Commerce,' as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between

that Act, this Court had held on several occasions that the phrase "among the several States" embraces all commerce save that "which is confined to a single State *and does not affect* other States." *Second Employers' Liability Cases,* 223 U. S. 1, 46–47 (1912) (emphasis added); *The Minnesota Rate Cases,* 230 U. S. 352, 398–399 (1913). In applying the Clayton Act prohibitions to persons and corporations "engaged in commerce [among the several States]," Congress thus may reasonably be said to have intended to reach persons or corporations whose activities, while wholly intrastate in nature, affect other States through their effects on interstate commerce.

The holding in *Transamerica Corp.* v. *Board of Governors,* 206 F. 2d 163, 166 (CA3 1953), that Congress, when it enacted the Clayton Act, desired "to exercise its power under the commerce clause of the Constitution to the fullest extent," has nothing to rebut it. Congress apparently was not as timorous as the present Court in moving against centers of economic power and practices that aggrandize it. Heretofore that is the way we have read the Clayton Act: that Act was intended to complement the Sherman Act by regulating in their incipiency actions which might irreparably damage competition before reaching the level of actual restraint proscribed by the Sherman Act, and, in the absence of some indication of legislative intent to the contrary, we should not lightly assume that Congress intended to undercut that complementary function by circumscribing the jurisdictional reach of the Clayton Act more narrowly than that of the

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any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States." 15 U. S. C. § 12.

Sherman Act.[5] See *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 170–171 (1964); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 589, 597 (1957); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355–356 (1922); S. Rep. No. 698, 63d Cong., 2d Sess., 1 (1914). And that is the way in which we assumed that the Celler-Kefauver Act in 1950, 64 Stat. 1125, 15 U. S. C. § 18, addressed itself to the problem. For we said in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 315–323 (1962), that the legislative history showed congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." *Id.*, at 315–316. One dramatic way of leveling local business is pulling it into a vast interstate business regime of the nature alleged in this complaint.

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[5] Indeed, we would have to sit as a Committee of Revision over Congress, shaping the law to fit our prejudices against antitrust regulations, to hold that "in commerce" as used in the Clayton Act was intended to provide less comprehensive coverage than the language of the Sherman Act. Prior to passage of the Clayton Act, labor union practices had been held by this Court to *affect* commerce and thus to fall within the reach of the Sherman Act, despite the fact that the union activities could not be regarded as being in the flow of commerce. *Loewe* v. *Lawlor*, 208 U. S. 274, 300–301 (1908). See also *Teamsters Local 167* v. *United States*, 291 U. S. 293, 297 (1934); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940); *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 189 (1954). If the Court is right today in saying that "in commerce" as used in the Clayton Act is to be read more restrictively than the Sherman Act, then those who drafted the Clayton Act (including Louis D. Brandeis) to protect labor were needlessly concerned—no express exemption of labor would have been necessary, since the "in commerce" language of the Clayton Act (if narrowly read) would not have supported judicial attempts to reach labor activities on an "affecting commerce" theory. The drafters obviously thought otherwise.

I

I agree with the court below that jurisdiction may be sustained on an "in commerce" theory.[6] Clayton Act §§ 3 and 7 apply to persons or corporations "engaged in commerce"; we have held, in a line of cases arising under the Fair Labor Standards Act (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, that persons or enterprises engaged in building or repairing toll roads, bridges, and canal locks are "engaged in commerce" and therefore within the reach of the commerce power, by virtue of their relationship to indispensable instrumentalities of our system of interstate commerce. *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427 (1955); *Fitzgerald Co.* v. *Pedersen*, 324 U. S. 720 (1945); *Overstreet* v. *North Shore Corp.*, 318 U. S. 125 (1943). It is true, as the majority notes, that the FLSA and the antitrust laws are different statutes, but the critical difference between the statutes arises in an area which in no way weakens the applicability of the FLSA cases to the present inquiry.

In the FLSA and in many other regulatory enactments, Congress itself has determined that certain classes of activities have a sufficient impact upon interstate commerce to warrant regulation of the entire class, regardless of whether an individual instance of the activity in question can be shown to be in or to affect commerce. See generally *Perez* v. *United States*, 402 U. S. 146, 152–154 (1971); *United States* v. *Darby*, 312 U. S. 100, 119–121

[6] The decision of the Court of Appeals on the Sherman Act issue, which remains intact by virtue of our limited grant of certiorari, held that petitioners and their alleged activities were sufficiently "in commerce" to support Sherman Act jurisdiction. 487 F. 2d 202, 205 (1973). The majority now holds, however, that petitioners and their alleged activities were *not* sufficiently "in commerce" to support Clayton and Robinson-Patman Act coverage. In light of the latter holding, it is difficult to imagine the reception that Copp's Sherman Act claims will receive on remand.

(1941). The FLSA represents such a congressional determination with respect to the payment of wages below a specified level and with respect to employment exceeding a specified number of hours per week (under specified conditions). 29 U. S. C. §§ 206, 207. Once either of these practices is found to exist with respect to an employer or employee covered by the FLSA, the regulatory provisions of that Act are called into play without further inquiry into the possible effect of the individual employer's practices on interstate commerce.

In the antitrust laws, Congress has provided a different sort of treatment. The Sherman Act broadly prohibits practices in restraint of trade or commerce, and the Clayton and Robinson-Patman Acts bar price discrimination, tie-ins, and corporate stock or assets acquisitions where "the effect of" such practices "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." The finding that a person or corporation is covered by these Acts does not trigger automatic application of the regulatory prohibition; instead, a court must go on to make an individualized determination of the actual or potential impact of that particular person's or corporation's activities on competition or on interstate commerce.[7]

It is in this respect that the antitrust laws differ from the FLSA and other regulatory enactments. The present case, however, does not turn on that difference, because it does not raise the issue of whether the actions of the

[7] Of course, in a limited range of Sherman Act cases, this Court has held that certain practices are *per se* violations of the antitrust laws; that is to say, these practices are conclusively presumed to be illegal without the need for any particularized inquiry into their effects. See generally *White Motor Co.* v. *United States,* 372 U. S. 253, 259–262 (1963), and cases collected therein. These cases may be viewed as limited exceptions to the individualized approach described in the text above.

named defendants had a sufficiently adverse effect on interstate commerce to make out a violation of the antitrust laws; that issue goes to the merits of Copp's claims, and cannot properly be reached at this stage. Instead, the case as now presented raises the threshold issue of whether the named defendants are within the jurisdictional reach of the antitrust laws, and our inquiry on that point does not differ significantly from our inquiry under the FLSA or any other regulatory statute. The FLSA covers employers of employees "engaged in commerce or in the production of goods for commerce"; the Clayton Act and Robinson-Patman Act provisions at issue here cover persons or corporations "engaged in commerce." We have held, in FLSA and Federal Employers' Liability Act (FELA) cases, that Congress' use of the phrase "engaged in commerce" is sufficiently broad to reach employees engaged in repairing highways or in carrying bolts to be used for bridge repairs, *Overstreet* v. *North Shore Corp., supra;* in light of the purposes of the Clayton Act, I see no reason why the phrase "engaged in commerce" as used in that Act should not be read equally broadly, and should not thereby be deemed sufficient to reach corporations engaged in building highways or in producing and supplying the very materials used in such construction. As the Court of Appeals aptly noted: "Regulation of business practices through the antitrust laws . . . may justifiably reach further than some other types of regulation because the antitrust laws are concerned directly with aiding the flow of commerce." 487 F. 2d 202, 204 (1973).

II

An alternative ground for affirming the judgment below, likewise rejected by the majority, is that the Clayton Act's "engaged in commerce" jurisdictional language is sufficiently broad to encompass corporations which are

not in the flow of commerce itself but which, through their activities, affect commerce. For the reasons stated in the introductory portion of this opinion, I, for one, am persuaded that Clayton Act §§ 3 and 7 are as broad as the Sherman Act in this respect. The majority expressly disclaims any intent to resolve that issue on the ground that Copp has failed to produce any "proof" of such effects, and is therefore not entitled to continue this suit even under a broad reading of the jurisdictional phrase; in my view, the burden of proof which the Court thereby imposes upon Copp is one which may not properly be imposed at this stage of the litigation.

The complaint alleges the acquisition by Gulf of named companies with the purpose and effect of creating a monopoly under the Sherman Act and likewise substantially lessening competition and creating a monopoly in violation of § 7 of the Clayton Act. Like allegations are made respecting certain acquisitions of Union Oil. Allegations are made that the petitioners divide the geographic areas of competition for the purpose of eliminating competition. The petitioners are alleged to indulge in tie-in practices, whereby base rock material would be sold substantially more cheaply to contractors who buy their asphaltic concrete from the named petitioners. The complaint alleges that the petitioners have maintained high prices in areas where there is no competition and that where competition exists, they sell their products at artificially low prices—below cost—and that that is the practice of petitioners where they compete with Copp. Thus, violations of the Sherman Act, Clayton Act, and Robinson-Patman Act are alleged.

There has been no trial. The case was disposed of on pleadings and affidavits. The District Judge ordered discovery so that all the parties could "develop the facts bearing upon the question of whether the alleged con-

spiracy was one affecting interstate commerce." At the end of the time allotted for discovery, the District Court ruled that "the local activities of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce," and as respects one of the defendants (who is not a party in the case now before us) granted its motion for summary judgment.[8]

The Court of Appeals speaking through Judge Alfred T. Goodwin said—properly, I think:

> "Nor can we accept defendants' argument that the plaintiffs must show not only that the parties and sales are 'in' commerce but must show that competition was injured before the court has jurisdiction. This is the result of confusing the substantive with the jurisdictional requirements of the antitrust laws. It is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it." 487 F. 2d, at 206.

The allegations and the complaint plainly gave the District Court jurisdiction.[9] What a trial on the merits might

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[8] Federal Rule Civ. Proc. 56 "deals with the merits" of a claim and if in favor of the defendant is "in bar and not in abatement," 6 J. Moore, Federal Practice ¶ 56.03, p. 2051 (2d ed. 1974). Lack of jurisdiction of the court is a matter in abatement and thus is not usually appropriate for a summary judgment, which is not a substitute for a motion to dismiss for want of jurisdiction. *Id.*, at 2052–2053.

On the general propriety of discovery orders of this sort, see 4 *id.*, ¶ 26.56 [6]; but "[t]here are cases . . . in which the jurisdictional questions are so intertwined with the merits that the court might prefer to reserve judgment on the jurisdiction until after discovery has been completed." *Id.*, at 26–191. See also the discussion in n. 10, *infra*.

[9] The issue of whether there is subject-matter jurisdiction raises the question whether the complaint, on its face, asserts a nonfrivolous claim "arising under" federal law. *Baker* v. *Carr*, 369 U. S. 186, 199–200 (1962); *Bell* v. *Hood*, 327 U. S. 678, 682–683

produce no one knows. The District Judge said: "I conclude that the local activities of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce." That could not possibly be said until at least the plaintiffs had offered their proof; yet, as the Court of Appeals said, the plaintiffs need not prove, on a motion that goes to the jurisdiction of the court, the merits of their case in order to obtain an opportunity to try it.[10]

(1946). If such a claim is stated, the District Court is then empowered to assume jurisdiction and to determine whether the claim is good or bad, on the basis of a motion to dismiss for failure to state a claim or cause of action. *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 359 (1959); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 249 (1951). Such a dismissal is on the merits, not for want of jurisdiction. *Bell* v. *Hood, supra.*

[10] It is sometimes said that where the district court's jurisdiction is challenged, that court has the power, either on its own motion or on motion of a party, to inquire into the facts as they exist for purposes of resolving the jurisdictional issue. *Land* v. *Dollar*, 330 U. S. 731, 735 n. 4 (1947), and cases cited; *Local 336, American Federation of Musicians* v. *Bonatz*, 475 F. 2d 433, 437 (CA3 1973). On the other hand, if the jurisdictional issue is closely intertwined with or dependent on the merits of the case, the preferred procedure is to proceed to a determination of the case on the merits. *McBeath* v. *Inter-American Citizens for Decency Comm.*, 374 F. 2d 359, 362–363 (CA5), cert. denied, 389 U. S. 896 (1967); *Jaconski* v. *Avisun Corp.*, 359 F. 2d 931, 935–936 (CA3 1966).

The cases cited for the proposition that a district court may inquire into jurisdictional facts on a motion to dismiss for want of jurisdiction are cases in which the jurisdictional issue was whether the plaintiff met the amount-in-controversy requirement. That jurisdictional issue is sufficiently independent of the merits of the claim to warrant independent examination, if challenged. Where the jurisdictional issue is more closely linked to the merits, disposition of the jurisdictional issue on motion becomes inappropriate. Thus in *Land* v. *Dollar*, where the complaint alleged that members of the United States Maritime Commission were unlawfully holding

shares of Dollar stock under a claim that the stock belonged to the United States, the District Court dismissed on the ground that the suit was against the United States. In affirming a reversal of that dismissal, the Court said: "[A]lthough as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits." 330 U. S., at 735. This was true because if the plaintiffs prevailed on either of their theories on the merits (that the Commission was without authority to acquire the shares, or that the contract was simply a pledge of the shares rather than an outright transfer), then they would also prevail on the jurisdictional issue. And in the *McBeath* case, *supra*, the Court of Appeals for the Fifth Circuit reversed a pretrial dismissal of a Sherman Act claim on grounds of lack of jurisdiction (for failure to show an effect on interstate commerce). Relying on *Land* v. *Dollar*, it held that the issue of effects on interstate commerce was so intertwined with the merits of the claim that it was error for the District Court to dismiss without giving the plaintiff a full chance to prove his case on the merits.

In cases such as *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186 (1954); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948); and *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), this Court has reviewed "interstate commerce" issues in the context of dismissals of antitrust suits prior to trial on the merits. Those dismissals, however, were based, not upon motions for summary judgment or for dismissal for want of jurisdiction, but rather upon motions to dismiss for failure to state a claim. In such cases, of course, the allegations of the complaint must be taken as true. *Id.*, at 224. In the case now before us, the District Court clearly went beyond the face of the complaint and required respondents to produce *proof* of interstate effects.

Syllabus

AMERICAN RADIO ASSN., AFL–CIO, ET AL. *v.* MOBILE STEAMSHIP ASSN., INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 73–748. Argued October 21, 1974—Decided December 17, 1974

Respondents, an association representing stevedoring companies, and a shipper, sought injunctive relief in an Alabama state court against picketing of a foreign-flag ship by petitioner maritime unions which were protesting as substandard the wages paid the foreign crewmen who manned the ship. The trial court issued a temporary injunction, and the Alabama Supreme Court affirmed. Petitioners contend that the state courts were without jurisdiction to grant relief, and that the issuance of an injunction interfered with their free speech rights. *Held:*

1. The jurisdiction of the Alabama courts was not pre-empted by the National Labor Relations Act (NLRA). *Windward Shipping* v. *American Radio Assn.*, 415 U. S. 104. Pp. 219–228.

(a) Even if there is a dispute between petitioners and respondents independent of petitioners' dispute with foreign-flag ships, it is subject to state-court disposition unless it satisfies the jurisdictional requirements of the NLRA. P. 221.

(b) The fact that the state court's jurisdiction is invoked by stevedores and shippers, rather than by the foreign-ship owners as in *Windward, supra,* does not convert into "commerce" within the meaning of the NLRA's jurisdictional requirements, activities that plainly were not such in *Windward.* Pp. 221–225.

(c) Neither the shipper seeking to ship his products, the stevedores who contracted to unload the foreign-flag vessel's cargo, nor the longshoremen employed to do the unloading, were, for the purposes of jurisdiction of the National Labor Relations Board over a dispute directly affecting the maritime operations of foreign-flag vessels, "engaged in or affecting commerce" within the purview of the NLRA, and therefore petitioners' picketing did not even "arguably" constitute an unfair labor practice under § 8 (b)(4) of the Act, the secondary boycott provision. Pp. 225–228.

2. The Alabama courts' action in enjoining the picketing violated no right conferred upon petitioners by the First and Fourteenth Amendments, because that action is well within that "broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing

aimed at preventing effectuation of that policy," *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284, 293. Pp. 228–232.

(a) Since the picketing here was for a prohibited purpose, it is not entitled to protection on the ground that the place where it occurred constituted a public forum for presentation of lawful communications. *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, distinguished. P. 230.

(b) The injunction is supported by a "valid public policy." In the context in which the Alabama Supreme Court stated the public policy to be the prevention of "wrongful interference" with respondents' businesses, that term obviously refers to third parties' efforts to induce employees to cease performing services essential to the conduct of their employer's business, third-party participation being critical to picketing being categorized as "wrongful interference." Pp. 230–231.

(c) Petitioners' contention that the record fails to support the conclusion that there was a substantial question whether the picketing constituted "wrongful interference," is without merit, since the question whether evidence is sufficient to make out a cause of action created by state law and tried in the state courts is a matter for decision by those courts. Pp. 231–232.

291 Ala. 201, 279 So. 2d 467, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 232. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 234.

Howard Schulman argued the cause and filed briefs for petitioners.

Frank McRight argued the cause for respondent Mobile Steamship Assn., Inc. With him on the brief was *Kirk C. Shaw*. *Alex F. Lankford III* argued the cause and filed a brief for respondent Malone.*

**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 reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork* for the United States; by *Frank L. Wiswall, Jr.*, for the Republic of Liberia; by *Robert S. Ogden, Jr.*, and *Joseph*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners are the six maritime unions which appeared before this Court as respondents in *Windward Shipping* v. *American Radio Assn.*, 415 U. S. 104 (1974). We granted their petition for certiorari to the Supreme Court of Alabama, 415 U. S. 947, in order to review their contentions that this case was distinguishable from *Windward* on the pre-emption issue, and that the temporary injunction upheld by that court had infringed rights guaranteed to them under the First and Fourteenth Amendments to the United States Constitution.[1]

As in *Windward,* this case arises from picketing designed to publicize the adverse impact on American seamen of the operations of foreign-flag carriers which employ foreign crewmen at wages substantially below those paid to American seamen. As in *Windward,* the picketing occurred during 1971, but in this case it took place in Mobile, Ala., and was directed against the *Aqua Glory,* a ship of Liberian registry. The pickets displayed the same signs and distributed the same literature as they did in *Windward,*[2] and they were subject to the same instructions.

Fortenberry for Westwind Africa Line, Ltd.; and by *Bryan F. Williams, Jr.*, for West Gulf Maritime Assn. et al.

[1] The decision of the Supreme Court of Alabama is reported at 291 Ala. 201, 279 So. 2d 467 (1973). Because that court validated only a temporary injunction, and remanded for trial on the merits, an issue has been raised as to our jurisdiction to consider this case. We think that *Construction Laborers* v. *Curry,* 371 U. S. 542 (1963), is conclusive of the finality of the judgment below for the purposes of 28 U. S. C. § 1257.

[2] The pickets carried signs which read:

"ATTENTION TO THE PUBLIC
THE WAGES AND BENEFITS PAID ABOARD
THE VESSEL SS [name of vessel] ARE SUB-

The picketing in each case also had similar results. In *Windward,* we observed: "The picketing, although neither obstructive nor violent, was not without effect. Longshoremen and other port workers refused to cross the picket lines to load and unload petitioners' vessels." 415 U. S., at 108. Here, the Supreme Court of Alabama, in affirming a temporary injunction issued by the Alabama Circuit Court, said of petitioners' activities in Mobile:

> "Posting the pickets, as was done on the dock adjacent to the Aqua Glory, brought about an immediate refusal by the stevedore workers of the

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STANDARD TO THOSE OF THE AMERICAN SEAMEN. THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE STANDARD AND THE LOSS OF OUR JOBS. PLEASE DO NOT PATRONIZE [THIS VESSEL]. HELP THE AMERICAN SEAMEN. WE HAVE NO DISPUTE WITH OTHER VESSELS AT THIS SITE."

[Printed names of the six unions.] App. 6a.

They distributed literature which stated:

"To the Public—American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

"American dollars flowing to these foreign shipowners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

"A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

"PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

"Our dispute here is limited to the vessel picketed at this site, the S. S.————" *Id.,* at 7a.

[Printed names of the six unions.]

locals of International Longshoremen's Association to cross the picket line of the appellant unions. About eighty percent of the cargo ships that enter the Port of Mobile, sail under a foreign-flag and are manned by alien crews." [3]

I

It is apparent from the facts already stated that the Houston picketing in *Windward* and the Mobile picketing here were for all practical purposes identical. Petitioners refer to *Windward* as "involving the union petitioners in the identical national picketing dispute as part of the Committee's program . . . ." Brief for Petitioners 7 n. 1. But petitioners contend that since the state-court plaintiffs in this case are not the foreign owners of a picketed ship, as they were in *Windward,* but are instead stevedoring companies which seek to service the ship [4] and a shipper who wishes to have his crops loaded on it, the question of pre-emption of state-court jurisdiction by the National Labor Relations Act should be answered differently than it was in *Windward.*[5] Petitioners reason that respondents could have charged them with an unfair labor practice under the secondary boycott provision of the National Labor Relations Act, § 8 (b)(4), 49 Stat. 452, as amended, 29 U. S. C. § 158 (b)(4), and that since petitioners' activities were arguably prohibited under that section, the respondents' exclusive remedy was to seek relief from

[3] 291 Ala., at 205, 279 So. 2d, at 470.

[4] The stevedoring companies appear here through their bargaining representative, Mobile Steamship Association, Inc.

[5] Petitioners also suggest that the result should be different because *Windward* did not involve vessels which, while flying foreign flags, were American owned. Petitioners do not, however, direct our attention to any evidence in the record as to the ownership of the *Aqua Glory.* In any event, we think this factor irrelevant, in light of *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10, 19 (1963).

the National Labor Relations Board. Cf. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959).

Petitioners' position in this respect contrasts markedly with their posture in the *Windward* litigation. There petitioners, as respondents in this Court, urged that "peaceful and truthful primary picketing, non obstructive and without trespass upon private property, by American workers protesting substandard wages and benefits paid," are activities "actually protected by the Act." Brief for Respondents in No. 72–1061, O. T. 1973, p. 15. They also urged that "the American seamen's activities at bar constitutes [*sic*] typical lawful primary picketing, sanctioned and protected by the Act, *Garner* [v. *Teamsters Union,* 346 U. S. 485 (1953),] and [*Longshoremen* v.] *Ariadne* [*Co.*], 397 U. S. [195,] 202 [(1970)]." Brief for Respondents in No. 72–1061, O. T. 1973, p. 16. Petitioners apparently urged the same arguments in the Texas Court of Civil Appeals, whose judgment we reviewed in *Windward,* because that court stated:

> "[A]ppellees' picketing carefully remained within the guidelines for permissible picketing on the premises of a secondary employer promulgated in Sailor's Union of the Pacific, 92 N. L. R. B. 547 and adopted in Local 761, Inter. Union of Elec., Radio and Mach. Wkrs. v. NLRB, 366 U. S. 667 . . . (1961)." [6]

Petitioners, having failed to persuade this Court in *Windward* that their Houston picketing was *protected* under § 7 of the National Labor Relations Act, 29 U. S. C. § 157, now contend that their Mobile picketing was at least arguably a secondary boycott *prohibited* by § 8 (b)(4)(B) of the Act, 29 U. S. C. § 158 (b)(4)(B). They would have us hold not only that there is an independent controversy between petitioner unions, representing

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[6] *Windward Shipping* v. *American Radio Assn.,* 482 S. W. 2d 675, 678 (1972).

American seamen, and the contracting stevedores represented by respondent, but also that this independent dispute is subject to the jurisdiction of the Board.

Acceptance of petitioners' argument would result in a rule whereby a state court had jurisdiction over a complaint for injunction filed by a foreign-ship owner claiming that picketing activities of a union were interfering with his business relationships with a contract stevedore, but the same court would have no jurisdiction where the contract stevedore sought an injunction on precisely the same grounds. The anomaly of such a result is reason enough to question it, but we believe that there is a more fundamental flaw in petitioners' claim.

Even if there is a dispute between petitioners and respondents which is, in some semantic sense, independent of petitioners' dispute with foreign-flag ships, that dispute is subject to state-court disposition unless it satisfies the jurisdictional requirements of the NLRA. In this regard, we note that a necessary predicate for a finding by the Board of an unfair labor practice under § 8 (b)(4)(i) is that the individual induced or encouraged must be employed by a "person engaged in commerce or in an industry affecting commerce." Similarly, a necessary predicate for finding an unfair labor practice under § 8 (b)(4)(ii) is that the person threatened, coerced, or restrained must have been engaged in "commerce or in an industry affecting commerce," and a necessary predicate for Board jurisdiction of unfair labor practices under § 10 (a) of the Act, 29 U. S. C. § 160 (a) is that they be practices "affecting commerce."

Petitioners interpret *Windward* as having done nothing more than establish that the maritime operations of foreign ships are not "in commerce." They assume that *Windward* said nothing about either the business activities of persons seeking to deal with such ships, or about whether, for these purposes, those activities are "in commerce" or "affecting commerce." Petitioners therefore

are able to state that the requirements of §§ 8 (b)(4) and 10 are satisfied because:

> "Unquestionably, the Association, constituting stevedoring companies employing longshoremen to load and discharge vessels at the port of Mobile, Alabama, is an 'employer' engaged in 'commerce' under the Act, and equally unquestionably, respondent Malone, delivering his soybeans to the dock elevator, is a 'person' engaged in 'commerce,' under the Act." Brief for Petitioners 15–16.

We do not believe, however, that the line of cases [7] commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site.

In *Windward* we stated that our task was to determine "whether the activities . . . complained of were activities 'affecting commerce' within the meaning of . . . the National Labor Relations Act," [8] and we concluded that they were not. 415 U. S., at 105–106. We recognized that the picketing activities did not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres,* but we went on to say that

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[7] *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957); *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (1963); *Incres S. S. Co.* v. *Maritime Workers,* 372 U. S. 24 (1963).

[8] The relevant definitions appear in 29 U. S. C. §§ 152 (6) and (7):

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

the latter cases "do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable." 415 U. S., at 114. We further observed:

> "At the very least, the pickets must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, *either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels,* or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large-scale increase in operating costs would have more than a negligible impact on the '*maritime operations*' of these foreign ships, and the effect would be by no means limited to costs incurred while in American ports. Unlike *Ariadne,* the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country." [9] *Ibid.* (Emphasis supplied.)

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[9] Our Brother STEWART suggests in dissent that *Longshoremen* v. *Ariadne Co.,* 397 U. S. 195 (1970), requires reversal here, because in that case it was held that longshoremen servicing foreign-flag vessels in American ports are in "commerce" within the meaning of the Act. But the *Ariadne* court, in distinguishing *Benz, supra,* and *McCulloch, supra,* stated that "[t]he considerations that informed the Court's construction of the statute" in those cases "are clearly inapplicable to the situation presented here. The participation of some crew members in the longshore work does not obscure the fact that this dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work." 397 U. S., at 199. The Court in *Windward* reiterated that distinction:

"The pickets in *Ariadne,* unlike the pickets in *Benz* or *Incres,* were primarily engaged in a dispute as to whether an employer should hire unionized or nonunionized American workers to perform long-

While we thus spoke in *Windward* of the effect of the Houston pickets on the maritime operations of foreign ships, the quoted passage shows that we fully recognized that this effect would not be produced solely by the pickets and the messages carried by their signs. It would be produced in large part by the refusal of American workmen employed by domestic stevedoring companies to cross the picket line in order to load and unload cargo coming to or from the foreign ships. Since *Windward* held that the Houston picketing was not in or affecting commerce, it would be wholly inconsistent to now hold, insofar as concerns Board jurisdiction over a complaint by respondents, that the employer of the longshoremen who honored the picket line, or the shipper whose goods they did not handle, was in or affecting commerce.

That we found it unnecessary to expressly state this conclusion in *Windward* suggests not that the point is an undecided one, but that such a conclusion inevitably flows from the fact that the response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected. The exaction of the "self-

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shoremen's work, and the substandard wages which they were protesting were being paid to fellow American workers." 415 U. S., at 112.

Here the picketing which triggered the dispute was not directed toward any wages or conditions of employment of the longshoremen. It was instead directed to substandard wages being paid to the crews of foreign-flag vessels throughout those vessels' worldwide maritime operations. In *Ariadne*, on the contrary, the picketing was directed toward requiring a foreign-flag vessel to hire unionized American workers, rather than nonunionized American workers, to service vessels berthed in American ports. That the latter effect does not surpass "the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable," *Windward, supra*, at 114, certainly provides no support for the proposition that the former effect also does not surpass that threshold.

imposed tariff to regain entry to American ports" does not depend upon American shippers heeding the message on the picket signs and declining to ship their cargoes in foreign bottoms. The same pressure upon the foreign-flag owners will result if longshoremen refuse to load or unload their ships. The effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-ship owners or by persons seeking to service and deal with the ships. The fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into "commerce" activities which plainly were not such in *Windward*.[10]

Our dissenting Brethren contend that our disposition is inconsistent with the Court's decision in *Hattiesburg Building & Trades Council* v. *Broome*, 377 U. S. 126 (1964), and with the Board's decision in *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N. L. R. B. 547 (1950). *Hattiesburg* dealt with the quite different question of applying the Board's own limitation of its *statutory* jurisdiction to those cases which have "a *substantial* effect on commerce." 23 N. L. R. B. Ann. Rep. 7 (1958) (emphasis added). The Board had promulgated a series of administratively established standards, in effect ceding to state courts and agencies disputes involving entities which admittedly "affected commerce," but whose volume of interstate business was not "sufficiently substantial to warrant the exercise of [Board] jurisdiction." 29

[10] In so holding, we need cast no doubt on those cases which hold that the Board has jurisdiction under § 8 (b) (4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. See *Madden* v. *Grain Elevator Workers Local 418*, 334 F. 2d 1014 (CA7 1964), cert. denied, 379 U. S. 967 (1965); *Grain Elevator Workers Local 418* v. *NLRB*, 126 U. S. App. D. C. 219, 376 F. 2d 774, cert. denied, 389 U. S. 932 (1967).

U. S. C. § 164 (c). The standards provided that they could be "satisfied by reference to the business operations of either the primary or the secondary employer." *Hattiesburg, supra,* at 126. Because of this provision, the Board had not in fact ceded its jurisdiction over the particular dispute that had been presented to the Mississippi courts. In *Hattiesburg* this Court did no more than enforce the natural consequence of this fact by holding that *Garmon* deprived the state courts of jurisdiction. We find nothing in that holding inconsistent with what we say or hold here. Certainly *Hattiesburg* does not, as MR. JUSTICE STEWART's dissent would have it, stand for the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices "affecting commerce." 29 U. S. C. § 160 (a).

That dissent's treatment of *Moore Dry Dock, supra,* reads a great deal more into that 1950 Board decision than its language and analysis can support. The decision itself contains no reference whatever to the jurisdiction of the Board over the primary employer, the foreign-flag vessel *Phopho,* and neither the decision nor the Trial Examiner's report considered the jurisdictional challenge presently confronting this Court. The Trial Examiner's report, from which that dissenting opinion quotes, did state that the Board, in an apparently unreported determination, had previously dismissed a petition for election aboard the *Phopho,* 92 N. L. R. B. 547, 560–561. The report later acknowledged that the Board had "left somewhat obscure the precise legal basis" of its jurisdictional ruling, a comment which was evoked by the contention that because the primary employer was "clearly engaged in commerce," the ruling must have been based on a different jurisdictional defect. *Id.,* at 568. This Court in *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957), not only noted that *Moore*

Dry Dock involved a different situation, but also rather pointedly stated: "We need only say that these cases are inapposite, without, of course, intimating any view as to their result." 353 U. S., at 143 n. 5. A 1950 Board precedent such as this can scarcely be regarded as controlling when it is clearly contrary to the thrust of this Court's *Benz-Windward* line of cases.

Petitioners rely on *Teamsters Union* v. *N. Y., N. H. & H. R. Co.*, 350 U. S. 155 (1956), and *Plumbers' Union* v. *Door County*, 359 U. S. 354 (1959), for the proposition that even though the Board may not have jurisdiction over the primary labor relations of a party which is excluded from the Act's definition of "employer," [11] it is nonetheless competent to consider secondary disputes involving such a party. In *Teamsters Union, supra,* a railroad was held to be barred from seeking relief in the state courts against a secondary boycott. The Court held that while the railroad was not a statutory "employer," it was nonetheless a "person" protected by § 8 (b)(4). A similar result was reached in *Door County, supra,* in which a non-"employer" county sought state court relief, not with respect to activities of its own employees, but with respect to a claimed secondary boycott arising from picketing against a nonunion subcontractor working on an addition to the county courthouse. While these cases establish the proposition that an entity which is not within the Act's definition of "employer"

[11] The definition appears in 29 U. S. C. § 152 (2):

"(2) 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 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."

may nonetheless be a "person" for purposes of protection against secondary boycotts, neither they nor any other case decided by this Court suggests that the Board has jurisdiction of § 8 (b)(4) complaints if the alleged unfair labor practice does not affect commerce. Indeed, in *Door County, supra,* the Court pointedly inquired whether the out-of-state origin of construction materials was sufficient to establish the jurisdictionally required effect on interstate commerce. 359 U. S., at 356.

Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even "arguably" violate § 8 (b)(4)(B) of that Act. Since Congress did not intend to strain through the filament of the NLRA picketing activities which so directly affect the maritime operations of foreign vessels, we hold that the Alabama courts were competent to apply their own law in resolving the dispute between petitioners and respondents unless, as petitioners claim, such a resolution violated petitioners' rights under the First and Fourteenth Amendments.

II

After concluding that the state courts had jurisdiction, the Supreme Court of Alabama considered whether the picketing was protected by the First and Fourteenth Amendments. Relying on *Teamsters Union* v. *Vogt, Inc.,* 354 U. S. 284 (1957), it concluded that if the picketing compromised valid public policies, it was not protected by its putative purpose of conveying information. The court therefore thought that the matter narrowed to whether or not the picketing had a purpose or objective to "wrongfully interfere" with respondents' businesses. Recognizing that the unions were appealing a temporary in-

junction, issued as a matter of equitable discretion to preserve the status quo pending final resolution of the dispute, the court inquired only whether there was evidence of a prohibited purpose sufficient to establish that the trial judge had not abused the "wide discretion" he possesses in such matters. The court found such evidence in the testimony of a local union official charged with carrying out the picketing. He had expressed the hope that union men would not cross the lines, that the port would become cluttered with foreign ships unable to load or unload, and that the docks would be shut down. On this basis the court concluded that a substantial question was presented as to whether the picketing had a prohibited purpose, and that the trial judge had not abused his discretion.

Petitioners repeat their First and Fourteenth Amendment arguments before this Court. They contend that the picketing was expressive conduct informing the public of the injuries they suffer at the hands of foreign ships, and "imploring the public" to " 'Buy American' or 'Ship American.' " Brief for Petitioners 21. This conduct, they contend, constitutes "the lawful exercise of protected fundamental rights of free speech," and is thus not subject to injunction.

We think this line of argument is foreclosed by our holding in *Vogt, supra.* There the Court, in an opinion by Mr. Justice Frankfurter, reviewed the cases in which we had dealt with disputes involving the interests of pickets in disseminating their message and of the State in protecting various competing economic and social interests. *Vogt* endorsed the view that picketing involves more than an expression of ideas, 354 U. S., at 289, and referred to our "growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy." *Id.,* at 290. The Court con-

cluded that our cases "established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Id.*, at 293. We believe that in the case now before us Alabama's interference with petitioners' picketing is well within that "broad field."

Petitioners seek to escape from *Vogt* in three ways. First, they contend that this case is squarely controlled by *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968). In that case, claim petitioners, picketing "identical as at bar, [designed] to peacefully and truthfully publicize substandard wages and concomitantly request the public not to patronize the picketed entity," was held to be protected. Brief for Petitioners 20. In rejecting this contention, we need only point out that *Logan Valley* concerned the location of picketing, not its purpose; indeed, it was on exactly this basis that the *Logan Valley* Court distinguished the line of cases culminating in *Vogt.* 391 U. S., at 314. *Logan Valley* established only that in some circumstances private business property can be so thoroughly clothed in the attributes of public property that it may not be completely closed as a public forum to those who wish to present otherwise lawful communications.

Petitioners' second argument is that the injunction here is not supported by a "valid public policy," as required by *Vogt.* They point out that while the Alabama Supreme Court stated the public policy to be the prevention of "wrongful interference" with respondents' businesses, it did not expressly define that term. We, however, think it obvious that in this context "wrongful interference" refers to efforts by third parties to induce employees to cease performing services essential to the conduct of their employer's business. That third-party participation is critical to picketing being categorized as

"wrongful interference" is clear from *Pennington* v. *Birmingham Baseball Club,* 277 Ala. 336, 170 So. 2d 410 (1964), a case cited by the Alabama Supreme Court in its opinion in this case.

In *Pennington* the Supreme Court of Alabama indicated that the state policy against "wrongful interference" is quite analogous to the federal policy of prohibiting secondary boycotts, and is based on similar considerations. The State's policy also appears to be based on the state interest in preserving its economy against the stagnation that could be produced by pickets' disruption of the businesses of employers with whom they have no primary dispute. At Mobile the picketing threatened to eliminate the 70% to 80% of the stevedores' business that depended on foreign shipping, and to cause serious losses for farmers whose agricultural crops required immediate harvesting and shipping.[12] Under *Vogt, supra,* the State may prefer these interests over petitioners' interests in conveying their "ship American" message through the speech-plus device of dockside picketing.

Petitioners' final contention is that the record fails to support the conclusion that a substantial question existed as to whether the picketing constituted "wrongful interference" under Alabama law. The question of whether evidence is sufficient to make out a cause of action created by state law and tried in the state courts is a matter for decision by those courts. Insofar as petitioners' argument on this score may be read to suggest that the evidence before the Alabama court would not support a finding that their activities were such as could be enjoined under *Vogt, supra,* we reject it. Petitioners seem to argue that the Alabama courts were bound by

[12] The record indicates that all grain storage facilities in the Mobile area were full. Additional soybeans could be harvested only as those already stored were transferred to waiting vessels. App. 77a–80a.

the statements of purpose appearing on the pickets' signs and literature, and that in any event one local official's statements of his hopes and expectations as to the picketing's effect could not override those stated purposes. This argument ignores the wide latitude open to triers of fact to make factual determinations on the basis of rational inferences which arise from the nature, location, and effect of picketing. See *Vogt, supra,* at 286, 295; *Plumbers Union* v. *Graham,* 345 U. S. 192, 197–200 (1953).

Concluding that the jurisdiction of the Alabama courts in this case was not pre-empted by the National Labor Relations Act, and that the action of those courts in enjoining the picketing at Mobile violated no right conferred upon petitioners by the First and Fourteenth Amendments, we affirm the judgment of the Supreme Court of Alabama.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

I agree with my Brother STEWART that the dispute in the present case is within the jurisdiction of the National Labor Relations Board and that that jurisdiction is exclusive of state jurisdiction. The foreign-flag ship involved in the present controversy is Liberian. Hence I add a few observations generated by Noël Mostert's Supership (1974) discussing the problems of the big new oil tankers and their vast pollution of the oceans of the world. He puts Liberian-flag ships in the following perspective:

> "Liberia now has the world's largest merchant marine, followed by Japan and Britain, and her lead is rapidly increasing; flag of convenience fleets have regularly grown at rates more than twice those of world fleets as a whole. Liberia and Panama together now own, on paper, nearly a quarter of world shipping. Tankers dominate these expatriate fleets.
>
> "Thirty-five to 40 percent of the Liberian tonnage is American-owned, and an additional 10 percent of

it is American-financed, which helps explain where the American merchant fleet, in steady decline since the end of the war, has taken itself. According to law, American-flag ships must be built in the United States and must be three-quarters manned by Americans. American shipbuilding costs used to be double those elsewhere (inflation abroad has helped make them competitive again), and American seamen's wages are still higher than elsewhere. . . .

"Flag of convenience operators often say that their ships, especially many of those under the Liberian flag, are among the largest, best-equipped, and most modern in the world. This may be true. But ships are only as good as the men who run them, and the record is not impressive. Old ships traditionally have a higher casualty rate than new ones. Liberian losses between 1966 and 1970 not only averaged twice as high as those of the other major maritime nations, but, contrary to the rule, the ships they were losing were on the whole new ones, certainly newer than the ones lost by the other principal merchant marines: the average age of Liberian losses in that four-year period was 8.7 years, while that of the Japanese and Europeans averaged 12 years.

"To a disconcerting degree, oil cargoes have been delivered in recent years by improperly trained and uncertificated officers aboard ships navigating with defective equipment." *Id.*, at 58–59.

While the Liberian-flag vessel in the present case was not an oil tanker, the quoted passages demonstrate the scope of the public interest of our people in keeping marine traffic in more responsible hands than those which the "flag of convenience" commonly uses. No public issue is today more important, at least to the life of the oceans of the world and the well-being of our own working force. Large national interests ride on today's decision. Congress, in this type of case, has appropriately

made the National Labor Relations Board the exclusive arbiter of the present controversy, as my Brother STEWART convincingly demonstrates. I accordingly would reverse the judgment below.

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

The issue in the present case is quite different from the issue decided last Term in *Windward Shipping* v. *American Radio Assn.*, 415 U. S. 104. Because the dispute in this case clearly "affects commerce" and thus falls within the exclusive regulatory power of the National Labor Relations Board, I would reverse the judgment before us.

In *Windward Shipping,* the owners and managing agents of two foreign-flag vessels sought injunctive relief in state courts in Texas to bar picketing of their vessels by several American maritime unions. The unions were attempting to publicize the competitive advantage enjoyed by foreign-flag vessels because of the substantial disparity between foreign and domestic seamen's wages. The vessels' owners and managing agents asked the state courts to enjoin the picketing as tortious under Texas law. The primary basis for this claim was that the picketing sought to induce the foreign-flag vessel owners and their foreign crews to break pre-existing contracts. The Texas courts concluded that they lacked jurisdiction to consider the complaint of interference with contract because the dispute between the foreign-flag shipowners and the American unions was "arguably" within the jurisdiction of the National Labor Relations Board.

In reversing the judgment of the Texas Court of Civil Appeals, this Court reaffirmed earlier cases that had recognized that "Congress, when it used the words 'in commerce' in the [Labor Management Relations Act], simply did not intend that Act to erase longstanding principles of comity and accommodation in international maritime

trade." 415 U. S., at 112–113. In those earlier cases the Court had concluded that maritime operations of foreign-flag ships employing alien seamen are not in "commerce" within the meaning of § 2 (6) of the National Labor Relations Act, as amended by the LMRA, 29 U. S. C. § 152 (6). Therefore, disputes affecting those operations do not "affect commerce," and are not within the jurisdiction of the Board. See *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138; *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10; *Incres S. S. Co.* v. *Maritime Workers,* 372 U. S. 24.

Although the union activity sought to be enjoined by the foreign-flag shipowners in *Windward Shipping* did not involve the same degree of intrusion into the internal affairs of foreign vessels that was present in *Benz, McCulloch,* and *Incres,* the Court concluded that the economic impact upon foreign shipping from the unions' conduct might severely disrupt the maritime operations of the foreign vessels. "Virtually none of the predictable responses of a foreign shipowner to picketing of this type," the Court noted, "would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." 415 U. S., at 115. Cf. *Longshoremen* v. *Ariadne Co.,* 397 U. S. 195. Accordingly, the Court held that the Texas courts had jurisdiction over the foreign shipowners' complaint that the union activity was interfering with pre-existing contracts between the owners and their crews.

The question presented by this case, however, is not whether state-court jurisdiction over a dispute between owners of foreign-flag vessels and American maritime unions is outside the scope of the Act, as it was in *Windward Shipping.* Rather, the question is whether state courts have jurisdiction over a complaint by an association of American stevedoring companies that secondary pressure caused by the picketing of American maritime unions constituted a wrongful interference with the

American companies' right to carry on their lawful business. Neither the language of the Act nor the principles of comity underlying our decision in *Windward Shipping* support the Court's conclusion that this dispute between American employers and American unions is outside the jurisdiction of the Labor Board.

As in *Windward Shipping,* the labor dispute in this case began when six American maritime unions picketed a foreign vessel to publicize the adverse consequences to American seamen of the low wages paid by the foreign shipowner. As a result of the picketing, American longshoremen and other workers employed by the member companies of the Mobile Steamship Association refused to service the foreign-flag vessel. It was this allegedly unlawful secondary pressure generated by the maritime unions' picketing that the Mobile Steamship Association sought to enjoin in state court as a tortious interference with its right to contract and to carry on its lawful business.

The allegedly tortious secondary pressure that formed the basis for Mobile Steamship Association's state-court complaint is precisely the type of concerted activity made subject to Board regulation by § 8 (b)(4)(i)(B) of the National Labor Relations Act, as amended, 73 Stat. 542, 29 U. S. C. § 158 (b)(4)(i)(B). That section, designed to shield neutral third parties from the adverse impact of labor disputes in which they are not involved, makes it an unfair labor practice for a labor organization "to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities . . . where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person . . . ."

I cannot agree with the Court's conclusion that the

secondary dispute between the American maritime unions and the Mobile Steamship Association that is the basis for this lawsuit fails to satisfy all the jurisdictional requirements of § 8 (b)(4)(B).[1] *Windward Shipping* and the cases on which it relied have established that the maritime operations of foreign-flag ships employing alien seamen are not in "commerce" within the meaning of the Act. Accordingly, we held in those cases that labor disputes affecting those operations do not "affect commerce," so far as the Act is concerned. But those decisions cannot be read to suggest that American stevedoring companies whose American employees load and unload both American- and foreign-flag vessels in American ports are not "engaged in commerce or in an industry affecting commerce." Indeed, in *Longshoremen* v. *Ariadne Co.*, 397 U. S., at 200, we held that longshoremen servicing foreign-flag vessels in American ports *are* in "commerce" within the meaning of § 2 (6) of the Act, and thus subject to the regulatory power of the Board. Consequently, stevedoring companies employing such longshoremen must be "engaged in commerce or in an industry affecting commerce" within the meaning of § 8 (b)(4)(B), and a labor dispute affecting their operations necessarily "affects commerce" within the meaning of the Act.

The Court's contrary conclusion appears to be based on the premise that it would be "wholly inconsistent" to hold that the unions' picketing was not "affecting commerce" so far as the primary dispute with the foreign-flag shipowner was concerned but was "affecting commerce" in the secondary dispute here involved. *Ante*, at 224. The Court does not indicate that a secondary

[1] Nobody has suggested that the maritime unions engaged in the secondary picketing are not "labor organizations" within the meaning of § 2 (5) of the Act, 29 U. S. C. § 152 (5), or that the longshoremen and other workers who refused to cross the picket lines and service the foreign-flag vessel are not "employees" within the meaning of § 2 (3), 29 U. S. C. § 152 (3).

dispute between the maritime unions and the Mobile Steamship Association could never "affect commerce" within the meaning of the Act, unlike the *Windward Shipping* dispute between the unions and the foreign shipowners which would never "affect commerce."

If the maritime unions had a primary dispute with American-flag shipowners, that dispute would clearly "affect commerce" within the meaning of the Act, and would thus clearly fall within the Board's regulatory power. To avoid inconsistency the Court would presumably conclude that a secondary dispute between stevedoring companies and maritime unions in such a situation would also "affect commerce." The Court would thus make the determination whether an American stevedoring company was "engaged in an industry affecting commerce," the § 8 (b)(4)(B) jurisdictional requirement, depend entirely on whether in a particular case a primary labor dispute to which the stevedoring company was not privy was between an American union and an American-flag shipowner or an American union and a foreign-flag shipowner. "The anomaly of such a result is reason enough to question it . . . ." *Ante,* at 221.

More importantly, the Court's conclusion that this secondary dispute between an American employer and American unions does not affect commerce because the primary dispute between the unions and foreign-flag shipowners is not within the Board's jurisdiction squarely conflicts with our decision in *Hattiesburg Building & Trades Council* v. *Broome,* 377 U. S. 126. In that case, an employer subjected to secondary pressure brought suit in state court to enjoin picketing at its premises. After finding that the primary employer was not in "commerce" within the meaning of the Act, the state court ruled that the pre-emption doctrine of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, was not applicable. The state court then enjoined the secondary picketing of the union. This Court unanimously reversed that judgment,

holding that the record clearly showed that "the *secondary* employer's operations met the [Board's] jurisdictional requirements. Since the union's activities in this case were arguably an unfair labor practice, the state court had no jurisdiction to issue the injunction." 377 U. S., at 127 (emphasis added; citations omitted).

The unanimous holding in *Broome* that exclusive Board jurisdiction over a secondary dispute exists although the primary dispute did not "affect commerce" within the meaning of the Act finds solid support in the language of § 8 (b)(4)(B) itself. The section expressly requires that the neutral, secondary employer be "engaged in commerce or in an industry affecting commerce." However, it requires only that the primary object of the secondary pressure be a "person." As defined by § 2 (1) of the Act, 29 U. S. C. § 152 (1), there is no requirement that a "person," which includes "individuals, labor organizations, partnerships, associations, [and] corporations," either be "engaged in commerce or in an industry affecting commerce," or otherwise be within the jurisdiction of the Act. See *Plumbers' Union* v. *Door County,* 359 U. S. 354 (governmental unit); *Teamsters Union* v. *N. Y., N. H. & H. R. Co.,* 350 U. S. 155 (railroad). Thus, the fact that the foreign-flag vessel which was the primary object of the unions' picketing activity was not in "commerce" cannot stand as a bar to the Board's exercise of jurisdiction over the secondary dispute in this case.

Neither considerations of comity nor a "reluctance to intrude domestic labor law willy-nilly into the complex of considerations affecting foreign trade," *Windward Shipping* v. *American Radio Assn.,* 415 U. S., at 110, justifies the Court's disregard of the clear language of § 8 (b)(4)(B) or its failure to follow the *Broome* decision. The dispute before the Alabama courts did not involve the maritime operations of the foreign-flag vessel that was the primary target of the unions' activity. The shipowners were not parties to the state-court law-

suit. The injunction approved by the Alabama Supreme Court is concerned solely with union interference with operations and contractual relations of the Mobile Steamship Association at the Port of Mobile. That one of the contractual relationships allegedly interfered with was between members of the Association and a foreign-flag vessel is not apparent from the face of the state-court injunction.[2]

In short, the dispute between American workingmen and unions and their American employers was well within the boundaries of the Act as we have defined those boundaries in *Windward Shipping, Benz, McCulloch,* and *Incres.* As such, it is indistinguishable from a number of

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[2] The Alabama courts enjoined the six maritime unions, their officers, members, and employees, from:

"1. Loitering, congregating, or picketing, by standing, walking, marching, sitting, or otherwise, at or near any part of the premises owned, occupied, or used by members of Complainant Mobile Steamship Association, Inc.

"2. In any manner interfering with or obstructing, by words or actions, any person or persons working for or desiring to work for members of Complainant Mobile Steamship Association, Inc.

"3. Interfering with the operations of any member of Complainant Mobile Steamship Association, Inc. in any manner whatsoever.

"4. Picketing or interfering at or near Complainant Mobile Steamship Association, Inc. and its members' premises or premises used by Complainant Mobile Steamship Association's members in a manner calculated to intimidate Complainant Mobile Steamship Association's members' employees or anyone working in association with the Complainant Mobile Steamship Association's members, or any other person entering or leaving or attempting to enter or leave Mobile Steamship Association's members' premises, or calculated to induce any such persons not to report or apply for work at Mobile Steamship Association's members' premises, or any facility used by Mobile Steamship Association's members.

"5. Picketing directed at vessels with whom members of the Mobile Steamship Association, Inc. have contractual relations.

"6. Interfering with the contractual relations existing or to exist between the members of the Mobile Steamship Association, Inc. and companies owning and/or operating vessels calling at the Port of Mobile."

secondary boycott cases over which the Board has exercised its exclusive jurisdiction. For example, in *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N. L. R. B. 547, the Board considered charges by an American drydock owner that union picketing of a Panamanian ship tied up at the drydock constituted unlawful secondary activity. The union was picketing in an attempt to be recognized as the bargaining representative of the Panamanian shipowner's crew. Prior to the Board's consideration of the secondary dispute, the union had filed a petition for certification with the Regional Director of the NLRB. The petition was dismissed " 'inasmuch as the internal economy of a vessel of foreign registry and ownership is involved.' " Upon appeal, the Board sustained the Regional Director's action on the ground that " 'upon the facts presently existing in this case, it does not appear that the Board has jurisdiction over the [e]mployer.' " *Id.*, at 560–561. Notwithstanding the Board's refusal to exercise jurisdiction over the primary dispute because it involved a foreign-flag vessel, the Board assumed jurisdiction over the secondary dispute between the union and the drydock owner. This Court in *Benz* observed that the Board's assumption of jurisdiction over the secondary dispute in *Moore Dry Dock* was very different from an attempt to assert jurisdiction over the primary dispute involving the foreign-flag shipowner. *Benz* v. *Compania Naviera Hidalgo*, 353 U. S., at 143 n. 5.[3]

Because the secondary dispute in this case implicates only American employers and their American employees, following the literal language of § 8 (b)(4)(B) and

[3] The only two Courts of Appeals that appear to have addressed the question have also sustained Board jurisdiction over secondary disputes involving American employers and unions despite the fact that the primary dispute involved foreign-flag vessels. *Madden* v. *Grain Elevator Workers Local 418*, 334 F. 2d 1014 (CA7); *Grain Elevator Workers 418* v. *NLRB*, 126 U. S. App. D. C. 219, 376 F. 2d 774.

recognizing the Board's exclusive jurisdiction over the dispute would not in any way undermine the principles of comity emphasized in our decision in *Windward Shipping*. The Board will only decide whether the secondary effects of the dispute are prohibited by § 8 (b)(4)(B). Exercise of this jurisdiction will not "thrust the National Labor Relations Board into 'a delicate field of international relations.'" *Longshoremen* v. *Ariadne Co.*, 397 U. S., at 199. Certainly a Board decision that secondary pressure violated § 8 (b)(4)(B) would not risk interference with international maritime trade. Nor would a decision that the secondary pressure did not violate § 8 (b)(4)(B) endanger the foreign-flag shipowners' interests in preserving the integrity of their maritime operations from the impact of the unions' picketing. These interests are fully protected under *Windward Shipping* by permitting the foreign-ship owner to seek an injunction in state court.

Where activities by parties subject to the regulatory power of the National Labor Relations Board are "arguably" prohibited by § 8 of the National Labor Relations Act, the general rule is that the jurisdiction of the Board is exclusive, pre-empting both federal- and state-court jurisdiction. *San Diego Building Trades Council* v. *Garmon*, 359 U. S., at 245; see *Longshoremen* v. *Ariadne Co.*, *supra*, at 201–202 (WHITE, J., concurring). Despite this rule the Solicitor General has suggested as *amicus curiae* that we recognize concurrent jurisdiction in state courts and the Board to enjoin secondary conduct when the primary dispute involves a foreign-flag vessel. Congress adopted such a proposal for concurrent state-court jurisdiction to award damages for conduct that violates § 8 (b)(4). § 303, Labor Management Relations Act, as amended, 29 U. S. C. § 187; see *Teamsters Union* v. *Morton*, 377 U. S. 252. But Congress expressly rejected a proposal for a comparable exception to the general rule of exclusive jurisdiction for complaints seeking injunctive

relief against secondary conduct arguably prohibited by § 8 (b)(4).[4] The only distinction between the amendment providing for general concurrent jurisdiction over secondary conduct rejected by Congress and the scheme suggested by the Government is that the Solicitor General would limit concurrent state-court jurisdiction to secondary disputes in which the primary employer was a foreign-flag shipowner. *Windward Shipping* fully protects the interests of these shipowners in maintaining the integrity of the maritime operations of their vessels by permitting them to seek state-court injunctions. Consequently, this distinction cannot justify overruling the congressional determination that American employers who enjoy the protection of § 8 (b)(4) should be limited to securing injunctive relief through the Board.

The Solicitor General also argues that there is no justification for the pre-emption doctrine in cases involving secondary disputes where the primary dispute is outside the jurisdiction of the Board. That position, of course, directly conflicts with *Hattiesburg Building & Trades Council* v. *Broome,* 377 U. S. 126, where this Court, as previously noted, reversed a state-court injunction directed against secondary conduct, holding the pre-emption doctrine applicable even though the Board had no jurisdiction over the primary dispute.

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[4] When Congress was considering the Taft-Hartley bill in 1947, an amendment was proposed in the Senate which would have given an injured party suffering from a secondary boycott the right to go directly into a district court and seek injunctive relief. 93 Cong. Rec. 4835. Senator Taft opposed the amendment, arguing that resistance to providing a private injunctive remedy in cases of secondary boycotts was so strong that the language of the committee bill authorizing the Board alone to obtain injunctive relief should be retained. Senator Taft proposed that private parties be given only the right to sue for damages. *Id.,* at 4843–4844. The amendment was thereafter defeated, *id.,* at 4847; and Senator Taft's proposal for a private-damages remedy, presently LMRA § 303, 29 U. S. C. § 187, was adopted. 93 Cong. Rec. 4874–4875.

Moreover, even though the primary dispute is outside the Board's jurisdiction, there is a continuing need to avoid development of conflicting rules of substantive law governing concerted secondary conduct. Through initial passage and subsequent amendment of § 8 (b)(4)(B), Congress has clearly stated that certain types of secondary activity are illegal without regard to the identity of the primary employer. But just as deliberately, Congress has chosen not to prohibit resort to certain types of secondary pressure. If the Alabama law of secondary boycotts can be applied to proscribe conduct that Congress decided not to prohibit when it enacted § 8 (b)(4)(B), "the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' " *Teamsters Union* v. *Morton,* 377 U. S., at 260, quoting *Garner* v. *Teamsters Union,* 346 U. S. 485, 500.

The need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the National Labor Relations Board, the agency created by Congress for that purpose, is a "primary justification for the pre-emption doctrine." *Vaca* v. *Sipes,* 386 U. S. 171, 180. Because the secondary activity of the maritime unions challenged by the Mobile Steamship Association "arguably" violates § 8 (b)(4)(B) of the Act, that need is fully present in the instant case.

In sum, the dispute between the American unions and the American stevedoring companies in this case clearly "affects commerce" within the meaning of the Act and thus falls within the exclusive regulatory power of the National Labor Relations Board. The judgment of the Alabama Supreme Court should, therefore, be reversed.

Syllabus

CANTRELL ET AL. *v.* FOREST CITY PUBLISHING CO. ET AL.

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

No. 73–5520. Argued November 13, 1974—
Decided December 18, 1974

Petitioners, a mother and her son, brought a diversity action against respondents, a newspaper publisher and a reporter, for invasion of privacy based on a feature story in the newspaper discussing the impact upon petitioners' family of the death of the father in a bridge collapse. The story concededly contained a number of inaccuracies and false statements about the family. The District Judge struck the claims for punitive damages for lack of evidence of malice "within the legal definition of that term," but allowed the case to go to the jury on the "false light" theory of invasion of privacy, after instructing the jurors that liability could be imposed only if they found that the false statements were published with knowledge of their falsity or in reckless disregard of the truth, and the jury returned a verdict for compensatory damages. The Court of Appeals reversed, holding that the District Judge should have directed a verdict for respondents, since his finding of no malice in striking the punitive damages claims was based on the definition of "actual malice" established in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, and thus was a determination that there was no evidence of the knowing falsity or reckless disregard of the truth required for liability. *Held:* The Court of Appeals erred in setting aside the jury's verdict. Pp. 251–254.

(a) The record discloses that the District Judge when he dismissed the punitive damages claims was not referring to the *New York Times* "actual malice" standard but to the common-law standard of malice that is generally required under state tort law to support an award of punitive damages and that in a "false light" case would focus on the defendant's attitude toward the plaintiff's privacy and not on the truth or falsity of the material published, and thus was not determining that petitioners had failed to introduce evidence of knowing falsity or reckless disregard of the truth. Pp. 251–252.

(b) Moreover, the evidence was sufficient to support jury findings that respondents had published knowing or reckless falsehoods about petitioners, particularly with respect to "calculated falsehoods" about petitioner mother's being present when the story was being prepared, and that respondent reporter's writing of the story was within the scope of his employment at the newspaper so as to render respondent publisher vicariously liable under *respondeat superior* for the knowing falsehoods in the story. Pp. 252–254.

484 F. 2d 150, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 254.

Harry Alan Sherman argued the cause and filed briefs for petitioners.

Smith Warder argued the cause for respondents. With him on the brief were *John R. Coughlin* and *Mark L. Rosen*.

MR. JUSTICE STEWART delivered the opinion of the Court.

Margaret Cantrell and four of her minor children brought this diversity action in a Federal District Court for invasion of privacy against the Forest City Publishing Co., publisher of a Cleveland newspaper, the Plain Dealer, and against Joseph Eszterhas, a reporter formerly employed by the Plain Dealer, and Richard Conway, a Plain Dealer photographer. The Cantrells alleged that an article published in the Plain Dealer Sunday Magazine unreasonably placed their family in a false light before the public through its many inaccuracies and untruths. The District Judge struck the claims relating to punitive damages as to all the plaintiffs and dismissed the actions of three of the Cantrell children in their entirety, but allowed the case to go to the jury

as to Mrs. Cantrell and her oldest son, William. The jury returned a verdict against all three of the respondents for compensatory money damages in favor of these two plaintiffs.

The Court of Appeals for the Sixth Circuit reversed, holding that, in the light of the First and Fourteenth Amendments, the District Judge should have granted the respondents' motion for a directed verdict as to all the Cantrells' claims. 484 F. 2d 150. We granted certiorari, 418 U. S. 909.

I

In December 1967, Margaret Cantrell's husband Melvin was killed along with 43 other people when the Silver Bridge across the Ohio River at Point Pleasant, W. Va., collapsed. The respondent Eszterhas was assigned by the Plain Dealer to cover the story of the disaster. He wrote a "news feature" story focusing on the funeral of Melvin Cantrell and the impact of his death on the Cantrell family.

Five months later, after conferring with the Sunday Magazine editor of the Plain Dealer, Eszterhas and photographer Conway returned to the Point Pleasant area to write a follow-up feature. The two men went to the Cantrell residence, where Eszterhas talked with the children and Conway took 50 pictures. Mrs. Cantrell was not at home at any time during the 60 to 90 minutes that the men were at the Cantrell residence.

Eszterhas' story appeared as the lead feature in the August 4, 1968, edition of the Plain Dealer Sunday Magazine. The article stressed the family's abject poverty; the children's old, ill-fitting clothes and the deteriorating condition of their home were detailed in both the text and accompanying photographs. As he had done in his original, prize-winning article on the Silver Bridge disaster, Eszterhas used the Cantrell family to

illustrate the impact of the bridge collapse on the lives of the people in the Point Pleasant area.

It is conceded that the story contained a number of inaccuracies and false statements. Most conspicuously, although Mrs. Cantrell was not present at any time during the reporter's visit to her home, Eszterhas wrote, "Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. Her world has changed. She says that after it happened, the people in town offered to help them out with money and they refused to take it." [1] Other significant misrepresentations were contained in details of Eszterhas' descriptions of the poverty in which the Cantrells were living and the dirty and dilapidated conditions of the Cantrell home.

The case went to the jury on a so-called "false light" theory of invasion of privacy. In essence, the theory of the case was that by publishing the false feature story about the Cantrells and thereby making them the objects of pity and ridicule, the respondents damaged Mrs. Cantrell and her son William by causing them to suffer outrage, mental distress, shame, and humiliation.[2]

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[1] Eszterhas, Legacy of the Silver Bridge, the Plain Dealer Sunday Magazine, Aug. 4, 1968, p. 32, col. 1.

[2] Although this is a diversity action based on state tort law, there is remarkably little discussion of the relevant Ohio or West Virginia law by the District Court, the Court of Appeals, and counsel for the parties. It is clear, however, that both Ohio and West Virginia recognize a legally protected interest in privacy. *E. g., Housh* v. *Peth*, 165 Ohio St. 35, 133 N. E. 2d 340; *Roach* v. *Harper*, 143 W. Va. 869, 105 S. E. 2d 564; *Sutherland* v. *Kroger Co.*, 144 W. Va. 673, 110 S. E. 2d 716. Publicity that places the plaintiff in a false light in the public eye is generally recognized as one of the several distinct kinds of invasions actionable under the privacy rubric. See Prosser, Privacy, 48 Calif. L. Rev. 383, 398–401; Restatement (Second) of Torts § 652E (Tent. Draft No. 13).

II

In *Time, Inc.* v. *Hill,* 385 U. S. 374, the Court considered a similar false-light, invasion-of-privacy action. The New York Court of Appeals had interpreted New York Civil Rights Law §§ 50–51 to give a "newsworthy person" a right of action when his or her name, picture or portrait was the subject of a "fictitious" report or article. Material and substantial falsification was the test for recovery. 385 U. S., at 384–386. Under this doctrine the New York courts awarded the plaintiff James Hill compensatory damages based on his complaint that Life Magazine had falsely reported that a new Broadway play portrayed the Hill family's experience in being held hostage by three escaped convicts. This Court, guided by its decision in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, which recognized constitutional limits on a State's power to award damages for libel in actions brought by public officials, held that the constitutional protections for speech and press precluded the application of the New York statute to allow recovery for "false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." 385 U. S., at 388. Although the jury could have reasonably concluded from the evidence in the *Hill* case that Life had engaged in knowing falsehood or had recklessly disregarded the truth in stating in the article that "the story re-enacted" the Hill family's experience, the Court concluded that the trial judge's instructions had not confined the jury to such a finding as a predicate for liability as required by the Constitution. *Id.,* at 394.

The District Judge in the case before us, in contrast to the trial judge in *Time, Inc.* v. *Hill,* did instruct the jury that liability could be imposed only if it concluded that the false statements in the Sunday Magazine feature

article on the Cantrells had been made with knowledge of their falsity or in reckless disregard of the truth.[3] No objection was made by any of the parties to this knowing-or-reckless-falsehood instruction. Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard

[3] The District Judge instructed the jury in part:

"[T]he constitutional protection for speech and press preclude[s] redress for false reports of matters of public interest in the absence of proof that the defendants published the report with knowledge of its falsity or in reckless disregard of the truth.

. . . . . .

"Thus, in this case the burden of proof is upon the plaintiffs to prove by a preponderance of the evidence their assertions of an invasion of privacy, the elements of which are:

"(1) An unwarranted and/or wrongful intrusion by the defendants into their private or personal affairs with which the public had no legitimate concern.

"(2) Publishing a report or article about plaintiff with knowledge of its falsity or in reckless disregard of the truth.

"(3) Defendants' acts of publishing a report or article about plaintiffs with knowledge of its falsity or in reckless disregard of the truth caused plaintiffs injury as individuals of ordinary sensibilities and damage in the form of outrage or mental suffering, shame or humiliation.

. . . . . .

"Thus, if it be your conclusion and determination that plaintiffs have failed to prove by a preponderance of the evidence that defendants invaded the [plaintiffs'] privacy by publishing a report or article about them with knowledge of its falsity or in reckless disregard of the truth, you need not deliberate further and you will return a verdict in favor of the defendants."

The District Judge also charged the jury:

"An act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

"Recklessness implies a higher degree of culpability than negligence. Recklessly means wantonly, with indifference to consequence."

announced in *Time, Inc.* v. *Hill* applies to all false-light cases. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323. Rather, the sole question that we need decide is whether the Court of Appeals erred in setting aside the jury's verdict.

III

At the close of the petitioners' case-in-chief, the District Judge struck the demand for punitive damages. He found that Mrs. Cantrell had failed to present any evidence to support the charges that the invasion of privacy "was done maliciously within the legal definition of that term." The Court of Appeals interpreted this finding to be a determination by the District Judge that there was no evidence of knowing falsity or reckless disregard of the truth introduced at the trial. Having made such a determination, the Court of Appeals held that the District Judge should have granted the motion for a directed verdict for respondents as to all the Cantrells' claims. 484 F. 2d, at 155.

The Court of Appeals appears to have assumed that the District Judge's finding of no malice "within the legal definition of that term" was a finding based on the definition of "actual malice" established by this Court in *New York Times Co.* v. *Sullivan*, 376 U. S., at 280: "with knowledge that [a defamatory statement] was false or with reckless disregard of whether it was false or not." As so defined, of course, "actual malice" is a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers.[4] As

[4] In *Time, Inc.* v. *Hill*, 385 U. S. 374, the Court did not employ this term of art. Instead, the Court repeated the actual standard of knowing or reckless falsehood at every relevant point. See, *e. g.*, *id.*, at 388, 390, 394.

such, it is quite different from the common-law standard of "malice" generally required under state tort law to support an award of punitive damages. In a false-light case, common-law malice—frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights—would focus on the defendant's attitude toward the plaintiff's privacy, not toward the truth or falsity of the material published. See *Time, Inc.* v. *Hill,* 385 U. S., at 396 n. 12. See generally W. Prosser, Law of Torts 9–10 (4th ed.).

Although the verbal record of the District Court proceedings is not entirely unambiguous, the conclusion is inescapable that the District Judge was referring to the common-law standard of malice rather than to the *New York Times* "actual malice" standard when he dismissed the punitive damages claims. For at the same time that he dismissed the demands for punitive damages, the District Judge refused to grant the respondents' motion for directed verdicts as to Mrs. Cantrell's and William's claims for compensatory damages. And, as his instructions to the jury made clear, the District Judge was fully aware that the *Time, Inc.* v. *Hill* meaning of the *New York Times* "actual malice" standard had to be satisfied for the Cantrells to recover actual damages. Thus, the only way to harmonize these two virtually simultaneous rulings by the District Judge is to conclude, contrary to the decision of the Court of Appeals, that in dismissing the punitive damages claims he was not determining that Mrs. Cantrell had failed to introduce any evidence of knowing falsity or reckless disregard of the truth. This conclusion is further fortified by the District Judge's subsequent denial of the respondents' motion for judgment *n. o. v.* and alternative motion for a new trial.

Moreover, the District Judge was clearly correct in believing that the evidence introduced at trial was sufficient

to support a jury finding that the respondents Joseph Eszterhas and Forest City Publishing Co. had published knowing or reckless falsehoods about the Cantrells.[5] There was no dispute during the trial that Eszterhas, who did not testify, must have known that a number of the statements in the feature story were untrue. In particular, his article plainly implied that Mrs. Cantrell had been present during his visit to her home and that Eszterhas had observed her "wear[ing] the same mask of nonexpression she wore [at her husband's] funeral." These were "calculated falsehoods," and the jury was plainly justified in finding that Eszterhas had portrayed the Cantrells in a false light through knowing or reckless untruth.

The Court of Appeals concluded that there was no evidence that Forest City Publishing Co. had knowledge of any of the inaccuracies contained in Eszterhas' article. However, there was sufficient evidence for the jury to find that Eszterhas' writing of the feature was within the scope of his employment at the Plain Dealer and that Forest City Publishing Co. was therefore liable under traditional doctrines of *respondeat superior*.[6] Although Eszterhas was not regu-

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[5] Although we conclude that the jury verdicts should have been sustained as to Eszterhas and Forest City Publishing Co., we agree with the Court of Appeals' conclusion that there was insufficient evidence to support the jury's verdict against the photographer Conway. Conway testified that the photographs he took were fair and accurate depictions of the people and scenes he found at the Cantrell residence. This testimony was not contradicted by any other evidence introduced at the trial. Nor was there any evidence that Conway was in any way responsible for the inaccuracies and misstatements contained in the text of the article written by Eszterhas. In short, Conway simply was not shown to have participated in portraying the Cantrells in a false light.

[6] The District Judge instructed the jury:

"Any act of an employee or agent, to become the act of the corpora-

larly assigned by the Plain Dealer to write for the Sunday Magazine, the editor of the magazine testified that as a staff writer for the Plain Dealer Eszterhas frequently suggested stories he would like to write for the magazine. When Eszterhas suggested the follow-up article on the Silver Bridge disaster, the editor approved the idea and told Eszterhas the magazine would publish the feature if it was good. From this evidence, the jury could reasonably conclude that Forest City Publishing Co., publisher of the Plain Dealer, should be held vicariously liable for the damage caused by the knowing falsehoods contained in Eszterhas' story.

For the foregoing reasons, the judgment of the Court of Appeals is reversed and the case is remanded to that court with directions to enter a judgment affirming the judgment of the District Court as to the respondents Forest City Publishing Co. and Joseph Eszterhas.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I adhere to the views which I expressed in *Time, Inc.* v. *Hill,* 385 U. S. 374, 401–402 (1967), and to those of Mr. Justice Black in which I concurred, *id.,* at 398–401. Freedom of the press is "abridged" in violation of the First

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tion, must be performed by the employee while acting within the scope of his employment.

. . . . . .

"The Court charges you as a matter of law that before any acts or knowledge of Joseph Eszterhas or Richard T. Conway may be imputed to the defendant, Forest City Publishing Company, the plaintiffs must prove by a preponderance of the evidence that defendant, Forest City Publishing Company, had actual knowledge of those acts and information or that Conway and Eszterhas were acting within the scope of their employment when they performed the acts or acquired the information."

None of the parties objected to this instruction.

and Fourteenth Amendments by what we do today. This line of cases, which of course includes *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), seems to me to place First Amendment rights of the press at a midway point similar to what our ill-fated *Betts* v. *Brady,* 316 U. S. 455 (1942), did to the right to counsel. The press will be "free" in the First Amendment sense when the judge-made qualifications of that freedom are withdrawn and the substance of the First Amendment restored to what I believe was the purpose of its enactment.

A bridge accident catapulted the Cantrells into the public eye and their disaster became newsworthy. To make the First Amendment freedom to report the news turn on subtle differences between common-law malice and actual malice is to stand the Amendment on its head. Those who write the current news seldom have the objective, dispassionate point of view—or the time—of scientific analysts. They deal in fast-moving events and the need for "spot" reporting. The jury under today's formula sits as a censor with broad powers—not to impose a prior restraint, but to lay heavy damages on the press. The press is "free" only if the jury is sufficiently disenchanted with the Cantrells to let the press be free of this damages claim. That regime is thought by some to be a way of supervising the press which is better than not supervising it at all. But the installation of the Court's regime would require a constitutional amendment. Whatever might be the ultimate reach of the doctrine Mr. Justice Black and I have embraced, it seems clear that in matters of public import such as the present news reporting, there must be freedom from damages lest the press be frightened into playing a more ignoble role than the Framers visualized.

I would affirm the judgment of the Court of Appeals.

SCHICK *v.* REED, CHAIRMAN, UNITED STATES BOARD OF PAROLE, ET AL.

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

No. 73–5677. Argued October 23, 1974—Decided December 23, 1974

Petitioner, sentenced to death, under Art. 118 of the Uniform Code of Military Justice, by a court-martial for murder, attacked the validity of a Presidential commutation to life imprisonment (under which petitioner had served 20 years) conditioned on petitioner's never being paroled. The District Court granted respondents' motion for summary judgment. The Court of Appeals affirmed, additionally rejecting petitioner's contention that this Court's intervening decision in *Furman* v. *Georgia,* 408 U. S. 238, required that petitioner be resentenced to a life term with the possibility of parole, the alternative punishment for murder under Art. 118. *Held:* The conditional commutation of petitioner's death sentence was within the President's powers under Art. II, § 2, cl. 1, of the Constitution to "grant Reprieves and Pardons for Offenses against the United States." Pp. 260–268.

(a) The executive pardoning power under the Constitution, which has consistently adhered to the English common-law practice, historically included the power to commute sentences on conditions not specifically authorized by statute. *United States* v. *Wilson,* 7 Pet. 150; *Ex parte Wells,* 18 How. 307. Pp. 260–266.

(b) Since the pardoning power derives from the Constitution alone, it cannot be modified, abridged, or diminished by any statute, including Art. 118, and *Furman* v. *Georgia, supra,* did not affect the conditional commutation of petitioner's sentence. Pp. 266–268.

157 U. S. App. D. C. 263, 483 F. 2d 1266, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 268.

Homer E. Moyer, Jr., argued the cause for petitioner *pro hac vice.* With him on the briefs was *Robert N. Sayler.*

Louis F. Claiborne argued the cause for respondents. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Harry R. Sachse.*

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

In 1960, the President, acting under the authority of Art. II, § 2, cl. 1, of the Constitution, commuted petitioner Maurice L. Schick's sentence from death to life imprisonment, subject to the condition that he would not thereafter be eligible for parole. The petitioner challenges the validity of the condition, and we granted certiorari to determine the enforceability of that commutation as so conditioned.

The pertinent facts are undisputed. In 1954 petitioner, then a master sergeant in the United States Army stationed in Japan, was tried before a court-martial for the brutal murder of an eight-year-old girl. He admitted the killing, but contended that he was insane at the time that he committed it. Medical opinion differed on this point. Defense experts testified that petitioner could neither distinguish between right and wrong nor adhere to the right when he killed the girl; a board of psychiatrists testifying on behalf of the prosecution concluded that petitioner was suffering from a nonpsychotic behavior disorder and was mentally aware of and able to control his actions. The court-martial rejected petitioner's defense and he was sentenced to death on March 27, 1954, pursuant to Art. 118 of the Uniform Code of Military Justice, 10 U. S. C. § 918. The conviction and sentence were affirmed by an Army Board of Review and, following a remand for consideration of additional psychiatric reports, by the Court of Military Appeals. 7 U. S. C. M. A. 419, 22 C. M. R. 209 (1956).

The case was then forwarded to President Eisenhower for final review as required by Art. 71 (a) of the UCMJ,

10 U. S. C. § 871 (a). The President acted on March 25, 1960:

> "[P]ursuant to the authority vested in me as President of the United States by Article II, Section 2, Clause 1, of the Constitution, the sentence to be put to death is hereby commuted to dishonorable discharge, forfeiture of all pay and allowances becoming due on and after the date of this action, and confinement at hard labor for the term of his [petitioner's] natural life. This commutation of sentence is expressly made on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 U. S. C. 4201 *et seq.*, 10 USC 3662 *et seq.*, 10 USC 871, 874), or any acts amendatory or supplementary thereof." App. 35.

The action of the President substituted a life sentence for the death sentence imposed in 1954, subject to the conditions described in the commutation. Petitioner was accordingly discharged from the Army and transferred to the Federal Penitentiary at Lewisburg, Pa. He has now served 20 years of his sentence. Had he originally received a sentence of life imprisonment he would have been eligible for parole consideration in March 1969; the condition in the President's order of commutation barred parole at any time.

In 1971, while appeals challenging the validity of the death penalty were pending in this Court, petitioner filed suit in the United States District Court for the District of Columbia to require the members of the United States Board of Parole to consider him for parole. The District

Court granted the Board of Parole's motion for summary judgment and the Court of Appeals affirmed, unanimously upholding the President's power to commute a sentence upon condition that the prisoner not be paroled. In addition, it rejected by a 2-1 vote petitioner's argument that *Furman* v. *Georgia,* 408 U. S. 238, decided on June 29, 1972, requires that he be resentenced to a simple life term, the alternative punishment for murder under Art. 118. 157 U. S. App. D. C. 263, 483 F. 2d 1266. We affirm the judgment of the Court of Appeals.

I

When the death sentence was imposed in 1954 it was, as petitioner concedes, valid under the Constitution of the United States and subject only to final action by the President. Absent the commutation of March 25, 1960, the sentence could, and in all probability would, have been carried out prior to 1972. Only the President's action in commuting the sentence under his Art. II powers, on the conditions stipulated, prevented execution of the sentence imposed by the court-martial.

The essence of petitioner's case is that, in light of this Court's holding in *Furman* v. *Georgia, supra,* which he could not anticipate, he made a "bad bargain" by accepting a no-parole condition in place of a death sentence. He does not cast his claim in those terms, of course. Rather, he argues that the conditions attached to the commutation put him in a worse position than he would have been in had he contested his death sentence—and remained alive—until the *Furman* case was decided 18 years after that sentence was originally imposed.

It is correct that pending death sentences not carried out prior to *Furman* were thereby set aside without conditions such as were attached to petitioner's commutation. However, petitioner's death sentence was not pending in 1972 because it had long since been commuted.

The question here is whether *Furman* must now be read as nullifying the condition attached to that commutation when it was granted in 1960. Alternatively, petitioner argues that even in 1960 President Eisenhower exceeded his powers under Art. II by imposing a condition not expressly authorized by the Uniform Code of Military Justice.

In sum, petitioner's claim gives rise to three questions: First, was the conditional commutation of his death sentence lawful in 1960; second, if so, did *Furman* retroactively void such conditions; and third, does that case apply to death sentences imposed by military courts where the asserted vagaries of juries are not present as in other criminal cases? Our disposition of the case will make it unnecessary to reach the third question.

II

The express power of Art. II, § 2, cl. 1, from which the Presidential power to commute criminal sentences derives, is to "grant Reprieves and Pardons . . . except in Cases of Impeachment." Although the authors of this clause surely did not act thoughtlessly, neither did they devote extended debate to its meaning. This can be explained in large part by the fact that the draftsmen were well acquainted with the English Crown authority to alter and reduce punishments as it existed in 1787. The history of that power, which was centuries old, reveals a gradual contraction to avoid its abuse and misuse.[1] Changes were made as potential or actual abuses were perceived; for example, Parliament restricted the power to grant a pardon to one who transported a prisoner overseas to evade the Habeas Corpus Act, because to allow such pardons would drain the Great Writ of its vitality. There

[1] See generally 6 W. Holdsworth, History of English Law 203 (1938).

were other limits, but they were few in number and similarly specifically defined.[2]

At the time of the drafting and adoption of our Constitution it was considered elementary that the prerogative of the English Crown could be exercised upon conditions:

> "It seems agreed, That the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend." 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787).

Various types of conditions, both penal and nonpenal in nature, were employed.[3] For example, it was common for a pardon or commutation to be granted on condition that the felon be transported to another place, and indeed our own Colonies were the recipients of numerous subjects of "banishment." This practice was never questioned despite the fact that British subjects generally could not be forced to leave the realm without an Act of Parliament and banishment was rarely authorized as a punishment for crime. The idea later developed that the subject's consent to transportation was necessary, but in most cases he was simply "agreeing" that his life should be spared. Thus, the requirement of consent was a legal fiction at best; in reality, by granting pardons or commutations conditional upon banishment, the Crown was exercising a power that was the equivalent and completely

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[2] See 3 E. Coke, Institutes 233 (6th ed. 1680); 5 J. Comyns, Digest of the Laws of England 230 (5th ed. 1822); J. Chitty, Prerogatives of the Crown 90–91 (1820); 4 W. Blackstone, Commentaries *398.

[3] Typical conditions were that the felon be confined at hard labor for a stated period of time, 4 Blackstone, *supra*, n. 2, at *401, or that he serve in the Armed Forces. 2 D. Hume, Crimes 481 (2d ed. 1819).

independent of legislative authorization.[4] 11 W. Holdsworth, History of English Law 569–575 (1938). In short, by 1787 the English prerogative to pardon was unfettered except for a few specifically enumerated limitations.

The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice. The records of the Constitutional Convention, as noted earlier, reveal little discussion or debate on § 2, cl. 1, of Art. II. The first report of the Committee on Detail proposed that the pertinent clause read: "He [the President] shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment."[5] This limitation as to impeachments tracked a similar restriction upon the English royal prerogative which existed in 1787. 4 W. Blackstone, Commentaries *399–400. An effort was made in the Convention to amend what finally emerged as § 2, cl. 1, and is reflected in James Madison's Journal for August 25, 1787, where the following note appears:

> "Mr. Sherman moved to amend the 'power to grant reprieves and pardons' so as to read 'to grant reprieves until the next session of the Senate, and pardons with consent of the Senate.'" 2 M. Farrand, Records of the Federal Convention of 1787, p. 419 (1911).

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[4] In *Ex parte Wells*, 18 How. 307 (1856), this Court expressed the view that legislative authorization was essential to the use of banishment from the realm as a commutable punishment by the English Crown. *Id.*, at 313. However, that conclusion was no more than dictum and is historically incorrect. Indeed, about the time that *Wells* was decided Parliament abolished banishment as a penalty in England, but the Crown retained and continued to exercise the power to annex such conditions to pardons. 11 Holdsworth, *supra*, n. 1, at 575.

[5] 2 M. Farrand, Records of the Federal Convention of 1787, p. 185 (1911).

The proposed amendment was rejected by a vote of 8–1. *Ibid.* This action confirms that, as in England in 1787, the pardoning power was intended to be generally free from legislative control.

Later Edmund Randolph proposed to add the words "'except cases of treason.'" Madison's description of Randolph's argument reflects familiarity with the English form and practice: "The *prerogative* of pardon in these [treason] cases was too great a trust." *Id.*, at 626 (emphasis added). Randolph's proposal was rejected by a vote of 8–2, and the clause was adopted in its present form. Thereafter, Hamilton's Federalist No. 69 summarized the proposed § 2 powers, including the power to pardon, as "resembl[ing] equally that of the King of Great-Britain and the Governor of New-York." The Federalist No. 69, p. 464 (J. Cooke ed. 1961).[6]

We see, therefore, that the draftsmen of Art. II, § 2, spoke in terms of a "prerogative" of the President, which ought not be "fettered or embarrassed." In light of the English common law from which such language was

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[6] In the Federalist No. 74 Hamilton enlarged on this point:

"Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection, that the fate of a fellow creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution: The dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind." The Federalist No. 74, pp. 500–501 (J. Cooke ed. 1961).

drawn, the conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute.

The few cases decided in this area are consistent with the view of the power described above. In *United States* v. *Wilson,* 7 Pet. 150 (1833), this Court was confronted with the question of whether a pardon must be pleaded in order to be effective. Mr. Chief Justice Marshall held for the Court that it must, because that was the English common-law practice:

> "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." *Id.,* at 160.

Similarly, in *Ex parte Wells,* 18 How. 307 (1856), the petitioner had been convicted of murder and sentenced to be hanged. President Fillmore granted a pardon " 'upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington.' " *Id.,* at 308. Later, Wells sought release by habeas corpus, contending that the condition annexed to the pardon and accepted by him was illegal. His argument was remarkably similar to that made by petitioner here:

> "[A] President granting such a pardon assumes a power not conferred by the constitution—that he legislates a new punishment into existence, and sen-

tences the convict to suffer it; in this way violating the legislative and judicial powers of the government, it being the province of the first, to enact laws for the punishment of offences . . . , and that of the judiciary, to sentence . . . according to them." *Id.*, at 309.

However, the Court was not persuaded. After an extensive review of the English common law and that of the States, which need not be repeated here, it concluded:

"The real language of [Art. II, § 2, cl. 1] is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them. . . .

"In this view of the constitution, by giving to its words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms.

. . . . . .

". . . [T]he power to offer a condition, without ability to enforce its acceptance, when accepted by the convict, is the substitution, by himself, of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made.

"'. . . And a man condemned to be hung cannot be permitted to escape the punishment altogether, by pleading that he had accepted his life by *duress per minas*.'" *Id.*, at 314–315.

In other words, this Court has long read the Constitution as authorizing the President to deal with individual cases by granting conditional pardons. The very essence of the pardoning power is to treat each case individually.

The teachings of *Wilson* and *Wells* have been followed consistently by this Court. See, *e. g., Ex parte Grossman,* 267 U. S. 87 (1925) (upholding a Presidential pardon of a contempt of court against an argument that it violated the principle of separation of powers); *Ex parte Garland,* 4 Wall. 333 (1867). Additionally, we note that Presidents throughout our history as a Nation have exercised the power to pardon or commute sentences upon conditions that are not specifically authorized by statute. Such conditions have generally gone unchallenged and, as in the *Wells* case, attacks have been firmly rejected by the courts. See 41 Op. Atty. Gen. 251 (1955). These facts are not insignificant for our interpretation of Art. II, § 2, cl. 1, because, as observed by Mr. Justice Holmes: "If a thing has been practised for two hundred years by common consent, it will need a strong case" to overturn it. *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31 (1922).

III

A fair reading of the history of the English pardoning power, from which our Art. II, § 2, cl. 1, derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress. Additionally, considerations of public policy and humanitarian impulses support an interpretation of that power so as to permit the attachment of any condition which does not otherwise offend the Constitution. The plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority in the President to "forgive" the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable. If we were

to accept petitioner's contentions, a commutation of his death sentence to 25 or 30 years would be subject to the same challenge as is now made, *i. e.,* that parole must be available to petitioner because it is to others. That such an interpretation of § 2, cl. 1, would in all probability tend to inhibit the exercise of the pardoning power and reduce the frequency of commutations is hardly open to doubt. We therefore hold that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself. It would be a curious logic to allow a convicted person who petitions for mercy to retain the full benefit of a lesser punishment with conditions, yet escape burdens readily assumed in accepting the commutation which he sought.

Petitioner's claim must therefore fail. The no-parole condition attached to the commutation of his death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole;[7] it does not offend the Constitution. Similarly, the President's action derived solely from his Art. II powers; it did not depend upon Art. 118 of the UCMJ or any other statute fixing a death penalty for murder. It is not correct to say that the condition upon petitioner's commutation was "made possible only through the court-martial's imposition of the death sentence." *Post,* at 269–270. Of course, the President may not aggravate punishment; the sentence imposed by statute is therefore relevant to a limited extent. But, as shown, the President has constitutional power to attach conditions to his commutation of any sentence. Thus, even if *Furman* v. *Georgia* applies to the military, a matter which we need not and do not decide, it could

[7] See, *e. g.,* 21 U. S. C. § 848 (c); Mass. Gen. Laws Ann., c. 265, § 2 (1970); Nev. Rev. Stat., Tit. 16, c. 200.030, § 6, c. 200.363, § 1 (a) (1973).

not affect a conditional commutation which was granted 12 years earlier.

We are not moved by petitioner's argument that it is somehow "unfair" that he be treated differently from persons whose death sentences were pending at the time that *Furman* was decided. Individual acts of clemency inherently call for discriminating choices because no two cases are the same. Indeed, as noted earlier, petitioner's life was undoubtedly spared by President Eisenhower's commutation order of March 25, 1960. Nor is petitioner without further remedies since he may, of course, apply to the present President or future Presidents for a complete pardon, commutation to time served, or relief from the no-parole condition. We hold only that the conditional commutation of his death sentence was lawful when made and that intervening events have not altered its validity.

Affirmed.

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

The Court today denies petitioner relief from the no-parole condition of his commuted death sentence, paying only lip service to our intervening decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Because I believe the retrospective application of *Furman* requires us to vacate petitioner's sentence and substitute the only lawful alternative—life with the opportunity for parole, I respectfully dissent.

I

The Court misconstrues petitioner's retroactivity argument. Schick does not dispute the constitutional validity of the death penalty in 1954 under then-existing case law. Nor does he contend that he was under sentence of death [1]

[1] But see Part II, *infra*.

in 1972 when the decision issued in *Furman,* invalidating "the imposition and carrying out" of discretionary death sentences. *Id.,* at 239. Rather, he argues that the retroactive application of *Furman* to his no-parole commutation is required because the imposition of the death sentence was the indispensable vehicle through which he became subject to his present sentence. In other words, the no-parole condition could not now exist had the court-martial before which Schick was tried not imposed the death penalty.

The relationship between the death sentence and the condition is clear. Article 118 of the Uniform Code of Military Justice (UCMJ) [2] authorizes only two sentences for the crime of premeditated murder: death or life imprisonment which entails at least the possibility of parole. Confinement without possibility of parole is unknown to military law; [3] it is not and has never been authorized for any UCMJ offense, 10 U. S. C. §§ 877–934; Manual for Courts-Martial, 34 Fed. Reg. 10502 (1969). In short, the penal restriction of the commutation was a creature of Presidential clemency made possible only

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[2] Article 118, 10 U. S. C. § 918, reads:

"Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he—

"(1) has a premeditated design to kill;

. . . . . .

"shall suffer death or imprisonment for life as a court-martial may direct." May 5, 1950, c. 169, § 1, 64 Stat. 140.

[3] Military prisoners incarcerated in federal penitentiaries are governed by the same parole statutes and regulations applicable to all federal prisoners. Under the federal parole eligibility statute, 18 U. S. C. §§ 4202–4203 (1970 ed. and Supp. II), petitioner, an inmate for 20 years at Lewisburg, now has satisfied the 15-year prerequisite for parole consideration. See 10 U. S. C. § 858. Likewise, if Schick had been confined in a military facility he would now be eligible for parole under 10 U. S. C. §§ 952–953.

through the court-martial's imposition of the death sentence.

The retroactivity of *Furman* is equally unclouded. The Court "[has] not hesitated" to give full retroactive effect to the *Furman* decision. *Robinson* v. *Neil,* 409 U. S. 505, 508 (1973). See *Stewart* v. *Massachusetts,* 408 U. S. 845 (1972); *Marks* v. *Louisiana,* 408 U. S. 933 (1972); *Walker* v. *Georgia,* 408 U. S. 936 (1972). The *per curiam* decision struck down both "the imposition and the carrying out" of discretionary death sentences as cruel and unusual punishment in violation of the Eighth Amendment. 408 U. S., at 239. The opinion specifically held that the "judgment . . . is . . . reversed insofar as it leaves undisturbed the death sentence imposed . . . ." *Id.,* at 240. The retroactive application of *Furman* results in more than the simple enjoining of execution; it nullifies the very act of sentencing. In effect a post-*Furman* court must ensure a prisoner the same treatment that he would have been afforded had the death penalty not been imposed initially.[4]

The full retroactivity of a constitutional ruling is aimed at the eradication of all adverse consequences of prior violations of that rule. We have recognized the importance of erasing "root and branch" the adverse legal consequences, both direct and indirect, of prior constitutional violations. See, *e. g., McConnell* v. *Rhay,* 393 U. S. 2, 3 (1968); *Linkletter* v. *Walker,* 381 U. S. 618, 639 (1965). The effective operation of this procedure was demon-

[4] Where only one alternative punishment is available to the trial court, that punishment has been automatically imposed either by the appellate court itself, *e. g., State* v. *Johnson,* 31 Ohio St. 2d 106, 285 N. E. 2d 751 (1972); *Commonwealth* v. *Bradley,* 449 Pa. 19, 295 A. 2d 842 (1972); *Anderson* v. *State,* 267 So. 2d 8, 10 (Fla. 1972); or by the trial judge on direction from the appellate court, *e. g., Capler* v. *State,* 268 So. 2d 338 (Miss. 1972); *State* v. *Square,* 263 La. 291, 268 So. 2d 229 (1972); *Garcia* v. *State,* 501 P. 2d 1128 (Okla. Crim. 1972).

strated in the decisions on the right to counsel in state felony trials. See *Pickelsimer* v. *Wainwright,* 375 U. S. 2 (1963); *Kitchens* v. *Smith,* 401 U. S. 847 (1971); *Burgett* v. *Texas,* 389 U. S. 109 (1967); *United States* v. *Tucker,* 404 U. S. 443 (1972).

Since *Furman* is fully retroactive petitioner's case should be simple to resolve. The terms of Art. 118 of the UCMJ provide that a person convicted of premeditated murder "shall suffer death or imprisonment for life as a court-martial may direct." A death sentence was imposed by the court-martial and affirmed by the Board of Review and the United States Court of Military Appeals, 7 U. S. C. M. A. 419, 22 C. M. R. 209 (1956). The death sentence so imposed was declared unconstitutional by *Furman* and is therefore null and void as a matter of law. The only legal alternative—simple life imprisonment—must be substituted. Concomitantly, the adverse consequence of the death sentence—the no-parole condition of petitioner's 1960 commutation—must also be voided, as it exceeds the lawful alternative punishment that should have been imposed. Petitioner should now be subject to treatment as a person sentenced to life imprisonment on the date of his original sentence and eligible for parole.[5]

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[5] Nothing in *Furman* suggests that it is inapplicable to the military. The *per curiam* carves out no exceptions to the prohibition against discretionary death sentences. The opinions of the five-member majority recognize no basis for excluding the members of the Armed Forces from protection against this form of punishment. Even the list of four capital punishment statutes not affected by the Court's decision, provided by my Brother STEWART, does not include the federal military statutes. 408 U. S. 238, 307 (1972). Even more persuasive is the language of my Brother POWELL in dissent which states that "numerous provisions of . . . the Uniform Code of Military Justice are also voided." *Id.,* at 417–418.

Beyond the language of *Furman* the Court has made clear in *Trop* v. *Dulles,* 356 U. S. 86 (1958), that the Eighth Amendment is appli-

The Court today suggests that petitioner cannot claim any benefit from *Furman* because no death penalty was pending against him at the time of the decision. The 1960 commutation is touted as the panacea for the constitutional defects of petitioner's original sentence. Unfortunately, such is not the case.

The imposition of the death sentence was the indispensable vehicle through which petitioner became subject to his present sentence. The commutation of the sentence did not cure the constitutional disabilities of the punishment. A noted expert on the subject of Presidential clemency states:

> "Unlike a pardon, a commutation does not absolve the beneficiary from most of the legal consequences of an offense." [6]

Although petitioner is not under direct threat of the death sentence, "he has suffered and continues to suffer enhanced punishment—the loss of his statutory right to

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cable to the military. While the Court divided on the penal nature of the statute which provided additional sanctions for servicemen convicted of wartime desertion, there was no disagreement on the application of the Amendment.

I would also note that the UCMJ, enacted in 1950, has by decision and practice incorporated the Bill of Rights and afforded its protection to the members of the Armed Forces. See, *e. g.*, *United States* v. *Tempia,* 16 U. S. C. M. A. 629, 634, 37 C. M. R. 249, 254 (1967); *United States* v. *Jacoby,* 11 U. S. C. M. A. 428, 430–431, 29 C. M. R. 244, 246–247 (1960); *United States* v. *Jobe,* 10 U. S. C. M. A. 276, 279, 27 C. M. R. 350, 353 (1959).

The fact that a court-martial rather than a jury imposes the death sentence is irrelevant. In my view the penalty is equally severe, and in my view equally offensive to the Eighth Amendment for that reason, see *Furman* v. *Georgia,* 408 U. S., at 314–374 (MARSHALL, J., concurring). Moreover, the potential for abuse and discrimination with which my Brethren were concerned in *Furman* is as evident here as in the civilian courts.

[6] W. Humbert, The Pardoning Power of the President 27 (1941).

be considered for parole—as a result of an illegally imposed death sentence" [7] The full retrospective application of *Furman* requires the eradication of this vestige of the prior constitutional violation. If petitioner had been granted stays of execution until *Furman* was decided, there is no doubt that his sentence would have to be vacated and a life sentence imposed instead. The situation should be no different simply because the Chief Executive commuted his sentence—in effect granting a permanent stay of execution. Nullification of the no-parole provision would relieve petitioner of this unconstitutional burden and clear the way for lawful resentencing with eligibility for parole.

II

Since the majority devotes its opinion to a discussion of the scope of Presidential power, I am compelled to comment. I have no quarrel with the proposition that the source of the President's commutation power is found in Art. II, § 2, cl. 1, of the Constitution, which authorizes the President to grant reprieves and pardons for offenses against the United States except for cases of impeachment. *Biddle* v. *Perovich,* 274 U. S. 480 (1927). Commutation is defined as the substitution of a lesser type of punishment for the punishment actually imposed at trial.[8]

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[7] 157 U. S. App. D. C. 263, 270, 483 F. 2d 1266, 1273 (1973) (Wright, J., dissenting).

[8] Although pardon and commutation emanate from the same source, they represent clearly distinct forms of clemency. Whereas commutation is a substitution of a milder form of punishment, pardon is an act of public conscience that relieves the recipient of all the legal consequences of the conviction. See, *e. g., United States ex rel. Brazier* v. *Commissioner of Immigration,* 5 F. 2d 162 (CA2 1924); *Chapman* v. *Scott,* 10 F. 2d 156, 159 (Conn. 1925), aff'd, 10 F. 2d 690 (CA2), cert. denied, 270 U. S. 657 (1926); Note, Executive Clemency in Capital Cases, 39 N. Y. U. L. Rev. 136, 138 (1964);

The issue here is whether the President's expansion of an unencumbered life term by addition of a condition proscribing Schick's eligibility for parole went beyond the authority conferred by Art. II. Article 118 of the UCMJ and the implementing court-martial regulations prescribe mandatory adjudication of either death or life imprisonment for the crime of premeditated murder. 10 U. S. C. § 918; 34 Fed. Reg. 10704. I take issue with the Court's conclusion that annexation of the "no-parole condition . . . does not offend the Constitution." *Ante,* at 267. In my view the President's action exceeded the limits of the Art. II pardon power. In commuting a sentence under Art. II the Chief Executive is not imbued with the constitutional power to create unauthorized punishments.

The congressionally prescribed limits of punishment mark the boundaries within which the Executive must exercise his authority.[9] By virtue of the pardon power the Executive may abstain from enforcing a judgment by judicial authorities; he may not, under the aegis of that power, engage in lawmaking or adjudication. Cf. *United States* v. *Benz,* 282 U. S. 304, 311 (1931) (an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it *qua* judgment); *United States ex rel. Brazier* v. *Commissioner of Immigration,* 5 F. 2d 162 (CA2 1924) (pardon power does not embrace right to bar congressionally prescribed deportation of prisoners).

While the clemency function of the Executive in the

Humbert, *supra,* n. 6, at 27; Black's Law Dictionary 351, 1268–1269 (4th ed. 1968).

[9] Indeed, Mr. Chief Justice Marshall expanded on the notion of separation of powers, stating: "[T]he power of punishment is vested in the legislative . . . department. It is the legislature . . . which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger,* 5 Wheat. 76, 95 (1820).

federal criminal justice system [10] is consistent with the separation of powers, the attachment of punitive conditions to grants of clemency is not. Prescribing punishment is a prerogative reserved for the lawmaking branch of government, the legislature. As a consequence, President Eisenhower's addition to Schick's commutation of a condition that did not coincide with punishment prescribed by the legislature for *any* military crime,[11] much less this specific offense, was a usurpation of a legislative function. While the exercise of the pardon power was proper, the imposition of this penal condition was not embraced by that power.[12]

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[10] Article 71 (a) of the UCMJ, 10 U. S. C. § 871 (a), outlines the Presidential role in the review of military convictions.

With the exception of premeditated murder and felony murder the UCMJ authorizes punishment at the discretion of the court-martial. Thus, in the majority of cases the President would not be limited to only two alternatives but could commute to any lesser sentence than that imposed by the court-martial consistent with the statutory authorization. It is only in the face of the mandate of Art. 118, limiting the alternatives to death or life imprisonment with the possibility of parole, that the restriction to the statutory alternatives may appear at first blush unduly Draconian.

[11] As already indicated, confinement without opportunity for parole is unknown to military law. See text accompanying n. 3, *supra*. Moreover, the only federal-law recognition of this punishment in a civilian context is found in the very limited no-parole provisions dealing with continuing narcotics enterprises. 21 U. S. C. § 848. Guided by the special nature of drug offenses and drug offenders the Congress enacted this narrow exception to universal eligibility for parole. See H. R. Rep. No. 2388, 84th Cong., 2d Sess., 4, 8, 11, 64 (1956).

[12] The Court cites *Ex parte Wells*, 18 How. 307 (1856), and an opinion of Attorney General Brownell, 41 Op. Atty. Gen. 251 (1955), in support of the statement that "Presidents . . . have [frequently] exercised the power to pardon or commute sentences upon conditions that are not specifically authorized by statute." *Ante*, at 266. *Wells* involved the simple substitution of the lesser penalty of life imprisonment for death; no separate punitive condition was attached

The Court today advances the antecedent English pardon power and prior holdings of this Court in support of the legality of the no-parole condition. Neither body of law has established an Executive right to define extra-legislative punishments.[13] Nor does the historical status of the pardon power in England or analysis of prior non-penal conditions supply any relevance here.

A

The English annals offer dubious support to the Court. The majority opinion recounts in copious detail the historical evolution of the pardon power in England. *Ante,* at 260–262. See also *Ex parte Wells,* 18 How. 307, 309–313 (1856). The references to English statutes and cases are no more than dictum; as the Court itself admonishes, "the [pardon] power flows from the Constitution alone." *Ante,* at 266. Accordingly, the primary resource for analyzing the scope of Art. II is our own republican system of government. See *Grosjean* v. *American Press Co.,* 297 U. S. 233, 248–249 (1936). The separation of powers doctrine does not vest the Chief Executive with an unrestrained clemency power, *supra,* at 274–275, but views his functions as distinct from the other coordinate branches. *Ante,* at 262–264. The references to the early American experience are not dispositive.[14]

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to the Executive action. A legal opinion from the Attorney General supplies reasoned interpretations but hardly bears the force of law.

[13] The King's pardon power, from which the President's Art. II power derives, also was subject historically to statutory limitations. See *Ex parte Wells, supra,* at 312–313; *id.,* at 322 (McLean, J., dissenting).

[14] With few exceptions conditional pardons were not granted by state governors except where authorized by law, *Ex parte Wells, supra,* at 322 (McLean, J., dissenting). The Court's references to the Framers' writings on the pardon power fail to take account of the separation of powers doctrine so fervently embraced by the constitutional drafters. *National Mutual Ins. Co.* v. *Tidewater Transfer*

Indeed, history recounts that even the pardon power of the King to "annex [a condition] to his bounty" was subject to statutory limitation. 4 W. Blackstone, Commentaries *401. As noted in the *Wells* case:

> "The sovereign of England, with all the prerogatives of the crown, in granting a conditional pardon, cannot substitute a punishment which the law does not authorize." 18 How., at 323 (McLean, J., dissenting).

Even the authority quoted by Blackstone in support of the proposition, 2 W. Hawkins, Pleas of the Crown 547 (8th ed. 1824), does not actually support the suggestion of unlimited power in the King. In fact, the conditions discussed were either imposed pursuant to statute or of a nonpunitive nature. See *Coles Case,* Moore K. B. 466, 72 Eng. Rep. 700 (1597); E. Coke, A Commentary upon Littleton 274b (19th ed. 1832). The Court acknowledges instances in which statutory authority placed restrictions on the monarch's power. *Ante,* at 260. The critical role of statutes in the imposition of the condition of banishment on pardons of convicted felons was recognized in a letter addressed to a member of the House of Lords:

> "There is hardly anything to be found respecting conditional pardons in the old English law-books; but the authority of the Crown to grant a conditional pardon in capital cases is . . . recognized in statute 5 Geo. 4, c. 84, s. 2 . . . ." W. Forsyth, Cases and Opinions on Constitutional Law 460 (1869).

Co., 337 U. S. 582 (1949); The Federalist No. 47 (J. Madison) (J. Cooke ed. 1961); E. Corwin, The President: Office and Powers 140 (1940). In fact Corwin notes:

"[T]he President is not authorized to *add* to sentences imposed by the courts [pursuant to legislative direction]—he may only *mitigate* them . . . ." *Ibid.* (emphasis in original).

The King's prerogative was thus not as broad as the majority's reading of Blackstone indicates. The great discretion available to the King to dispense mercy did not incorporate into the pardoning power the royal right to invade the legislative province of assessing punishments.

B

Contrary to the Court's suggestion, limitation of Executive action to the statutory framework is not undermined by earlier decisions of this Court. In *Biddle* v. *Perovich,* 274 U. S. 480, 483 (1927), the Solicitor General expressly noted that "[a] commutation is the substitution of a milder punishment known to the law for the one inflicted by the court." Mr. Justice Holmes, writing for a unanimous Court, concluded on a related matter that consent to commutation was unnecessary since "[b]y common understanding imprisonment for life is a less penalty than death." *Id.,* at 487. The Court held that the "only question is whether the substituted punishment was authorized by law . . . ." *Ibid.* While Holmes' specific reference is to the law of the Constitution, he then proceeds with a discussion of the statutory sanctions. Commutation to life imprisonment without any opportunity for parole would penalize the prisoner here beyond the terms of the UCMJ sanctions.

The requirement that the substituted sentence be one provided by law is not hampered by *Ex parte Wells, supra,* in which this Court upheld conditional commutation from a death sentence to a simple life term. The validity of mitigation of a sentence without depriving the prisoner of any additional rights is not inconsistent with rejection of unauthorized penal conditions. In *Wells* the Court acknowledged that limitations on the pardon power mandated its exercise "according to law; that is, as it had been used in England, and these States." 18 How., at 310. Although the *Wells* Court was not faced with the ques-

tion whether *all* possible conditions were in the ambit of Art. II, it addressed the specific limitation on penal conditions attached to commutations:

> "So, conditional pardons by the king do not permit transportation or exile as a commutable punishment, unless the same has been provided for by legislation." *Id.*, at 313.

The remaining cases on which the Court relies to sustain the condition offer minimal support and are easily distinguished.[15]

In conclusion I note that where a President chooses to exercise his clemency power he should be mindful that

> "[t]he punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment." *Bell* v. *United States*, 349 U. S. 81, 82 (1955).

See *Ex parte United States*, 242 U. S. 27, 42 (1916). The Congress has not delegated such authority to the President. I do not challenge the right of the President to issue pardons on nonpenal conditions, but, where the Executive elects to exercise the Presidential power for commutation the clear import of the Constitution mandates that the lesser punishment imposed be sanctioned by the legislature.[16]

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[15] *United States* v. *Wilson*, 7 Pet. 150 (1833), turned on the technical question of whether a pardon must be pleaded and only referred in dictum to the possibility that the President could condition a pardon. In *Ex parte Garland*, 4 Wall. 333 (1867), and *Ex parte Grossman*, 267 U. S. 87 (1925), the Court focused on the discretionary aspect of the pardon power which is here unchallenged. The emphasis was on the right of the President to grant a pardon to any criminal, for any offense, at any time. The question of conditional action was raised in only a tangential manner.

[16] The Court likens the no-parole condition to "sanctions imposed by legislatures such as mandatory minimum sentences . . . ." The

In sum, the no-parole condition is constitutionally defective in the face of the retrospective application of *Furman* and the extra-legal nature of the Executive action. I would nullify the condition, and direct the lower court to remand the case for resentencing to the only alternative available—life with the opportunity for parole—and its attendant benefits.

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similarity is all too close, in my view. Indeed, it is precisely because the President has invaded the legislative domain that the condition must fail.

Syllabus

BOWMAN TRANSPORTATION, INC. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

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

No. 73–1055. Argued November 20, 1974—
Decided December 23, 1974*

In 1969 hearing examiners for the Interstate Commerce Commission (ICC), following hearings in 1966 and 1967 and the subsequent filing of extensive briefs, rejected appellant motor carriers' applications for certificates of public convenience and necessity to transport general commodities between specified points in the Southwest and Southeast. In 1971 the ICC, over the opposition of appellee competing motor carriers, authorized the issuance of the certificates. Appellees then brought action in the District Court to set aside the ICC's order. The District Court refused to enforce the order on the ground that the ICC had acted arbitrarily in refusing to credit certain evidence introduced by appellees. *Held:*

1. The District Court erred in refusing to enforce the ICC's order. Pp. 284–294.

(a) Under the "arbitrary and capricious" standard the scope of review is a narrow one whereby a reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 416. Pp. 285–286.

(b) The ICC's observation that appellees' exhibits as to the acceptability of their existing service covered periods subsequent to the ICC's notice of hearing supported its refusal to credit this evidence. The ICC was entitled to regard such exhibits as nonrepresentative of the usual service, to reason that the shortcom-

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*Together with No. 73–1069, *Johnson Motor Lines, Inc.* v. *Arkansas-Best Freight System, Inc., et al.;* No. 73–1070, *Red Ball Motor Freight, Inc.* v. *Arkansas-Best Freight System, Inc., et al.;* No. 73–1071, *Lorch-Westway Corp. et al.* v. *Arkansas-Best Freight System, Inc., et al.;* and No. 73–1072, *United States et al.* v. *Arkansas-Best Freight System, Inc., et al.,* also on appeal to the same court.

ings were greater than the exhibits showed, and to conclude that service would be improved by granting the applications. Pp. 286–289.

(c) There was a rational basis for the ICC's attributing little significance to appellees' exhibits showing appellants' transit times over other routes. The question was whether service on the routes at issue would be enhanced by new entry and, as to this, performance by prospective entrants on other routes was of limited relevance. The ICC erred in not attributing the same qualification to appellants' transit time exhibits, but its finding that service would be improved by new entry was supported by other evidence. Pp. 289–292.

(d) The ICC's conclusion that consumer benefits of new entry outweighed any adverse impact upon the existing carriers reflects the kind of judgment that is entrusted to it, namely, the power to weigh the competing interests and arrive at a balance that is deemed "the public convenience and necessity." Pp. 292–294.

2. The lapse of time between the conclusion of evidentiary hearings and the ultimate agency decision in this case does not justify a reviewing court's requiring that the record be reopened. Pp. 294–296.

3. The ICC was entitled to take an approach, divergent from that of its examiners, favoring added competition among carriers. Pp. 297–299.

4. Whether or not the certificate granted appellant Bowman Transportation Co. conformed to the authority set forth in its application, an issue not briefed or argued in this Court, should be considered by the District Court on remand. Pp. 299–300.

364 F. Supp. 1239, reversed and remanded.

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

Charles S. Rhyne argued the cause for appellants in Nos. 73–1055, 73–1069, 73–1070, and 73–1071. With him on the briefs were *Bryce Rea, Jr., Donald E. Cross, Courts Oulahan, Robert L. Jones, Jr., Maurice F. Bishop, Sander W. Shapiro,* and *Jerry C. Prestridge. William L. Patton* argued the cause for the United States et al. in No. 73–1072. With him on the brief were *Solicitor General Bork, Assistant Attorney General Kauper, Carl D. Lawson,*

Fritz R. Kahn, Betty Jo Christian, and *Richard H. Streeter.*

Phineas Stevens argued the cause for appellees in all cases. With him on the brief were *Drew L. Carraway, Phillip Robinson, M. Ward Bailey, Don A. Smith, Thomas Harper, Wentworth E. Griffin, Frank W. Taylor, Jr., William O. Turney,* and *J. William Cain, Jr.*

Mr. Justice Douglas delivered the opinion of the Court.

This is a direct appeal from a final judgment of a three-judge District Court, 28 U. S. C. §§ 1253, 2101, invalidating an order of the Interstate Commerce Commission. Ten applications of motor carriers to conduct general commodities operations between points in the Southwest and Southeast were consolidated in one proceeding. Three additional applicants were allowed to intervene. The hearing examiners, after extensive hearings, rejected each application. The Commission granted three of the applications of appellant carriers. Appellees, competing carriers, brought an action in the District Court, 28 U. S. C. § 1336, to suspend, enjoin, and annul that portion of the order of the Commission that authorizes issuance of certificates of public convenience and necessity to Red Ball, Bowman, and Johnson. The District Court refused to enforce the Commission's order because its findings and conclusions were arbitrary, capricious, and without rational basis within the meaning of the Administrative Procedure Act, 5 U. S. C. § 706, and likewise refused to remand the case believing that no useful purpose would be served, 364 F. Supp. 1239, 1264.[1]

[1] The hearings lasted over 18 months; this transcript covers 23,423 pages; there are 1,989 exhibits; a total of 950 witnesses testified on behalf of 10 applicants; 66 rail and motor carriers entered appearances in opposition to the applications; 48 of the protestants offered evidence through 62 witnesses and numerous exhibits.

The Administrative Procedure Act in 5 U. S. C. § 706 provides that:

> "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] . . .
>
> . . . . .
>
> "(E) unsupported by substantial evidence . . . ."

These two provisions of 5 U. S. C. § 706 (2) are part of six which are "separate standards." See *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 413 (1971). The District Court properly concluded that, though an agency's finding may be supported by substantial evidence, based on the definition in *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951),[2] it may nonetheless reflect arbitrary and capricious action. There seems, however, to be agreement that the findings and conclusions of the Commission are supported by substantial evidence. The question remains whether, as the District Court held, the Commission's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as provided in 5 U. S. C. § 706 (2)(A). We disagree with the District Court and accordingly reverse its judgment and remand the cases for consideration of one issue not reached by the District Court or by this Court.

I

The Motor Carrier provisions of the Interstate Commerce Act, 49 Stat. 551, 49 U. S. C. § 307, empower the

[2] "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." 340 U. S., at 488. And see 4 K. Davis, Administrative Law Treatise § 29.03, p. 129 (1958); L. Jaffe, Judicial Control of Administrative Action 601 (1965).

Commission to grant an application for a certificate if it finds (1) that the applicant is "fit, willing, and able properly to perform the service proposed"; and (2) that the service proposed "is or will be required by the present or future public convenience and necessity." The Commission made both findings, relying upon the applicants' general service record in support of a finding of fitness, and upon expressions of customer dissatisfaction with the existing service in support of its conclusion that the service proposed was consistent with the public convenience and necessity. The competing appellee carriers made presentations designed to show that their existing service was satisfactory and that the applicants would not offer measurably superior performance. The District Court concluded that the Commission had acted arbitrarily in its treatment of the presentations made by the protesting carriers. While the Commission had acknowledged the appellees' evidence, its reasons for refusing to credit it would not, in the District Court's view, withstand scrutiny, making its action tantamount to an arbitrary refusal to consider matters in the record.

Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe, supra,* at 416. The agency must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 168 (1962). While we may not supply a reasoned basis for the agency's action that the

agency itself has not given, *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581, 595 (1945). Having summarized the appropriate scope of review, we proceed to consider the District Court's objections seriatim.

A. Evidence as to Existing Service

The applicant carriers presented exhibits showing the time in transit of selected shipments that had been consigned to appellee carriers by particular shippers during a designated study period. As the Commission acknowledged, the selection of particular shipments from those occurring during the study period had been made with an eye toward demonstrating service inadequacies.[3] These "worst case" studies figured in the Commission's finding that service would be improved by the entry of new carriers to the routes at issue.

The appellee carriers offered studies of their own. These covered the same period and the same shippers as the applicants' presentations, but whereas the applicants had selected particular shipments to emphasize inadequacies, the appellee carriers included in their presentations all of the shipments consigned during the study period. These exhibits, argued the protesting carriers, placed the incidents cited by the applicants in perspective and demonstrated that the existing service was generally acceptable. The Commission acknowledged the appellees' presentations but concluded that they offered an inadequate rebuttal to the applicants' exhibits because

[3] The Commission stated: "Many of the service exhibits do not cover all of the shipper's pertinent traffic during the study period and some include shipments which were listed because complaints were received on this traffic." *Herrin Transportation Co.*, 114 M. C. C. 571, 596 (1971).

(1) they "relate to short periods of time or cover traffic handled for specified shippers"; and (2) the studies represented service provided by appellees after the Commission had designated the applications for hearing. *Herrin Transportation Co.*, 114 M. C. C. 571, 599 (1971). The District Court ruled that the Commission had applied inconsistent standards in reviewing the evidence of the parties, since the appellees' exhibits were based upon the same study periods and the same shippers as the applicants' exhibits. 364 F. Supp., at 1259–1260.

We agree with the District Court that the first reason assigned by the Commission—that the appellees' exhibits were based only upon short periods and particular shippers—failed to distinguish the presentations of applicants and opponents. To counter the applicants' presentations, the protesting carriers chose the identical study periods and shippers but expanded the presentation to show all the shipments consigned. Since the protesters confined themselves to the periods and shippers the applicants had selected, there was no basis for an inference that the former had chosen so as to make the exhibits unrepresentative in their favor.

The Commission's second reason, however—that the appellees' studies covered periods subsequent to a notice of hearing—provides support for the Commission's assessment of the evidence. The Commission recognized that protesting carriers might have been spurred to improve their service by the threat of competition raised by the designation of applicants for hearing. Therefore, reasoned the Commission, the protesting carriers' performance subsequent to the notice of hearing might be superior to the service they normally offered, and their exhibits, covering those periods, had to be read in light of that possibility. But the Commission was not precluded from relying upon the demonstrated shortcomings of the protesters' service during that period, for the incen-

tive effect the Commission identified would have, if anything, distorted the performance studies in the protesters' favor.

The issue before the Commission was not whether the appellees' service met some absolute standard of performance but whether the "public convenience and necessity" would be served by the entry of new carriers into the markets served by appellees. *United States* v. *Dixie Express,* 389 U. S. 409, 411–412 (1967). Even if the Commission had accepted appellees' exhibits at face value, it could still have concluded that the deficiencies were sufficient to justify the admission of additional carriers. Certainly the Commission was entitled to regard the appellees' studies as possibly nonrepresentative of the usual service afforded,[4] to reason that the shortcomings

[4] The District Court also ruled that since there had been no suggestion during the evidentiary hearings that performance studies subsequent to notice of hearing might not be viewed as representative, the appellees had been denied fair notice of the standards by which their evidence would be judged. 364 F. Supp. 1239, 1260. We disagree. A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292 (1937); *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274 (1924). But these salutary principles do not preclude a factfinder from observing strengths and weaknesses in the evidence that no party identified. If the examiners had raised the qualifications to appellees' evidence the Commission later interposed, there would have been no basis for suggesting unfairness. See *American Trucking Assns.* v. *Frisco Transportation Co.,* 358 U. S. 133, 144 (1958). The situation is not altered by the fact that the Commission parted company with the examiners. Even as to matters such as the credibility of witnesses, where the examiner is thought to have an advantage, the reviewing agency is not rigidly barred from taking a contrary position. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). We perceive no reason for binding an agency to the experience and viewpoint of

were probably greater than these studies showed, and to conclude that service would be improved by granting the applications.

B. Evidence of Applicants' Fitness

The applicants supported their service proposals with exhibits showing transit times over comparable distances on other routes. The appellees once again pointed out that the applicants had been selective and offered transit times on different routes served by the applicants that were substantially longer than those applicants proposed to provide on the routes at issue. Appellees thus argued that the applicants could not reasonably be expected to live up to their service proposals. In addition, the appellees cited service restrictions that the applicants practiced on other routes—refusal to make scheduled pickup of merchandise, refusal to handle shipments less than a certain weight, refusal to transport goods to certain destinations, and the like.

The Commission attributed little significance to the appellees' rebuttal. With respect to transit times, the Commission noted that different highway conditions might make transit times over identical distances totally incomparable. 114 M. C. C., at 611. The District Court held that the Commission had acted arbitrarily in so treating the evidence, for it had apparently relied on the applicants' transit-time evidence (*id.*, at 586, 600) to support its finding of fitness. 364 F. Supp., at 1260–1261. Similarly, the District Court viewed as

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the examiner in the interpretation of studies in the record. Appellees are not in a position to claim unfair surprise. The Commission offered the identical rationale in interpreting transit-time studies in a case decided just as hearings in this case began. See *Braswell Freight Lines*, 100 M. C. C. 482, 493–494 (1966). Appellees offered their studies knowing that the Commission might interpose qualifications.

arbitrary the Commission's failure to mention in its opinion the service restrictions by applicants that appellees' had cited, since the Commission had relied upon identical restrictions practiced by appellees to support its finding that existing service was not satisfactory. 114 M. C. C., at 600.

The Commission's treatment of the evidence of the applicants' performance on other routes is not a paragon of clarity. Had the Commission responded in a more considered manner to the evidence appellees presented, review would have been greatly facilitated, and further review by this Court perhaps avoided entirely. But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more. The question before the Commission was whether service on the routes at issue would be enhanced by permitting new entry, and as to this the performance by prospective entrants on new routes was of limited relevance. The Commission noted with respect to transit times that different highway conditions might make experience there a poor indication of the times applicants could provide on the routes they sought to enter. More generally, the applicants' performance on other routes might, because of market conditions peculiar to that route (*e. g.*, the nature of demand for service, or the number of competing carriers), offer an inaccurate basis for predicting what the applicants would do if admitted to the routes they sought in competition with the carriers already there. A carrier performing lethargically on a route where it was the sole provider of motor transportation, for example, could ill afford to continue the same practice where the situation was more competitive.[5]

[5] We thus distinguish the case where a firm already in possession of a franchise that offers a high degree of protection from competi-

The particular features of the applicants' performance elsewhere that the appellees cited were not shown by the Commission to be explainable by special market conditions on the routes where they occurred. It is said that the Commission could conclude that the evidence of performance elsewhere would be unlikely to prove dispositive, and that accordingly, absent some compelling demonstration by a proponent of a "performance elsewhere" study that it offered important predictive value, the Commission should disregard such evidence.[6] Of course, evidence of especially egregious performance elsewhere might have been viewed as an exception; a general assumption that competition would force new entrants to exceed the pre-existing quality of service in an effort to attract business might have to yield in the face of an applicant whose shortcomings elsewhere were many and flagrant. But no such evidence was offered here, and none of the applicants was so characterized. Indeed the examiners found

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tion seeks its renewal. Cf. *Office of Communication of United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 341, 359 F. 2d 994, 1007 (1966) ("history of programming misconduct . . . would preclude . . . the required finding that renewal of the license would serve the public interest").

[6] Fairness as well as rationality, however, command evenhanded application of such a rule. The Commission should not have cited applicants' "performance elsewhere" presentations without noting appropriate qualifications. Compare 114 M. C. C., at 586, with *id.*, at 611. Yet in view of the examiners' undisputed conclusion that all the carriers were "substantial and responsible," there was adequate remaining basis for the Commission's finding of the applicants' fitness. And the service benefits the Commission anticipated from new entry included, not merely a possibility of improved transit times, but many other improvements in service quality. The Commission identified as service deficiencies that would be removed by new entry the following: "restrictions or embargoes [or] outright refusals by existing carriers to handle . . . traffic"; "pickup and delivery problems; interline difficulties relating to loss, damage, tracing, shortages, and misrouting . . . ." *Id.*, at 600.

that "in the main the carriers participating in these proceedings are substantial and responsible carriers" (2 App. 878), and no party has disputed this finding. We do not find the Commission's treatment of the evidence arbitrary.

II

Having found that the admission of the applicant carriers to the routes they sought would produce benefits to the consumers served, the Commission proceeded to consider the effect of new entry upon the appellees. While the Commission acknowledged that competition from new entrants might cause at least short-run business losses for existing carriers, it found that, with the exception of one carrier, none would be "seriously adversely affected." Further, the Commission concluded that in any event, "the gains to be derived by the shipping public in general far outweigh any adverse effect this carrier or any other protestant may experience." 114 M. C. C., at 611.

The District Court thought the Commission's treatment unsupportable, in view of the findings by the hearing examiners as to adverse impacts if the applications were granted. 364 F. Supp., at 1262–1263. Insofar as the District Court's comments express the view that the Commission failed to consider the examiners' findings or the appellees' interests, the record shows otherwise. The Commission stated in its opinion that "grants of authority will subject some of protestants' traffic to the possibility of diversion," but went on to make findings that there would be no "serious adverse impact." 114 M. C. C., at 610–611.

The evidence that moved the examiners to a contrary view consisted of testimony by appellees' witnesses about the volume of shipments for which new entrants would compete if allowed to enter the market. The testimony thus presented the carriers' maximum potential exposure,

leaving considerable leeway for predicting what was likely if applications were granted. Cf. *Market Street R. Co.* v. *Railroad Comm'n*, 324 U. S. 548 (1945). The examiners emphasized the magnitude of potential harm; the Commission took a more optimistic view. We see nothing arbitrary in this posture. That a carrier's entire business will be subject to competition hardly compels the conclusion that its operations will show no profit. It was rational for the Commission so to conclude that the new entrant may be expected not to swallow up existing carriers, especially if the latter make efforts to attract business. Moreover, the testimony offered by appellees' witnesses gave the carriers' exposure to competition if every new application sought by appellees were granted.[7] Thus, the examiners were reporting upon potential diversions of traffic under conditions that were never realized. Since the Commission granted only three of the 10 pending applications, much of the testimony on this matter had to be regarded with qualification, and some of it disregarded entirely.[8]

The Commission's conclusion that consumer benefits outweighed any adverse impact upon the existing carriers reflects the kind of judgment that is entrusted to it, a power to weigh the competing interests and arrive at a balance that is deemed "the public convenience and necessity." *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535–536 (1946). If the Commission has "drawn out and

[7] Each carrier presented the possible diversion of traffic that would result if the applications it was opposing were granted. In many cases, the protesting carrier was opposing applications not ultimately granted by the Commission. See, *e. g.*, Examiners' Decision, App. D, at 6, 13, 14, 19, 24, 25, 34, 35, and 48 (reproduced in 2 App. 864, 1191).

[8] The same must be said of the examiners' concern that service to small communities might be adversely affected by granting all the applications, since these fears derived from those about impact upon protesting carriers.

crystallized these competing interests [and] attempted to judge them with as much delicacy as the prospective nature of the inquiry permits," *ICC* v. *J–T Transport Co.*, 368 U. S. 81, 89 (1961), we can require no more. Here the Commission identified the competing interests. We cannot say that the balance it struck was arbitrary or contrary to law.

III

The District Court expressed concern about the considerable lapse of time between the conclusion of evidentiary hearings and the Commission's decision. 364 F. Supp., at 1261–1262. While it is unclear whether this was an independent ground for setting aside the Commission's order, we deem it advisable to deal directly with the suggestion that the record has grown too stale to support the order.

Hearings on the applications in these cases began in 1966 and concluded in 1967. Thereafter, the parties prepared extensive briefs for the examiners, who rendered their decision in November 1969. The decision of the Commission was handed down on December 30, 1971. Thus, the evidentiary material pertained to service conditions which were dated by five years at the time the Commission rendered its decision.

We appreciate the difficulties that arise when the lapse between hearing and ultimate decision is so long. Undoubtedly economic changes dated the 1966 studies that the parties, both applicants and appellees, had placed in the record. Nevertheless, we have always been loath to require that factfinding begin anew merely because of delay in proceedings of such magnitude and complexity. To repeat what was said in *ICC* v. *Jersey City*, 322 U. S. 503, 514–515 (1944):

> "Administrative consideration of evidence—particularly where the evidence is taken by an examiner,

> his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

Only in *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248 (1932), did we remand a case for reopening of evidentiary proceedings; there the Commission's refusal to reopen in light of the economic metamorphosis brought on by the Great Depression led the Court to find an abuse of discretion. The same exceptional circumstances that compelled that disposition, however, have been found lacking in more recent cases. See *United States* v. *Northern Pacific R. Co.,* 288 U. S. 490 (1933); *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474 (1934); *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38 (1936); *ICC* v. *Jersey City, supra; United States* v. *Pierce Auto Lines, supra; Northern Lines Merger Cases,* 396 U. S. 491 (1970). *Illinois Commerce Comm'n* v. *United States, supra,* is of particular relevance, for there the Court refused to compel the Interstate Com-

merce Commission to reopen for the inclusion of new economic studies a record already closed for a comparable period. We believe appellees failed to meet the heavy burden thrust upon them by our cases.[9]

The protracted character of the proceedings resulted, not from bureaucratic inertia, but from the number and complexity of the issues and from the agency procedures that extended to the parties, in an effort to insure fairness in appearance as well as reality, and an opportunity to comment upon the proceedings at every stage. More than 900 witnesses testified in the original hearings, which consumed 150 days. At the conclusion the parties submitted briefs requiring seven months to prepare. The examiners' decision did not issue until nearly two years later. It is doubtful that the Commission could have made the record more current by judicial notice alone; while live testimony might not have been required, the Commission would at least have had to entertain evidence in affidavit form. Yet there would have been little assurance that at the conclusion of such a reopening, and the time required to digest the new material, the record would not again have become "stale." Accordingly, we conclude that there is sound basis for adhering to our practice of declining to require reopening of the record, except in the most extraordinary circumstances.

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[9] Much is made, for example, of the Commission's failure to notice a number of terminal closings by appellant Red Ball that had occurred since evidentiary proceedings had concluded. 364 F. Supp., at 1261. The Commission, however, cited the number of Red Ball terminals—reduced by intervening events—only in support of its conclusion that Red Ball, rather than three other carriers, should be certificated to offer new service. 114 M. C. C., at 603. Since these three carriers are not among appellees, we have doubt that appellees can show substantial prejudice from the Commission's failure to update the information.

IV

We conclude by addressing a concern voiced by the District Court, that the Commission's decision

> "indicates a predilection to grant these particular applications, followed by a strained attempt to marshal findings to support such conclusion." 364 F. Supp., at 1264.

We disagree with the District Court insofar as its remarks charge the Commission with prejudging the issue and deciding without giving consideration to the evidence. But we think the approach adopted by the Commission does differ from that taken by the examiners in significant respects that are important to identify.

The examiners viewed the evidence against a backdrop of assumptions about the relationship between consumer needs and carrier responsibilities. The examiners ruled, for example, that all shippers were not entitled to "single-line service" and that the shippers' difficulties were attributable, in part, to lack of diligence. The examiners put it that

> "[n]ormally existing carriers should have an opportunity . . . to transport all of the traffic they can handle adequately and efficiently in the territory they are authorized to serve without the competition of new operations."

And to the extent that service inadequacies were demonstrated, the examiners viewed complaints to force compliance with certificates held by existing carriers as a preferred mode of relief.

The Commission's approach, on the other hand, was more congenial to new entry and the resulting competition. This is the Commission's prerogative in carrying out its mandate to insure "safe, adequate, economical, and efficient service," National Transportation Policy,

preceding 49 U. S. C. § 1. The Commission was not compelled to adopt the same approach as the examiners. It could conclude that the benefits of competitive service to consumers might outweigh the discomforts existing certificated carriers could feel as a result of new entry.[10] Our decisions have dispelled any notion that the Commission's primary obligation is the protection of firms holding existing certificates. *ICC* v. *J–T Transport Co., supra,* disapproved the proposition that shippers must take their grievances through complaint procedures before improvement through new entry is permitted. 368 U. S., at 91. And in *United States* v. *Dixie Express,* 389 U. S. 409 (1967), we rejected the suggestion by a reviewing court that existing carriers have "a property right" to an opportunity to make amends before new certificates issue. *Id.,* at 411.

A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen Government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration. *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944); *FMC* v. *Svenska Amerika Linien,* 390 U. S. 238 (1968); *Gulf States Utilities Co.* v. *FPC,* 411 U. S. 747 (1973); *Denver & R. G. W. R. Co.* v. *United States,* 387 U. S. 485 (1967). The Commission, of course, is entitled to conclude that preservation of a competitive structure in a given case is overridden by other interests, *United States* v. *Drum,* 368

[10] In commenting upon the perceived lack of diligence by the shippers in seeking out service, the examiners rejected the notion that "the burden is upon carriers to inform shippers of their services through personal solicitation." The Commission, however, would have been free to conclude that greater promotional effort by carriers, brought about through competition, might most economically facilitate the matching of services to needs.

U. S. 370, 374–375 (1962), but where, as here, the Commission concludes that competition "aids in the attainment of the objectives of the national transportation policy," *McLean Trucking Co.* v. *United States, supra,* at 85–86, we have no basis for disturbing the Commission's accommodation.

V

Our opinion disposes of appellees' objections to the Commission's order insofar as it granted the applications of Johnson and Red Ball.[11] As to appellant Bowman, however, an issue remains. In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The "excess" was granted, subject to a condition precedent of publication in the Federal Register of Bowman's request for the excess authority. Various appellees filed objections to the augmented authority sought by Bowman, which the Commission overruled. Appellees challenged the Commission's procedure in the District Court on a variety of grounds, and though the District Court indicated disapproval of the Commission's action, the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications.

While we have on occasion decided residual issues in the interest of an expeditious conclusion of protracted litigation, see *Consolo* v. *FMC,* 383 U. S. 607, 621 (1966), we believe that the issue of conformity of the Bowman certificate to its application is one for the District Court. The issue was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction. And while the District Court spoke of the Commission's

[11] At oral argument counsel for appellees disposed of any "substantial evidence" objections to the Commission's order by conceding that "we did not allege that any finding of fact itself was not supported by substantial evidence." Tr. of Oral Arg. 25.

action in this regard, we do not construe its expressions as a final ruling, since they were unnecessary to the District Court's disposition of the case. Accordingly, the issue remains open on remand.

We hasten to add, however, that our remand provides no basis for depriving Bowman of authority conferred by the Commission that was within its original application.

Reversed and remanded.

Syllabus

LINDEN LUMBER DIVISION, SUMMER & CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 73–1231. Argued November 18, 1974—
Decided December 23, 1974*

An employer who has not engaged in an unfair labor practice impairing the electoral process does not commit a violation of § 8 (a) (5) of the National Labor Relations Act simply because he refuses to accept evidence of the union's majority status other than the results of a Board election. At least in the absence of any agreement to permit majority status to be determined by means other than a Board election, a union that is refused recognition despite authorization cards or other such evidence purporting to show that it represents a majority of the employees has the burden of taking the next step and invoking the Board's election procedure. Pp. 303–310.

159 U. S. App. D. C. 228, 487 F. 2d 1099, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which WHITE, MARSHALL, and POWELL, JJ., joined, *post,* p. 310.

Norton J. Come argued the cause for the National Labor Relations Board, respondent in No. 73–1231 and petitioner in No. 73–1234. With him on the brief were *Solicitor General Bork, Peter G. Nash, John S. Irving,* and *Patrick Hardin. Lawrence M. Cohen* argued the cause for petitioner in No. 73–1231. With him on the briefs were *Steven R. Semler* and *Ronald F. Hart-*

*Together with No. 73–1234, *National Labor Relations Board* v. *Truck Drivers Union Local No. 413 et al.,* also on certiorari to the same court.

man. *Laurence Gold* argued the cause and filed a brief for respondent unions in both cases.†

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases present a question expressly reserved in *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 595, 601 n. 18 (1969).

In *Linden* respondent union obtained authorization cards from a majority of petitioner's employees and demanded that it be recognized as the collective-bargaining representative of those employees. Linden said it doubted the union's claimed majority status and suggested the union petition the Board for an election. The union filed such a petition with the Board but later withdrew it when Linden declined to enter a consent election agreement or abide by an election, on the ground that respondent union's organizational campaign had been improperly assisted by company supervisors. Respondent union thereupon renewed its demand for collective bargaining; and again Linden declined, saying that the union's claimed membership had been improperly influenced by supervisors. Thereupon respondent union struck for recognition as the bargaining representative and shortly filed a charge of unfair labor practice against Linden based on its refusal to bargain.

There is no charge that Linden engaged in an unfair labor practice [1] apart from its refusal to bargain. The

†*Gerard C. Smetana, Jerry Kronenberg,* and *Milton Smith* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

[1] At the conclusion of the strike Linden refused to reinstate two employees it alleged to be supervisors and therefore unprotected by the Act. The Board found that to be an unfair labor practice. Thereupon Linden reinstated the two employees and this issue was not tendered to the court below. 159 U. S. App. D. C. 228, 234, 487 F. 2d 1099, 1105 (1973).

Board held that Linden should not be guilty of an unfair labor practice [2] solely on the basis "of its refusal to accept evidence of majority status other than the results of a Board election." 190 N. L. R. B. 718, 721 (1971).

In *Wilder* [3] there apparently were 30 employees in the plant, and the union with 11 signed and two unsigned authorization cards requested recognition as the bargaining agent for the company's production and maintenance employees. Of the 30 employees 18 were in the production and maintenance unit which the Board found to be appropriate for collective bargaining. No answer was given by the employer, Wilder, and recognitional picketing began. The request was renewed when the two unsigned cards were signed, but Wilder denied recognition. Thereupon the union filed unfair labor practice charges against Wilder. A series of Board decisions and judicial decisions, not necessary to recapitulate here, consumed about seven years until the present decision by the Court of Appeals.[4] The Board made the same ruling as respects Wilder as it did in Linden's case. See 198 N. L. R. B. 998 (1972). On petitions for review the Court of Appeals reversed. 159 U. S. App. D. C. 228, 487 F. 2d 1099 (1973). We reverse the Court of Appeals.

In *Gissel* we held that an employer who engages in "unfair" labor practices " 'likely to destroy the union's

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[2] Section 8 (a)(5) of the National Labor Relations Act provides: "(a) It shall be an unfair labor practice for an employer—

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." 49 Stat. 453, as amended, 61 Stat. 141, 29 U. S. C. § 158 (a)(5).

[3] See n. 4, *infra*.

[4] The long series of rulings is described in the opinion of the Court of Appeals, 159 U. S. App. D. C., at 229–232, 487 F. 2d, at 1100–1103. Wilder did not petition for certiorari. No. 73–1234, which we granted, is the petition of the Board, but for convenience it is referred to herein as the *Wilder* case.

majority and seriously impede the election' " may not insist that before it bargains the union get a secret ballot election. 395 U. S., at 600. There were no such unfair labor practices here, nor had the employer in either case agreed to a voluntary settlement of the dispute and then reneged. As noted, we reserved in *Gissel* the questions "whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute." *Id.*, at 601 n. 18.

We recognized in *Gissel* that while the election process had acknowledged superiority in ascertaining whether a union has majority support, cards may "adequately reflect employee sentiment." *Id.*, at 603.

Generalizations are difficult; and it is urged by the unions that only the precise facts should dispose of concrete cases. As we said, however, in *Gissel,* the Board had largely abandoned its earlier test that the employer's refusal to bargain was warranted, if he had a good-faith doubt that the union represented a majority. A different approach was indicated. We said:

> "[A]n employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status. See *Aaron Brothers,* 158 N. L. R. B. 1077, 1078. If he

> does make an investigation, the Board's recent cases indicate that reasonable polling in this regard will not always be termed violative of § 8 (a)(1) if conducted in accordance with the requirements set out in *Struksnes Construction Co.*, 165 N. L. R. B. [1062], 65 L. R. R. M. 1385 (1967). And even if an employer's limited interrogation is found violative of the Act, it might not be serious enough to call for a bargaining order. See *Aaron Brothers, supra; Hammond & Irving, Inc.*, 154 N. L. R. B. 1071 (1965). As noted above, the Board has emphasized that not 'any employer conduct found violative of Section 8 (a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding,' *Aaron Brothers, supra,* at 1079." 395 U. S., at 609–610.

In the present cases the Board found that the employers "should not be found guilty of a violation of Section 8 (a)(5) solely upon the basis of [their] refusal to accept evidence of majority status other than the results of a Board election." 190 N. L. R. B., at 721; see 198 N. L. R. B., at 998. The question whether the employers had good reasons or poor reasons was not deemed relevant to the inquiry. The Court of Appeals concluded that if the employer had doubts as to a union's majority status, it could and should test out its doubts by petitioning for an election. It said:

> "While we have indicated that cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such 'convincing evidence of majority support' so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition

for an election, if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt." 159 U. S. App. D. C., at 240, 487 F. 2d, at 1111.

To take the Board's position is not to say that authorization cards are wholly unreliable as an indication of employee support of the union. An employer concededly may have valid objections to recognizing a union on that basis. His objection to cards may, of course, mask his opposition to unions. On the other hand he may have rational, good-faith grounds for distrusting authorization cards in a given situation. He may be convinced that the fact that a majority of the employees strike and picket does not necessarily establish that they desire the particular union as their representative. Fear may indeed prevent some from crossing a picket line; or sympathy for strikers, not the desire to have the particular union in the saddle, may influence others. These factors make difficult an examination of the employer's motive to ascertain whether it was in good faith. To enter that domain is to reject the approval by *Gissel* of the retreat which the Board took from its "good faith" inquiries.

The union which is faced with an unwilling employer has two alternative remedies under the Board's decision in the instant cases. It can file for an election; or it can press unfair labor practice charges against the employer under *Gissel*. The latter alternative promises to consume much time. In *Linden* the time between filing the charge and the Board's ruling was about 4½ years; in *Wilder*, about 6½ years. The Board's experience indicates that the median time in a contested case is 388 days. *Gissel*, 395 U. S., at 611 n. 30. On the other hand the median time between the filing of the petition for an election and the decision of the Re-

gional Director is about 45 days.[5] In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored. The question remains—should the burden be on the union to ask for an election or should it be the responsibility of the employer?

The Court of Appeals concluded that since Congress in 1947 authorized employers to file their own representation petitions by enacting § 9 (c)(1)(B),[6] the burden was on them. But the history of that provision indicates it was aimed at eliminating the discrimination against employers which had previously existed under the Board's prior rules, permitting employers to petition for an election only when confronted with claims by two or more unions.[7] There is no suggestion that Congress wanted to place the burden of getting a secret election on the employer.

"Today an employer is faced with this situation.

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[5] Thirty-seventh Annual Report of the National Labor Relations Board 13 (1972).

[6] Section 9 (c)(1)(B) provides:

"(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . . . .

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 61 Stat. 144, 29 U. S. C. § 159 (c)(1)(B).

[7] S. Rep. No. 105, 80th Cong., 1st Sess., 10–11 (1947); 93 Cong. Rec. 3838 (1947).

> A man comes into his office and says, 'I represent your employees. Sign this agreement, or we strike tomorrow.' Such instances have occurred all over the United States. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board under those circumstances, and say, 'I want an election. I want to know who is the bargaining agent for my employees.'" 93 Cong. Rec. 3838 (1947) (remarks of Senator Taft).

Our problem is not one of picking favorites but of trying to find the congressional purpose by examining the statutory and administrative interpretations that incline one way or another. Large issues ride on who takes the initiative. A common issue is, what should be the representative unit? In *Wilder* the employer at first took the position that the unit should be one of 30 employees. If it were 18, as the union claimed (or even 25 as the employer later argued), the union with its 13 authorization cards (assuming them to be valid) would have a majority. If the unit were 30, the union would be out of business.

Section 9 (c)(1)(B) visualizes an employer faced with a claim by individuals or unions "to be recognized as the representative defined in § 9 (a)." [8] That question of representation is raised only by a claim that the applicant represents a majority of employees, "in a unit appro-

[8] Section 9 (a) provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 49 Stat. 453, as amended, 61 Stat. 143, 29 U. S. C. § 159 (a).

priate for such purposes." § 9 (a). If there is a significant discrepancy between the unit which the employer wants and the unit for which the union asked recognition, the Board will dismiss the employer's petition. *Aerojet-General Corp.*, 185 N. L. R. B. 794 (1970); *Bowman Bldg. Products Div.*, 170 N. L. R. B. 312 (1968); *Amperex Electronic Corp.*, 109 N. L. R. B. 353 (1954); *Wm. Wood Bakery, Inc.*, 97 N. L. R. B. 122 (1951). In that event the union, if it desired the smaller unit, would have to file its own petition, leaving the employer free to contest the appropriateness of that unit. The Court of Appeals thought that if the employer were required to petition the Board for an election, the litigable issues would be reduced. The recurring conflict over what should be the appropriate bargaining unit, coupled with the fact that if the employer asks for a unit which the union opposes his election petition is dismissed, is answer enough.

The Board has at least some expertise in these matters and its judgment is that an employer's petition for an election, though permissible, is not the required course. It points out in its brief here that an employer wanting to gain delay can draw a petition to elicit protests by the union, and the thought that an employer petition would obviate litigation over the sufficiency of the union's showing of interest is in its purview apparently not well taken. A union petition to be sure must be backed by a 30% showing of employee interest. But the sufficiency of such a showing is not litigable by the parties.[9]

In light of the statutory scheme and the practical administrative procedural questions involved, we cannot say that the Board's decision that the union should go forward and ask for an election on the employer's refusal

[9] *NLRB* v. *Savair Mfg. Co.*, 414 U. S. 270, 287 n. 6 (1973) (WHITE, J., dissenting).

to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.

In sum, we sustain the Board in holding that, unless an employer has engaged in an unfair labor practice that impairs the electoral process,[10] a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure.

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

Under a recently adopted Board policy, an employer who does not commit independent unfair labor practices prejudicing the holding of a fair election has an absolute right to refuse to bargain with a union selected by a majority of his employees until that union petitions for and wins a Board-supervised election. I cannot agree with the Court's conclusion that this Board policy constitutes a permissible interpretation of §§ 8 (a)(5) and 9 (a) of the Act.[1] Accordingly, I would affirm the judg-

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[10] We do not reach the question whether the same result obtains if the employer breaches his agreement to permit majority status to be determined by means other than a Board election. See *Snow & Sons,* 134 N. L. R. B. 709 (1961), enf'd, 308 F. 2d 687 (CA9 1962). In the instant cases the Board said that the employers and the unions "never voluntarily agreed upon any mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union majority status." 190 N. L. R. B., at 721; see 198 N. L. R. B., at 998.

[1] Section 9 (a) of the Act, 49 Stat. 453, as amended, 61 Stat. 143, 29 U. S. C. § 159 (a), provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees . . . ." Section

ment of the Court of Appeals remanding the case to the Board for further proceedings, although my views are somewhat at variance with those expressed in the Court of Appeals' opinion.

Section 9 (a) expressly provides that the employees' exclusive bargaining representative shall be the union "designated or selected" by a majority of the employees in an appropriate unit. Neither § 9 (a) nor § 8 (a)(5), which makes it an unfair labor practice for an employer to refuse to bargain with the representative of his employees, specifies how that representative is to be chosen. The language of the Act thus seems purposefully designed to impose a duty upon an employer to bargain whenever the union representative presents convincing evidence of majority support, regardless of the method by which that support is demonstrated. And both the Board and this Court have in the past consistently interpreted §§ 8 (a)(5) and 9 (a) to mean exactly that. A "union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8 (a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes." *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 597 (footnote omitted).[2]

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8 (a)(5), 29 U. S. C. § 158 (a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

[2] For example, in *Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 62, 69, the Court stated that where the union had obtained signed authorization cards from a majority of the employees, denial of recognition of the union by the employer would have violated § 8 (a)(5) in the absence of any bona fide dispute as to the existence of the required majority of eligible employees.

As the Court recognized in *Gissel,* the 1947 Taft-Hartley amendments strengthen this interpretation of the Act. One early version of the House bill would have amended the Act to permit the Board to find an employer unfair labor practice for refusing to bargain with a union only if the union was "currently recognized by the employer or certified as such [through an election] under section 9." § 8 (a)(5) of H. R. 3020, 80th Cong., 1st Sess. The proposed change, which would have eliminated any method of requiring employer recognition of a union other than a Board-supervised election, was rejected in conference. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41. After rejection of the proposed House amendment, the House Conference Report explicitly stated that § 8 (a)(5) was intended to follow the provisions of "existing law." *Ibid.* And "existing law" unequivocally recognized that a union could establish majority status and thereby impose a bargaining obligation on an unwilling employer by means other than petitioning for and winning a Board-supervised election. *NLRB* v. *Gissel Packing Co., supra,* at 596–598.

The 1947 amendments, however, did provide an alternative to immediate union recognition for an employer faced with a union demand to bargain on behalf of his employees. Section 9 (c)(1)(B), added to the Act in 1947, provides that an employer, alleging that one or more individuals or labor organizations have presented a claim to be recognized as the exclusive representative of his employees, may file a petition for a Board-supervised representation election.

This section, together with §§ 8 (a)(5) and 9 (a), provides clear congressional direction as to the proper approach to the situation before us. When an employer is faced with a demand for recognition by a union that has presented convincing evidence of majority support, he may elect to follow one of four alternatives. First,

he is free to recognize the union and thereby satisfy his § 8 (a)(5) obligation to bargain with the representatives "designated or selected" by his employees.[3] Second, he may petition for a Board-supervised election, pursuant to § 9 (c)(1)(B). *NLRB* v. *Gissel Packing Co., supra,* at 599. Third, rather than file his own election petition, the employer can agree to be bound by the results of an expedited consent election ordered after the filing of a union election petition. See 29 CFR § 102.62. Finally, the employer can refuse to recognize the union, despite its convincing evidence of majority support, and also refuse either to petition for an election or to consent to a union-requested election. In this event, however, the Act clearly provides that the union may charge the employer with an unfair labor practice under § 8 (a)(5) for refusing to bargain collectively with the representatives of his employees. If the General Counsel issues a complaint and the Board determines that the union in fact represents a majority of the employees, the Board must issue an order directing the employer to bargain with the union. See, *e. g., NLRB* v. *Dahlstrom Metallic Door Co.,* 112 F. 2d 756; cf. *NLRB* v. *Gissel Packing Co., supra,* at 595–600.

The Court offers two justifications for its approval of the new Board practice which, disregarding the clear language of §§ 8 (a)(5) and 9 (a), requires an employer

[3] If despite its convincing evidence of majority support the union in fact has not attained majority status, a grant of exclusive recognition to the minority union by the employer would constitute unlawful support in violation of §§ 8 (a)(1) and 8 (a)(2) of the Act. *Garment Workers* v. *NLRB,* 366 U. S. 731, 737–738. This result, however, imposes no real hardship on the employer or the union since it merely requires that recognition be withheld until a Board-conducted election results in majority selection of a representative. *Id.,* at 739. In addition, an employer concerned about the possibility of recognizing a minority union may always petition for an election pursuant to § 9 (c)(1)(B) prior to recognition.

to bargain only with a union certified as bargaining representative after a Board-supervised election conducted upon the petition of the union.[4]

First, it is suggested that to require the Board under some circumstances to find a § 8 (a)(5) violation when an employer refuses to bargain with the noncertified union supported by a majority of his employees would compel the Board to re-enter the domain of subjective "good faith" inquiries. *Ante,* at 306. This fear is unwarranted. It is true that early in the administration of the Act it was held that an employer could lawfully refuse to bargain if he had a good-faith doubt as to the union's majority status, even if in fact the union did represent a majority of the employees. See *NLRB* v. *Gissel Packing Co., supra,* at 597 n. 11; *NLRB* v. *Remington Rand, Inc.,* 94 F. 2d 862, 868. But it was recognized at the same time that a union could present "convincing evidence of majority support" that "could not in good faith be ignored." *NLRB* v. *Dahlstrom Metallic Door Co., supra,* at 757; see *NLRB* v. *Gissel Packing Co., supra,* at 596; *NLRB* v. *Remington Rand, Inc., supra,* at 868.

Within broad limits imposed by the Act itself, the Board may use its understanding of the policies and practical considerations of the Act's administration to determine the circumstances under which an employer must take evidence of majority support as "convincing." Cf. *NLRB* v. *Insurance Agents,* 361 U. S. 477, 499; *NLRB* v. *Truck Drivers Union,* 353 U. S. 87, 96. The Act in no way requires the Board to define "convincing evidence" in a manner that reintroduces a subjective

[4] The Board, of course, continues to permit an employer voluntarily to recognize a noncertified union supported by a majority of his employees. But under the Board rule approved by the Court, an employer has no obligation to do so under the Act.

test of the employer's good faith in refusing to bargain with the union. If the Board continues to believe, as it has in the recent past, that it is unworkable to adopt any standard for determining when an employer has breached his duty to bargain that incorporates a subjective element, see *NLRB* v. *Gissel Packing Co.*, 395 U. S., at 592–594, it may define "convincing evidence of majority support" solely by reference to objective criteria—for example, by reference to "a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees . . . ." *Id.*, at 597.[5]

Even with adoption of such an objective standard for measuring "convincing evidence of majority support," the employer's "subjective" doubts would be adequately safeguarded by § 9 (c)(1)(B)'s assurance of the right to file his own petition for an election. Despite the Board's broad discretion in this area, however, the Act simply does not permit the Board to adopt a rule that avoids *subjective* inquiries by eliminating entirely *all* inquiries into an employer's obligation to bargain with a noncertified union selected by a majority of his employees.

The second ground upon which the Court justifies its approval of the Board's new practice is that it serves to remove from the employer the burden of obtaining a Board-supervised election. *Ante,* at 307. Although I agree with the Court that it would be improper to impose such an obligation on an employer, the Board's

[5] I do not attempt to indicate how the Board should specify standards as to what may constitute "convincing evidence." In view of its experience and expertise, the Board is better qualified than we are to undertake the specifics of this task. I do suggest that the support of a bare majority of employees, whether demonstrated by authorization cards, a strike, or a strike vote, would not necessarily constitute convincing evidence. Given the possibility of undue peer pressure or even coercion in personal card solicitation or nonsecret strike votes, a higher level of objective dependability might be obtained by requiring a greater show of support than a bare majority.

new policy is not necessary to eliminate such a burden.

The only employer obligation relevant to this case, apart from the requirement that the employer not commit independent unfair labor practices that would prejudice the holding of a fair election, is the one imposed by §§ 8 (a)(5) and 9 (a) of the Act: an employer has a duty to bargain collectively with the representative designated or selected by his employees. When an employer is confronted with "convincing evidence of majority support," he has the *option* of petitioning for an election or consenting to an expedited union-petitioned election. As the Court explains, § 9 (c)(1)(B) does not require the employer to exercise this option. If he does not, however, and if he does not voluntarily recognize the union, he must take the risk that his conduct will be found by the Board to constitute a violation of his § 8 (a)(5) duty to bargain. In short, petitioning for an election is not an employer obligation; it is a device created by Congress for the employer's self-protection, much as Congress gave unions the right to petition for elections to establish their majority status but deliberately chose not to require a union to seek an election before it could impose a bargaining obligation on an unwilling employer. *NLRB* v. *Gissel Packing Co., supra,* at 598–599.[6]

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[6] Although the Court reiterates the generally acknowledged view that elections are the preferred method for determining whether a union has majority support, it suggests that an election held as a result of an employer petition or an expedited election to which the employer has consented is somehow less desirable than a union-requested election. *Ante,* at 309. No such distinction is possible. The advantages of a secret election to determine the true desires of employees with respect to the selection of a collective-bargaining representative, ensuring a choice that is free from the influences of mass psychology, see *Brooks* v. *NLRB,* 348 U. S. 96, 100, are entirely unrelated to whether the union or the employer has initiated the election proceedings.

The language and history of the Act clearly indicate that Congress intended to impose upon an employer the duty to bargain with a union that has presented convincing evidence of majority support, even though the union has not petitioned for and won a Board-supervised election. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy." *Colgate-Palmolive-Peet Co.* v. *NLRB*, 338 U. S. 355, 363. Accordingly, I would affirm the judgment of the Court of Appeals remanding the case to the Board, but for further proceedings consistent with the views expressed in this opinion.

KELLEY *v.* SOUTHERN PACIFIC CO.

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

No. 73–1270. Argued October 22, 1974—Decided December 23, 1974

Petitioner, an employee of a trucking company (PMT), was injured while transferring automobiles in respondent's railyard from respondent's railroad car to a PMT auto trailer, an operation that PMT performed under contract for respondent. Although respondent's employees occasionally consulted with PMT employees about the operation, PMT supervisors controlled the day-to-day unloading process. Petitioner, claiming that he was sufficiently under respondent's control to bring him under the coverage of the Federal Employers' Liability Act (FELA), which makes a covered railroad liable for negligently causing injury or death to any person "while he is employed" by the railroad, and that the accident resulted from respondent's negligence, brought suit against respondent under the FELA. The District Court found that the relationship between petitioner and respondent sufficed to make the FELA apply, the court having concluded that: PMT was serving generally as respondent's agent; PMT employees were respondent's agents for purposes of the unloading operation; and the work performed by petitioner fulfilled a nondelegable duty of respondent. The Court of Appeals reversed, having concluded that the District Court's test for FELA liability was too broad. *Held:*

1. The "while employed" language of the FELA requires not only that the FELA plaintiff be an agent of the rail carrier but the carrier's servant, and here the District Court erred in holding that petitioner (who according to the court's findings was neither a borrowed servant of respondent nor a dual servant of respondent and PMT) came within the coverage of the FELA, since those findings also did not establish a master-servant relationship between respondent and PMT that would be necessary to render petitioner a subservant of the railroad. Nor was the District Court's conclusion that respondent was "responsible" for the unloading operation tantamount to a finding that the railroad controlled or had the right to control the physical conduct of PMT employees like petitioner in the unloading operation. Pp. 322–326.

2. The District Court's findings that petitioner worked most of the time on respondent's premises and that respondent's employees were responsible for checking the safety conditions on the railroad cars showed only that the two companies' operations were closely related, not that respondent's employees supervised the unloading operation, and consequently the FELA's "while employed" requirement remains unsatisfied even under the proper test. Pp. 326–331.

3. The record should be re-examined by the District Court in light of the proper legal standard. Pp. 331–332.

486 F. 2d 1084, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post,* p. 332. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 333. BLACKMUN, J., filed a dissenting opinion, *post,* p. 341.

R. Jay Engel argued the cause and filed briefs for petitioner.

John J. Corrigan argued the cause for respondent. With him on the brief was *Donald O. Roy.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner Eugene Kelley was seriously injured when he fell from the top of a tri-level railroad car where he had been working. He sought recovery for his injuries from the respondent railroad under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60. Under the FELA, a covered railroad is liable for negligently causing the injury or death of any person "while he is employed" by the railroad. Although petitioner acknowledged that he was technically in the employ of a trucking company rather than the railroad, he contended that his work was sufficiently under the control of the railroad to bring him within the

coverage of the FELA. The District Court agreed, but the Court of Appeals for the Ninth Circuit reversed, 486 F. 2d 1084 (1973), creating an apparent conflict with a previous decision of the Fourth Circuit, *Smith* v. *Norfolk & Western R. Co.*, 407 F. 2d 501, cert. denied, 395 U. S. 979 (1969).[1] We granted certiorari to resolve the conflict. 416 U. S. 935 (1974). We vacate the judgment and remand the case for further proceedings in the District Court.

I

At the time of his accident, petitioner had worked for the Pacific Motor Trucking Co. (PMT), a wholly owned subsidiary of the Southern Pacific Co., for about eight years.[2] PMT was engaged in various trucking enterprises, primarily in conjunction with the railroad operations of its parent company. Among PMT's functions was transporting new automobiles from respondent's San Francisco railyard to automobile dealers in the San Francisco area. As part of its contractual arrangement with

[1] Very similar fact situations have arisen in a number of federal and state cases. *E. g., Tarboro* v. *Reading Co.*, 396 F. 2d 941 (CA3 1968), cert. denied, 393 U. S. 1027 (1969); *Mazzucola* v. *Pennsylvania R. Co.*, 281 F. 2d 267 (CA3 1960); *Cimorelli* v. *New York Central R. Co.*, 148 F. 2d 575 (CA6 1945); *Thornton* v. *Norfolk & Western R. Co.*, 307 F. Supp. 667 (ED Va. 1969); *Hunter* v. *Missouri-Kansas-Texas R. Co.*, 258 F. Supp. 20 (ND Okla. 1966); *Fawcett* v. *Missouri Pacific R. Co.*, 242 F. Supp. 675 (WD La. 1963), aff'd *per curiam*, 347 F. 2d 233 (CA5), cert. denied, 382 U. S. 907 (1965); *Valentine* v. *South Coast Corp.*, 218 F. Supp. 148 (ED La. 1963), aff'd *per curiam*, 334 F. 2d 244 (CA5 1964); *Williams* v. *Chicago & Eastern Illinois R. Co.*, 13 Ill. App. 3d 596, 300 N. E. 2d 766 (1973); *Waters* v. *Chicago & Eastern Illinios R. Co.*, 86 Ill. App. 2d 48, 229 N. E. 2d 151 (1967); *Turpin* v. *Chicago, B. & Q. R. Co.*, 403 S. W. 2d 233 (Mo.), cert. denied, 384 U. S. 1003 (1966); *Drago* v. *Central R. Co.*, 93 N. J. L. 176, 106 A. 803, cert. denied, 251 U. S. 553 (1919).

[2] Petitioner has abandoned his claim that PMT's status as respondent's wholly owned subsidiary should render respondent liable generally for injuries to PMT employees.

the railroad, PMT would unload automobiles from Southern Pacific's "tri-level" auto-carrying flatcars when they arrived in the yard. It was petitioner's job to unhook the automobiles from their places on the railroad cars and to drive them into the yard for further transfer to PMT auto trailers. PMT maintained the unloading operation in the yard on a permanent basis. Although there were Southern Pacific employees in the area who would occasionally consult with PMT employees about the unloading process, PMT supervisors controlled and directed the day-to-day operations.

On July 3, 1963, petitioner was unhooking automobiles in the usual fashion from the top level of one of the tri-level flatcars. A safety cable, normally affixed to the flatcar to protect against falls, was apparently not in place because of an equipment defect. During the unhooking process, petitioner fell from the top of the car and suffered a disabling injury. He subsequently received workmen's compensation payments from PMT. Shortly before the three-year FELA statute of limitations had run, he brought suit against the respondent,[3] claiming it had been negligent in failing to maintain the safety cable in its proper place and in proper working order.

In his complaint, petitioner alleged that he was employed by the respondent railroad within the meaning of the FELA. After a six-day hearing, the District Court, sitting as trier of fact,[4] ruled in petitioner's favor on the employment question. The job of unloading

[3] In most FELA cases a finding of nonemployment does no more than deprive the plaintiff of the various procedural and proof advantages of the Act, since the common-law negligence action against a nonemployer is generally available in the alternative. In this case, however, when petitioner brought his FELA suit, the statute of limitations for California's common-law negligence action had already run.

[4] Although both parties initially demanded a jury trial, they agreed to try the limited question of employment to the court.

automobiles was the railroad's responsibility, the court found, "pursuant to its contractual responsibilities to the shippers and its tariff responsibilities." In addition, the court found that the railroad supplied the necessary ramps and owned the area in which the PMT employees worked. The responsibility for supervision and control of the unloading operations was respondent's, the court concluded, even though "the exercise thereof was executed by employees of Pacific Motor Trucking Company." In sum, the court found that PMT was serving generally as the railroad's agent; PMT employees were agents of the railroad for the purposes of the unloading operation; and because the work being performed by petitioner was "in fulfillment of a non-delegable duty of defendant Southern Pacific Company," the relationship between petitioner and the railroad was sufficient to bring him within the coverage of the FELA. After this resolution of the employment issue, the railroad stipulated to its negligence, the parties agreed to set damages at $200,000, and the trial court entered judgment for petitioner in that amount.

The Court of Appeals observed that the District Court had not found that petitioner was "employed" by the railroad, either permanently or at the time of his accident. The court noted that the "while employed" clause of the FELA requires a finding not just of agency but of a master-servant relationship between the rail carrier and the FELA plaintiff. Concluding that the District Court had applied an unduly broad test for FELA liability, the Court of Appeals reversed the District Court's judgment.

II

Petitioner insists that the District Court in effect made a factual finding of employment and that the Court of Appeals erred in upsetting that finding. Of course, even

if the District Court made such a finding of employment after applying the proper principles of law, that would not be the end of the matter. Under Fed. Rule Civ. Proc. 52 (a), an appellate court must set aside the trial court's findings if it concludes that they are "clearly erroneous." See *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395 (1948). We need not reach the question whether any of the District Court's findings in this case were clearly erroneous, however, since we agree with the Court of Appeals that the trial court applied an erroneous legal standard in holding that the plaintiff was within the reach of the FELA. *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 194 n. 9 (1963).

The heart of the District Court's analysis was its conclusion that the "traditional agency relationship" between respondent and PMT, in conjunction with the master-servant relationship between PMT and petitioner, was sufficient under the circumstances of this case to bring petitioner under the coverage of the Act. But this Court has repeatedly required more than that to satisfy the "while employed" clause of the FELA. From the beginning the standard has been proof of a master-servant relationship between the plaintiff and the defendant railroad. See *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94 (1915); *Hull* v. *Philadelphia & Reading R. Co.*, 252 U. S. 475, 479 (1920); *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227, 228 (1959).

In an early FELA case, this Court noted that the words "employee" and "employed" in the statute were used in their natural sense, and were "intended to describe the conventional relation of employer and employé." *Robinson, supra,* at 94. In *Baker, supra,* the Court reaffirmed that for the purposes of the FELA the question of employment, or master-servant status, was to be determined by reference to common-law principles. The

Court in *Baker* referred to sections of the Restatement (Second) of Agency dealing with the borrowed-servant doctrine and the general master-servant relationship as a guideline for analysis and proper jury instructions.[5] Section 220 (1) of the Restatement defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." In § 220 (2), the Restatement recites various factors that are helpful in applying that definition. While that section is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker.

Under common-law principles, there are basically three methods by which a plaintiff can establish his "employment" with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. See Restatement (Second) of Agency § 227; *Linstead* v. *Chesapeake & Ohio R. Co.*, 276 U. S. 28 (1928). Second, he could be deemed to be acting for two masters simultaneously. See Restatement § 226; *Williams* v. *Pennsylvania R. Co.*, 313 F. 2d 203, 209 (CA2 1963). Finally, he could be a subservant of a company that was in turn a servant of the railroad. See Restatement § 5 (2); *Schroeder* v. *Pennsylvania R. Co.*, 397 F. 2d 452 (CA7 1968).

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[5] A year later, in *Ward* v. *Atlantic Coast Line R. Co.*, 362 U. S. 396, 400 (1960), the Court again cited the Restatement as the proper basis for instructing a jury on the various factors that bear on the factual question of employment. The Court in *Ward* approved an instruction that incorporated several of the factors mentioned in Restatement § 220.

Nothing in the District Court's findings suggests that petitioner was sufficiently under the control of respondent to be either a borrowed servant of the railroad or a dual servant of the railroad and PMT.[6] The District Court's findings come closest to suggesting a subservant relationship running from the railroad through PMT to petitioner. But even that theory fails on the findings in the trial court, since those findings did not establish the master-servant relationship between respondent and PMT necessary to render petitioner a subservant of the railroad.

The District Court found that PMT employees exercised supervision and control over the unloading operations, although the railroad bore the "responsibility" for those functions. On these facts, the District Court was plainly correct in concluding that PMT was an agent of the railroad. But a finding of agency is not tantamount to a finding of a master-servant relationship. See Restatement (Second) of Agency § 2. The finding that the railroad was "responsible" for the unloading operations is significantly weaker than would be a finding that it controlled or had the right to control the physical conduct of the PMT employees in the course of their unloading operations. The railroad would satisfy the District Court's "responsibility" test whenever it agreed to perform a serv-

[6] It appears that the District Court consciously declined to make a finding of "employment" or master-servant relationship between the railroad and Kelley. Petitioner proposed findings that respondent "had the right to exercise control over the details of the work being performed by [petitioner]," that the parties "believed that a relationship of master and servant existed" between them, and that petitioner "was an 'employee' of defendant Southern Pacific Company." The court declined to make any of these three proposed findings, although it adopted several of petitioner's less critical proposed findings in whole or in part. Moreover, the court specifically found that at the time of his injury, petitioner was in the employment of PMT, a finding that petitioner, of course, had not requested.

ice and subsequently engaged another company to perform that service for it on its premises. The "control or right to control" test, by contrast, would be met only if it were shown that the role of the second company was that of a conventional common-law servant.[7] Accordingly, we agree with the Court of Appeals that the District Court's test for FELA coverage was too broad.

III

The dissenters argue that even if the District Court erred in defining the applicable legal standard, we should reverse the Court of Appeals and reinstate the judgment of the District Court. The facts found by the District Court, they contend, satisfied the requirements of the "while employed" clause, even under the proper test. We disagree.

As we noted in Part II, the District Court's findings concerning the contractual relationship between PMT and the railroad fall far short of compelling the conclusion that Kelley was employed by Southern Pacific. The court's other factual determinations add no more force to the claim. The findings that Kelley's crew worked most of the time on the railroad's premises and that railroad employees were responsible for checking safety conditions

[7] The District Court appeared to place substantial weight on its finding that the unloading operation was a "non-delegable duty" of the railroad, "pursuant to its contractual responsibilities to the shippers and its tariff responsibilities." But the fact that respondent undertook the contractual obligation to unload the cars and added the unloading cost to its overall charge to the shipper does not affect the nature of its arrangement with PMT. The railroad was free either to use its own employees to unload the automobiles or to subcontract the work to another company. Nor did the publication of tariffs for the unloading services automatically render anyone who performed those tasks an employee of the railroad for FELA purposes. See *Norman* v. *Spokane-Portland & S. R. Co.*, 101 F. Supp. 350 (Ore. 1950), aff'd *per curiam*, 192 F. 2d 1020 (CA9 1951).

on the tri-level cars reflect the fact that the activities of the two companies were closely related and necessarily had to be coordinated. Railroad employees tending the cars and PMT employees unloading them naturally had substantial contact with one another. In addition, Southern Pacific supervisory personnel were occasionally in the area where PMT conducted its unloading operations and from time to time would advise or consult with PMT employees and supervisors. But the trial court did not find that Southern Pacific employees played a significant supervisory role in the unloading operation or, more particularly, that petitioner was being supervised by Southern Pacific employees at the time of his injury.[8] Nor did the court find that Southern Pacific employees had any general right to control the activities of petitioner and the other PMT workers.[9]

The two companies were sufficiently distinct in organization and responsibility that there was no apparent overlap in the supervisory ranks. Indeed, the labor con-

[8] Petitioner has pointed to testimony from PMT employees who stated that in the course of the unloading operation they had contact with various Southern Pacific employees, including clerks, who would check on arriving and departing cars, "car-whackers," who were responsible for car maintenance and inspection, and switchmen, who would occasionally ask the PMT employees to indicate when they were finished working on a car so that the switch engine could clear the tracks. These contacts, however, were plainly not supervisory in nature and do not buttress petitioner's claim to railroad employment.

[9] In addition to the findings discussed above, the District Court found that petitioner had worked for PMT for a substantial period, that he performed unskilled labor, and that he was compensated by an hourly wage. While these factors are generally relevant to the employment inquiry, see Restatement (Second) of Agency §§ 220 (2)(d), (f), (g), we fail to see how they aid petitioner here. They make it plain that Kelley was a general servant of PMT, but neither the District Court nor the dissenters explain how they bear significantly on respondent's control over or right to control Kelley's activities.

tract between the Teamsters and PMT expressly provided that the PMT employees would be subject only to the control of PMT supervisors. In light of the analysis in this Court's previous cases, the District Court's findings clearly fail to establish that petitioner was "employed" by the railroad.

In *Robinson* v. *Baltimore & Ohio R. Co., supra,* the petitioner was an employee of the Pullman Company, serving as porter in charge of a Pullman car that was hauled by the respondent railroad. Although the Pullman employees worked closely with railroad employees, and although the Pullman car was an integral part of the railroad operation, the Court held that that was not enough to make petitioner an employee of the railroad for the purposes of the Act. Even the petitioner's responsibility for taking tickets or fares of passengers boarding the Pullman car at night was not enough to make him a servant of the railroad. This service was merely an accommodation to the railroad, not a demonstration of the railroad's right to control the conduct of the Pullman employee. The Court stated that at the time the Act was passed, "[i]t was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." 237 U. S., at 94. The Pullman company, like PMT in this case, selected its own employees, and it "defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure." *Id.,* at 93.

In the following year, the Court was again faced with the question whether a particular worker was an employee of the railroad that had caused his death, or whether he

was an independent contractor. *Chicago, R. I. & P. R. Co.* v. *Bond,* 240 U. S. 449 (1916). The decedent had been engaged by the railroad to procure coal and wood and to perform various other services at its loading center in Enid, Okla. Although the railroad directed the decedent's activities to some extent, the Court observed that those directions were simply reformulations of the flexible obligations assumed by the decedent under his contract, not "a detailed control of the actions of [decedent] or those of his employees." *Id.,* at 455–456. The arrangement by which decedent had been engaged to provide services for the railroad, the Court concluded, was "not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results." *Id.,* at 456.

In *Bond* the Court relied on the earlier decision in *Standard Oil Co.* v. *Anderson,* 212 U. S. 215 (1909), to clarify the distinction between a contractor and an employee. In that case, a longshoreman was injured when a winch operator negligently lowered a load of oil cases on him. Petitioner, the general employer of the negligent winchman, argued that at the time of the accident the winchman was the borrowed servant of the stevedoring company, the longshoreman's employer. The Court, however, held that the winchman was not a servant of the stevedore but the servant of an independent contractor. The general employer had not furnished the employee to the stevedore, the Court wrote; it had furnished only the employee's work. Focusing on the locus of the power to control and direct the servant's work, the Court emphasized the importance of distinguishing between "authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking." *Id.,* at 222. Cf.

Denton v. *Yazoo & Mississippi Valley R. Co.*, 284 U. S. 305 (1932).

In this case, as in *Anderson*, the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. See *Del Vecchio* v. *Pennsylvania R. Co.*, 233 F. 2d 2, 5 (CA3 1956). The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed *pro hac vice* employees of the railroad.[10]

[10] The Court in *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1 (1963), applied the analysis of *Standard Oil Co.* v. *Anderson*, 212 U. S. 215 (1909), in a factual setting somewhat analogous to that of the present case. The petitioner in *Shenker* was employed as a janitor for the B&O Railroad. In addition to his work for the B&O, he maintained a nearby rail station and performed various services for the Pittsburgh & Lake Erie Railroad (P&LE). Although petitioner was on P&LE's premises and was doing P&LE's work when he was injured, the Court noted that "there can be no question that the petitioner is an employee of the B&O." 374 U. S., at 5. Citing *Anderson*, the Court wrote:

"[U]nder the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services. In the present case, the undisputed facts show that the petitioner was at all times paid by the B&O and under the sole supervision of B&O employees. The intimations of the B&O that the petitioner might have been given directions by the P&LE baggageman is at most an example of the minimum cooperation necessary to carry out a coordinated undertaking, and, as noted in *Anderson*, cannot amount to control or supervision." *Id.*, at 6 (footnote omitted).

Accord, *Hull* v. *Philadelphia & Reading R. Co.*, 252 U. S. 475, 479–480 (1920). In *Linstead* v. *Chesapeake & Ohio R. Co.*, 276 U. S. 28 (1928), the Court held that the borrowed-servant test was met where an employer had made the services of several of its employees available to the C&O Railroad for a specific purpose. Linstead, a conductor employed by the Big Four Railroad was instructed to

The factual setting of *Baker* v. *Texas & Pacific R. Co., supra,* provides an instructive contrast. Petitioner in *Baker* was nominally employed by a contractor who was engaged in maintenance work for the railroad. At trial, he introduced evidence to show that his work was part of the maintenance task of the railroad and that the material he was pumping into the roadbed was supplied by the railroad. Most significantly, there was evidence to show that

> "a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture." 359 U. S., at 228–229.

Because the evidence of control or right to control was in serious dispute, the Court held that the case must be permitted to go to the jury. As we have indicated, however, the District Court found no such day-to-day supervision that would support a finding that petitioner and his coworkers were, in effect, employees of the railroad.

IV

We part company with the Court of Appeals on the propriety of a remand. The court rendered judgment for respondent apparently because it determined that the District Court had found that there was no employment relationship, or because it had decided on its own that any such finding would have been clearly erroneous. Yet, while the District Court's failure to adopt peti-

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accompany a C&O train along C&O tracks between Kentucky and Ohio, under the immediate supervision of a C&O trainmaster. On these facts the Court held that he was the "special employee" of the C&O and could recover from the railroad under the FELA.

tioner's proposed findings of fact relating to employment is of some significance in determining what that court deemed to be the requirements of the "while employed" clause, see n. 6, *supra*, it is not enough to constitute a reviewable finding that there was no master-servant relationship between petitioner and the railroad. Similarly, while the Court of Appeals may have meant to suggest that in its view the record could not support a finding of employment, that suggestion is not developed in its opinion, and we think the best course at this point is to require the trier of fact to re-examine the record in light of the proper legal standard. Accordingly, we vacate the judgment of the Court of Appeals and remand the case to that Court with instructions to remand the case to the District Court for further findings in accordance with this opinion.

Vacated and remanded.

MR. JUSTICE STEWART, concurring in the judgment.

In determining Kelley's status under the FELA, the District Judge apparently relied on general agency principles, rather than on the particular principles of master-servant law. This was error, and it is thus proper to remand this case to the District Judge so that he can take a fresh look at the record, in light of the correct legal standard.

The correct standard is not a novel one. The law of master and servant has been with us for a long time, and its adequate exposition elsewhere, *e. g.*, Restatement (Second) of Agency §§ 5 (2), 220, 226, and 227 renders much of the Court's extended discussion unnecessary. But my chief problem with the Court's opinion is its insistence upon dissecting the particularized evidence in this case. Whether or not the Southern Pacific Co. controlled or had the right to control Kelley's work is for the original factfinder to determine.

The Court today substantially invades the trial court's function. If the Court wishes to decide the issue itself, a remand is unnecessary. If the Court wishes to leave the decision to the District Judge, who saw the evidence and heard the witnesses, much of the detailed discussion of the evidence in the Court's opinion is gratuitous.

I believe that both the efficient allocation of judicial resources and the ends of justice are best served by a remand—but a genuine remand, affording the District Judge latitude to perform his proper function as fact-finder. Because the Court's opinion bristles with broad hints that a finding of FELA coverage would be clearly erroneous, its remand of this case seems to me to approach disingenuousness.

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

Today's decision marks a return to the era when the FELA was interpreted in a hostile and restrictive manner by the federal judiciary. Accordingly, I am constrained to register my dissent.

The first Employers' Liability Act was enacted in 1906, 34 Stat. 232, and this Court responded by holding the Act unconstitutional. *Employers' Liability Cases,* 207 U. S. 463 (1908). Congress tried again in 1908 and produced the Act which is now in effect. 35 Stat. 65, 45 U. S. C. § 51 *et seq.* This time the Court upheld the statute, *Second Employers' Liability Cases,* 223 U. S. 1 (1912), but judicial hostility did not end. The defense of assumption of risk was, for the most part, held to be still available to the employer. *Seaboard Air Line R. Co.* v. *Horton,* 233 U. S. 492 (1914). The Act sought expressly to control the use of a contributory negligence defense, but the Court circumvented this to a considerable degree by developing the doctrine of "primary duty." See *Great Northern R. Co.* v. *Wiles,* 240 U. S. 444 (1916).

Finally, in 1939, the Congress decided that further legislation was needed. 53 Stat. 1404. The result was a more liberal view of the Act which did not provide the employer with so many defenses. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54 (1943).

Since 1939 this Court has interpreted the Act in the spirit of those amendments. Gradual liberalization has occurred, and the narrow, technical approach of earlier years has been eschewed. See W. Prosser, Law of Torts 536–537 (4th ed. 1971). This development did not occur without dissent. Divisions of opinion occurred on the merits and also on the question of whether the Court should involve itself in this area at all. See, *e. g.*, *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957). Nevertheless, the Court continued to oversee the application of the Act and to insist that judicial interpretations be consistent with the Act's overall purpose.

One of the questions which has arisen under the Act has been the definition of employment. Section 1 of the FELA, 45 U. S. C. § 51, provides that the carrier is liable in damages for injury or death resulting to an employee from the carrier's negligence. But the damage must be done to the one injured or killed "while he is employed" by the carrier. In the past judges have sometimes tried to give this requirement a rigid, technical content, but such an approach has been rejected by this Court.

In *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227 (1959), the petitioner's decedent had been hired as a workman by W. H. Nichols & Co., a firm which had entered into a contract with the respondent railroad. The decedent was working along the main line of the railroad performing various operations designed to strengthen and stabilize the roadbed. He was killed when he was struck by a train. The trial judge refused to submit the issue of employment to the jury and held that as a matter of

law the decedent was not in an employment relationship with the railroad at the time of his death. This Court reversed on the ground that whether the decedent was an employee within the meaning of the Act was properly a question for the jury. Noting that the terms "employee" and "employed" are not used in any "special sense," the Court reasoned that the issue of employment "contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement, Agency 2d, § 220, comment *c;* § 227, comment *a.*" *Id.*, at 228.

Ward v. *Atlantic Coast Line R. Co.,* 362 U. S. 396 (1960), involved similar considerations to those in *Baker.* The petitioner was employed as a laborer by the railroad, but he was working on his day off with a crew which was fixing a siding track that belonged to a third party. Since the petitioner was being paid by this third party on the day of the injury, a question existed as to whether the petitioner was an employee of the railroad at the time of the accident. We held that the trial judge had improperly charged the jury to consider only one factor, that of the awareness of the victim that he was working for a third party on the day in question. We noted that a number of factors must be considered under Restatement (Second) of Agency § 220.

Many Courts of Appeals have been confronted with problems similar to those in *Baker* and *Ward,* and they too have taken a nontechnical approach based on the various aspects of the particular case presented. For example, in *Missouri K–T R. Co.* v. *Hearson,* 422 F. 2d 1037 (CA10 1970), the injured worker was a car cleaner. The railroad had stopped doing its own car cleaning and had hired a firm to do the job, and the injured worker was nominally the employee of this hired firm. But, upon examining all the factors, the Court of Appeals affirmed

the District Court ruling that reasonable men could not differ in the conclusion that the victim was in an employment relationship with the railroad for FELA purposes. In *Schroeder* v. *Pennsylvania R. Co.*, 397 F. 2d 452 (CA7 1968), the deceased worker was nominally an employee of a trucking company which was under contract to perform certain pickup and delivery services for the railroad. Considering all the facts the Court of Appeals held that the trial judge had properly submitted to the jury the question of whether the deceased had been employed by the railroad for FELA purposes. Many more cases of a similar nature exist. See, *e. g.*, *Byrne* v. *Pennsylvania R. Co.*, 262 F. 2d 906 (CA3 1958); *Cimorelli* v. *New York Central R. Co.*, 148 F. 2d 575 (CA6 1945). But see, *e. g.*, *Fawcett* v. *Missouri Pacific R. Co.*, 242 F. Supp. 675 (WD La. 1963), aff'd, 347 F. 2d 233 (CA5 1965).

The case most clearly in point from another Court of Appeals is *Smith* v. *Norfolk & Western R. Co.*, 407 F. 2d 501 (CA4 1969). There the injured worker was also employed by a company which unloaded autos from railroad cars, and, like the petitioner here, the worker fell to the ground from the top tier of one of the cars. The District Court granted the worker summary judgment, since it had no doubt that he was an employee of the railroad within the meaning of the FELA. The Court of Appeals affirmed, using the following language: "Though employees of independent contractors are not accorded coverage under the Act . . . if the injured worker is employed by an agent or adjunct of the railroad he will be treated as an employee of the railroad for purposes of the Act. . . . Thus traditional concepts of agency extend the coverage of the Act." *Id.*, at 502. The District Court in this case relied on the language of the Court of Appeals in *Smith* v. *Norfolk & Western R. Co.*, *supra*. The Court today holds that this language misstates the law.

All servants[1] are agents of their masters. Restatement (Second) of Agency § 2 (2). But many agents are not servants within the meaning of § 220 of the Restatement. For example, an agent may be an independent contractor, but an independent contractor may never be a servant. *Id.* § 14 N, comment *a.* In *Baker* and *Ward* we referred to the Restatement as a source of principles which provide a basis for the factual decision as to whether an individual is an employee for FELA purposes. Under those principles an employee must be a servant and not merely an agent.[2]

Because the District Court in the present case used the word "agent" rather than "servant" or "employee" it committed a technical error. But our inquiry here should not be limited to a narrow examination of whether the right form of words was used to support a judgment in favor of a seriously injured worker. The District Court found that the requisite relationship was present to permit a recovery under the FELA, and we should ask whether the findings of fact that were made were sufficient to support that conclusion under the legal standard as correctly described.

The District Court made numerous findings of fact which support its conclusion that the FELA is applicable here, and these findings have not been held to be "clearly erroneous" under Fed. Rule Civ. Proc. 52 (a). Petitioner had been working in the job of unloading automobiles from respondent's railroad cars for eight years. Restatement (Second) of Agency §§ 220 (2)(f), 227,

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[1] The term "servant" as used in the Restatement expresses the same concept that "employee" does within the meaning of the FELA. Restatement (Second) of Agency § 220, comment *g.*

[2] Support for this point is found in the fact that, as noted by the Court of Appeals below, Congress once rejected a proposal that suppliers of accessorial services to railroads be included under the FELA. See S. Rep. No. 661, 76th Cong., 1st Sess., 2 (1939).

comment *c*. The work performed was that of respondent, to be performed in the general course of respondent's business pursuant to its contractual responsibilities. *Id.* § 220 (2)(h). The work was of an unskilled variety. *Id.* §§ 220 (2)(d), 227, comment *c*. Petitioner was paid by the hour. *Id.* § 220 (2)(g). The record was unclear as to who supplied the necessary hammers and wrenches, but respondent clearly supplied the necessary ramps and working area, and it was responsible for safety. *Id.* § 220 (2)(e). Respondent had the immediate responsibility for supervision and control of the work, though this task was carried out by others who, like petitioner, were servants of Pacific Motor Trucking Co. *Id.* § 220 (2)(a).[3]

There are basically two reasons for the Court of Appeals' reversal of the District Court's holding in peti-

[3] The value of examining multiple factors such as these is that it permits the analyst to avoid reliance on abstract inquiries as to kinds and degrees of control. Some factors—such as who is responsible for supervision, whose work is being performed, and who supplies the tools and place of work—are of obvious relevance. Other factors, though perhaps of less weight, are also helpful. For example, the skill of the worker and the manner in which he is paid are relevant to the ease with which control over him may be shifted from one master to another. And the length of time that the nominal servant of one master has been aiding in the business of another is likewise indicative of a shift in control.

Section 220 (2) of the Restatement provides a number of factors which it states should be considered "among others." Another factor which might be considered in this case is that Pacific Motor Trucking Co. is a wholly owned subsidiary of respondent. The Court of Appeals noted that no case has been made for piercing the corporate veil and thus disregarding the fact that the railroad and the trucking company are separate entities. Indeed, petitioner does not urge that we do so. Brief for Petitioner 6 n. 3. If the corporate veil were to be pierced that would presumably end the inquiry, an inappropriate result on this record. Nevertheless, it seems reasonable to take into account as one of many factors the relationship between the trucking company and the respondent.

tioner's favor. First, the District Court found that petitioner was an employee of the trucking company. But this does not mean that petitioner was not also an employee of the railroad for the purposes of the FELA. In *Byrne* v. *Pennsylvania R. Co.*, 262 F. 2d, at 910, the victim was an employee of Westinghouse who was working on a railroad locomotive at the time of his death. The Court of Appeals noted in that case that "[t]here is, of course, no question but that [the victim] was an employee of Westinghouse. The issue is whether sufficient evidence was adduced to enable the jury to conclude that [the victim] was also an employee of the Railroad." See Restatement (Second) of Agency §§ 226 and 227. If the mere fact that an individual is on the payroll of someone other than the railroad sufficed to make that individual not an employee of the railroad for FELA purposes, then this Court would not have found it necessary to reverse in the *Baker* case. Such a simple test could be devised, but whether such a change in the law is to be made should be up to Congress to decide.

The second reason the Court of Appeals used for reversing the District Court was that the District Court had rejected a finding that petitioner was an employee of the railroad. The trial judge was relying on the "agency" language of *Smith* v. *Norfolk & Western R. Co., supra,* and he therefore apparently had his labels confused. He was using the concept of employment in a narrow and restricted way, yet was expanding it to accommodate decisions such as *Baker* by including both employment and agency relationships within the scope of the FELA. If the District Judge did not find an employment relationship in this narrow sense, that fact is unimportant, for he did find a relationship sufficient to satisfy the correct test. While he used language of agency he gave that language the substantive content

of *Baker* and of the source relied upon by *Baker*—Restatement (Second) of Agency § 220. He made findings of fact easily sufficient to support the existence of an employment relationship under the correct substantive test, and he in fact found that the requisite relationship existed. The fact that he used the word "agency" rather than the word "employment" to describe this relationship is thus of no more than technical, abstract concern. This is not the sort of concern that should motivate us in the FELA context.

The majority here has taken a different tack from that of the Court of Appeals. Citing numerous cases from the era before the 1939 amendments to the Act, the majority argues that the railroad here exercised insufficient control over the petitioner to establish the requisite employment relationship. Under the approach taken in *Baker* and *Ward,* however, the existence of a master-servant relationship is to be determined from an examination of many factors. This is quite different from the majority's concentration on technical distinctions regarding kinds and degrees of control and cooperation.[4] As I have indicated, I think that a judgment in favor of the petitioner is quite justified on the basis of facts already found by the District Court. I have no strong objection to the decision that the case be remanded for new findings in light of the correctly stated legal standard, but I dissent from the rigid and old-fashioned standard of liability which the majority indicates should be made applicable.

In a strictly doctrinal sense this case may not have a great impact on the coverage of the FELA, but I fear

[4] The majority relies on two modern cases, *Baker* v. *Texas & Pacific R. Co.,* 359 U. S. 227 (1959), and *Shenker* v. *Baltimore & Ohio R. Co.,* 374 U. S. 1 (1963). But there is nothing in these cases to indicate that technical distinctions between control and cooperation are the only subjects of investigation in considering whether a master-servant relationship exists under the FELA.

that the precedent set today bodes ill for the future. It distorts the accepted meaning of the Act and reflects a judicial hostility to the FELA of the kind that existed prior to the 1939 amendments.

I would reverse the judgment below.

MR. JUSTICE BLACKMUN, dissenting.

The Court in its decided cases has traveled far in order to accord Federal Employers' Liability Act coverage to a variety of employment situations. See, *e. g.*, *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1, 5 (1963), and *North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 260 (1914). Its many decisions are now a well-chalked slate that should not be significantly erased without good reasons. Neither should the Court change a mature and highly developed legal standard, long accepted by Congress, without explaining those reasons or even saying what the effect will be.

For me, the Court's *per curiam* opinion in *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227 (1959), controls this case. There the injured workman had been hired by a corporation engaged in work along the railroad's main-line right-of-way. The work consisted of pumping sand and cement into the roadbed in order to strengthen and stabilize it. The workman was struck by a train while engaged at this job. The petitioners contended that he was killed while he was "employed" by the railroad, within the meaning of the Act. Evidence on the question was introduced, but the trial judge declined to submit the issue to the jury, holding as a matter of law that the workman was not in such a relationship to the railroad at the time of his death as to entitle him to the Act's protection. The state courts refused to disturb the judgment for the railroad.

This Court, however, held that the Act does not use the terms "employee" and "employed" in any special

sense, and that the familiar general legal problems as to whose employee or servant a worker is at a given time present themselves as matters of federal law under the Act. Each case, the Court said, must be decided on its peculiar facts and " 'ordinarily no one feature of the relationship is determinative.' " The Court concluded that it was "perfectly plain" that the question "contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law." *Id.*, at 228. It pointed out that the petitioners introduced evidence tending to prove that the work "was part of the maintenance task of the railroad"; that the road "furnished the material to be pumped into the roadbed"; and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job. *Ibid.* The railroad introduced evidence tending to controvert this. The Court then held that an issue for determination by the jury was presented.

So it is here. Kelley was injured at the railroad's loading-and-unloading ramp in San Francisco. He and others were unchaining new automobiles for unloading when he fell from the third level of the railroad car. He was hired, paid by, and could be discharged by the railroad's wholly owned subsidiary. All the officers and directors of that subsidiary were officers or directors of the railroad. The subsidiary was the only company then having a contract with the railroad to unload cars at that ramp. Kelley had been employed at this particular job and at this site for eight years and was paid on an hourly basis. The unloading was the railroad's responsibility pursuant to its contractual obligation to its shipper. The railroad supplied the necessary working area. The work performed by Kelley was unskilled. Railroad employees had the responsibility daily to check the safety of the cars and to make necessary repairs. There was evidence

that the railroad exercised a degree of control over the unloading operation and that PMT employees performing this work frequently felt they had to heed the railroad supervisor's command.*

All this, it seems to me, is enough to create an issue for the trier of fact, just as the *Baker* case illustrates and as it teaches. The trier could find that Kelley was doing work of a kind and in a way and under such supervision of the Southern Pacific as made him an employee of that railroad for purposes of the FELA.

I feel the Court, *ante,* at 325 n. 6, gives undue emphasis to the District Court's treatment of findings of fact proposed by the petitioner. Every actively practicing trial attorney knows that some judges readily adopt findings presented by counsel; that other judges almost always reject proposed findings and prefer to draft their own or have their clerks prepare them; and that still others adopt a middle course. In this case the District Court produced a judgment for the injured workman. I doubt whether there can be much significance in the adjustment-of-proposed-findings route by which that judgment was reached.

While the Court disclaims any modification of the standards for allowing questions of fact in FELA cases to go to the jury, its decision here suggests otherwise. The Court implies that supervision must be "day-to-day" in order to constitute "supervision" for purposes of creating "employee" status under the FELA. *Ante,* at 331. Does this mean that orders must be issued with a certain frequency (*e. g.,* every day, or most days) or merely in a certain manner (*e. g.,* the "daily" normal "course of the work," *Baker,* 359 U. S., at 228–229)? The

*There was testimony by PMT employees that in practice they took instructions and directions from Southern Pacific supervisors, and that failing to follow them could jeopardize their jobs. *E. g.,* App. 57.

Court does not say. I suspect that trial judges will be inclined to resolve most doubts against plaintiffs if their findings are to be so vulnerable to challenge.

I also fear that the Court's holding may be one that opens the way for the railroads of this country to avoid FELA liability. That way apparently is to contract out large portions of maintenance and loading and unloading responsibilities that normally are part of the railroad's operation.

I would reverse the judgment of the Court of Appeals, and I therefore dissent.

JACKSON *v.* METROPOLITAN EDISON CO.

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

No. 73–5845. Argued October 15, 1974—Decided December 23, 1974

Petitioner brought suit against respondent, a privately owned and operated utility corporation which holds a certificate of public convenience issued by the Pennsylvania Utility Commission, seeking damages and injunctive relief under 42 U. S. C. § 1983 for termination of her electric service allegedly before she had been afforded notice, a hearing, and an opportunity to pay any amounts found due. Petitioner claimed that under state law she was entitled to reasonably continuous electric service and that respondent's termination for alleged nonpayment, permitted by a provision of its general tariff filed with the Commission, was state action depriving petitioner of her property without due process of law and giving rise to a cause of action under § 1983. The Court of Appeals affirmed the District Court's dismissal of petitioner's complaint. *Held:* Pennsylvania is not sufficiently connected with the challenged termination to make respondent's conduct attributable to the State for purposes of the Fourteenth Amendment, petitioner having shown no more than that respondent was a heavily regulated private utility with a partial monopoly and that it elected to terminate service in a manner that the Commission found permissible under state law. Cf. *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163. *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451; *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, distinguished. Pp. 349–359.

483 F. 2d 754, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., *post,* p. 359, BRENNAN, J., *post,* p. 364, and MARSHALL, J., *post,* p. 365, filed dissenting opinions.

Jack Greenberg argued the cause for petitioner. On the briefs were *Alan Linder* and *Jonathan M. Stein.*

Thomas M. Debevoise argued the cause and filed a brief for respondent.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Metropolitan Edison Co. is a privately owned and operated Pennsylvania corporation which holds a certificate of public convenience issued by the Pennsylvania Public Utility Commission empowering it to deliver electricity to a service area which includes the city of York, Pa. As a condition of holding its certificate, it is subject to extensive regulation by the Commission. Under a provision of its general tariff filed with the Commission, it has the right to discontinue service to any customer on reasonable notice of nonpayment of bills.[1]

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*Briefs of *amici curiae* urging reversal were filed by *Franklin A. Martens* for the National Consumer Law Center, Inc., et al., and by *Richard A. Weisz, Stefan M. Rosenzweig, Michael B. Weisz,* and *Anthony G. Amsterdam* for the Legal Aid Foundation of Long Beach et al.

Gilbert Stein filed a brief for the city of Philadelphia as *amicus curiae* urging affirmance.

Peter H. Schiff and *Richard A. Solomon* filed a brief for the Public Service Commission of New York as *amicus curiae.*

[1] Metropolitan Edison Company Electrical Tariff, Electric Pa. P. U. C. No. 41, Rule 15. This portion of Metropolitan's general tariff, filed with the Utility Commission under the notice-filing requirement of Pa. Stat. Ann., Tit. 66, § 1142 (1959) (since the general tariff involved a rate increase), provides in pertinent part:

"(15)—*Cause for discontinuance of service.*

"Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill . . . ."

Its filed tariff also gives it the right to terminate service for fraud or for tampering with a meter but Metropolitan did not seek to assert these grounds below.

Petitioner Catherine Jackson is a resident of York, who has received electricity in the past from respondent. Until September 1970, petitioner received electric service to her home in York under an account with respondent in her own name. When her account was terminated because of asserted delinquency in payments due for service, a new account with respondent was opened in the name of one James Dodson, another occupant of the residence, and service to the residence was resumed. There is a dispute as to whether payments due under the Dodson account for services provided during this period were ever made. In August 1971, Dodson left the residence. Service continued thereafter but concededly no payments were made. Petitioner states that no bills were received during this period.

On October 6, 1971, employees of Metropolitan came to the residence and inquired as to Dodson's present address. Petitioner stated that it was unknown to her. On the following day, another employee visited the residence and informed petitioner that the meter had been tampered with so as not to register amounts used. She disclaimed knowledge of this and requested that the service account for her home be shifted from Dodson's name to that of one Robert Jackson, later identified as her 12-year-old son. Four days later on October 11, 1971, without further notice to petitioner, Metropolitan employees disconnected her service.

Petitioner then filed suit against Metropolitan in the United States District Court for the Middle District of Pennsylvania under the Civil Rights Act of 1871, 42 U. S. C. § 1983, seeking damages for the termination and an injunction requiring Metropolitan to continue providing power to her residence until she had been afforded notice, a hearing, and an opportunity to pay any amounts found due. She urged that under state law she had an

entitlement to reasonably continuous electrical service to her home [2] and that Metropolitan's termination of her service for alleged nonpayment, action allowed by a provision of its general tariff filed with the Commission, constituted "state action" depriving her of property in violation of the Fourteenth Amendment's guarantee of due process of law.[3]

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[2] The basis for this claimed entitlement is Pa. Stat. Ann., Tit. 66, § 1171 (1959), providing in part:

"Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities . . . . Such service also shall be reasonably continuous and without unreasonable interruptions or delay. . . ."

Mrs. Jackson finds in this provision a state-law entitlement to continuing utility service to her residence. She reasons that under the Due Process Clause of the Fourteenth Amendment she cannot be deprived of this entitlement to utility service without adequate notice and a hearing before an impartial body: until these are completed, her service must continue. Because of our conclusion on the threshold question of state action, we do not reach questions relating to the existence of a property interest or of what procedural guarantees the Fourteenth Amendment would require if a property interest were found to exist.

Mr. Justice Brennan, dissenting, *post*, at 364, concludes that there is no justiciable controversy between petitioner and respondent because whatever entitlement to service petitioner had was previously terminated by respondent in accordance with its tariff. We do not believe this to be any less a determination of the merits of the action than is our conclusion that whatever deprivation she may have suffered was not caused by the State. Issues of whether a claimed entitlement is "property" within the meaning of the Due Process Clause, *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and whether if so its deprivation was consistent with due process, see *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), are themselves constitutional questions which we find no occasion to reach in this case.

[3] Section 1 of the Fourteenth Amendment provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

The District Court granted Metropolitan's motion to dismiss petitioner's complaint on the ground that the termination did not constitute state action and hence was not subject to judicial scrutiny under the Fourteenth Amendment.[4] On appeal, the United States Court of Appeals for the Third Circuit affirmed, also finding an absence of state action.[5] We granted certiorari to review this judgment.[6]

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." In 1883, this Court in the *Civil Rights Cases,* 109 U. S. 3, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful," against which the Fourteenth Amendment offers no shield. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

We have reiterated that distinction on more than one occasion since then. See, *e. g., Evans* v. *Abney,* 396 U. S. 435, 445 (1970); *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 171–179 (1972). While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is "private," on

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due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] The decision is reported at 348 F. Supp. 954 (1972).

[5] The decision is reported at 483 F. 2d 754 (1973).

[6] 415 U. S. 912 (1974). Compare *Kadlec* v. *Illinois Bell Telephone Co.,* 407 F. 2d 624 (CA7), cert. denied, 396 U. S. 846 (1969); *Lucas* v. *Wisconsin Electric Power Co.,* 466 F. 2d 638 (CA7 1972), cert. denied, 409 U. S. 1114 (1973), with *Palmer* v. *Columbia Gas of Ohio, Inc.,* 479 F. 2d 153 (CA6 1973), modified in *Turner* v. *Impala Motors,* 503 F. 2d 607 (CA6 1974). Cf. *Ihrke* v. *Northern States Power Co.,* 459 F. 2d 566 (CA8), vacated as moot, 409 U. S. 815 (1972).

the one hand, or "state action," on the other, frequently admits of no easy answer. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 723 (1961); *Moose Lodge No. 107* v. *Irvis, supra,* at 172.

Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.[7] 407 U. S., at 176–177. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 462 (1952). It may well be that

[7] Enterprises subject to the same regulatory system as Metropolitan are enumerated in the definition of "public utility" contained in Pa. Stat. Ann., Tit. 66, § 1102 (17) (1959 and Supp. 1974–1975). Included in this definition are all companies engaged in providing gas, power, or water; all common carriers, pipeline companies, telephone and telegraph companies, sewage collection and disposal companies; and corporations affiliated with any company engaging in such activities. Among some of the enterprises held subject to this regulatory scheme are freight forwarding and storage companies (*Highway Freight Co.* v. *Public Service Comm'n,* 108 Pa. Super. 178, 164 A. 835 (1933)), real estate developers who, incident to their business, provide water services (*Sayre Land Co.* v. *Pennsylvania Public Utility Comm'n,* 21 D. & C. 2d 469 (1959)), and individually owned taxicabs. *Pennsylvania Public Utility Comm'n* v. *Israel,* 356 Pa. 400, 52 A. 2d 317 (1947). In *Philadelphia Rural Transit Co.* v. *Philadelphia,* 309 Pa. 84, 93, 159 A. 861, 864 (1932), the court estimated that there were 26 distinct types of enterprises subject to this regulatory system, and a fair reading of Pennsylvania law indicates a substantial expansion of included enterprises since that case. The incidents of regulation do not appear materially different between enterprises. If the mere existence of this regulatory scheme made Metropolitan's action that of the State, then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania.

acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107, supra,* at 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. *Burton* v. *Wilmington Parking Authority, supra.*

Petitioner advances a series of contentions which, in her view, lead to the conclusion that this case should fall on the *Burton* side of the line drawn in the *Civil Rights Cases, supra,* rather than on the *Moose Lodge* side of that line. We find none of them persuasive.

Petitioner first argues that "state action" is present because of the monopoly status allegedly conferred upon Metropolitan by the State of Pennsylvania. As a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly.[8] But assuming that it had, this fact is not determinative in consider-

[8] It is provided in Pa. Stat. Ann., Tit. 66, § 1121 (Supp. 1974–1975), that issuance of a certificate of public convenience is a prerequisite for engaging in the utility business in Pennsylvania. The requirements for obtaining such a certificate are described in Pa. Stat. Ann., Tit. 66, §§ 1122, 1123 (1959 and Supp. 1974–1975). There is nothing in either Metropolitan's certificate or in the statutes under which it was issued indicating that the State has granted or guaranteed to Metropolitan monopoly status. In fact Metropolitan does face competition within portions of its service area from another private utility company and from municipal utility companies. Metropolitan was organized in 1874, 39 years before Pennsylvania's adoption of its first utility regulatory scheme in 1913. There is no indication that it faced any greater competition in 1912 than today. As petitioner admits, such public utility companies are natural mo-

ing whether Metropolitan's termination of service to petitioner was "state action" for purposes of the Fourteenth Amendment. In *Pollak, supra,* where the Court dealt with the activities of the District of Columbia Transit Co., a congressionally established monopoly, we expressly disclaimed reliance on the monopoly status of the transit authority. 343 U. S., at 462. Similarly, although certain monopoly aspects were presented in *Moose Lodge No. 107, supra,* we found that the Lodge's action was not subject to the provisions of the Fourteenth Amendment. In each of those cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here.

Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by Pa. Stat. Ann., Tit. 66, § 1171 (1959), and hence performs a "public function." We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. See, *e. g., Nixon* v. *Condon,* 286 U. S. 73 (1932) (election); *Terry* v. *Adams,* 345 U. S. 461 (1953) (election); *Marsh* v. *Alabama,* 326 U. S. 501 (1946) (company town); *Evans* v. *Newton,* 382 U. S. 296 (1966) (municipal park). If

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nopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale. Burdick, The Origin of the Peculiar Duties of Public Service Companies, 11 Col. L. Rev. 514 (1911); H. Trachsel, Public Utility Regulation 7–8, 52 (1947). Regulation was superimposed on such natural monopolies as a substitute for competition and not to eliminate it:

'The primary object of the Public Utility Law is not to establish monopolies or to guarantee the security of investments in public service corporations, but to serve the interests of the public." *Highway Express Lines, Inc.* v. *Pennsylvania Public Utility Comm'n,* 195 Pa. Super. 92, 100, 169 A. 2d 798, 802 (1961); cf. *Pottsville Union Traction Co.* v. *Public Service Comm'n,* 67 Pa. Super. 301, 304 (1917).

we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty. *Girard Life Insurance Co.* v. *City of Philadelphia,* 88 Pa. 393 (1879); *Baily* v. *Philadelphia,* 184 Pa. 594, 39 A. 494 (1898).

Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses "affected with the public interest" are state actors in all their actions.

We decline the invitation for reasons stated long ago in *Nebbia* v. *New York,* 291 U. S. 502 (1934), in the course of rejecting a substantive due process attack on state legislation:

> "It is clear that there is no closed class or category of businesses affected with a public interest . . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test . . . ." *Id.,* at 536.

See, *e. g., Tyson & Brother* v. *Banton,* 273 U. S. 418, 451 (1927) (Stone, J., dissenting).

Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.[9]

We also reject the notion that Metropolitan's termination is state action because the State "has specifically authorized and approved" the termination practice. In the instant case, Metropolitan filed with the Public Utility Commission a general tariff—a provision of which states Metropolitan's right to terminate service for nonpayment.[10] This provision has appeared in Metropolitan's previously filed tariffs for many years and has never been the subject of a hearing or other scrutiny by the Commission.[11] Although the Commission did hold

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[9] The argument has been impliedly rejected by this Court on a number of occasions. See, *e. g., Civil Rights Cases,* 109 U. S. 3, 8 (1883). It is difficult to imagine a regulated activity more essential or more "clothed with the public interest" than the maintenance of schools, yet we stated in *Evans* v. *Newton,* 382 U. S. 296, 300 (1966):

"The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions. While a State may not segregate public schools so as to exclude one or more religious groups, those sects may maintain their own parochial educational systems."

[10] See n. 1, *supra.* The same provision appeared in all of Metropolitan's prior general tariffs. The sole reason for substituting the new general tariff, which contains all the terms and conditions of Metropolitan's service, was to procure a rate increase. This was the sole change between Metropolitan's Electrical Tariff No. 41 and its predecessor.

[11] Petitioner does not contest the fact that Metropolitan had this right at common law before the advent of regulation. Brief for Petitioner 31.

hearings on portions of Metropolitan's general tariff relating to a general rate increase, it never even considered the reinsertion of this provision in the newly filed general tariff.[12] The provision became effective 60 days after filing when not disapproved by the Commission.[13]

As a threshold matter, it is less than clear under state law that Metropolitan was even required to file this provision as part of its tariff or that the Commission would have had the power to disapprove it.[14] The District Court observed that the sole connection of the Commission with this regulation was Metropolitan's simple notice filing with the Commission and the lack of any Commission action to prohibit it.[15]

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[12] Petitioner concedes that the hearing was solely devoted to the question of the proposed rate increase. *Id.*, at 30.

[13] See Pa. Stat. Ann., Tit. 66, § 1148 (1959); Pa. P. U. C. Tariff Regulations, § II, "Public Notice of Tariff Changes." These provisions specify that utility companies must give 60 days' notice to the public before changing their rules filed in their general tariff. Since Pa. Stat. Ann., Tit. 66, § 1171 (1959), provides that "[s]ubject to . . . the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service," the Commission arguably had the power to disapprove utility rules. There is no evidence that it has ever even considered the provision in question. When the 60-day notice period passed, the provisions became effective.

[14] Pennsylvania P. U. C. Tariff Regulations, § VIII, "Discount for Prompt Payment and Penalties for Delayed Payment of Bills," is the only authority cited for a state-imposed requirement that Metropolitan file its termination provision as part of its general tariff. This section requires the filing of "penalties" imposed upon customers for failures to pay bills promptly. Respondent argues that this applies only to monetary penalties. There is no Pennsylvania case law on the question.

[15] "The only apparent state involvement with the activity complained of here is in Tariff Reg. VIII of the Pennsylvania P. U. C. . . . [T]he purpose of Tariff Reg. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their

The case most heavily relied on by petitioner is *Public Utilities Comm'n* v. *Pollak, supra.* There the Court dealt with the contention that Capital Transit's installation of a piped music system on its buses violated the First Amendment rights of the bus riders. It is not entirely clear whether the Court alternatively held that Capital Transit's action was action of the "State" for First Amendment purposes, or whether it merely assumed, *arguendo,* that it was and went on to resolve the First Amendment question adversely to the bus riders.[16] In either event, the nature of the state involvement there was quite different than it is here. The District of Columbia Public Utilities Commission, on its own motion, commenced an investigation of the effects of the piped music, and after a full hearing concluded not only that Capital Transit's practices were "not inconsistent with public convenience, comfort, and safety," 81 P. U. R. (N. S.) 122, 126 (1950), but also that the

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bills. As in *Kadlec,* defendant here acted pursuant to its own regulations and out of a purely private, economic motive. No state official participated in the practice complained of, nor is it alleged that the state requested or co-operated in the suspension of service." 348 F. Supp., at 958.

[16] See 343 U. S., at 462. At one point the Court states:

"We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments." *Ibid.*

Later, the opinion states:

"We, therefore, find it appropriate to examine into what restriction, if any, the First and Fifth Amendments place upon the Federal Government . . . *assuming* that the action of Capital Transit . . . amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto." *Id.,* at 462–463. (Emphasis added.)

The Court then went on to find no constitutional violation in the challenged action.

practice "in fact, through the creation of better will among passengers, . . . tends to improve the conditions under which the public ride." *Ibid.* Here, on the other hand, there was no such imprimatur placed on the practice of Metropolitan about which petitioner complains. The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action." At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State,[17] does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

We also find absent in the instant case the symbiotic relationship presented in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961). There where a private lessee, who practiced racial discrimination, leased space for a restaurant from a state parking authority in a publicly owned building, the Court held that the State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in

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[17] As in *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 173 (1972), there is no suggestion in this record that the Pennsylvania Public Utility Commission intended either overtly or covertly to encourage the practice. See n. 15, *supra.*

the enterprise. *Id.,* at 725. We cautioned, however, that while "a multitude of relationships might appear to some to fall within the Amendment's embrace," differences in circumstances beget differences in law, limiting the actual holding to lessees of public property. *Id.,* at 726.

Metropolitan is a privately owned corporation, and it does not lease its facilities from the State of Pennsylvania. It alone is responsible for the provision of power to its customers. In common with all corporations of the State it pays taxes to the State, and it is subject to a form of extensive regulation by the State in a way that most other business enterprises are not. But this was likewise true of the appellant club in *Moose Lodge No. 107* v. *Irvis, supra,* where we said:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U. S., at 176–177.

All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

We conclude that the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's

conduct in so doing attributable to the State for purposes of the Fourteenth Amendment. We therefore have no occasion to decide whether petitioner's claim to continued service was "property" for purposes of that Amendment, or whether "due process of law" would require a State taking similar action to accord petitioner the procedural rights for which she contends. The judgment of the Court of Appeals for the Third Circuit is therefore

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

I reach the opposite conclusion from that reached by the majority on the state-action issue.

The injury alleged took place when respondent discontinued its service to this householder without notice or opportunity to remedy or contest her alleged default, even though its tariff provided that respondent might "discontinue its service on reasonable notice." [1] May a State allow a utility—which in this case has no competitor—to exploit its monopoly in violation of its own tariff? May a utility have complete immunity under federal law when the State allows its regulatory agency to become the prisoner of the utility or, by a listless attitude of no concern, to permit the utility to use its monopoly power in a lawless way?

In *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961), we said: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the

[1] Rule 15 of the tariff provides in part:

"Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof."

State in private conduct be attributed its true significance." *Id.*, at 722. A particularized inquiry into the circumstances of each case is necessary in order to determine whether a given factual situation falls within "the variety of individual-state relationships which the [Fourteenth] Amendment was designed to embrace." *Ibid.* As our subsequent discussion in *Burton* made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility.[2] *Id.*, at 722–726. See generally *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972).

It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling.

It is said that the mere fact of respondent's monopoly status, assuming *arguendo* that that status is state conferred or state protected,[3] "is not determinative in con-

[2] The court below in *Burton* had relied heavily on a number of facts indicating minimal state involvement, but we regarded that court's analysis as unduly restricted in its scope: "While these factual considerations are indeed validly accountable aspects of the enterprise upon which the State has embarked, we cannot say that they lead inescapably to the conclusion that state action is not present. Their persuasiveness is diminished when evaluated in the context of other factors which must be acknowledged." 365 U. S., at 723.

After discussing those additional factors in greater detail, we concluded: "Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Id.*, at 724.

[3] It seems irrelevant that Metropolitan was organized prior to the inauguration of utility regulation in Pennsylvania, and that a utility

sidering whether Metropolitan's termination of service to petitioner was 'state action' for purposes of the Fourteenth Amendment." *Ante,* at 351–352. Even so, a state-protected monopoly status is highly relevant in assessing the aggregate weight of a private entity's ties to the State.[4]

It is said that the fact that respondent's services are "affected with a public interest" is not determinative. I agree that doctors, lawyers, and grocers are not transformed into state actors simply because they provide arguably essential goods and services and are regulated by the State. In the present case, however, respondent is not just one person among many; it is the only public utility furnishing electric power to the city. When power is denied a householder, the home, under modern conditions, is likely to become unlivable.

Respondent's procedures for termination of service may never have been subjected to the same degree of state scrutiny and approval, whether explicit or implicit, that was present in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451 (1952). Yet in the present case the State is heavily involved in respondent's termination procedures, getting into the approved tariff a requirement of "reasonable notice." Pennsylvania has undertaken to regulate numerous aspects of respondent's operations in some de-

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of this sort is, for all practical purposes, a natural monopoly. Whatever its origins, the existing situation presents a monopoly enterprise subject to detailed state regulation; the nature and extent of that regulation take on particular significance in light of the lack of any alternative source of service available to Metropolitan's customers.

[4] Our disclaimer of reliance upon this factor in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 462 (1952), should not be read as holding that monopoly status is wholly irrelevant; the "disclaimer" on its face simply states that monopoly status was not used as an ingredient of the finding of federal governmental involvement in that case.

tail,[5] and a "hands-off" attitude of permissiveness or neutrality toward the operations in this case is at war with the state agency's functions of supervision over respondent's conduct in the area of servicing householders, particularly where (as here) the State would presumably lend its weight and authority to facilitate the enforcement of respondent's published procedures. Cf. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970); *Reitman* v. *Mulkey*, 387 U. S. 369 (1967); *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225 (1956); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

In the aggregate, these factors depict a monopolist providing essential public services as a licensee of the State and within a framework of extensive state supervision and control. The particular regulations at issue, promulgated by the monopolist, were authorized by state law and were made enforceable by the weight and authority of the State. Moreover, the State retains the power of oversight to review and amend the regulations if the public interest so requires. Respondent's actions are sufficiently intertwined with those of the State, and its termination-of-service provisions are sufficiently buttressed by state law to warrant a holding that respondent's actions in terminating this householder's service were "state action" for the purpose of giving federal jurisdiction over respondent under 42 U. S. C. § 1983. Though the Court pays lip service to the need for assessing the totality of the State's involvement in this enterprise, *ante*, at 358, its underlying analysis is

[5] The Public Utility Commission is given extensive control over utility rates, Pa. Stat. Ann., Tit. 66, § 1141 *et seq.* (1959 and Supp. 1974–1975), and over the character and quality of utility services and facilities, §§ 1171, 1182–1183; it is given broad power to receive and investigate complaints, §§ 1391, 1398, and to regulate and supervise the activities, rules, and contractual undertakings of utilities, §§ 1171, 1341–1343, 1360.

fundamentally sequential rather than cumulative. In that perspective, what the Court does today is to make a significant departure from our previous treatment of state-action issues.

Mr. Justice Brandeis in *Liggett Co.* v. *Lee,* 288 U. S. 517 (1933), in speaking of the competition among the States to ease the opportunities and methods of incorporation, said: "The race was one not of diligence but of laxity." *Id.,* at 559 (dissenting opinion). One has only to peruse the 84-part Utility Corporations Report by the Federal Trade Commission (under the direction of its able counsel the late Robert E. Healy) to realize that state regulation of utilities has largely made state commissions prisoners of the utilities. See especially S. Doc. No. 92, 70th Cong., 1st Sess., pt. 73–A (1936); and see *id.,* pt. 72–A, p. 880. In this connection it should be noted that successful attempts by public utilities to exclude themselves from the antitrust laws have been based on the assertion that their monopoly activity constitutes "state action." See *Washington Gas Light Co.* v. *Virginia Electric & Power Co.,* 438 F. 2d 248, 250–252 (CA4 1971); *Gas Light Co. of Columbus* v. *Georgia Power Co.,* 440 F. 2d 1135, 1138–1140 (CA5 1971).

By like token the tariff prescribing termination-of-service procedures was possible only because of "state action." And it would be compatible only with administrative abdication of authority to equate "administrative silence with abandonment of administrative duty." *Washington Gas Light Co.* v. *Virginia Electric & Power Co., supra,* at 252.

Section 1983 was designed to give citizens a federal forum [6] for civil rights complaints wherever, by direct or

[6] There is no requirement for an exhaustion of state remedies before suing under § 1983 (see *Wilwording* v. *Swenson,* 404 U. S. 249 (1971)), though suggestions for statutory changes in that regard

indirect actions, a State, acting "in cahoots" with a private group or through neglect or listless oversight, allows a private group to perpetrate an injury. The theory is that in those cozy situations, local politics and the pressure of economic overlords on subservient state agencies make recovery in state courts unlikely. I realize we are in an area where we witness a great retreat from the exercise of federal jurisdiction which the Congress has conferred on federal courts. The sentiment here is that state courts are as hospitable as federal courts to federal claims. That may well be true, in some instances. But it is for the Senate and the House to make that decision. We should not tolerate an erosion of the policy Congress expressed in drafting § 1983.

Section 1983 addresses itself to grievances inflicted "under color of any statute, ordinance, [or] regulation . . . of any State . . . ." The regulatory regime imposed by Pennsylvania on respondent utility seems to fit this statute like a glove. Electrical service, being a necessity of life under the circumstances of this case, is an entitlement which under our decisions may not be taken without the requirements of procedural due process. *Fuentes* v. *Shevin,* 407 U. S. 67, 80 (1972); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Palmer* v. *Columbia Gas of Ohio, Inc.,* 479 F. 2d 153 (CA6 1973).

MR. JUSTICE BRENNAN, dissenting.

I do not think that a controversy existed between petitioner and respondent entitling petitioner to be heard in this action. Under Pennsylvania law respondent's duty under Pa. Stat. Ann., Tit. 66, § 1171 (1959), to provide service was limited by § 25 of the General Rules and Regulations, the Electric Service Tariff, on file with the

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have been made. Judd, The Expanding Jurisdiction of the Federal Courts, 60 A. B. A. J. 938, 941 (1974).

Pennsylvania Public Utility Commission, to provision of such service only to "customers," defined as "[a]ny person[s] . . . lawfully receiving service from [the] Company." Petitioner, as the Court notes, ceased being a "customer" in September 1970 when her account was terminated for nonpayment of bills. That termination was pursuant to Rule 15 of the tariff quoted by the Court in n. 1. From September 1970 to September 1971, respondent's "customer" was James Dodson; and his delinquency in payment for service during that period, not petitioner's delinquency before September 1970, was the occasion for the termination of service on October 11, 1971. An effort by petitioner at that time to have service continued if she paid $30 on account on her delinquent 1970 bill failed when respondent rejected the offer and shut off the service. In these circumstances petitioner had no basis in my view for the claimed entitlement under § 1171 quoted by the Court in n. 2, and therefore no controversy existed between petitioner and respondent which could be the subject of her action. I would therefore intimate no view upon the correctness of the holdings below whether the termination of service on October 11, 1971, constituted state action but would vacate the judgment of the Court of Appeals with direction that the case be remanded to the District Court with instruction to enter a new judgment dismissing the complaint. See *Golden* v. *Zwickler,* 394 U. S. 103, 109–110 (1969).

MR. JUSTICE MARSHALL, dissenting.

I agree with my Brother BRENNAN that this case is a very poor vehicle for resolving the difficult and important questions presented today. The confusing sequence of events leading to the challenged termination makes it unclear whether petitioner has a property right under state law to the service she was receiving from the

respondent company. Because these complexities would seriously hamper resolution of the merits of the case, I would dismiss the writ as improvidently granted. Since the Court has disposed of the case by finding no state action, however, I think it appropriate to register my dissent on that point.

I

The Metropolitan Edison Co. provides an essential public service to the people of York, Pa. It is the only entity, public or private, that is authorized to supply electric service to most of the community. As a part of its charter to the company, the State imposes extensive regulations, and it cooperates with the company in myriad ways. Additionally, the State has granted its approval to the company's mode of service termination—the very conduct that is challenged here. Taking these factors together, I have no difficulty finding state action in this case. As the Court concluded in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 725 (1961), the State has sufficiently "insinuated itself into a position of interdependence with [the company] that it must be recognized as a joint participant in the challenged activity."

Our state-action cases have repeatedly relied on several factors clearly presented by this case: a state-sanctioned monopoly; an extensive pattern of cooperation between the "private" entity and the State; and a service uniquely public in nature. Today the Court takes a major step in repudiating this line of authority and adopts a stance that is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations.

A

When the State confers a monopoly on a group or organization, this Court has held that the organization assumes many of the obligations of the State. *Railway*

Employes' Dept. v. *Hanson,* 351 U. S. 225 (1956). Even when the Court has not found state action based solely on the State's conferral of a monopoly, it has suggested that the monopoly factor weighs heavily in determining whether constitutional obligations can be imposed on formally private entities. See *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192 (1944). Indeed, in *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 177 (1972), the Court was careful to point out that the Pennsylvania liquor-licensing scheme "falls far short of conferring upon club licensees a monopoly in the dispensing of liquor in any given municipality or in the State as a whole."

The majority distinguishes this line of cases with a cryptic assertion that public utility companies are "natural monopolies." *Ante,* at 351–352, n. 8. The theory behind the distinction appears to be that since the State's purpose in regulating a natural monopoly is not to aid the company but to prevent its charging monopoly prices, the State's involvement is somehow less significant for state-action purposes. I cannot agree that so much should turn on so narrow a distinction. Initially, it is far from obvious that an electric company would not be subject to competition if the market were unimpeded by governmental restrictions. Certainly the "start-up" costs of initiating electric service are substantial, but the rewards available in a relatively inelastic market might well be sufficient under the right circumstances to attract competitive investment. Instead, the State has chosen to forbid the high profit margins that might invite private competition or increase pressure for state ownership and operation of electric power facilities.

The difficulty inherent in this kind of economic analysis counsels against excusing natural monopolies from the reach of state-action principles. To invite inquiry into whether a particular state-sanctioned monopoly might have survived without the State's express approval

grounds the analysis in hopeless speculation. Worse, this approach ignores important implications of the State's policy of utilizing private monopolies to provide electric service. Encompassed within this policy is the State's determination not to permit governmental competition with the selected private company, but to cooperate with and regulate the company in a multitude of ways to ensure that the company's service will be the functional equivalent of service provided by the State.[1]

B

The pattern of cooperation between Metropolitan Edison and the State has led to significant state involvement in virtually every phase of the company's business. The majority, however, accepts the relevance of the State's regulatory scheme only to the extent that it demonstrates state support for the challenged termination procedure. Moreover, after concluding that the State in this case had not approved the company's termination procedures, the majority suggests that even state authorization and approval would not be sufficient: the State would apparently have to *order* the termination practice in question to satisfy the majority's state-action test, see *ante,* at 357.

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[1] The State's regulatory pattern makes it amply clear that it expects utility companies to behave more like governmental entities than private corporations. The rates are fixed by the Public Utility Commission, as are the standards of service and the company's system of accounting. Pa. Stat. Ann., Tit. 66, §§ 1141, 1149, 1171, 1182, 1183, 1211 (1959). The character of the facilities is subject to state approval and continuing supervision, and the State also requires that the service "shall be reasonably continuous and without unreasonable interruptions or delay." § 1171. The certificate of public convenience confers certain eminent domain rights upon the company, § 1124 (Supp. 1974–1975), as well as the right of entry onto a customer's property to maintain and inspect its equipment. Pa. P. U. C. Electric Regulations, Rule 14D.

I disagree with the majority's position on three separate grounds. First, the suggestion that the State would have to "put its own weight on the side of the proposed practice by ordering it" seems to me to mark a sharp departure from our previous state-action cases. From the *Civil Rights Cases,* 109 U. S. 3 (1883), to *Moose Lodge, supra,* we have consistently indicated that state authorization and approval of "private" conduct would support a finding of state action.[2]

Second, I question the wisdom of giving such short shrift to the extensive interaction between the company and the State, and focusing solely on the extent of state support for the particular activity under challenge. In cases where the State's only significant involvement is through financial support or limited regulation of the private entity, it may be well to inquire whether the

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[2] In the *Civil Rights Cases,* the Court suggested that state action might be found if the conduct in question were "sanctioned in some way by the State," 109 U. S., at 17. Later cases made it clear that the State's sanction did not need to be in the form of an affirmative command. *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151 (1914); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451 (1952). In *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 725 (1961), the Court noted that by its inaction, the State had "elected to place its power, property and prestige behind the admitted discrimination," although the State did not actually order the discrimination. See *id.,* at 726–727 (STEWART, J., concurring). And in *Reitman* v. *Mulkey,* 387 U. S. 369, 381 (1967), the Court based its "state action" ruling on the fact that the California constitutional provision "was intended to authorize, and does authorize, racial discrimination in the housing market." Even in *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 176–177 (1972), the Court suggested that if the State's regulation had in any way fostered or encouraged racial discrimination, a state-action finding might have been justified. Certainly this is a less rigid standard than the Court's requirement in this case that the Public Utility Commission be shown to have ordered the challenged conduct, not merely to have approved it.

State's involvement suggests state approval of the objectionable conduct. See *Powe* v. *Miles,* 407 F. 2d 73, 81 (CA2 1968); *Grossner* v. *Trustees of Columbia University,* 287 F. Supp. 535, 547–548 (SDNY 1968). But where the State has so thoroughly insinuated itself into the operations of the enterprise, it should not be fatal if the State has not affirmatively sanctioned the particular practice in question.

Finally, it seems to me in any event that the State *has* given its approval to Metropolitan Edison's termination procedures. The State Utility Commission approved a tariff provision under which the company reserved the right to discontinue its service on reasonable notice for nonpayment of bills.

The majority attempts to make something of the fact that the tariff provision was not challenged in the most recent Utility Commission hearings, and that it had apparently not been challenged before. But the provision had been included in a tariff required to be filed and approved by the State pursuant to statute. That it was not seriously questioned before approval does not mean that it was not approved. It suggests, instead, that the Commission was satisfied to permit the company to proceed in the termination area as it had done in the past. The majority's test puts potential plaintiffs in a difficult position: if the Commission approves the tariff without argument or a hearing, the State has not sufficiently demonstrated its approval and support for the company's practices. If, on the other hand, the State challenges the tariff provision on the ground, for example, that the "reasonable notice" does not meet the standards of fairness that it expects of the utility, then the State has not put its weight behind the termination procedure employed by the company, and again there is no state action. Apparently, authorization and approval would require the

kind of hearing that was held in *Pollak*, where the Public Utilities Commission expressly stated that the bus company's installation of radios in buses and streetcars was not inconsistent with the public convenience, safety, and necessity. I am afraid that the majority has in effect restricted *Pollak* to its facts if it has not discarded it altogether.[3]

C

The fact that the Metropolitan Edison Co. supplies an essential public service that is in many communities supplied by the government weighs more heavily for me than for the majority. The Court concedes that state action might be present if the activity in question were "traditionally associated with sovereignty," but it then undercuts that point by suggesting that a particular service is not a public function if the State in question has not required that it be governmentally operated. This reads the "public function" argument too narrowly. The whole point of the "public function" cases is to look behind the State's decision to provide public services through private parties. See *Evans* v. *Newton*, 382 U. S. 296 (1966); *Terry* v. *Adams*, 345 U. S. 461 (1953); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). In my view, utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a "public function."

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[3] I cannot accept the majority's characterization of *Pollak* as not necessarily deciding the state-action question there presented. *Ante*, at 356. Whatever doubt on that score may have been created by the original opinion has long since been resolved by this Court. See *Evans* v. *Newton*, 382 U. S. 296, 301 (1966); *id.*, at 319–320 (Harlan, J., dissenting); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 119 (1973) (opinion of BURGER, C. J.); *id.*, at 133 (STEWART, J., concurring).

I agree with the majority that it requires more than a finding that a particular business is "affected with the public interest" before constitutional burdens can be imposed on that business. But when the activity in question is of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it, much more is involved than just a matter of public interest. In those cases, the State has determined that if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body. And when the State's regulatory scheme has gone that far, it seems entirely consistent to impose on the public utility the constitutional burdens normally reserved for the State.

Private parties performing functions affecting the public interest can often make a persuasive claim to be free of the constitutional requirements applicable to governmental institutions because of the value of preserving a private sector in which the opportunity for individual choice is maximized. See *Evans* v. *Newton, supra,* at 298; H. Friendly, The Dartmouth College Case and the Public-Private Penumbra (1969). Maintaining the private status of parochial schools, cited by the majority, advances just this value. In the due process area, a similar value of diversity may often be furthered by allowing various private institutions the flexibility to select procedures that fit their particular needs. See *Wahba* v. *New York University,* 492 F. 2d 96, 102 (CA2), cert. denied, *post,* p. 874. But it is hard to imagine any such interests that are furthered by protecting privately owned public utility companies from meeting the constitutional standards that would apply if the companies were state owned. The values of pluralism and diversity are

simply not relevant when the private company is the only electric company in town.

II

The majority's conclusion that there is no state action in this case is likely guided in part by its reluctance to impose on a utility company burdens that might ultimately hurt consumers more than they would help them. Elaborate hearings prior to termination might be quite expensive, and for a responsible company there might be relatively few cases in which such hearings would do any good. The solution to this problem, however, is to require only abbreviated pretermination procedures for all utility companies, not to free the "private" companies to behave however they see fit. At least on occasion, utility companies have failed to demonstrate much sensitivity to the extreme importance of the service they render, and in some cities, the percentage of error in service termination is disturbingly high. See *Palmer* v. *Columbia Gas Co. of Ohio, Inc.*, 342 F. Supp. 241, 243 (ND Ohio 1972), aff'd, 479 F. 2d 153 (CA6 1973); *Bronson* v. *Consolidated Edison Co.*, 350 F. Supp. 443, 448 (SDNY 1972).[4] Accordingly, I think that at the minimum, due process would require advance notice of a proposed termination with a clear indication that a responsible company official can readily be contacted to consider any claim of error.

III

What is perhaps most troubling about the Court's opinion is that it would appear to apply to a broad range of claimed constitutional violations by the company. The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state-

[4] In *Bronson,* Judge Tyler noted that the state utility commission had found that 16% of the complaints investigated resulted in adjustments in favor of the customer. 350 F. Supp., at 448 n. 11.

action analysis when different constitutional claims are presented. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 190–191 (1970) (BRENNAN, J., concurring and dissenting); *Grafton* v. *Brooklyn Law School*, 478 F. 2d 1137, 1142 (CA2 1973). Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve. I cannot believe that this Court would hold that the State's involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of nondiscrimination. Yet nothing in the analysis of the majority opinion suggests otherwise.

I dissent.

MISSISSIPPI *v.* ARKANSAS

DECREE

No. 48, Orig. Decided February 26, 1974—Decree entered February 26, 1974—Amended decree entered December 23, 1974

Opinion reported: 415 U. S. 289.
Decree reported: 415 U. S. 302.

AMENDED DECREE

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Luna Bar, depicted in Mississippi's Exhibits 1 and 2, constituting, respectively, Appendix A and part of Appendix B to the Special Master's report, and appended hereto and hereby made a part of this decree, came into existence by accretion to Carter Point and is, and was, a part of the State of Mississippi.

2. The boundary line between the State of Mississippi and the State of Arkansas in the areas between the upstream and the downstream ends of Tarpley Cut-off is as follows:

> "That part of the abandoned bed of the Mississippi River between the upstream end of the Tarpley Cut-off and the downstream end of Tarpley Cut-off as defined and identified in Mississippi's said Exhibit 2, being a plat prepared by Austin B. Smith. The above described State boundary line being more particularly described as follows, to-wit:
> "Beginning at the head of Tarpley Cut-off Channel at Point P–36 as shown on said Smith's Mississippi Exhibit P–2 at Latitude 33°26′24″ and Longitude 91°06′46″;
> "thence west to Point P–1, Lat. 33°26′25″ and Long. 91°07′30″;

"thence southwesterly to Point P–2, Lat. 33°26′0.0″ and Long. 91°07′56″;
"thence southwesterly to Point P–3, Lat. 33°25′47″ and Long. 91°08′17″;
"thence southwesterly to Point P–4, Lat. 33°25′40″ and Long. 91°08′42″;
"thence southwesterly to Point P–5, Lat. 33°25′36″ and Long. 91°09′0.0″;
"thence southwesterly to Point P–6, Lat. 33°25′30″ and Long. 91°09′29″;
"thence southwesterly to Point P–7, Lat. 33°25′25″ and Long. 91°10′0.0″;
"thence southwesterly to Point P–8, Lat. 33°25′21″ and Long. 91°10′28″;
"thence southwesterly to Point P–9, Lat. 33°25′16″ and Long. 91°11′0.0″;
"thence southwesterly to Point P–10, Lat. 33°25′10″ and Long. 91°11′29″;
"thence southwesterly to Point P–11, Lat. 33°25′06″ and Long. 91°11′46″;
"thence southwesterly to Point P–12, Lat. 33°25′00″ and Long. 91°12′04″;
"thence southwesterly to Point P–13, Lat. 33°24′52″ and Long. 91°12′17″;
"thence southwesterly to Point P–14, Lat. 33°24′46″ and Long. 91°12′23″;
"thence southward to Point P–15, Lat. 33°24′37″ and Long. 91°12′28″;
"thence southward to Point P–16, Lat. 33°24′23″ and Long. 91°12′32″;
"thence southward to Point P–17, Lat. 33°24′11.5″ and Long. 91°12′30″;
"thence southeasterly to Point P–18, Lat. 33°24′0.0″ and Long. 91°12′21″;
"thence southeasterly to Point P–19, Lat. 33°23′44.5″ and Long. 91°12′0.0″;

"thence southeasterly to Point P–20, Lat. 33°23′37″ and Long. 91°11′49.5″;
"thence southeasterly to Point P–21, Lat. 33°23′06″ and Long. 91°11′0.0″;
"thence southeasterly to Point P–22, Lat. 33°23′0.0″ and Long. 91°10′48″;
"thence southeasterly to Point P–23, Lat. 33°22′54″ and Long. 91°10′34″;
"thence southeasterly to Point P–24, Lat. 33°22′49″ and Long. 91°10′18″;
"thence eastward to Point P–25, Lat. 33°22′48″ and Long. 91°10′10″;
"thence eastward to Point P–26, Lat. 33°22′47″ and Long. 91°10′0.0″;
"thence eastward to Point P–27, Lat. 33°22′43.5″ and Long. 91°09′14.5″;
"thence eastward to Point P–28, Lat. 33°22′44″ and Long. 91°09′0.0″;
"thence northeasterly to Point P–29, Lat. 33°22′46.5″ and Long. 91°08′45″;
"thence northeasterly to Point P–30, Lat. 33°22′53″ and Long. 91°08′24″;
"thence northeasterly to Point P–31, Lat. 33°23′0.0″ and Long. 91°08′04.5″;
"thence northeasterly to Point P–32, Lat. 33°23′01.5″ and Long. 91°08′0.0″;
"thence northeasterly to Point P–33, Lat. 33°23′09.5″ and Long. 91°07′40″;
"thence northeasterly to Point P–34, Lat. 33°23′13″ and Long. 91°07′31″;
"thence northeasterly to Point P–35, Lat. 33°23′25″ and Long. 91°06′39″ at the foot of Tarpley Cut-off Channel";

3. The costs of this suit, including the expenses of the Special Master and the printing of his report, have been

paid out of the fund made up of equal contributions by the State of Mississippi and the State of Arkansas and said fund has been sufficient to defray all said expenses to the date of the issuance of the report. Any costs and expenses that may be incurred beyond the amount so contributed by the respective litigants shall be borne by the State of Arkansas.

FUSARI, COMMISSIONER OF LABOR *v.* STEINBERG ET AL.

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

No. 73–848. Argued October 15–16, 1974—Decided January 14, 1975

The judgment of a three-judge District Court holding that the Connecticut "seated interview" procedures for assessing continuing eligibility for unemployment compensation benefits violated due process is vacated, and the case is remanded for reconsideration in light of intervening changes in Connecticut law. Pp. 385–389.

364 F. Supp. 922, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post,* p. 390.

Donald E. Wasik, Assistant Attorney General of Connecticut, argued the cause for appellant. With him on the brief was *Robert K. Killian,* Attorney General.

John M. Creane, by appointment of the Court, *post,* p. 990, argued the cause for appellees. With him on the brief were *Raymond J. Kelly* and *John A. Dziamba.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case comes to us on appeal from a three-judge District Court determination that the Connecticut "seated interview" procedures for assessing continuing

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**Dennis R. Yeager, E. Richard Larson, Stephen M. Randels, John M. Levy, Jerry L. Covington, Marttie Louis Thompson, Stephen E. Gottlieb, C. Christopher Brown,* and *C. Lyonel Jones* filed a brief for the National Employment Law Project, Inc., et al. as *amici curiae* urging affirmance.

Stephen P. Berzon, Stefan M. Rosenzweig, J. Albert Woll, and *Bernard Kleiman* filed a brief for Ellenmae Crow et al. as *amici curiae.*

eligibility for unemployment compensation benefits violate the Due Process Clause of the Fourteenth Amendment. 364 F. Supp. 922 (Conn. 1973). Our independent examination of Connecticut law reveals that the State significantly revised its unemployment compensation system following the District Court's decision. Some of the amendments are designed to ameliorate problems that the court identified. In these circumstances, we think it inappropriate to decide the issues tendered by the parties. We therefore vacate the decision of the District Court and remand for reconsideration in light of the intervening changes in Connecticut law.

I

In Connecticut, unemployment compensation benefits are paid from a trust fund maintained by employer contributions. Appellant Fusari, State Commissioner of Labor and Administrator of the Unemployment Compensation Act, administers the fund. Under the Connecticut statute, a claimant first must file an initiating claim and establish his general entitlement to receive state unemployment compensation benefits. Conn. Gen. Stat. Rev. §§ 31–230 and 31–235 (1973). Thereafter, the claimant must report to the local unemployment compensation office biweekly and demonstrate continued eligibility for benefits for the preceding two-week period. The claimant must submit forms swearing to his availability for work and to his reasonable efforts to obtain employment during the period in question. He also must submit a form listing the persons to whom he has applied for employment during the preceding two weeks.

Upon receipt of the forms, the paying official may make routine inquiries. If no serious question of eligibility arises, immediate payment is made. If, however, the forms or responses to questions raise suspicion of possible disqualification, the claimant is directed to a

"seated interview" with a factfinding examiner for a more thorough inquiry into the possible factors that might render him ineligible for benefits. Although the claimant bears the burden of establishing eligibility, *Northrup* v. *Administrator,* 148 Conn. 475, 480, 172 A. 2d 390, 393 (1961); *Waskiewicz* v. *Egan,* 15 Conn. Supp. 286, 287 (1947), doubtful cases are to be decided in his favor. Conn. Gen. Stat. Rev. § 31–274 (c).

An examiner's favorable determination of eligibility results in immediate payment of benefits. If, however, the examiner concludes that the claimant is ineligible, no payment is made. Within a few days the claimant receives a written statement indicating the reasons for disqualification and notifying him of the right to appeal. Benefits for the period in question normally are withheld pending resolution of the administrative appeal.[1] The State's policy, sometimes honored in the breach, is that pendency of an appeal does not affect the claimant's eligibility to receive benefits for subsequent periods.[2]

This appeal arises from a class action challenging the legality of the procedures used for determining continued

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[1] Prior to the 1974 amendments, the Administrator could authorize payment of benefits during pendency of an administrative appeal if "good cause" was shown. Conn. Gen. Stat. Rev. § 31–241. The record provides no indication of the frequency of such authorizations. One of the 1974 amendments requires that benefits be paid in accordance with the Administrator's determination, regardless of the filing of an appeal. The amendment removes the Administrator's specific authority to award benefits during appeal for "good cause shown." See Conn. Pub. Act 74–339, § 14 (1974). We cannot determine whether this amendment was intended to deprive the Administrator of the power to award benefits for cause following an adverse ruling of eligibility.

[2] The stipulation of facts indicates only that some claimants subsequently were denied benefits because they had appeals pending. App. 39a. It does not reveal the frequency of this occurrence.

eligibility for benefits.[3] Appellees asserted that Connecticut violated the federal statutory requirement that state procedures be designed reasonably to assure the payment of benefits "when due," 42 U. S. C. § 503,[4] and

[3] Each of the named plaintiffs had filed a valid initiating claim and received benefits for a period of time. Each subsequently was denied benefits following a seated interview in which the examiner concluded that he or she had made insufficient efforts to obtain employment. The District Court defined the class to be all present and future unemployment benefit recipients whose benefits were or would be subject to termination without a prior hearing, excepting those persons whose benefits terminate due to exhaustion of entitlement. 364 F. Supp. 922, 927–928.

[4] The "when due" requirement is one of a number of conditions imposed on state receipt of federal assistance. The Federal Government plays a cooperative role in the implementation of state unemployment compensation programs, bearing the costs of administration of those programs that satisfy federal requirements. On determining that state laws and practices satisfy the standards of § 303 of the Social Security Act, 49 Stat. 626, as amended, 42 U. S. C. § 503, the Secretary of Labor must certify that the State should receive the amount that he considers necessary for the proper and efficient administration of such law during the fiscal year in which payment is made. § 502 (a).

In addition to imposing restrictions on the fiscal administration of state unemployment compensation funds, § 303 establishes specific procedural safeguards for benefit claimants. 42 U. S. C. §§ 503 (a) (1) and (a)(3). It provides:

"(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

also that the Connecticut seated-interview procedures were constitutionally defective in failing to provide a pretermination hearing satisfying the standards of *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). At appellees' request, a three-judge court was convened to hear the matter.[5]

The District Court's findings of fact provide some indication of the actual operation of the Connecticut system. The findings reveal that the reversal rate of appealed denials of benefits was significant, ranging from 19.4% to 26.1% during the periods surveyed.[6] The District Court also found that a significant delay was required for obtaining administrative review of the examiner's determination: 89.9% of the 461 intrastate appeals[7] filed in

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reasonably calculated to insure full payment of unemployment compensation when due;

. . . . . .

"(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." (Emphasis added.)

[5] The action was brought pursuant to 42 U. S. C. § 1983 and 28 U. S. C. §§ 2201 and 2202. Jurisdiction was alleged under 28 U. S. C. § 1343. This Court's jurisdiction rests on 28 U. S. C. § 1253.

[6] During the period July 1971 to June 1972, there were 6,534 appealed denials, of which 26.1% were reversed. The reversal rate for July to October 1972 remained at approximately 26%, but fell to 19.4% during the three-month period from January to March 1973. 364 F. Supp., at 936–937, n. 28. The director of the Waterbury office testified that the reversal rate had fallen to 18.8% by May 1973. See App. 215a.

A more complete assessment of the operation of the Connecticut system might be obtained by attempting to determine the overall error rate for all denials of benefits. The District Court made no finding on this point.

[7] The State of Connecticut has entered into reciprocal agreements with other States, enabling claimants who have moved into Connecticut to rely on wage credits earned elsewhere. Appeals of denials of interstate claims often require transfer of information

the month of December 1972 required more than 100 days to resolve. The average delay during that period exceeded 126 days. Moreover, the court determined that the December 1972 figures probably were typical of the delays that might be encountered in other time periods.[8]

The District Court expressed serious reservations whether the Connecticut system satisfied the "when due" requirement of federal law. It felt foreclosed from so ruling on this statutory issue, however, by this Court's summary affirmance in *Torres* v. *New York State Dept. of Labor*, 405 U. S. 949 (1972). The District Court concluded that *Torres* was distinguishable on the constitutional issue, and held that the Connecticut procedures violated due process "because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time." 364 F. Supp., at 937–938. After suggesting a number of alterations of the state system that might raise its operation to a constitutionally adequate level, the court enjoined appellant from denying unemployment benefits under then-existing procedures without first providing a constitutionally sufficient prior hearing. *Id.*, at 938. At appellant's request, the District Court stayed its injunction pending resolution of an appeal to this

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from the reciprocating State and thus consume a greater period of time.

[8] In 1973, the Connecticut administrative appellate procedure was the slowest in the Nation. Statistics reveal that during that calendar year the Commission decided only 5.3% of the appeals within 30 days. During that same period the Commission decided only 15.5% of appeals within 45 days and resolved appeals within 75 days of filing in only 31.4% of the cases. See Unemployment Insurance Statistics, Table 17B—Appeals Decisions Under State Programs, Time Lapse Between Date of Filing Appeal and Date of Decisions, January-December 1973. U. S. Dept. of Labor, Manpower Administration (March-April 1974).

Court. We subsequently noted probable jurisdiction. 415 U. S. 912 (1974).

II

Following our notation of probable jurisdiction, the Connecticut Legislature enacted major revisions of the procedures by which unemployment compensation claims are determined. Conn. Pub. Act 74–339 (1974).[9] Section 31–241, one of the sections under consideration in this appeal, was amended to require that examiners only consider evidence presented in person or in writing at a hearing provided for that purpose.[10] *Id.*, § 14, amending Conn. Gen. Stat. Rev. § 31–241. The legislature also completely altered the structure of the Connecticut system of administrative review, substituting a two-tiered Employment Security Appeals Division for the Unemployment Compensation Commission. Conn. Pub. Act 74–339, *supra*, §§ 1–12.

The amended statute provides for the creation of a staff of referees to review the examiners' decisions *de novo*. § 15. Referees are to be appointed by an Employment Security Board of Review, § 9,[11] the three mem-

[9] The record available to us suggests that the Department of Labor was instrumental in encouraging reform. See Conn. H. Proc. 5132, 5151 (May 2, 1974). That record is silent as to whether the District Court's decision or this Court's notation of jurisdiction provided additional encouragement.

[10] As noted by the District Court, factfinding examiners often telephoned employers to obtain evidence relating to the validity of benefit claims. 364 F. Supp., at 925. The amendment appears designed to eliminate that practice.

[11] Under Connecticut's prior system, the Commissioners who decided appeals were appointed by the Governor. See Conn. Gen. Stat. Rev. § 31–238. The legislative debates indicate that they held other employment and served only on a part-time basis. See Conn. S. Proc. 2630; Conn. H. Proc. 5152. In revising the Connecticut system, the legislators expressed a desire to insulate the referee system from the influences of partisan politics. Conn. S. Proc. 2629; Conn. H. Proc. 5153–5154. The revised Connecticut sys-

bers of which are appointed by the Governor. § 3. The statute further provides that the referee section "shall consist of such referees as the board deems necessary for the prompt processing of appeals hearings and decisions and for the performance of the duties imposed by this act." § 9. Appeals from the referees' decisions are to be taken to the Employment Security Board of Review and thereafter to the state courts. §§ 15 and 21, amending Conn. Gen. Stat. Rev. §§ 31–242 and 31–248, and new § 25 added by the 1974 amendments.

The legislative history indicates that the Connecticut Legislature anticipated that these amendments would have a significant impact on the speed and fairness of the resolution of contested claims. Legislators repeatedly characterized the amendments as a "true reform" of important consequence. See Conn. S. Proc. 2578, 2624, 2629 (May 7, 1974). Particular emphasis was placed on the need to improve the State's treatment of administrative appeals. It was recognized that Connecticut's torpid system of administrative appeal was markedly inferior to those used in other States. *Id.*, at 2578, 2621; Conn. H. Proc. 5133–5135, 5152 (May 2, 1974). Revision of the appellate system was designed to remedy that problem. In the words of one member of the House: "The bill . . . sets up a unique system which is designed to cut down that [appellate] backlog." *Id.*, at 5152.

III

The amendments to the Connecticut statute, which became effective on July 1, 1974, Conn. Pub. Act 74–339, § 36 (1974), may alter significantly the character of the

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tem provides that referees must be members of the State's civil service, Conn. Pub. Act 74–339, § 9 (1974), and the history of the amendments clearly indicates that the referees' commitment to the processing of appeals will be full time. Conn. S. Proc. 2628, 2630; Conn. H. Proc. 5142, 5147.

system considered by the District Court. Although the precise significance of the amendment to § 31–241 is unclear, the court's concern for the absence of a right of confrontation, 364 F. Supp., at 935, may be diminished by the requirement that examiners base their decisions only on evidence submitted in person or in writing. Perhaps of greater importance is the revision of the State's system of administrative appeal. Both in distinguishing *Torres* and in determining that the Connecticut system failed to satisfy the minimal requirements of procedural due process, the District Court placed substantial reliance on the length of time required to obtain administrative review of the examiner's decision. The amendments to Connecticut law are designed to remedy this problem.

This Court must review the District Court's judgment in light of presently existing Connecticut law, not the law in effect at the time that judgment was rendered.[12] *Diffenderfer* v. *Central Baptist Church,* 404 U. S. 412, 414 (1972); *Hall* v. *Beals,* 396 U. S. 45, 48 (1969); *United States* v. *Alabama,* 362 U. S. 602, 604 (1960). We are unable meaningfully to assess the issues in this appeal on the present record.

Both the statutory and constitutional questions are significantly affected by the length of the period of deprivation of benefits.[13] The basic thrust of the

[12] Our determination of the existence and significance of Connecticut's amendments to its unemployment compensation act was largely unassisted by counsel. Indeed, initial examination of the briefs and consideration of oral argument led us to believe that the system considered by the District Court remained substantially intact. We find it difficult to understand the failure of counsel fully to inform the Court of these amendments to Connecticut law.

[13] The District Court ruled that our summary affirmance in *Torres* v. *New York State Department of Labor,* 405 U. S. 949 (1972), precluded any determination that the Connecticut system failed to satisfy the federal "when due" requirement. Appellees did not cross-appeal to question that ruling, and appellant maintains

statutory "when due" requirement [14] is timeliness. See *California Human Resources Dept.* v. *Java,* 402 U. S. 121, 130–133 (1971). While we can determine on this record that Connecticut's previous system often failed to deliver benefits in a timely manner,[15] we can only specu-

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that the issue is not before the Court. We observed in *United States* v. *Raines,* 362 U. S. 17, 27 n. 7 (1960), that an appeal under 28 U. S. C. § 1252 brings the "whole case" before the Court. Thus, issues that might provide alternative grounds for support of the District Court judgment can be considered by this Court even though not specifically presented by cross-appeal. The same principle governs appeals brought under 28 U. S. C. § 1253. We therefore have jurisdiction to decide the point, and we would feel compelled to re-examine a statutory claim that may be dispositive before considering a difficult constitutional issue. See *Rosado* v. *Wyman,* 397 U. S. 397, 402 (1970); *Harmon* v. *Brucker,* 355 U. S. 579, 581 (1958).

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

[15] The District Court interpreted our summary affirmance in *Torres* to indicate that benefits are not "due" under § 303 until administratively deemed payable. 364 F. Supp., at 930. While this is a plausible reading of the evolution and affirmance of *Torres,* it is not one that we can endorse. Such a definition of the "when due" requirement of federal law would leave little vitality to *Java* and would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits. See 402 U. S., at 130–133. By reading our summary affirmance in *Torres* at its broadest, the District Court heightened the tension between that judgment and our more considered disposition of *Java.* A narrower interpretation of *Torres* would have been appropriate.

Any statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility inevitably will generate fact-specific applications. In this instance, many of the factual distinctions that the District Court relied on to distinguish *Torres* on the constitutional issue apply equally to the "when due" question. For example, the delay in resolving administrative appeals is considerably greater in Connecticut than in the New York system, where administrative appeals were resolved in an average of 45 days. See *Torres* v. *New York State Dept. of Labor,* 321 F. Supp. 432, 439 (SDNY 1971). And, as the District Court observed, the *Torres* court apparently

late how the new system might operate. And, assuming that the federal statutory requirements were satisfied, it would prove equally difficult to assess the question of procedural due process.

Identification of the precise dictates of due process requires consideration of both the governmental function involved and the private interests affected by official action. *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961); *Goldberg* v. *Kelly,* 397 U. S., at 263–266. As the Court recognized in *Boddie* v. *Connecticut,* 401 U. S. 371, 378 (1971): "The formality and procedural requisites for [a due process] hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." In this context, the possible length of wrongful deprivation of unemployment benefits is an important factor in assessing the impact of official action on the private interests. Cf. *Arnett* v. *Kennedy,* 416 U. S. 134, 168–169 (1974) (opinion of POWELL, J.); *id.,* at 190, 192 (WHITE, J., concurring in part and dissenting in part). Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process. The record, of course, provides no indication of the promptness and adequacy of review under the new system. We are unable, therefore, to decide this appeal on its merits.

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did not consider the probable accuracy of the challenged procedure in determining whether it adequately assured delivery of benefits "when due." See 364 F. Supp., at 936. We do not undertake to identify the combination of factors that justify the *Torres* decision. Having once decided the case summarily, we decline to do so again. We only indicate that the District Court should not have felt precluded from undertaking a more precise analysis of the statutory issue than it felt empowered to do in this case.

The judgment of the District Court is vacated, and the case remanded for reconsideration in light of the intervening changes in Connecticut law.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court; however, it may be useful to mention two points which bear further discussion. First, as the Court notes, *ante,* at 387 n. 12, all parties failed to inform us that after the District Court entered judgment the Connecticut Legislature significantly changed its unemployment compensation system. I agree with the Court that this failure is "difficult to understand." *Ibid.* It is disconcerting to this Court to learn of relevant and important developments in a case after the entire Court has come to the Bench to hear arguments.

Even at oral argument we were not informed of the changes in state law although both parties filed their briefs after the new statute was passed. The Connecticut Legislature appears to have changed the system at least in part to expedite administrative appeals and thereby treat claimants more fairly, see *ante,* at 380, 386, thus meeting in part, at least, the basis of the attack on the system. All parties had an obligation to inform the Court that the system which the District Court had enjoined had been changed; however, only a cryptic reference was made to the change of law. The appellees' brief is 122 pages long and notes the change once, at the end of a footnote. Brief for Appellees 65 n. 52. At that point appellees are contending that the long delay between the seated interview and administrative review of a decision to withhold benefits aggravates the defects which they contend exist in the seated interview itself. There appellees quote *Boddie* v. *Connecticut,* 401 U. S

371, 378 (1971), where the Court said: "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the *nature of the subsequent proceedings.*" (Brief for Appellees 64; emphasis appellees'.) Given the fact that the changes in the procedures may well have an effect on "subsequent proceedings," *ante,* at 386, the Court should have been explicitly advised that changes had occurred. The only reference to changes in the law actually gives the impression that their effect is negligible.

This Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of any development which may conceivably affect an outcome.

Second, although I agree wholeheartedly with the Court's reasoned discussion of the tension between the summary affirmance in *Torres* v. *New York State Dept. of Labor,* 405 U. S. 949 (1972), aff'g 333 F. Supp. 341 (SDNY 1971), and the Court's opinion in *California Human Resources Dept.* v. *Java,* 402 U. S. 121 (1971), *ante,* at 388–389, n. 15, we might well go beyond that and make explicit what is implicit in some prior holdings. *E. g., Gibson* v. *Berryhill,* 411 U. S. 564, 576 (1973); *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974). When we summarily affirm, without opinion, the judgment of a three-judge district court we affirm the judgment but not necessarily the reasoning by which it was reached.* An

*Some are quick to use the district court opinion to define this Court's judgment. See Note, The Supreme Court, 1953 Term, 68 Harv. L. Rev. 96, 102 (1955); Note, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, 52 B. U. L. Rev. 373, 409 (1972). Another common response to summary affirmances of three-judge-court judgments is confusion as to what they actually do mean. See Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 74 n. 365 (1964); Shanks, Book Review, 84

unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established. *E. g., Edelman* v. *Jordan, supra,* at 671; *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 343–344 (1969) (Harlan, J., concurring); *id.,* at 350 (Black, J., dissenting); *Reynolds* v. *Sims,* 377 U. S. 533, 614 (1964) (Harlan, J., dissenting).

Harv. L. Rev. 256, 257–258, n. 17 (1970); Note, Impact of the Supreme Court's Summary Disposition Practice on its Appeals Jurisdiction, 27 Rutgers L. Rev. 952, 962 (1974); Note, 52 B. U. L. Rev., *supra,* at 407–415.

Syllabus

SOSNA *v.* IOWA ET AL.

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

No. 73–762. Argued October 17, 1974—Decided January 14, 1975

Appellant's petition for divorce was dismissed by an Iowa trial court for lack of jurisdiction because she failed to meet the Iowa statutory requirement that a petitioner in a divorce action be a resident of the State for one year preceding the filing of the petition. Appellant then brought a class action under Fed. Rule Civ. Proc. 23 in the Federal District Court against appellees State and state trial judge, asserting that Iowa's durational residency requirement violated the Federal Constitution on equal protection and due process grounds and seeking injunctive and declaratory relief. After certifying that appellant represented the class of persons residing in Iowa for less than a year who desired to initiate divorce actions, the three-judge District Court upheld the constitutionality of the statute. *Held:*

1. The fact that appellant had long since satisfied the durational residency requirement by the time the case reached this Court does not moot the case, since the controversy remains very much alive for the class of unnamed persons whom she represents and who, upon certification of the class action, acquired a legal status separate from her asserted interest. *Dunn* v. *Blumstein,* 405 U. S. 330. Pp. 397–403.

(a) Where, as here, the issue sought to be litigated escapes full appellate review at the behest of any single challenger, the case does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs. P. 401.

(b) At the time the class action was certified, appellant demonstrated a "real and immediate" threat of injury and belonged to the class that she sought to represent. Pp. 402–403.

(c) The test of Rule 23 (a) that the named representative in a class action "fairly and adequately protect the interests of the class," is met here, where it is unlikely that segments of the class represented would have interests conflicting with appellant's, and the interests of the class have been competently urged at each level of the proceeding. P. 403.

2. The Iowa durational residency requirement for divorce is not unconstitutional. Pp. 404–410.

(a) Such requirement is not unconstitutional on the alleged ground that it establishes two classes of persons and discriminates against those who have recently exercised their right to travel to Iowa. Appellant was not irretrievably foreclosed from obtaining some part of what she sought, and such requirement may reasonably be justified on grounds of the State's interest in requiring those seeking a divorce from its courts to be genuinely attached to the State, as well as of the State's desire to insulate its divorce decrees from the likelihood of successful collateral attack. *Shapiro* v. *Thompson,* 394 U. S. 618; *Dunn, supra; Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, distinguished. Pp. 406–409.

(b) Nor does the durational residency requirement violate the Due Process Clause of the Fourteenth Amendment on the asserted ground that it denies a litigant the opportunity to make an individualized showing of bona fide residence and thus bars access to the divorce courts. Even if appellant could make an individualized showing of physical presence plus the intent to remain, she would not be entitled to a divorce, for Iowa requires not merely "domicile" in that sense, but residence in the State for one year. See *Vlandis* v. *Kline,* 412 U. S. 441, 452. Moreover, no total deprivation of access to divorce courts but only delay in such access is involved here. *Boddie* v. *Connecticut,* 401 U. S. 371, distinguished. Pp. 409–410.

360 F. Supp. 1182, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, *post,* p. 410. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 418.

James H. Reynolds argued the cause for appellant. With him on the briefs was *Paul E. Kempter.*

Elizabeth A. Nolan, Assistant Attorney General of Iowa, argued the cause for appellees. With her on the brief were *Richard C. Turner,* Attorney General, and *George W. Murray,* Special Assistant Attorney General.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant Carol Sosna married Michael Sosna on September 5, 1964, in Michigan. They lived together in New York between October 1967 and August 1971, after which date they separated but continued to live in New York. In August 1972, appellant moved to Iowa with her three children, and the following month she petitioned the District Court of Jackson County, Iowa, for a dissolution of her marriage. Michael Sosna, who had been personally served with notice of the action when he came to Iowa to visit his children, made a special appearance to contest the jurisdiction of the Iowa court. The Iowa court dismissed the petition for lack of jurisdiction, finding that Michael Sosna was not a resident of Iowa and appellant had not been a resident of the State of Iowa for one year preceding the filing of her petition. In so doing the Iowa court applied the provisions of Iowa Code § 598.6 (1973) requiring that the petitioner in such an action be "for the last year a resident of the state." [1]

Instead of appealing this ruling to the Iowa appellate courts, appellant filed a complaint in the United States District Court for the Northern District of Iowa asserting that Iowa's durational residency requirement for in-

[1] Iowa Code § 598.6 (1973) provides:

"Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage, in addition to setting forth the information required by section 598.5, must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only."

Iowa Code § 598.9 (1973) requires dismissal of the action "[i]f the averments as to residence are not fully proved."

voking its divorce jurisdiction violated the United States Constitution. She sought both injunctive and declaratory relief against the appellees in this case, one of which is the State of Iowa,[2] and the other of whom is the judge of the District Court of Jackson County, Iowa, who had previously dismissed her petition.

A three-judge court, convened pursuant to 28 U. S. C. §§ 2281, 2284, held that the Iowa durational residency requirement was constitutional. 360 F. Supp. 1182 (1973). We noted probable jurisdiction, 415 U. S. 911 (1974), and directed the parties to discuss "whether the United States District Court should have proceeded to the merits of the constitutional issue presented in light of *Younger* v. *Harris,* 401 U. S. 37 (1971) and related cases." For reasons stated in this opinion, we decide that this case is not moot, and hold that the Iowa durational residency requirement for divorce does not offend the United States Constitution.[3]

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[2] In their answer to the complaint, appellees asserted that the court lacked jurisdiction over the State by virtue of the Eleventh Amendment, but thereafter abandoned this defense to the action. While the failure of the State to raise the defense of sovereign immunity in the District Court would not have barred Iowa from raising that issue in this Court, *Edelman* v. *Jordan,* 415 U. S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U. S. 459 (1945), no such defense has been advanced in this Court. The failure of Iowa to raise the issue has likewise left us without any guidance from the parties' briefs as to the circumstances under which Iowa law permits waiver of the defense of sovereign immunity by attorneys representing the State. Our own examination of Iowa precedents discloses, however, that the Iowa Supreme Court has held that the State consents to suit and waives any defense of sovereign immunity by entering a voluntary appearance and defending a suit on the merits. *McKeown* v. *Brown,* 167 Iowa 489, 499, 149 N. W. 593, 597 (1914). The law of Iowa on the point therefore appears to be different from the law of Indiana treated in *Ford, supra.*

[3] Our request that the parties address themselves to *Younger* v. *Harris,* 401 U. S. 37 (1971), and related cases, indicated our concern

I

Appellant sought certification of her suit as a class action pursuant to Fed. Rule Civ. Proc. 23 so that she might represent the "class of those residents of the State of Iowa who have resided therein for a period of less than one year and who desire to initiate actions for dissolution of marriage or legal separation, and who are barred from doing so by the one-year durational residency requirement embodied in Sections 598.6 and 598.9 of the Code of Iowa." [4] The parties stipulated that there were in the State of Iowa "numerous people in the same situation as plaintiff," that joinder of those persons was impracticable, that appellant's claims were representative of the class, and that she would fairly and adequately protect the interests of the class. See Rule 23 (a). This stipulation was approved by the District

as to whether either this Court or the District Court should reach the merits of the constitutional issue presented by the parties in light of appellant Sosna's failure to appeal the adverse ruling of the State District Court through the state appellate network. In response to our request, both parties urged that we reach the merits of appellant's constitutional attack on Iowa's durational residency requirement.

In this posture of the case, and in the absence of a disagreement between the parties, we have no occasion to consider whether any consequences adverse to appellant resulted from her first obtaining an adjudication of her claim on the merits in the Iowa state court and only then commencing this action in the United States District Court.

[4] Since jurisdiction was predicated on 28 U. S. C. § 1343 (3), this case presents no problem of aggregation of claims in an attempt to satisfy the requisite amount in controversy of 28 U. S. C. § 1331 (a). Cf. *Zahn* v. *International Paper Co.,* 414 U. S. 291 (1973); *Snyder* v. *Harris,* 394 U. S. 332 (1969). Although the complaint did not so specify, the absence of a claim for monetary relief and the nature of the claim asserted disclose that a Rule 23 (b) (2) class action was contemplated. Therefore, the problems associated with a Rule 23 (b) (3) class action, which were considered by this Court last Term in *Eisen* v. *Carlisle & Jacquelin,* 417 U. S. 156 (1974), are not present in this case.

Court in a pretrial order.[5] After the submission of briefs and proposed findings of fact and conclusions of law by the parties, the three-judge court by a divided vote upheld the constitutionality of the statute.

While the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual "case or controversy," *Richardson* v. *Ramirez,* 418 U. S. 24 (1974), and on the record before us we feel obliged to address the question of mootness before reaching the merits of appellant's claim. At the time the judgment of the three-judge court was handed down, appellant had not yet resided in Iowa for one year, and that court was clearly presented with a case or controversy in every sense contemplated by Art. III of the Constitution.[6] By the time her case reached this Court, however, appellant had long since satisfied the Iowa durational residency requirement, and Iowa Code § 598.6 (1973) no longer stood as a barrier to her attempts to secure dissolution of her marriage in the Iowa courts.[7] This is not an unusual development in a case challenging the validity of a durational residency requirement, for in many cases appellate review

[5] The defendant state-court judge neither raised any claims of immunity as a defense to appellant's action, nor questioned the propriety of the appellant's effort to represent a statewide class against a judge like him who apparently sat in a single county or judicial district within the State.

[6] The District Court was aware of the possibility of mootness, 360 F. Supp. 1182, 1183 n. 5 (ND Iowa 1973), and expressed the view that even the "termination of plaintiff's deferral period . . . would not render this case moot since the cause before us is a class action and the court is confronted with the reasonable likelihood that the problem will occur to members of the class of which plaintiff is currently a member."

[7] Counsel for appellant disclosed at oral argument that appellant has in fact obtained a divorce in New York. Tr. of Oral Arg. 22.

will not be completed until after the plaintiff has satisfied the residency requirement about which complaint was originally made.

If appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a divorce elsewhere would make this case moot and require dismissal. *Alton* v. *Alton,* 207 F. 2d 667 (CA3 1953), dismissed as moot, 347 U. S. 610 (1954); *SEC* v. *Medical Committee for Human Rights,* 404 U. S. 403 (1972). But appellant brought this suit as a class action and sought to litigate the constitutionality of the durational residency requirement in a representative capacity. When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant.[8] We are of the view that this factor significantly affects the mootness determination.

In *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498 (1911), where a challenged ICC order had expired, and in *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), where petitioners sought to be certified as candidates in an election that had already been held, the Court expressed its concern that the defendants in those cases could be expected again to act contrary to the rights asserted by the particular named plaintiffs involved, and in each case the controversy was held not to be moot because the questions presented were "capable of repetition, yet

[8] The certification of a suit as a class action has important consequences for the unnamed members of the class. If the suit proceeds to judgment on the merits, it is contemplated that the decision will bind all persons who have been found at the time of certification to be members of the class. Rule 23 (c)(3); Advisory Committee Note, 28 U. S. C. App., pp. 7765–7766. Once the suit is certified as a class action, it may not be settled or dismissed without the approval of the court. Rule 23 (e).

evading review." That situation is not presented in appellant's case, for the durational residency requirement enforced by Iowa does not at this time bar her from the Iowa courts. Unless we were to speculate that she may move from Iowa, only to return and later seek a divorce within one year from her return, the concerns that prompted this Court's holdings in *Southern Pacific* and *Moore* do not govern appellant's situation. But even though appellees in this proceeding might not again enforce the Iowa durational residency requirement against appellant, it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified. In this sense the case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion.

This problem was present in *Dunn* v. *Blumstein,* 405 U. S. 330 (1972), and was there implicitly resolved in favor of the representative of the class. Respondent Blumstein brought a class action challenging the Tennessee law which barred persons from registering to vote unless, at the time of the next election, they would have resided in the State for a year and in a particular county for three months. By the time the District Court opinion was filed, Blumstein had resided in the county for the requisite three months, and the State contended that his challenge to the county requirement was moot. The District Court rejected this argument, *Blumstein* v. *Ellington,* 337 F. Supp. 323, 324–326 (MD Tenn. 1970). Although the State did not raise a mootness argument in this Court, we observed that the District Court had been correct:

> "Although appellee now can vote, the problem to voters posed by the Tennessee residence require-

ments is '"capable of repetition, yet evading review."'" 405 U. S., at 333 n. 2.

Although the Court did not expressly note the fact, by the time it decided the case Blumstein had resided in Tennessee for far more than a year.

The rationale of *Dunn* controls the present case. Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent. Like the other voters in *Dunn,* new residents of Iowa are aggrieved by an allegedly unconstitutional statute enforced by state officials. We believe that a case such as this, in which, as in *Dunn,* the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs.[9] *Dunn, supra; Rosario* v. *Rockefeller,* 410 U. S. 752, 756 n. 5 (1973); *Vaughan* v. *Bower,* 313 F. Supp. 37, 40 (Ariz.), aff'd, 400 U. S. 884 (1970).[10] We note, how-

[9] This view draws strength from the practical demands of time. A blanket rule under which a class action challenge to a short durational residency requirement would be dismissed upon the intervening mootness of the named representative's dispute would permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation. Such a consideration would not itself justify any relaxation of the provision of Art. III which limits our jurisdiction to "cases and controversies," but it is a factor supporting the result we reach if consistent with Art. III. For the reasons stated in the text, *infra,* we believe that our holding here does comport with both the language of Art. III and our prior decisions.

[10] This has been the prevailing view in the Circuits. See, *e. g., Cleaver* v. *Wilcox,* 499 F. 2d 940 (CA9 1974); *Rivera* v. *Freeman,* 469 F. 2d 1159 (CA9 1972); *Conover* v. *Montemuro,* 477 F. 2d 1073 (CA3 1972); *Roberts* v. *Union Co.,* 487 F. 2d 387 (CA6 1973); *Shiffman* v. *Askew,* 359 F. Supp. 1225 (MD Fla. 1973), aff'd *sub nom. Makres* v. *Askew,* 500 F. 2d 577 (CA5 1974); *Moss* v. *Lane*

ever, that the same exigency that justifies this doctrine serves to identify its limits. In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation.

Our conclusion that this case is not moot in no way detracts from the firmly established requirement that the judicial power of Art. III courts extends only to "cases and controversies" specified in that Article. There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23,[11] but there must be a live controversy at the time this Court reviews the case.[12] *SEC* v. *Medical Committee for Human Rights, supra.* The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

In so holding, we disturb no principles established by our decisions with respect to class-action litigation. A

Co., Inc., 471 F. 2d 853 (CA4 1973). Contra: *Watkins* v. *Chicago Housing Authority,* 406 F. 2d 1234 (CA7 1969); cf. *Norman* v. *Connecticut State Board of Parole,* 458 F. 2d 497 (CA2 1972).

[11] There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

[12] When this Court has entertained doubt about the continuing nature of a case or controversy, it has remanded the case to the lower court for consideration of the possibility of mootness. *Indiana Employment Div.* v. *Burney,* 409 U. S. 540 (1973).

named plaintiff in a class action must show that the threat of injury in a case such as this is "real and immediate," not "conjectural" or "hypothetical." *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974); *Golden* v. *Zwickler,* 394 U. S. 103, 109–110 (1969). A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court. *Bailey* v. *Patterson,* 369 U. S. 31 (1962); *Rosario, supra; Hall* v. *Beals,* 396 U. S. 45 (1969). Appellant Sosna satisfied these criteria.

This conclusion does not automatically establish that appellant is entitled to litigate the interests of the class she seeks to represent, but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to "fairly and adequately protect the interests of the class." Rule 23 (a). Since it is contemplated that all members of the class will be bound by the ultimate ruling on the merits, Rule 23 (c)(3), the district court must assure itself that the named representative will adequately protect the interests of the class. In the present suit, where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance,[13] and where the interests of that class have been competently urged at each level of the proceeding, we believe that the test of Rule 23 (a) is met. We therefore address ourselves to the merits of appellant's constitutional claim.

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[13] There are frequently cases in which it appears that the particular class a party seeks to represent does not have a sufficient homogeneity of interests to warrant certification. *Hansberry* v. *Lee,* 311 U. S. 32, 44 (1940); *Phillips* v. *Klassen,* 163 U. S. App. D. C. 360, 502 F. 2d 362 (1974), cert. denied, *post,* p. 996. In this case, however, it is difficult to imagine why any person in the class appellant represents would have an interest in seeing Iowa Code § 598.6 (1973) upheld.

II

The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact. In *Barber* v. *Barber,* 21 How. 582, 584 (1859), the Court said: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . . ." In *Pennoyer* v. *Neff,* 95 U. S. 714, 734–735 (1878), the Court said: "The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved," and the same view was reaffirmed in *Simms* v. *Simms,* 175 U. S. 162, 167 (1899).

The statutory scheme in Iowa, like those in other States, sets forth in considerable detail the grounds upon which a marriage may be dissolved and the circumstances in which a divorce may be obtained. Jurisdiction over a petition for dissolution is established by statute in "the county where either party resides," Iowa Code § 598.2 (1973), and the Iowa courts have construed the term "resident" to have much the same meaning as is ordinarily associated with the concept of domicile. *Korsrud* v. *Korsrud,* 242 Iowa 178, 45 N. W. 2d 848 (1951). Iowa has recently revised its divorce statutes, incorporating the no-fault concept,[14] but it retained the one-year durational residency requirement.

The imposition of a durational residency requirement for divorce is scarcely unique to Iowa, since 48 States impose such a requirement as a condition for maintaining

[14] See generally Peters, Iowa Reform of Marriage Termination, 20 Drake L. Rev. 211 (1971).

an action for divorce.[15] As might be expected, the periods vary among the States and range from six weeks [16] to two years.[17] The one-year period selected by Iowa is the most common length of time prescribed.[18]

Appellant contends that the Iowa requirement of one year's residence is unconstitutional for two separate reasons: *first,* because it establishes two classes of persons and discriminates against those who have recently exercised their right to travel to Iowa, thereby contravening the Court's holdings in *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972); and *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250 (1974); and, *second,* because it denies a litigant the opportunity to make an individualized showing of bona fide residence and therefore denies such residents access to the only method of legally dissolving their marriage. *Vlandis* v. *Kline,* 412 U. S. 441 (1973); *Boddie* v. *Connecticut,* 401 U. S. 371 (1971).

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[15] Louisiana and Washington are the exceptions. La. Code Civ. Proc., Art. 10A (7) (Supp. 1974); but see Art. 10B providing that "if a spouse has established and maintained a residence in a parish of this state for a period of twelve months, there shall be a rebuttable presumption that he has a domicile in this state in the parish of such residence." Wash. Laws 1973, 1st Ex. Sess., c. 157. Among the other 48 States, the durational residency requirements are of many varieties, with some applicable to all divorce actions, others only when the respondent is not domiciled in the State, and still others applicable depending on where the grounds for divorce accrued. See the 50-state compilation issued by the National Legal Aid and Defender Association, Divorce, Annulment and Separation in the United States (1973).

[16] See, *e. g.,* Idaho Code § 32–701 (1963); Nev. Rev. Stat. § 125.020 (1973).

[17] See, *e. g.,* R. I. Gen. Laws Ann. § 15–5–12 (1970); Mass. Gen. Laws Ann., c. 208, §§ 4–5 (1958 and Supp. 1974).

[18] A majority of the States impose a one-year residency requirement of some kind. Divorce, Annulment and Separation in the United States, *supra,* n. 15.

State statutes imposing durational residency requirements were, of course, invalidated when imposed by States as a qualification for welfare payments, *Shapiro, supra;* for voting, *Dunn, supra;* and for medical care, *Maricopa County, supra.* But none of those cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed.[19] What those cases had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional claims of the individuals. But Iowa's divorce residency requirement is of a different stripe. Appellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro,* the voters in *Dunn,* or the indigent patient in *Maricopa County.* She would eventually qualify for the same sort of adjudication which she demanded virtually upon her arrival in the State. Iowa's requirement delayed her access to the courts, but, by fulfilling it, she could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time.

Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience. Cf. *Kahn* v. *Shevin,* 416 U. S. 351 (1974). A decree of divorce is not a matter in which the only interested parties are the State as a sort of "grantor," and a divorce petitioner such as appellant in the role of "grantee." Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights. Where a married couple has minor children, a decree of

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[19] *Shapiro,* 394 U. S., at 638 n. 21; *Maricopa County,* 415 U. S., at 258–259.

divorce would usually include provisions for their custody and support. With consequences of such moment riding on a divorce decree issued by its courts, Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here.

Such a requirement additionally furthers the State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack. A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant had when she commenced her action in the state court after having long resided elsewhere. Until such time as Iowa is convinced that appellant intends to remain in the State, it lacks the "nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." *Williams* v. *North Carolina,* 325 U. S. 226, 229 (1945). Perhaps even more important, Iowa's interests extend beyond its borders and include the recognition of its divorce decrees by other States under the Full Faith and Credit Clause of the Constitution, Art. IV, § 1. For that purpose, this Court has often stated that "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil." *Williams, supra; Andrews* v. *Andrews,* 188 U. S. 14 (1903); *Bell* v. *Bell,* 181 U. S. 175 (1901). Where a divorce decree is entered after a finding of domicile in *ex parte* proceedings,[20] this Court has held that the

[20] When a divorce decree is not entered on the basis of *ex parte* proceedings, this Court held in *Sherrer* v. *Sherrer,* 334 U. S. 343, 351–352 (1948):

"[T]he requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the

finding of domicile is not binding upon another State and may be disregarded in the face of "cogent evidence" to the contrary. *Williams, supra,* at 236. For that reason, the State asked to enter such a decree is entitled to insist that the putative divorce petitioner satisfy something more than the bare minimum of constitutional requirements before a divorce may be granted. The State's decision to exact a one-year residency requirement as a matter of policy is therefore buttressed by a quite permissible inference that this requirement not only effectuates state substantive policy but likewise provides a greater safeguard against successful collateral attack than would a requirement of bona fide residence alone.[21] This is precisely the

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defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

Our Brother MARSHALL argues in dissent that the Iowa durational residency requirement "sweeps too broadly" since it is not limited to *ex parte* proceedings and could be narrowed by a waiver provision. *Post,* at 425. But Iowa's durational residency requirement cannot be tailored in this manner without disrupting settled principles of Iowa practice and pleading. Iowa's rules governing special appearances make it impossible for the state court to know, either at the time a petition for divorce is filed or when a motion to dismiss for want of jurisdiction is filed, whether or not a respondent will appear and participate in the divorce proceedings. Iowa Rules Civ. Proc. 66, 104. The fact that the state legislature might conceivably adopt a system of waivers and revise court rules governing special appearances does not make such detailed rewriting appropriate business for the federal judiciary.

[21] Since the majority of States require residence for at least a year, see n. 18, *supra,* it is reasonable to assume that Iowa's one-year "floor" makes its decrees less susceptible to successful collateral attack in other States. As the Court of Appeals for the Fifth Circuit observed in upholding a six-month durational residency requirement imposed by Florida, an objective test may impart to a State's divorce decrees "a verity that tends to safeguard them against the suspicious eyes of other states' prosecutorial authorities, the suspicions of private

sort of determination that a State in the exercise of its domestic relations jurisdiction is entitled to make.

We therefore hold that the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack, requires a different resolution of the constitutional issue presented than was the case in *Shapiro, supra, Dunn, supra,* and *Maricopa County, supra.*

Nor are we of the view that the failure to provide an individualized determination of residency violates the Due Process Clause of the Fourteenth Amendment. *Vlandis* v. *Kline,* 412 U. S. 441 (1973), relied upon by appellant, held that Connecticut might not arbitrarily invoke a permanent and irrebuttable presumption of nonresidence against students who sought to obtain in-state tuition rates when that presumption was not necessarily or universally true in fact. But in *Vlandis* the Court warned that its decision should not "be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement." *Id.,* at 452. See *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), aff'd, 401 U. S. 985 (1971). An individualized determination of physical presence plus the intent to remain, which appellant apparently seeks, would not entitle her to a divorce even if she could have made such a showing.[22] For

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counsel in other states, and the post-decree dissatisfactions of parties to the divorce who wish a second bite. Such a reputation for validity of divorce decrees is not, then, merely cosmetic." *Makres* v. *Askew,* 500 F. 2d 577, 579 (1974), aff'g 359 F. Supp. 1225 (MD Fla. 1973).

[22] In addition to a showing of residence within the State for a year, Iowa Code § 598.6 (1973) requires any petition for dissolution to state "that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only." In dismissing appellant's petition in state court, Judge Keck observed

Iowa requires not merely "domicile" in that sense, but residence in the State for a year in order for its courts to exercise their divorce jurisdiction.

In *Boddie* v. *Connecticut, supra,* this Court held that Connecticut might not deny access to divorce courts to those persons who could not afford to pay the required fee. Because of the exclusive role played by the State in the termination of marriages, it was held that indigents could not be denied an opportunity to be heard "absent a countervailing state interest of overriding significance." 401 U. S., at 377. But the gravamen of appellant Sosna's claim is not total deprivation, as in *Boddie,* but only delay. The operation of the filing fee in *Boddie* served to exclude forever a certain segment of the population from obtaining a divorce in the courts of Connecticut. No similar total deprivation is present in appellant's case, and the delay which attends the enforcement of the one-year durational residency requirement is, for the reasons previously stated, consistent with the provisions of the United States Constitution.

Affirmed.

MR. JUSTICE WHITE, dissenting.

It is axiomatic that Art. III of the Constitution imposes a "threshold requirement . . . that those who seek to invoke the power of federal courts must allege an actual case or controversy." *O'Shea* v. *Littleton,* 414 U. S. 488, 493 (1974); *Flast* v. *Cohen,* 392 U. S. 83, 94–101 (1968); *Jenkins* v. *McKeithen,* 395 U. S. 411, 421–425 (1969) (opinion of MARSHALL, J.). To satisfy the requirement, plaintiffs must allege "some threatened or actual injury," *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617 (1973), that is "real and immediate" and not con-

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that appellant had failed to allege good-faith residence. (Jurisdictional Statement App. B. 2.)

jectural or hypothetical. *Golden* v. *Zwickler,* 394 U. S. 103, 108–109 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273 (1941); *Public Workers* v. *Mitchell,* 330 U. S. 75, 89–91 (1947). Furthermore, and of greatest relevance here:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast* v. *Cohen, supra,* at 99–100 (footnote omitted).

All of this the Court concedes. It is conceded as well that had the named plaintiff in this case not brought a class action, the case would now be dismissed as moot because the plaintiff, appellant here, has now satisfied the Iowa residency requirement and, what is more, has secured a divorce in another State. Appellant could not have begun this suit either for herself or for a class if at the time of filing she had been an Iowa resident for a year or had secured a divorce in another jurisdiction. There must be a named plaintiff initiating the action who has an existing controversy with the defendant, whether the plaintiff is suing on his own behalf or on behalf of a class as well. However unquestioned it may

be that a class of persons in the community has a "real" dispute of substance with the defendant, an attorney may not initiate a class action without having a client with a personal stake in the controversy who is a member of the class, and who is willing to be the named plaintiff in the case. The Court recently made this very clear when it said that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton, supra,* at 494 (footnote omitted).

The Court nevertheless holds that once a case is certified as a class action, the named plaintiff may lose that status which had qualified him to bring the suit and still be acceptable as a party to prosecute the suit to conclusion on behalf of the class. I am unable to agree. The appellant now satisfies the Iowa residence requirement and has secured a divorce. She retains no real interest whatsoever in this controversy, certainly not an interest that would have entitled her to be a plaintiff in the first place, either alone or as representing a class. In reality, there is no longer a named plaintiff in the case, no member of the class before the Court. The unresolved issue, the attorney, and a class of unnamed litigants remain. None of the anonymous members of the class is present to direct counsel and ensure that class interests are being properly served. For all practical purposes, this case has become one-sided and has lost the adversary quality necessary to satisfy the constitutional "case or controversy" requirement. A real issue unquestionably remains, but the necessary adverse party to press it has disappeared.

The Court thus dilutes the jurisdictional command of Art. III to a mere prudential guideline. The only specific, identifiable individual with an evident continuing

interest in presenting an attack upon the residency requirement is appellant's counsel. The Court in reality holds that an attorney's competence in presenting his case, evaluated *post hoc* through a review of his performance as revealed by the record, fulfills the "case or controversy" mandate. The legal fiction employed to cloak this reality is the reification of an abstract entity, "the class," constituted of faceless, unnamed individuals who are deemed to have a live case or controversy with appellees.[1]

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[1] The Court contends that its rationale is the prevailing view in the circuits and lists five Circuits in support and two opposing. *Ante,* at 401–402, n. 10. Of the five decisions cited in support, four are without weight or inapposite in the present context. *Conover* v. *Montemuro,* 477 F. 2d 1073, 1081–1082 (CA3 1973), contains only dictum. *Makres* v. *Askew,* 500 F. 2d 577 (CA5 1974), is only an affirmance of a District Court decision without discussion of mootness. Two other cases, *Moss* v. *Lane Co., Inc.,* 471 F. 2d 853 (CA4 1973), and *Roberts* v. *Union Co.,* 487 F 2d 387 (CA6 1973), deal with claims of racial and sexual discrimination, respectively, in employment practices, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.* In such cases, Congress has expressed an intention and provided that any person "claiming to be aggrieved" could bring suit under Title VII to challenge discriminatory employment practices. 42 U. S. C. § 2000e–5; *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U. S. 205, 209 (1972). Since any discrimination in employment based upon sexual or racial characteristics aggrieves an employee or an applicant for employment having such characteristics by stigmatization and explicit or implicit application of a badge of inferiority, Congress gave such persons standing by statute to continue an attack upon such discrimination even though they fail to establish particular injury to themselves in being denied employment unlawfully. Cf. *Trafficante, supra.* Congress has expressed no similar intention as to the subject matter of the instant litigation, that is, to allow suits by " 'private attorneys general in vindicating a policy that Congress considered to be of the highest priority,' " 409 U. S., at 211, nor are the circumstances present here analogous to a case of racial or sexual discrimination which inherently is class based. Hence, these cases provide no

No prior decision supports the Court's broad rationale. In cases in which the inadequacy of the named representative's claim has become apparent prior to class certification, the Court has been emphatic in rejecting the argument that the class action could still be pursued. *O'Shea* v. *Littleton, supra,* at 494–495; *Bailey* v. *Patterson,* 369 U. S. 31, 32–33 (1962). Cf. *Richardson* v. *Ramirez,* 418 U. S. 24 (1974); *Hall* v. *Beals,* 396 U. S. 45, 48–49 (1969).

It is true that *Dunn* v. *Blumstein,* 405 U. S. 330, 333 n. 2 (1972), looks in the other direction. There, by the time the Court rendered its decision, the class representative in an action challenging a durational residency requirement for voting had satisfied the requirement and was eligible to vote in the next election. The Court indicated that the case was not moot, saying that the issue was "capable of repetition, yet evading review." But the question was not contested between the parties and was noted only in passing. Its ramifications for the question of mootness in a class action setting were not explored. Although I joined the opinion in that case, I do not deem it dispositive of the jurisdictional issue here, especially in light of *Indiana Employment Division* v. *Burney,* 409 U. S. 540 (1973). There the class representative's claim had been fully settled, and the Court remanded the case to the District Court for consideration of mootness, a course which the majority, relying on *Dunn,* rejects here. As I see it, the question of whether a class action survives after the representative's claim has been mooted remains unsettled by prior decisions. Indeed, what authority there is provides more support for a conclusion that when the personal stake of the named plaintiff terminates, the class action fails.

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authority for the Court's expansive construction of Art. III's case-or-controversy requirement.

Although the Court cites *Dunn* v. *Blumstein, supra,* as controlling authority, the principal basis for its approach is a conception of the class action that substantially dissipates the case-or-controversy requirement as well as the necessity for adequate representation under Fed. Rule Civ. Proc. 23 (a)(4). In the Court's view, the litigation before us is saved from mootness only by the fact that class certification occurred prior to appellant's change in circumstance. In justification, the Court points to two significant consequences of certification. First, once certified, the class action may not be settled or dismissed without the district court's approval. Second, if the action results in a judgment on the merits, the decision will bind all members found at the time of certification to be members of the class. These are significant aspects of class-action procedure, but it is not evident and not explained how and why these procedural consequences of certification modify the normal mootness considerations which would otherwise attach. Certification is no substitute for a live plaintiff with a personal interest in the case sufficient to make it an adversary proceeding. Moreover, certification is not irreversible or inalterable; it "may be conditional, and may be altered or amended before the decision on the merits." Rule 23 (c)(1).[2] Furthermore, under Rule 23 (d) the court may make various types of orders in conducting the litigation, including an order that notice be given "of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action" and "requiring that the pleadings be amended to eliminate therefrom allegations as to representation

[2] See 7A C. Wright & A. Miller, Federal Practice and Procedure § 1785, pp. 137–138 (1972); 3B J. Moore, Federal Practice ¶ 23.50, p. 23–1103 (1974).

of absent persons . . . ." [3] Class litigation is most often characterized by its complexity and concomitant flexibility of a court in managing it, and emphasis upon one point in the process flies in the face of that reality.

The new certification procedure of Rule 23 (c)(1), as amended in 1966, was not intended to modify the strictures of Fed. Rule Civ. Proc. 82 that "[t]hese rules shall not be construed to extend . . . the jurisdiction of the United States district courts . . . ." Cf. *Snyder* v. *Harris,* 394 U. S. 332, 337–338 (1969). The intention behind the certification amendment, which had no counterpart in the earlier version of the rule, was merely "to give clear definition to the action . . . ," Advisory Committee Note, 28 U. S. C. App., p. 7767; 3B J. Moore, Federal Practice ¶ 23.50, pp. 23–1101 to 23–1102 (1974), not as the Court would now have it, to avoid jurisdictional problems of mootness.[4]

It is claimed that the certified class supplies the necessary adverse parties for a continuing case or controversy

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[3] See 7A Wright & Miller, *supra,* n. 2, §§ 1793, 1974; 3B Moore, *supra,* n. 2, ¶¶ 23.72–23.74.

[4] The Court apparently also does not view certification as the key to its holding since it mentions in dicta that some class actions will not be moot even though the named representatives' claims become moot prior to certification. If the district court does not have a reasonable amount of time within which to decide the certification question prior to the mooting of the named parties' controversies, the Court says, "[i]n such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *Ante,* at 402 n. 11. If certification is not the factor which saves the case from mootness, it appears that the Court is satisfied that the case is a live controversy as long as an *issue* would otherwise not be reviewable here. The Court does not say whether the same flexible standard of mootness applies to cases appealable to the courts of appeals.

with appellees. This is not true; but even if it were, the Court is left with the problem of determining whether the class action is still a good one and whether under Rule 23 (a)(4) appellant is a fair and adequate representative of the class. That appellant can no longer in any realistic sense be considered a member of the class makes these determinations imperative. The Court disposes of the problem to its own satisfaction by saying that it is unlikely that segments of the class appellant represents would have conflicting interests with those she has sought to advance and that because the interests of the class have been competently urged at each level of the proceeding the test of Rule 23 (a)(4) is met. The Court cites no authority for this retrospective decision as to the adequacy of representation which seems to focus on the competence of counsel rather than a party plaintiff who is a representative member of the class.[5] At the very least, the case should be remanded to the District Court where these considerations could be explored and the desirability of issuing orders under Rule 23 (d) to protect the class might be considered.

The Court's refusal to remand for consideration of mootness and adequacy of representation can be explained only by its apparent notion that there may be categories of issues which will permit lower courts to pass upon them but which by their very nature will become moot before this Court can address them. Thus it is said that "no single challenger will remain subject to [the residency requirement] for the period necessary to see such a lawsuit to its conclusion." *Ante,* at 400. Hence,

[5] The general rule has been that the "[q]uality of representation embraces both the competence of the legal counsel of the representatives and the stature and interest of the named parties themselves." 7 Wright & Miller, *supra,* n. 2, § 1766, pp. 632–633 (footnotes omitted). The decisions in the past have rested on several considerations. See *id.,* at 633–635.

the Court perceives the need for a general rule which will eliminate the problem. Article III, however, *is* an "awkward" limitation. It prevents *all* federal courts from addressing some important questions; there is nothing surprising in the fact that it may permit only the lower federal courts to address other questions. Article III is not a rule always consistent with judicial economy. Its overriding purpose is to define the boundaries separating the branches and to keep this Court from assuming a legislative perspective and function. See *Flast* v. *Cohen,* 392 U. S. 83, 96 (1968). The ultimate basis of the Court's decision must be a conclusion that the issue presented is an important and recurring one which should be finally resolved here. But this notion cannot override constitutional limitations.

Because I find that the case before the Court has become moot, I must respectfully dissent.

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

The Court today departs sharply from the course we have followed in analyzing durational residency requirements since *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). Because I think the principles set out in that case and its progeny compel reversal here, I respectfully dissent.

As we have made clear in *Shapiro* and subsequent cases, any classification that penalizes exercise of the constitutional right to travel is invalid unless it is justified by a compelling governmental interest. As recently as last Term we held that the right to travel requires that States provide the same vital governmental benefits and privileges to recent immigrants that they do to long-time residents. *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, 261 (1974). Although we recognized that not all durational residency requirements are penalties

upon the exercise of the right to travel interstate,[1] we held that free medical aid, like voting, see *Dunn* v. *Blumstein,* 405 U. S. 330 (1972), and welfare assistance, see *Shapiro* v. *Thompson, supra,* was of such fundamental importance that the State could not constitutionally condition its receipt upon long-term residence. After examining Arizona's justifications for restricting the availability of free medical services, we concluded that the State had failed to show that in pursuing legitimate objectives it had chosen means that did not impinge unnecessarily upon constitutionally protected interests.

The Court's failure to address the instant case in these terms suggests a new distaste for the mode of analysis we have applied to this corner of equal protection law. In its stead, the Court has employed what appears to be an *ad hoc* balancing test, under which the State's putative interest in ensuring that its divorce petitioners establish some roots in Iowa is said to justify the one-year residency requirement. I am concerned not only about the disposition of this case, but also about the implications of the majority's analysis for other divorce statutes and for durational residency requirement cases in general.

I

The Court omits altogether what should be the first inquiry: whether the right to obtain a divorce is of sufficient importance that its denial to recent immigrants constitutes a penalty on interstate travel. In my view, it clearly meets that standard. The previous decisions of this Court make it plain that the right of marital association is one of the most basic rights conferred on the individual by the State. The interests associated

[1] *Memorial Hospital* v. *Maricopa County,* 415 U. S., at 256–259; see also *Shapiro* v. *Thompson,* 394 U. S., at 638 n. 21.

with marriage and divorce have repeatedly been accorded particular deference, and the right to marry has been termed "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967). In *Boddie* v. *Connecticut,* 401 U. S. 371 (1971), we recognized that the right to seek dissolution of the marital relationship was closely related to the right to marry, as both involve the voluntary adjustment of the same fundamental human relationship. *Id.,* at 383. Without further laboring the point, I think it is clear beyond cavil that the right to seek dissolution of the marital relationship is of such fundamental importance that denial of this right to the class of recent interstate travelers penalizes interstate travel within the meaning of *Shapiro, Dunn,* and *Maricopa County.*

II

Having determined that the interest in obtaining a divorce is of substantial social importance, I would scrutinize Iowa's durational residency requirement to determine whether it constitutes a reasonable means of furthering important interests asserted by the State. The Court, however, has not only declined to apply the "compelling interest" test to this case, it has conjured up possible justifications for the State's restriction in a manner much more akin to the lenient standard we have in the past applied in analyzing equal protection challenges to business regulations. See *McGowan* v. *Maryland,* 366 U. S. 420, 425–428 (1961); *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552, 557 (1947); but see *Johnson* v. *Robison,* 415 U. S. 361, 376 (1974). I continue to be of the view that the "rational basis" test has no place in equal protection analysis when important individual interests with constitutional implications are at stake, see *San Antonio School District* v. *Rodriguez,* 411

U. S. 1, 109 (1973) (MARSHALL, J., dissenting); *Dandridge* v. *Williams,* 397 U. S. 471, 520–522 (1970) (MARSHALL, J., dissenting). But whatever the ultimate resting point of the current readjustments in equal protection analysis, the Court has clearly directed that the proper standard to apply to cases in which state statutes have penalized the exercise of the right to interstate travel is the "compelling interest" test. *Shapiro* v. *Thompson,* 394 U. S., at 634, 638; *Oregon* v. *Mitchell,* 400 U. S. 112, 238 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *Dunn* v. *Blumstein,* 405 U. S., at 342–343; *Memorial Hospital* v. *Maricopa County,* 415 U. S., at 262–263.

The Court proposes three defenses for the Iowa statute: first, the residency requirement merely delays receipt of the benefit in question—it does not deprive the applicant of the benefit altogether; second, since significant social consequences may follow from the conferral of a divorce, the State may legitimately regulate the divorce process; and third, the State has interests both in protecting itself from use as a "divorce mill" and in protecting its judgments from possible collateral attack in other States. In my view, the first two defenses provide no significant support for the statute in question here. Only the third has any real force.

A

With the first justification, the Court seeks to distinguish the *Shapiro, Dunn,* and *Maricopa County* cases. Yet the distinction the Court draws seems to me specious. Iowa's residency requirement, the Court says, merely forestalls access to the courts; applicants seeking welfare payments, medical aid, and the right to vote, on the other hand, suffer unrecoverable losses throughout the waiting period. This analysis, however, ignores the severity of the deprivation suffered by the divorce petitioner who is forced to wait a year for relief. See *Stanley* v. *Illinois,*

405 U. S. 645, 647 (1972). The injury accompanying that delay is not directly measurable in money terms like the loss of welfare benefits, but it cannot reasonably be argued that when the year has elapsed, the petitioner is made whole. The year's wait prevents remarriage and locks both partners into what may be an intolerable, destructive relationship. Even applying the Court's argument on its own terms, I fail to see how the *Maricopa County* case can be distinguished. A potential patient may well need treatment for a single ailment. Under Arizona statutes he would have had to wait a year before he could be treated. Yet the majority's analysis would suggest that Mr. Evaro's claim for nonemergency medical aid is not cognizable because he would "eventually qualify for the same sort of [service]," *ante,* at 406. The Court cannot mean that Mrs. Sosna has not suffered any injury by being foreclosed from seeking a divorce in Iowa for a year. It must instead mean that it does not regard that deprivation as being very severe.[2]

B

I find the majority's second argument no more persuasive. The Court forgoes reliance on the usual justifications for durational residency requirements—budgetary considerations and administrative convenience, see *Shapiro,* 394 U. S., at 627–638; *Maricopa County,* 415 U. S., at 262–269. Indeed, it would be hard to make a persuasive argument that either of these interests is significantly

[2] The majority also relies on its "mere delay" distinction to dispose of *Boddie* v. *Connecticut,* 401 U. S. 371 (1971), see *ante,* at 410. Yet even though the majority in *Boddie* relied on due process rather than equal protection, I am fully convinced that if the Connecticut statute in question in that case had required indigents to wait a year for a divorce, the statute would still have been constitutionally infirm, see 401 U. S., at 383–386 (DOUGLAS, J., concurring in result), a point the Court implicitly rejects today.

implicated in this case. In their place, the majority invokes a more amorphous justification—the magnitude of the interests affected and resolved by a divorce proceeding. Certainly the stakes in a divorce are weighty both for the individuals directly involved in the adjudication and for others immediately affected by it. The critical importance of the divorce process, however, weakens the argument for a long residency requirement rather than strengthens it. The impact of the divorce decree only underscores the necessity that the State's regulation be evenhanded.[3]

It is not enough to recite the State's traditionally exclusive responsibility for regulating family law matters; some tangible interference with the State's regulatory scheme must be shown. Yet in this case, I fail to see how any legitimate objective of Iowa's divorce regulations would be frustrated by granting equal access to new state residents.[4] To draw on an analogy, the States have great interests in the local voting process and wide latitude in regulating that process. Yet one regulation that the States may not impose is an unduly long residency requirement. *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). To remark, as the Court does, that because of the consequences riding on a divorce decree "Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here"

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[3] The majority identifies marital status, property rights, and custody and support arrangements as the important concerns commonly resolved by divorce proceedings. But by declining to exercise divorce jurisdiction over its new citizens, Iowa does not avoid affecting these weighty social concerns; instead, it freezes them in an unsatisfactory state that it would not require its long-time residents to endure.

[4] A durational requirement such as Iowa's 90-day conciliation period would not, of course, be subject to an equal protection challenge, as it is required uniformly of all divorce petitioners.

is not to make an argument, but merely to state the result.

C

The Court's third justification seems to me the only one that warrants close consideration. Iowa has a legitimate interest in protecting itself against invasion by those seeking quick divorces in a forum with relatively lax divorce laws, and it may have some interest in avoiding collateral attacks on its decree in other States.[5] These interests, however, would adequately be protected by a simple requirement of domicile—physical presence plus intent to remain—which would remove the rigid one-year barrier while permitting the State to restrict the availability of its divorce process to citizens who are genuinely its own.[6]

[5] Appellees do not rely on these factors to support the Iowa statute. In their brief appellees argue that the legislature's determination to impose a one-year residency requirement was reasonable "in the light of the interest of the State of Iowa in a dissolution proceeding." Brief for Appellees 8. The full faith and credit argument is mentioned only in the middle of a long quotation from another court's opinion, *id.*, at 9. This is hardly sufficient to meet the requirement of a "clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." *Oregon* v. *Mitchell*, 400 U. S. 112, 238 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *Sherbert* v. *Verner*, 374 U. S. 398, 406–409 (1963).

[6] The availability of a less restrictive alternative such as a domicile requirement weighs heavily in testing a challenged state regulation against the "compelling interest" standard. See *Shapiro* v. *Thompson*, 394 U. S., at 638; *Dunn* v. *Blumstein*, 405 U. S. 330, 342, 350–352 (1972); *Memorial Hospital* v. *Maricopa County*, 415 U. S., at 267; *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). Since the Iowa courts have in effect interpreted the residency statute to require proof of domicile as well as one year's residence, see *Korsrud* v. *Korsrud*, 242 Iowa 178, 45 N. W. 2d 848 (1951); *Julson* v. *Julson*, 255 Iowa 301, 122 N. W. 2d 329 (1963), a shift to a "pure" domicile test would impose no new burden on the State's factfinding process.

The majority notes that in *Williams* v. *North Carolina,* 325 U. S. 226 (1945), the Court held that for *ex parte* divorces one State's finding of domicile could, under limited circumstances, be challenged in the courts of another. From this, the majority concludes that since Iowa's findings of domicile might be subject to collateral attack elsewhere, it should be permitted to cushion its findings with a one-year residency requirement.

For several reasons, the year's waiting period seems to me neither necessary nor much of a cushion. First, the *Williams* opinion was not aimed at States seeking to avoid becoming divorce mills. Quite the opposite, it was rather plainly directed at States that had cultivated a "quickie divorce" reputation by playing fast and loose with findings of domicile. See *id.,* at 236–237; *id.,* at 241 (Murphy, J., concurring). If Iowa wishes to avoid becoming a haven for divorce seekers, it is inconceivable that its good-faith determinations of domicile would not meet the rather lenient full faith and credit standards set out in *Williams.*

A second problem with the majority's argument on this score is that *Williams* applies only to *ex parte* divorces. This Court has held that if both spouses were before the divorcing court, a foreign State cannot recognize a collateral challenge that would not be permissible in the divorcing State. *Sherrer* v. *Sherrer,* 334 U. S. 343 (1948); *Coe* v. *Coe,* 334 U. S. 378 (1948); *Johnson* v. *Muelberger,* 340 U. S. 581 (1951); *Cook* v. *Cook,* 342 U. S. 126 (1951). Therefore, the Iowa statute sweeps too broadly even as a defense to possible collateral attacks, since it imposes a one-year requirement whenever the respondent does not reside in the State, regardless of whether the proceeding is *ex parte.*[7]

[7] This problem could be cured in large part if the State waived its year's residency requirement whenever the respondent agreed to consent to the court's jurisdiction.

Third, even a one-year period does not provide complete protection against collateral attack. It merely makes it somewhat less likely that a second State will be able to find "cogent evidence" that Iowa's determination of domicile was incorrect. But if the Iowa court has erroneously determined the question of domicile, the year's residence will do nothing to preclude collateral attack under *Williams*.

Finally, in one sense the year's residency requirement may technically increase rather than reduce the exposure of Iowa's decrees to collateral attack. Iowa appears to be among the States that have interpreted their divorce residency requirements as being of jurisdictional import.[8] Since a State's divorce decree is subject to collateral challenge in a foreign forum for any jurisdictional flaw that would void it in the State's own courts, *New York ex rel. Halvey* v. *Halvey*, 330 U. S. 610 (1947), the residency requirement exposes Iowa divorce proceedings to attack both for failure to prove domicile and for failure to prove one year's residence. If nothing else, this casts doubt on the majority's speculation that Iowa's residency requirement may have been intended as a statutory shield for its divorce decrees. In sum, concerns about the need

[8] See *Hinds* v. *Hinds*, 1 Iowa 36 (1855); *Williamson* v. *Williamson*, 179 Iowa 489, 495, 161 N. W. 482, 485 (1917); *Korsrud* v. *Korsrud*, *supra*; *Schaefer* v. *Schaefer*, 245 Iowa 1343, 1350, 66 N. W. 2d 428, 433 (1954); cf. *White* v. *White*, 138 Conn. 1, 81 A. 2d 450 (1951); *Wyman* v. *Wyman*, 212 N. W. 2d 368 (Minn. 1973); *Camp* v. *Camp*, 21 Misc. 2d 908, 189 N. Y. S. 2d 561 (1959) (construing Florida law). While the *Williams* case establishes that collateral attack can always be mounted against the divorcing State's finding of domicile, other States have provided that failure to meet the durational residency requirement is not jurisdictional and thus does not provide an independent basis for collateral attack, see, *e. g.*, *Schreiner* v. *Schreiner*, 502 S. W. 2d 840 (Tex. Ct. Civ. App. 1973); *Hammond* v. *Hammond*, 45 Wash. 2d 855, 278 P. 2d 387 (1954) (construing Idaho law).

for a long residency requirement to defray collateral attacks on state judgments seem more fanciful than real. If, as the majority assumes, Iowa is interested in assuring itself that its divorce petitioners are legitimately Iowa citizens, requiring petitioners to provide convincing evidence of bona fide domicile should be more than adequate to the task.[9]

III

I conclude that the course Iowa has chosen in restricting access to its divorce courts unduly interferes with the right to "migrate, resettle, find a new job, and start a new life." *Shapiro* v. *Thompson,* 394 U. S., at 629. I would reverse the judgment of the District Court and remand for entry of an order granting relief if the court finds that there is a continuing controversy in this case. See *Steffel* v. *Thompson,* 415 U. S. 452 (1974); *Johnson* v. *New York State Education Dept.,* 409 U. S. 75, 79 n. 7 (1972) (MARSHALL, J., concurring).

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[9] The majority argues that since most States require a year's residence for divorce, Iowa gains refuge from the risk of collateral attack in the understanding solicitude of States with similar laws. Of course, absent unusual circumstances, a judgment by this Court striking down the Iowa statute would similarly affect the other States with one- and two-year residency requirements. For the same reason, the risk of subjecting Iowa to an invasion of divorce seekers seems minimal. If long residency requirements are held unconstitutional, Iowa will not stand conspicuously alone without a residency requirement "defense." Moreover, its 90-day conciliation period, required of all divorce petitioners in the State, would still serve to discourage peripatetic divorce seekers who are looking for the quickest possible adjudication.

INTERNATIONAL TELEPHONE & TELEGRAPH CORP., COMMUNICATIONS EQUIPMENT & SYSTEMS DIVISION *v.* LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL.

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

No. 73–1313. Argued November 19, 1974—
Decided January 14, 1975

Petitioner employer filed an unfair labor practice charge against respondent union under § 8 (b) (4) (D) of the National Labor Relations Act (NLRA), which makes it an unfair labor practice for a labor organization to induce employees to strike to force an employer to assign particular work to employees in a particular labor organization. Section 10 (k) of the NLRA provides that whenever a § 8 (b) (4) (D) unfair labor practice charge is filed, the National Labor Relations Board shall hear and determine the dispute out of which such unfair labor practice arose, unless within 10 days after notice that such charge has been filed the parties submit evidence that they have adjusted the dispute, in which case or upon compliance with the Board's decision, such charge shall be dismissed. Pursuant to § 10 (k) a hearing was held before a hearing officer, and subsequently the Board rendered a decision adverse to respondent, which then indicated it would not comply therewith. The Board's General Counsel thereafter issued a complaint on the unfair labor practice charge, and at a trial examiner's hearing, at which the General Counsel was represented by the same attorney who had been the hearing officer in the § 10 (k) proceeding, the trial examiner concluded that respondent had violated § 8 (b) (4) (D), and the Board issued a cease-and-desist order. The Court of Appeals, on respondent's petition to set aside the order, agreed that respondent had violated § 8 (b) (4) (D), but refused to enforce the order, on the ground that because the § 10 (k) hearing officer had participated in both the § 10 (k) and the § 8 (b) (4) (D) proceedings, the Board had not complied with the Administrative Procedure Act (APA), 5

U. S. C. § 554 (a), which prohibits commingling prosecutorial and adjudicatory functions in agency proceedings, and generally applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U. S. C. § 551 (7) defining "adjudication" as "agency process for the formulation of an order," and § 551 (6) defining "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making." *Held:* The APA, 5 U. S. C. § 554, does not govern proceedings conducted under § 10 (k) of the NLRA. Pp. 441–448.

(a) The § 10 (k) determination is not itself a "final disposition" within the meaning of "order" and "adjudication" in the APA. When Congress defined "order" in terms of a "final disposition," it required that "final disposition" to have some determinate consequences for the party to the proceeding, and here the Board does not order anybody to do anything at the conclusion of the § 10 (k) proceeding. Pp. 441–444.

(b) Nor is such determination "agency process for the formulation of an order" within the meaning of 5 U. S. C. § 551 (7). Although important practical consequences in the § 8 (b) (4) (D) proceeding result from the Board's determination in the § 10 (k) proceeding, they do not alone make the § 10 (k) proceeding related to the § 8 (b) (4) (D) proceeding in a manner that would make the former "agency process" for the formulation of the order of the latter. The § 10 (k) proceeding is unlike the typical hearing before an administrative law judge which is then subject to consideration by the agency. The issues in a § 10 (k) proceeding are similar to but not identical with the focus of the § 8 (b) (4) (D) proceeding. The standard of proof is different, and the inquiry in a § 8 (b) (4) (D) proceeding is whether the union engaged in forbidden conduct with a forbidden objective. The proceedings are separate, and the agency makes the determination in each of them. Pp. 444–448.

486 F. 2d 863, reversed and remanded.

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

Matthew E. Murray argued the cause for petitioner. With him on the brief was *John D. O'Brien.*

Robert E. Fitzgerald, Jr., argued the cause for respondent Local 134, International Brotherhood of Electrical

Workers. With him on the brief was *Edward J. Calihan, Jr.* *Norton J. Come* argued the cause for respondent National Labor Relations Board in support of petitioner. With him on the brief were *Solicitor General Bork, Peter G. Nash, John S. Irving,* and *Patrick Hardin.* *Charles V. Koons, Irving M. Friedman,* and *Harold A. Katz* filed a brief for respondent Communications Workers of America in support of petitioner.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1947 Congress responded to the labor unrest caused by jurisdictional disputes by adding § 8 (b)(4)(D) to the National Labor Relations Act, which made it an unfair labor practice for a labor organization to induce the employees of any employer to strike in the hopes of forcing an employer to assign particular work to employees in a particular labor organization.[1] In the belief

[1] Labor Management Relations Act, 1947, 61 Stat. 141, as amended by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 542, § 8 (b)(4)(D), 29 U. S. C. § 158 (b)(4)(D), presently provides:

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

. . . . . .

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is

that resolution of jurisdictional disputes was more important to industrial peace than the imposition of unfair labor practice sanctions, *NLRB* v. *Radio Engineers,* 364 U. S. 573, 576–577 (1961) (hereinafter *CBS*), Congress at the same time enacted § 10 (k), 29 U. S. C. § 160 (k),[2] to induce unions to settle their differences without awaiting unfair labor practice proceedings and enforcement of Board orders by courts of appeals.

One year earlier Congress had responded to the many expressed concerns for fairness and regularity in the administrative process summarized in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 36–41 (1950), by enacting the Administrative Procedure Act (Act).[3] Section 5 of that Act, now 5 U. S. C. § 554, establishes requirements governing certain agency proceedings that come within the Act's definition of "adjudication." We granted certiorari to the Court of Appeals for the Seventh Circuit in this

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failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

[2] Title 29 U. S. C. § 160 (k) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

[3] 60 Stat. 237, as codified by an Act to enact Title 5, United States Code, 80 Stat. 378. Slight modifications in the Act sections under consideration in this case were made at the time of codification, but no substantive changes were intended. H. R. Rep. No. 901, 89th Cong., 1st Sess., 3 (1965); S. Rep. No. 1380, 89th Cong., 2d Sess., 18 (1966).

case, 416 U. S. 981 (1974), to review its conclusion that 5 U. S. C. § 554 applied to a § 10 (k) proceeding conducted by the Board, 486 F. 2d 863 (1973). Another Court of Appeals had decided a short time earlier that such a Board proceeding was not subject to § 554, *Bricklayers* v. *NLRB,* 155 U. S. App. D. C. 47, 475 F. 2d 1316 (1973).

The case now before us arose out of a jurisdictional dispute between respondent Local 134 of the International Brotherhood of Electrical Workers (IBEW) (hereafter respondent) and the Communications Workers of America (CWA) over whose members would perform certain telephone installation work in Cook County, Ill. Petitioner International Telephone & Telegraph Corp., which had a nationwide collective-bargaining agreement with the CWA, had established a communications equipment and systems division to sell and install private telephone systems.[4] In 1970 petitioner entered into a contract with the village of Elk Grove, Ill., for the installation and sale of a switching system and related telephone and circuitry work. Since employees of the Illinois Bell Telephone Co., who were members of respondent, had already run trunklines from the local operating telephone system to the Administrative Office of the village, petitioner's contract covered only the remaining two stages necessary to complete installation of the system. First the telephone cable had to be routed from the telephone room in the basement to the telephone instruments in particular rooms and offices by a process known as "pulling cable"; petitioner subcontracted this work to the C. A. Riley Electric Construction Co.,

[4] The division was organized to take advantage of a ruling by the Federal Communications Commission that private telephone systems could be interconnected with an operating telephone company system. *Use of the Carterfone Device in Message Toll Telephone Service,* 13 F. C. C. 2d 420 (1968).

whose employees are represented by respondent. Second, by a process known as "terminating the cable," the cable would be connected to the telephone instruments. Petitioner planned to have its own technicians, who were represented by the CWA, perform this work.

C. A. Riley had hoped to perform the terminating work and inquired of petitioner's supervisor whether that was possible. The supervisor informed Riley of petitioner's plan to have its own employees do the work, and Riley told the supervisor that petitioner's representatives had better meet with the business agent of respondent. On two occasions petitioner's representatives met with the union business agent, who told them that respondent installed all telephone equipment in Cook County and that CWA members would install no telephone equipment in Cook County. On the second occasion the respondent's business agent was quite explicit: "We'd better get that work or there will be trouble." [5]

When CWA employees appeared at the jobsite on December 3, 1970, to begin their portion of the work, all of respondent's members left their jobs.[6] That after-

[5] 197 N. L. R. B. 879, 881 (1972).

[6] The respondent's business agent had been notified the previous evening that petitioner's employees would begin their work on December 3. When petitioner's two employees reported to the basement telephone room for work, two of respondent's members, who were employed by the Illinois Bell Telephone Co., packed up their tools and left because they would not work with CWA members. Respondent's steward entered the room and demanded to see petitioner's employees' union cards. When they could not produce Local 134 membership cards, the steward announced, "I can't work here" or "we can't work here." *Ibid.* After this comment, four or five employees of the Johnson Electric Co., who also were members of Local 134, drifted away. At a coffee break a few moments later, the steward told all the assembled members of Local 134 that he was going home because he did not want to work with "nonunion" men.

noon a representative of the village of Elk Grove met with petitioner's regional sales manager, and they agreed to pull petitioner's employees off the job temporarily. Representatives of respondent were informed, and all Local 134 employees thereafter returned to work.[7]

On December 3, 1970, petitioner filed a charge alleging that respondent had violated § 8 (b)(4)(D) of the National Labor Relations Act, 29 U. S. C. § 158 (b)(4)(D). The Board's Regional Director found reasonable cause to believe that the charge had merit and proceeded in accordance with the language of § 10 (k):

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." 29 U. S. C. § 160 (k).

Respondent was notified that a hearing would be conducted by a hearing officer[8] upon the dispute alleged in

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The other Local 134 members also left the jobsite at that time, and none worked on the job for the rest of the day.

[7] Petitioner's employees remained off the job until December 21, at which time they returned and performed the terminating work. Respondent's members, who had worked on the project as employees of Riley, Illinois Bell, and the Johnson Electric Co., had completed their work by December 21 so that no second confrontation occurred.

[8] The Board's regulations provided that a "hearing officer" is

the charge, and the hearing was held on March 12, 15, and 17, 1971, with Stephen S. Schulson, an attorney in the regional office, presiding. All parties appeared at the hearing and were given full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. In accordance with NLRB regulations, the record was transmitted to the Board for decision without any recommendation from the hearing officer.[9] The Board received briefs from petitioner, respondent, and the CWA, and concluded that employees represented by the CWA were entitled to perform the work in dispute. 191 N. L. R. B. 828 (1971). On August 30, 1971, respondent notified the Regional Director that it would not comply with the Board's § 10 (k) determination. The Regional Director, on behalf of the Board's General Counsel, then issued a complaint upon the § 8 (b)(4)(D) unfair labor practice charge that had been held in abeyance pending the attempt to resolve the dispute pursuant to the § 10 (k) proceeding. At the hearing before a trial examiner, the General Counsel was represented by the same attorney who had presided over the compilation of testimony for

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"the agent of the Board conducting the hearing in a proceeding under section 9 or in a dispute proceeding under section 10 (k) of the act." 29 CFR § 102.6 (1971). A hearing officer "normally is an attorney or field examiner attached to the regional office but may be another qualified official." 29 CFR § 101.20 (c). The "hearing officer" is to be distinguished from a "trial examiner," who presides over unfair labor practice proceedings. 29 CFR § 102.6. The Board's current regulation is identical to the regulation in force at the time of the § 10 (k) proceeding of the present case except that the term "trial examiner" has been changed to "administrative law judge," 29 CFR § 102.6 (1974). See 37 Fed. Reg. 16787 (1972).

[9] The Board's regulations, 29 CFR § 101.34, require the hearing officer to transmit the record to the Board but provide that he shall make "no recommendations in regard to resolution of the dispute."

the Board in the § 10 (k) proceeding. The trial examiner concluded that respondent had violated § 8 (b)(4)(D) and he recommended that it be ordered to cease its unlawful conduct; exceptions were filed with the Board [10] which it overruled in ordering respondent to cease and desist from its unlawful conduct. 197 N. L. R. B. 879 (1972).

Respondent filed a petition to review and set aside the Board's order in the Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement of its order.[11] The Court of Appeals found respondent's conduct to be "the very activity § 8 (b)(4)(D) was intended to prohibit," 486 F. 2d, at 866, but refused to enforce the Board's order because it decided that the Board had not complied with the Act, 5 U. S. C. § 554.[12] The court was under the impression that the

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[10] Exception 16 brought to the Board's attention the failure of the trial examiner to address respondent's argument that the Act had been violated by the participation of attorney Schulson in both the § 10 (k) and § 8 (b)(4)(D) proceedings. Since the issue of the applicability of the Act was presented to the Board, the Court of Appeals was entitled to consider the objection, and so are we. 29 U. S. C. §§ 160 (e)–(f).

[11] *Ibid.*

[12] Title 5 U. S. C. § 554 provides:

"(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

"(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

"(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

"(3) proceedings in which decisions rest solely on inspections, tests, or elections;

"(4) the conduct of military or foreign affairs functions;

"(5) cases in which an agency is acting as an agent for a court; or

parties had "admitted that § 554 applies to § 10 (k) hearings," 486 F. 2d, at 867, and regarded the participation by Schulson in both proceedings as a violation of 5 U. S. C.

"(6) the certification of worker representatives.

"(b) Persons entitled to notice of an agency hearing shall be timely informed of—

"(1) the time, place, and nature of the hearings;

"(2) the legal authority and jurisdiction under which the hearing is to be held; and

"(3) the matters of fact and law asserted.

"When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

"(c) The agency shall give all interested parties opportunity for—

"(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

"(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

"(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

"(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

"(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

"An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this

§ 554 (d), which prohibits commingling prosecutorial and adjudicatory functions. See n. 12, *supra.* Even though the Board had argued that the § 10 (k) proceeding "was without binding effect on anyone" so that "it was not improper for the same person to perform the functions of hearing officer and subsequently prosecute an unfair labor practice charge based upon the evidence adduced at that hearing," the Court of Appeals relied upon this Court's opinion in *NLRB* v. *Plasterers' Union,* 404 U. S. 116 (1971), to support its conclusion that "the hearing officer's rulings at the § 10 (k) hearing largely determine what evidence the Board will have to consider at the Unfair Labor Practice Hearing . . . ." 486 F. 2d, at 866–867. With that perspective, the Court of Appeals found the attorney's participation to be "plainly inconsistent with both the spirit and the letter of the Act." *Id.,* at 868.

I

To determine whether § 554 governs proceedings conducted under § 10 (k) of the National Labor Relations Act necessitates some understanding of both statutory provisions which, as noted above, were enacted within a year of each other. The Administrative Procedure Act was aptly described in *Wong Yang Sung, supra,* as "a new, basic and comprehensive regulation of procedures in many agencies," 339 U. S., at 36. The Court there

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title, except as witness or counsel in public proceedings. This subsection does not apply—

"(A) in determining applications for initial licenses;

"(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

"(C) to the agency or a member or members of the body comprising the agency.

"(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

further observed that the Act "contains many compromises and generalities and, no doubt, some ambiguities." *Id.,* at 40–41. Because it was designed to regulate administrative proceedings throughout a wide spectrum of agency activities, its language is necessarily abstract in many places. The more we may know about the particular agency proceeding to which the Act is sought to be applied, the better we will be able to apply it.

The events leading up to the enactment of §§ 8 (b)(4)(D) and 10 (k) have been recounted by this Court in *CBS, supra,* and *Plasterers' Union, supra,* and need not here be reviewed in detail. Congress made the judgment "that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions." *CBS,* 364 U. S., at 577. Voluntary and therefore prompt resolution of such jurisdictional disputes is encouraged both by the 10-day grace period following notice of the filing of an unfair labor practice charge, and by the dismissal of such a charge if the union complies with the Board's adverse § 10 (k) determination. 29 CFR § 101.36.

To effectuate the congressional objective of prompt resolution of jurisdictional disputes, almost from the date of the enactment of § 10 (k), the Board has applied procedures to proceedings under that section that are quite different from those of a proceeding under § 8 (b)(4)(D). The § 10 (k) hearing is described in the Board's regulations:

> "If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a

> statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute." 29 CFR § 101.34.

Streamlined procedures were both designed and justified because "the decision in the proceedings under Section 10 (k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved." *National Union of Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 83 N. L. R. B. 341 (1949).[13]

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[13] The Board has adhered consistently to this position. See, *e. g.*, *International Longshoremen's & Warehousemen's Union (General Ore, Inc.)*, 124 N. L. R. B. 626, 628–629 (1959):

"It is well established that Section 8 of the Administrative Procedure Act, which provides for the issuance of the initial decision by the hearing officer, does not apply to a proceeding under Section 10 (k). Under Section 101.30 of the Statements of Procedure and Section 102.80 of the Board's Rules and Regulations, Series 7, the hearing under Section 10 (k) is nonadversary in character and, according to the procedure adopted therefor, conducted in the same way as a hearing in a representation proceeding. The Board adopted such procedure because the decision under Section 10 (k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section. The unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner if the dispute remains unresolved. It is to

The Board concluded from this analysis of the nature of the § 10 (k) proceeding that the provisions of the Act governing adjudications were not applicable. While an agency's interpretation of the Act may not be entitled to the same weight as the agency's interpretation of its own substantive mandate, see *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224, 236 n. 6 (1973), its characterization of its own proceeding is entitled to weight, and that characterization may in turn have relevance in determining the applicability of the Act.

II

The question which we must decide here is whether the § 10 (k) determination is an "adjudication" governed by the Act, 5 U. S. C. § 554. The Court of Appeals did not consider in any detail whether § 554 governs § 10 (k) proceedings since it was under the impression that the parties had conceded the general applicability of this

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the subsequent adversary proceeding, which leads to a final Board determination, that Section 8 of the Administrative Procedure Act applies. The primary function of the hearing officer, who is acting under the delegation of authority from the Board, in a nonadversary proceeding is to insure that the record contains a full statement of pertinent facts as may be necessary for the determination of the dispute by the Board. The hearing officer makes no recommendations in regard to the resolution of the dispute. While we think it better practice not to assign a Board agent who has previously engaged in the performance of investigative and prosecuting functions for the Agency to act as a hearing officer in the same or in a related case, we find that the Longshoremen in the instant case was not prejudiced by such assignment. The Longshoremen does not allege that it was denied the opportunity to present evidence in support of its contentions, or that it was prejudiced in any other manner by the conduct of the hearing officer." (Footnotes omitted.) In *General Ore*, unlike the present case, the hearing officer had previously represented the General Counsel in proceedings factually related to the § 10 (k) proceeding at which he *later* presided.

section to such hearings. 486 F. 2d, at 867. Petitioner and the Board contend that the Court of Appeals was mistaken with respect to any such concession, and state that they argued both in their principal briefs and in their petitions for rehearing that § 554 was not applicable. Respondent acknowledges that no such concession was made,[14] and we therefore address the issue on its merits.

If one were to start with the proposition that all administrative action falls into one of two categories, rulemaking or adjudication, the § 10 (k) determination certainly is closer to the latter than to the former. But such light as we have on the intention of Congress when it enacted the Act does not indicate that this is a sound starting point. Knowledgeable authorities in this field observed shortly after passage of the Act that "certain types of agency action are neither rule making nor adjudication." Ginnane, "Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act, 95 U. Pa. L. Rev. 621, 633 (1947); Netterville, The Administrative Procedure Act: A Study in Interpretation, 20 Geo. Wash. L. Rev. 1, 33 (1951); cf. Attorney General's Manual on the Administrative Procedure Act 40 (1947).

Section 554 applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," [15] and 5

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[14] Tr. of Oral Arg. 20.

[15] The Board, which did not join with petitioner in seeking review of this case but which is nevertheless a party to the case under this Court's Rule 21 (4), urges that even if the § 10 (k) proceeding is an "adjudication" under the Act, the language in § 10 (k) directing the Board "to hear and determine the dispute" is not sufficient to bring the proceeding within the language of 5 U. S. C. § 554, which operates in the case of adjudications "required by statute to be determined on the record after opportunity for an agency hearing." In light

U. S. C. § 551 (7), defines "adjudication" as "agency process for the formulation of an order"; "order" is in turn defined as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing," 5 U. S. C. § 551 (6). While one might argue that an intermediate proceeding within an agency is necessarily a "part" of a "final order," we think a sounder interpretation of the language Congress used is that the phrase "whole or a part" refers to components of that which is itself the final disposition required by the definition of "order" in § 551 (6). Intermediate proceedings within an agency may be subject to the provisions of § 554, however, by virtue of the fact that they are "agency process for the formulation of an order" rather than because their product is a "part" of the final disposition. Thus if the Board's § 10 (k) determination is itself a "final disposition" of a Board proceeding or is "agency process for the formulation" of an order in a resulting § 8(b)(4)(D) proceeding, then the § 10 (k) proceeding is governed by 5 U. S. C. § 554.

In a tautological sense, of course, the Board's determination in a § 10 (k) proceeding is a "final disposition" of *that* proceeding, but we think that when Congress defined "order" in terms of a "final disposition," it required that "final disposition" to have some determinate consequences for the party to the proceeding. The Board does not order anybody to do anything at the conclusion of a § 10 (k) proceeding. As the Attorney General's Manual on the Administrative Procedure Act 40 (1947) observed: "[I]nvestigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication." This

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of our disposition of the case it is unnecessary to address this contention.

Court noted in *Plasterers' Union,* 404 U. S., at 126, that "the § 10 (k) decision standing alone, binds no one." We conclude, therefore, that the § 10 (k) determination is not itself a "final disposition" within the meaning of "order" and "adjudication" in 5 U. S. C. §§ 551 (6), (7).

Respondent's principal argument for affirmance of this case rests on the contention that although the § 10 (k) determination may not itself be a "final disposition," and therefore an "order," it is "agency process for the formulation" of the ultimate § 8 (b)(4)(D) order that the Board may issue.

There are undoubtedly important practical consequences in the § 8 (b)(4)(D) proceeding that result from the Board's determination in the § 10 (k) proceeding. These were described in the following language in *Plasterers' Union, supra,* at 126–127:

> "[T]he impact of the § 10 (k) decision is felt in the § 8 (b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10 (k) decision against it, a § 8 (b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10 (k) decision and the employer does not comply, the employer's § 8 (b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed. Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10 (k) decision, but both will lose their § 8 (b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other

way to implement the Board's § 10 (k) decision." (Footnote omitted.)

But we do not think that such practical consequences alone make the § 10 (k) proceeding related to the § 8 (b)(4)(D) proceeding in a manner that would make the former "agency process" for the formulation of the order in the latter. The prototype of an intermediate proceeding that is "agency process for the formulation of an order," is a hearing before an administrative law judge who makes findings of fact and conclusions of law, initially decides the case, and whose recommended decision "becomes the decision of the agency . . . unless there is an appeal to, or review on motion of, the agency." 5 U. S. C. § 557 (b). All of the parties to this case, for instance, agree that the § 8 (b)(4)(D) unfair labor practice hearing before the trial examiner (now administrative law judge) was subject to § 554 since it was "agency process for the formulation of an order."

The relationship between the § 10 (k) proceeding and the § 8 (b)(4)(D) proceeding, however, is quite distinct from the relationship between the hearing before an administrative law judge and ultimate review of his findings and recommendations by the agency. The § 10 (k) proceeding has a life of its own from the time that testimony is taken in the field by a hearing officer until the time the Board, with the record of the testimony before it but with no proposed findings or conclusions or recommendations from the hearing officer, reaches its own determination. The Board's attention in the § 10 (k) proceeding is not directed to ascertaining whether there is substantial evidence to show that a union has engaged in forbidden conduct with a forbidden objective. Those inquiries are left for the § 8 (b)(4)(D) proceeding.[16]

[16] The Board's powers under § 10 (k) depend upon whether there is reasonable cause to believe that § 8 (b)(4)(D) has been violated. In the present case the Board reviewed the record compiled by

Indeed, the Board's § 10 (k) determination is not unlike an advisory opinion, since the matter may well end there. If the Board determines that employees of the charged union are entitled to the work, the § 8 (b)(4)(D) charge against it will be dismissed. 29 CFR § 102.91. If the Board determination is adverse to the charged union and the union accedes, the § 8 (b)(4)(D) charge will be dismissed and the General Counsel will not issue a complaint. *Ibid.* Only if the union indicates that it will not comply with the Board's determination are further proceedings necessitated, and those proceedings will be under § 8 (b)(4)(D), not § 10 (k). As this Court observed in *Plasterers' Union,* 404 U. S., at 122 n. 10:

> "The § 10 (k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10 (k) decision, the Board must prove the union guilty of a § 8 (b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a § 10 (k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8 (b)(4)(D) determination. *International Typographical Union,* 125 N. L. R. B. 759, 761 (1959). Both parties may put

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the hearing officer and concluded that the requisite reasonable cause existed. The respondent suggested that certain testimonial evidence was incredible, but the Board observed:

"In a jurisdictional dispute context, the Board is not charged with finding that a violation did in fact occur, but only that there is reasonable cause to believe that there has been a violation. On this testimony, and without ruling on the credibility of the testimony in issue, we are satisfied that there is reasonable cause to believe that a violation of Section 8 (b)(4)(D) has occurred." 191 N. L. R. B., at 830 (footnotes omitted).

By contrast, a union can be found guilty of committing an unfair labor practice only if a violation is established by a preponderance of the evidence. 29 U. S. C. § 160 (c).

> in new evidence at the § 8 (b)(4)(D) stage, although often, as in the present cases, the parties agree to stipulate the record of the § 10 (k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under § 10 (k), the Board need only find that there is reasonable cause to believe that a § 8 (b)(4)(D) violation has occurred, while in the § 8 (b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8 (b)(4)(D). *International Typographical Union, supra,* at 761 n. 5 (1959)."

In each case it is the agency itself, the National Labor Relations Board, which makes the ultimate determination. The same issues will generally be relevant, the record of the earlier proceeding will be admitted in the later one, 29 CFR § 102.92, and the Board's ruling on the merits of those issues which are common to the two proceedings is likely to be the same in the one as in the other. But the proceedings are nonetheless separate; the same tribunal finally determines each of them.

Were we to adopt respondent's position that merely because a § 10 (k) determination has a significant practical effect on the § 8 (b)(4)(D) proceeding, it was therefore "agency process for the formulation" of the § 8 (b)(4)(D) order, we might well sweep under the definition of that term numerous ancillary agency proceedings that are distinct from the adjudications on which they have an effect, and which the language of the Act does not appear to have been designed to reach. We therefore decline to adopt that position. We accordingly conclude that a § 10 (k) determination is neither itself a final disposition under the definitional section of the Act, nor is it "agency process for the formulation of an order" within the meaning of that section. Proceedings under

§ 10 (k) are therefore not governed by the Act, 5 U. S. C. § 554.

Although the Board's § 10 (k) proceedings need not be conducted pursuant to the Act, 5 U. S. C. § 554, the agency remains "free under the Act to accord litigants appearing before it more procedural rights than the Act requires," *Florida East Coast R. Co.*, 410 U. S., at 236 n. 6.[17] The Board's procedures are, of course, constrained by the Due Process Clause of the Fifth Amendment, but respondent has raised no contention that attorney Schulson's participation in both proceedings approached a constitutional violation.[18]

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

It is so ordered.

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[17] The Board indicates that "[i]t is not general practice to use the same person who hears the Section 10 (k) case to investigate and prosecute the subsequent Section 8 (b) (4) (D) case." Memorandum for the NLRB 4 n. 4.

[18] There is a suggestion in the opinion of the Court of Appeals that the Board's order should not be enforced even if the Act does not govern the § 10 (k) proceeding because the commingling of functions was "incompatible with the accepted norms for the proper administration of justice." 486 F. 2d 863, 868. Cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950). In the present case, however, attorney Schulson prosecuted the case for the General Counsel *after* he had presided at the § 10 (k) proceeding. Even if it be assumed that his function at the § 10 (k) proceeding was judicial in nature, it is hard to see how this sequence of events would present the danger of commingling which the Court of Appeals saw. The Court of Appeals may have confused "hearing officers" with "trial examiners" or "hearing examiners" (now "administrative law judges") who are ordinarily required to make recommended decisions, 5 U. S. C. § 557 (b), and who must be appointed pursuant to 5 U. S. C. § 3105. 486 F. 2d, at 867 n. 3.

Syllabus

MANESS *v.* MEYERS, JUDGE

CERTIORARI TO THE 169TH JUDICIAL DISTRICT COURT OF TEXAS, BELL COUNTY

No. 73–689. Argued October 22, 1974—Decided January 15, 1975

A lawyer is not subject to the penalty of contempt for advising his client, during the trial of a civil case, to refuse on Fifth Amendment grounds to produce material demanded by a subpoena *duces tecum* when the lawyer believes in good faith that the material may tend to incriminate his client. To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation, since when a witness is so advised the advice becomes an integral part of the protection accorded the witness by the Fifth Amendment. Pp. 458–470.

(a) That the client in any ensuing criminal action could move to suppress the subpoenaed material after it had been produced does not afford adequate protection, because without something more "he would be compelled to surrender the very protection which the privilege is designed to guarantee," *Hoffman* v. *United States*, 341 U. S. 479, 486. *United States* v. *Blue*, 384 U. S. 251, distinguished. Pp. 461–463.

(b) Here where petitioner lawyer admitted that the allegedly obscene magazines subpoenaed for the purpose of enjoining their distribution were "of the same character" as magazines for distribution of which his client had recently been convicted (so that petitioner had, at the very least, a reasonable basis for assuming that a risk of further criminal prosecution existed), and where there was no assurance under state law that the material could be suppressed and no avenue other than assertion of the privilege, with the risk of contempt, that would have assured appellate review in advance of surrendering the magazines, the advice was given in good faith. Pp. 468–470.

Reversed.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the result, in which BLACKMUN, J., joined, *post*, p. 470. WHITE, J., filed an opinion concurring in the result, *post*, p. 472.

William F. Walsh argued the cause for petitioner. With him on the briefs were *Stuart M. Nelkin* and *Michael Anthony Maness pro se.*

Joe B. Dibrell argued the cause for respondent. With him on the briefs were *John L. Hill,* Attorney General of Texas, *Larry F. York,* First Assistant Attorney General, and *Lonny F. Zwiener,* Assistant Attorney General.

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

We granted certiorari to decide whether in a state civil proceeding a lawyer may be cited for contempt for advising his client, a party to the litigation, that the client may refuse on Fifth Amendment grounds to produce subpoenaed material.

I

Petitioner is a lawyer. In January 1973 his client was convicted before a Municipal Court in the city of Temple, Texas, of selling seven obscene magazines in violation of a Temple ordinance. Six days later the client, Michael McKelva, was served by a Bell County deputy sheriff with a subpoena *duces tecum* directing him to produce 52 magazines before the 169th Judicial District Court. The titles of the magazines were given, but no other description was contained in the warrant.

Under the Texas Penal Code[1] upon application by

[1] Texas Penal Code, Art. 527 (Supp. 1973), regulates distribution of obscene articles. Generally, it provides criminal penalties for specific acts of distribution. In § 13, however, it provides for an injunction to enforce its other provisions:

"Sec. 13. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district, county, or city attorney within their respective jurisdictions, or the Attorney General to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the pro-

any city attorney the district courts may issue injunctions to prevent illegal distribution of obscene matter. The subpoena here was requested by the Temple City Attorney in order to obtain such an injunction. Besides commanding production of the magazines it ordered petitioner's client to appear at a hearing on February 1, 1973, and give testimony.

McKelva appeared represented by petitioner and an associate, Karl A. Maley. Earlier, Maley had filed a written motion to quash the subpoena. The motion claimed, *inter alia,* that the issuance of the subpoena was merely an attempt to require materials and testimony in violation of McKelva's constitutional right not to incriminate himself.

At the hearing petitioner orally argued the motion to quash. He, too, contended that the city was attempting, through a civil proceeding, to discover evidence which properly should be discovered, if at all, through criminal process. He freely admitted that the magazines dealt explicitly with acts of a sexual nature, and that they were "of the same character" as the magazines for distribu-

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visions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter." The entire article was repealed by Acts 1973, 63d Leg., c. 399, § 3 (a), p. 992, effective January 1, 1974. The new law does not seem to have any provision equivalent to § 13.

tion of which McKelva previously had been convicted.[2] Thus, he argued, it was quite clear that a "substantial possibility of self-incrimination" existed if McKelva was required to produce the magazines. Petitioner foresaw possible criminal prosecution either under the Temple ordinance [3] again, or under Art. 527 itself.

Although petitioner claimed the Fifth Amendment's protection was available in any proceeding whether civil or criminal, he also urged that under the circumstances the injunctive proceeding for which the magazines were subpoenaed was quasi-criminal in nature. He noted that it was brought under the Penal Code of Texas and concluded that the city should secure a search warrant, describing with particularity the magazines it desired produced.

The City Attorney responded that the proceeding was purely civil and that "there is no contention on the part of the City or any attempt on the part of the City to get any evidence for any criminal prosecution," and thus any material produced would not be incriminating. Further, he maintained, because there "are no criminal sanctions . . . there will be no evidence that would be incriminating under the rules . . . ."

In reply petitioner drew an analogy to tax cases where, he argued, courts have prohibited the Internal Revenue

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[2] The parties stipulated that the conviction had occurred and was then under appeal.

[3] It appears that the Temple city criminal ordinance dealing with obscenity is substantially identical to the criminal provisions of Art. 527. Texas Penal Code, Art. 527, § 12 (Supp. 1973), provides:

"Sec. 12. No city, county or other political subdivision may enact any regulation of obscene material which conflicts with the provisions of this Act; however, a city, county, or other political subdivision is authorized to regulate further the means and manner of distribution and exhibition of matter."

At the hearing the court took judicial notice of the similarity between Art. 527 and the Temple criminal ordinance. App. 29.

Service from using subpoenas to discover records which might tend to incriminate taxpayers. Petitioner contended that the nature of the proceeding in which evidence is sought is irrelevant to the compass of the Fifth Amendment, and that the character of the material requested is the only relevant inquiry. He asserted that the sole test is whether production of the material would create a substantial probability of criminal prosecution for his client. He noted that the City Attorney's representation that the city is not interested in a criminal prosecution "certainly does not bind for example the County Attorney, or anyone else . . . who might be interested in prosecuting such a case."

The court then denied the motion to quash and petitioner's client, McKelva, took the stand. In answer to preliminary questions he gave his name and address and stated that he was the operator of Mike's News in Temple. He admitted to having been served with the subpoena, but when he was asked whether he had brought the magazines he replied: "[U]nder the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me." The City Attorney then moved the court to instruct the witness to answer, and if he failed to do so to hold him in contempt. The court asked petitioner's cocounsel what would be a reasonable time to allow for the witness to bring the magazines into court, because the court understood the applicable rule to require time for compliance before a motion for contempt should be entertained. Counsel replied that according to their position no time need be allowed because, in any event, the subpoena would require production of evidence which would tend to incriminate the witness. The court then recessed until the afternoon and instructed the witness to return at that time with the requested magazines. Petitioner's cocounsel said he understood the instruction.

When the court reconvened, McKelva was recalled, and he responded negatively when the City Attorney asked whether he had made any effort to obtain the subpoenaed magazines. He did, however, acknowledge that he had understood the court's order to bring them. After he indicated that the sole reason for his failure to comply was his belief that if he did so it would entail a substantial possibility of self-incrimination, the City Attorney again moved for a contempt citation. This time the court found McKelva in contempt and stated that the failure to respond would be treated as an admission that the subpoenaed magazines are obscene. Petitioner objected, arguing that a person may not be penalized for asserting a constitutional right by way of making an adverse finding against him. The judge replied that no finding had been made, but in view of petitioner's admission that the magazines were of the same nature as those for which his client previously had been convicted, there was justification for treating a refusal to produce them as an admission to be considered with other evidence.[4] Petitioner responded that he was obliged to assert that although the other magazines had been held obscene the subpoenaed magazines were not.

After other testimony was heard, McKelva was again recalled and the court asked him if his disobedience was his own decision, or if it was on the advice of counsel. McKelva replied that it was on the advice of counsel, specifically petitioner and Maley. Petitioner then asked his client whether he would produce the magazines if counsel advised him they were not incriminatory. McKelva replied that he would. This made it clear that but for the advice of counsel McKelva would have produced the subpoenaed matter.

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[4] The correctness of the conclusion as to inferences to be drawn from a witness' failure to respond is not before us for decision.

After a short recess the court ruled the subpoenaed magazines obscene, and enjoined their continued exhibition and sale. Finally, the court held petitioner and his cocounsel in contempt, as well as their client,[5] and fixed punishment for each of them at 10 days' confinement and a $200 fine.

The judge noted his reluctance to find the attorneys in contempt, stating this was the first time he had ever done so, but he felt that the attorneys had usurped the authority of the court: "This Court has not been permitted to rule on the admissibility of that evidence. You have ruled on it . . . ." Before the hearing ended, however, petitioner stated that he and his cocounsel had not deliberately and intentionally attempted to frustrate the court. Petitioner felt there was merely a philosophical difference between counsel and the court as to the scope of the Fifth Amendment protection. The court responded that the self-incrimination defense could have been reached either by a motion to suppress the evidence after it had been produced for injunctive purposes, or by an objection to an attempt to introduce it at a criminal trial.

The record shows no indication whatsoever of contumacious conduct on the part of petitioner or his cocounsel. The court appears to have been offended, in a strictly legal sense, only by the lawyers' advice which caused their client to decline on Fifth Amendment grounds to produce subpoenaed material. There is nothing in the record to suggest that petitioner or his cocounsel acted otherwise than in the good-faith belief that if their client produced the materials he would run a substantial risk of self-incrimination.

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[5] The only question presented here is the validity of the contempt penalty imposed upon the attorney. The validity of the contempt penalty imposed on petitioner's client is not before us.

The day the contempt citation was issued petitioner, on behalf of McKelva, applied to the Supreme Court of Texas for an original writ of habeas corpus. The same day that court denied the application pending further information to complete the record, and then finally denied the writ on February 5, 1973.

On February 8, 1973, petitioner filed an application on behalf of McKelva for a writ of habeas corpus in the United States District Court for the Western District of Texas, Waco Division. However, at 10 a. m. that day the judge who issued the contempt citation ordered McKelva released from custody although he had only served seven of his 10 days. The release was "for good behavior."

Pursuant to Texas procedure [6] the citation of the attorneys was reviewed by another state district judge, the respondent here, Judge James R. Meyers. A hearing was held on May 11, 1973, with the Texas Attorney General's office appearing in support of the contempt

[6] "Art. 1911a. Contempt; power of courts; penalties

. . . . .

"Penalties for contempt

"Sec. 2. (a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court.

. . . . .

"(c) Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred.

"Confinement to enforce order

"Sec. 3. Nothing in this Act affects a court's power to confine a contemner in order to compel him to obey a court order." Tex. Rev. Civ. Stat., Art. 1911 (Supp. 1974–1975).

citation. The parties agreed that the burden of proof was on the Attorney General, and also agreed that the record of the injunction hearing would provide the basis for the court's decision.

The court noted that it felt that the record supported a finding beyond a reasonable doubt that the client was advised not to bring the materials, and the court was dubious that materials displayed for public sale are protected by the Fifth Amendment. However, the court also stated, "I think it is a very close point." Counsel for petitioner agreed that the record clearly reflected that petitioner had *advised* his client that he had a Fifth Amendment privilege on the issue, but claimed that it did not reflect that petitioner had *instructed* him not to bring the subpoenaed materials.

On October 1, 1973, Judge Meyers affirmed the finding of contempt but changed the penalty to a $500 fine with no confinement. It is that judgment which is under review here.

Both Texas appellate courts refused to review the judgment. The Texas Court of Criminal Appeals denied petitioner's motion for leave to file an original application for a writ of habeas corpus, and the Supreme Court of Texas also denied a petition for a writ of habeas corpus. Both courts' orders were entered October 11. By order of Judge Meyers, personal recognizance bonds of petitioner and Maley were continued in order that Maley could seek a writ of habeas corpus from the United States District Court for the Western District of Texas and petitioner could petition for a writ of certiorari from this Court.

On December 20, 1973, Judge Jack Roberts of the United States District Court for the Western District of Texas, Waco Division, granted Maley's petition for a writ of habeas corpus. He noted that even incorrect

orders from courts ordinarily must be obeyed until set aside, but he concluded that McKelva had asserted a valid Fifth Amendment privilege, and therefore neither he nor his lawyer could be held in contempt for asserting that privilege. Since civil and criminal liability under Art. 527 arise from the same act the judge also concluded that the Fifth Amendment applied even in the injunctive action. Indeed, he noted that the leading case of *Boyd* v. *United States,* 116 U. S. 616 (1886), involved forfeiture proceedings which, "though they may be civil in form, are in their nature criminal." *Id.,* at 634. He held that since Maley was only acting to protect rights guaranteed by the Constitution to his client, "he cannot be held in contempt."

An appeal has been filed from that judgment and is now pending before the United States Court of Appeals for the Fifth Circuit. On April 15, 1974, we granted the petition for a writ of certiorari, 416 U. S. 934; we are advised that the case is being held pending our decision in this case.

II

The narrow issue in this case is whether a lawyer may be held in contempt for advising his client, during the trial of a civil case, to refuse to produce material demanded by a subpoena *duces tecum* when the lawyer believes in good faith the material may tend to incriminate his client.

We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Howat v. *Kansas,* 258 U. S. 181, 189–190 (1922); *Worden* v. *Searls,* 121 U. S. 14 (1887). The orderly and expeditious administration of justice by the courts requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States* v. *Mine Workers,* 330 U. S. 258, 293 (1947). This principle is especially applicable to orders issued during trial. *E. g., Illinois* v. *Allen,* 397 U. S. 337 (1970). Such orders must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation. This does not mean, of course, that every ruling by a presiding judge must be accepted in silence. Counsel may object to a ruling. An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling. *United States* v. *La Franca,* 282 U. S. 568, 570 (1931). But, once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders. While claims of error may be preserved in whatever way the applicable rules provide, counsel should neither engage the court in extended discussion once a ruling is made, nor advise a client not to comply.[7] A lawyer who coun-

[7] In a case dealing with misconduct of attorneys but decided under the Federal Rules of Criminal Procedure, Mr. Justice Jackson discussed these same elementary propositions:

"Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist or to insult the judge—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that

sels his client not to comply with a court order during trial would, first, subject his client to contempt, and in addition, if he persisted the lawyer would be exposed to sanctions for obstructing the trial. Remedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice.

When a court during trial orders a witness to reveal information, however, a different situation may be presented. Compliance could cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. In those situations we have indicated the person to whom such an order is directed has an alternative:

> "[W]e have 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,* [309 U. S. 323 (1940)]; *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)." *United States* v. *Ryan,* 402 U. S. 530, 532–533 (1971).

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we should not remind the bar of them were it not for the misconceptions manifest in this case." *Sacher* v. *United States,* 343 U. S. 1, 9 (1952).

This method of achieving precompliance review is particularly appropriate where the Fifth Amendment privilege [8] against self-incrimination is involved. The privilege has ancient roots, see, *e. g., Brown* v. *Walker,* 161 U. S. 591, 596–597 (1896); *Miranda* v. *Arizona,* 384 U. S. 436, 458–463 (1966); see especially *id.,* at 458 n. 27. This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892); *Arndstein* v. *McCarthy,* 254 U. S. 71, 72–73 (1920). The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. *Hoffman* v. *United States,* 341 U. S. 479, 486 (1951). In view of the place this privilege occupies in the Constitution and in our adversary system of justice, as well as the traditional respect for the individual that undergirds the privilege, the procedure described in *Ryan* seems an eminently reasonable method to allow precompliance review.

In the present case the City Attorney argued that if petitioner's client produced the magazines he was amply protected because in any ensuing criminal action he could

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[8] This case deals only with the privilege against self-incrimination contained in the Fifth Amendment to the Constitution and made applicable to the States by the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The constitutional basis for this privilege distinguishes it from other privileges established by state statute or common law such as those arising from the relation of priest and penitent, lawyer and client, physician and patient, and husband and wife. We are not now presented with questions as to the scope of privileges not found in the Constitution.

always move to suppress,[9] or object on Fifth Amendment grounds to the introduction of the magazines into evidence. Laying to one side possible waiver problems that might arise if the witness followed that course, cf. *Rogers* v. *United States,* 340 U. S. 367 (1951), we nevertheless cannot conclude that it would afford adequate protection. Without something more [10] "he would be compelled to surrender the very protection which the privilege is designed to guarantee." *Hoffman* v. *United States, supra,* at 486.

Our views as to the effectiveness of a later objection or motion to suppress do not conflict with *United States* v. *Blue,* 384 U. S. 251 (1966). There we said:

> "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial." *Id.,* at 255.

But the crucial distinction between that case and the instant question is that there the Government indeed "did acquire" the information. Blue had turned it over

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[9] Counsel for respondent could cite no Texas statute or case giving assurance that the magazines would be suppressed because they were produced involuntarily so the witness could avoid a contempt citation.

[10] It is important here that the witness was not granted immunity from prosecution on the basis of any magazines he might produce. Quite the contrary, he was ordered to produce after vulnerability to prosecution had been made only too clear to him. In response to the City Attorney's assertion that he did not intend to prosecute based on the magazines, petitioner noted that the State or county might still prosecute, *supra,* at 452, 453, and neither the City Attorney nor the judge disagreed. See n. 9, *supra.*

Had the witness been granted formal immunity a different case would be presented; in that event a witness may be compelled to testify. *Kastigar* v. *United States,* 406 U. S. 441 (1972). If counsel, in the face of a grant of immunity, advised his client not to testify or produce information, a different question would be presented because the good faith of the attorney would be open to doubt.

during a civil investigation *without* asserting the Fifth Amendment privilege. Here, on the contrary, petitioner's client had not yet delivered the subpoenaed material, and he consistently and vigorously asserted his privilege. Here the "cat" was not yet "out of the bag" and reliance upon a later objection or motion to suppress would "let the cat out" with no assurance whatever of putting it back.

Thus in advising his client to resist and risk a contempt citation, thereby allowing precompliance appellate review of the claim, petitioner counseled a familiar procedure. Although it is clear that noncompliance risked both an immediate contempt citation and a final criminal contempt judgment against the witness if, on appeal, petitioner's advice proved to be wrong, the issue here is whether petitioner, as counsel, can be penalized for good-faith advice to claim the privilege.

It appears that here the trial judge rejected the Fifth Amendment claim primarily because it was raised in a civil [11] and not a criminal case. The City Attorney relied most heavily on that distinction in his argument in opposition to the motion to quash.[12] Just as vigorously, petitioner contended that the privilege against self-incrimination protected his client regardless of the nature of the proceeding. He said:

> "It is very clear that the coverage of the Fifth Amendment is not to be determined by the nature of the proceeding in which it is asserted. The Fifth

[11] Petitioner also argued, as we noted earlier, that the proceeding was not civil at all but rather was "quasi criminal." App. 10. He noted that the proceeding was based upon "the provisions of Section 13 of Article 527 of the Texas Penal Code." *Ibid.* He viewed the injunctive action as a mere prelude to a criminal prosecution. Thus he contended that the city should have sought the magazines with a search warrant instead of a subpoena *duces tecum*.

[12] *Id.*, at 12.

Amendment applies to all proceedings, to injunctive proceedings, to administrative proceedings, and to criminal proceedings. It applies to interrogation by Police Officers out of Court. It applies across the board. We are not talking about the context of the proceedings in which the privilege against self-incrimination is asserted. We are talking about the character of material that is sought to be taken from the person who is subject to the subpoena.

"... [T]he test in those circumstances is whether there is a substantial probability in requiring the party that is served with the subpoena to produce the evidence, which evidence would entail self-incrimination, and with the production of the magazines for possible use in a criminal prosecution, and we say that this would amount to a violation of the privilege under the Fifth Amendment, and we contend that it most certainly would, and that it must." App. 13–14.

In overruling the claimed privilege the trial judge seems to have accepted the City Attorney's contention that the claim is not available in a civil proceeding. We disagree.

In *Kastigar* v. *United States,* 406 U. S. 441 (1972), we recently reaffirmed the principle that the privilege against self-incrimination can be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Id.,* at 444; *Lefkowitz* v. *Turley,* 414 U. S. 70, 77 (1973); *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 94 (1964) (WHITE, J., concurring); *McCarthy* v. *Arndstein,* 266 U. S. 34, 40 (1924); *United States* v. *Saline Bank,* 1 Pet. 100 (1828); cf. *Gardner* v. *Broderick,* 392 U. S. 273 (1968). The trial judge seems to have proceeded upon the mistaken premise that petitioner's client was misadvised even to assert the privilege in a civil proceeding, regardless of its ultimate merit. This error explains the severe sanction the court placed—

albeit reluctantly—upon petitioner because his advice seemed to have caused the witness' refusal to obey.[13] Thus the issue is whether in a civil proceeding a lawyer may be held in contempt for counseling a witness in good faith to refuse to produce court-ordered materials on the ground that the materials may tend to incriminate the witness in another proceeding. We hold that on this record petitioner may not be penalized even though his advice caused the witness to disobey the court's order.

The privilege against compelled self-incrimination would be drained of its meaning if counsel, being lawfully present,[14] as here, could be penalized for advising

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[13] Petitioner readily concedes that his advice indeed caused his client to disobey the order. When the court gave petitioner's client a final chance to purge himself of the contempt citation this colloquy took place:

"THE COURT: Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed to observe a subpoena duces tecum to bring certain matters with you as a witness. In your testimony with reference to why you failed to do this, you first indicated that it was on the advice of Counsel that you were declining to obey the subpoena, and so I want to ask you directly this morning, is your disobedience to this subpoena your own decision, or is it on the advice of Counsel, and if so, what Counsel?

"A. It is on the advice of Counsel, sir, and Mr. Friedman, Mr. Maley and Mr. Maness.

"THE COURT: Does either Counsel have any questions that they want to ask this witness?

"MR. MANESS: Your Honor, I would only like to ask Mr. McKelva, in the event that his Counsel were to advise him that his privileges against self-incrimination were not endangered by producing the . . . magazines in question, whether or not under those circumstances he would produce the magazines?

"A. I would." App. 27.

Counsel thus took full responsibility for his client's acts, as, of course, his duty to his client required.

[14] Under Texas procedure and the rulings of the trial court in this case the client was undoubtedly entitled to consult with counsel at the times and in the manner he did.

his client in good faith to assert it. The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege.[15] It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence.[16]

[15] Mr. Justice Stewart would appear to extend our reasoning far beyond the confines of this case. We do not agree that our reasoning leads "inexorably" to his conclusion. We have here a case where retained counsel, in a proceeding which he strenuously argued was not civil but quasi-criminal, has been held in contempt for advising his client that he may assert the Fifth Amendment privilege.

Reliance seems to us misplaced on the statement in *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932), that "[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him . . . such a refusal would be a denial of a hearing, and, therefore, of due process . . . ." Comments in a *criminal* case as to the law in a *civil* case hardly reach the level of constitutional doctrine, if indeed they are any more than dicta. From these dicta it is argued that it as much violates due process to punish an attorney for advising a witness of a privilege as to prevent the attorney from appearing at all; also that a contempt citation may "constitute an arbitrary interference with the constitutionally protected attorney-client relationship," *post*, at 472, even where no constitutional privilege is involved. We need not go so far nor travel such a circuitous route to reach our conclusion here. We are not aware that the Court has ever identified a "constitutionally protected attorney-client" privilege of the scope postulated by Mr. Justice Stewart.

[16] The American Bar Association Project on Standards for Criminal Justice, Defense Function § 1.6 (Approved Draft 1971) shows the difficulty such a situation would present for a lawyer:

"[T]he duties of a lawyer to his client are to represent his legitimate

There is a crucial distinction between citing a recalcitrant witness for contempt, *United States* v. *Ryan, supra,* and citing the witness' lawyer for contempt based only on advice given in good faith to assert the privilege against self-incrimination. The witness, once advised of the right, can choose for himself whether to risk contempt in order to test the privilege before evidence is produced. That decision is, and should be, for the witness. But, if his lawyer may be punished for advice so given there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege.

An early example of this situation is found in *In re Watts,* 190 U. S. 1 (1903). There lawyers advised their clients in good faith that state, not federal, courts had bankruptcy jurisdiction over a certain property in the hands of a state receiver. This advice led to a collision between the state and federal courts, and contempt citations for the lawyers. Although this Court held that the lawyers' advice was substantively incorrect, it refused to allow the federal contempt convictions to stand because there was no evidence the advice was given in bad faith. *Id.,* at 32. Mr. Chief Justice Fuller, speaking for the Court, said:

> "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence

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interests, and considerations of personal and professional advantage should not influence his advice or performance."

The introductory comments note:

"A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate." *Id.,* at 146.

of the bar is too vital to the due administration of justice to allow of the application of any other general rule." *Id.*, at 29.

We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony. To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation. When a witness is so advised the advice becomes an integral part of the protection accorded the witness by the Fifth Amendment.

III

In applying these principles it is important to note what this case does not involve: the claim is not based solely on privacy; this is not a case where state law is clear that a response to compulsory process under protest renders the response inadmissible in any criminal prosecution against the witness; most important, there is no contention here as to lack of good faith or reasonable grounds for assertion of a Fifth Amendment claim.

Both in a pretrial written motion and orally during trial, petitioner cogently stated his reasons for believing the privilege applied:

> "In view of the fact that there is this substantial possibility of self-incrimination; in view of the fact that seven other magazines that are of the same character as the . . . magazines named in the subpoena, that they have provided the basis for past criminal prosecutions; in view of the fact that criminal prosecutions are not only a very definite possibility, they are in fact a pronounced possibility, and so there is little reasonable doubt in these circumstances that the subpoena should be quashed

> because in fact it seeks to compel the person named in the subpoena to incriminate himself, and, of course, this is prohibited by the Fifth Amendment to the Constitution of the United States." App. 9–10.

Petitioner stated that the magazines were "of the same character" [17] as magazines for distribution of which his client had recently suffered a criminal conviction. There was therefore, at the very least, a reasonable basis for petitioner to assume that a risk of further criminal prosecution existed.[18] Both sides agree that the record is devoid of evidence of contumacious conduct or any disrespect for the court, cf., *e. g., In re Little,* 404 U. S. 553, 554–555 (1972). The highly professional tone of the proceeding is revealed by the statements of the judge, and by petitioner's closing comments to the judge after he had been cited for contempt:

> "If it please the Court, I certainly appreciate the Court's position. I think what we have here is not a situation, and I hope this is correct, where Counsel have deliberately and intentionally attempted to frustrate the Court. I think that rather what we have is where there is a philosophical difference between Counsel for the Defendant and the Court with regard to the applicable law as to self-incrimination and the production of evidence in a civil case." App. 32.

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[17] Petitioner's concession that the subpoenaed magazines were of the same character was not an admission they were obscene. His contention seems to have been that they were sufficiently like those for which his client previously had been convicted as to raise the possibility of prosecution, and thus to allow assertion of the Fifth Amendment privilege.

[18] In view of our disposition of this case upon other grounds we need not, and do not, decide whether the Fifth Amendment privilege actually encompasses these magazines.

On this record, with no state statute or rule guaranteeing a privilege or assuring that at a later criminal prosecution the compelled magazines would be inadmissible, it appears that there was no avenue other than assertion of the privilege, with the risk of contempt, that would have provided assurance of appellate review in advance of surrendering the magazines. We are satisfied that petitioner properly performed his duties as an advocate here, and he cannot suffer any penalty for performing such duties in good faith.[19]

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring in the result.

The Court today holds that the constitutional privilege against compulsory self-incrimination embraces the right of a testifying party to the unfettered advice of counsel in a civil proceeding. As the Court puts the matter, a "layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. . . . [I]f his lawyer may be punished for advice so given there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege." *Ante,* at 466–467.

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[19] We recognize that there may be instances where advice to plead the Fifth Amendment could be given in bad faith, or could be patently frivolous or for purposes of delay, and such instances would present far different issues from those here. See *Cole* v. *United States,* 329 F. 2d 437 (CA9), cert. denied, 377 U. S. 954 (1964); *United States* v. *Cioffi,* 493 F. 2d 1111, 1119 (CA2), cert. denied, 419 U. S. 917 (1974).

The premise underlying the conclusion that the constitutional privilege against compulsory self-incrimination includes the right to the *unfettered* advice of counsel in civil proceedings must be that there is a constitutional right, also derived from the privilege against compulsory self-incrimination, to *some* advice of counsel concerning the privilege in the first place. The Court's rationale thus inexorably implies that counsel must be appointed for any indigent witness, whether or not he is a party, in any proceeding in which his testimony can be compelled. For surely few indigents will be more cognizant than was Maness' client of the privilege against compulsory self-incrimination, let alone aware of the "nuances" of the privilege. Unless counsel is appointed, these indigents will be deprived, just as surely as Maness' client would have been had he not been advised by Maness, of the opportunity to decide whether to assert their constitutional privilege. "To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation." *Ante,* at 468.

I am unwilling to go that far toward recognizing an unqualified right to appointed counsel in civil proceedings in a case that does not demand it. But I concur in the Court's judgment upon a wholly different ground.

More than 40 years ago the Court recognized a due process right to retained counsel in civil proceedings. "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell* v. *Alabama,* 287 U. S. 45, 69. It requires no expansion of this well-established principle to hold that just as a state court may not arbitrarily prohibit retained counsel's presence in a courtroom, so too it may

not arbitrarily prohibit or punish good-faith advice given by retained counsel. The "right to be heard by counsel" is frustrated equally by denying the right to have counsel present during trial as by preventing counsel, once in the courtroom, from giving good-faith professional advice to his client.

The right to be advised by retained counsel in a civil proceeding does not, of course, guarantee a lawyer absolute immunity for advice he gives to his client. Whether a contempt citation constitutes an arbitrary interference with the constitutionally protected attorney-client relationship depends on both the tenor of the advice and the circumstances under which it is given. It does not depend solely on the nature of the legal issue involved. Advice to invoke a state-recognized testimonial privilege, for example, may be just as essential to the discharge of a lawyer's responsibility to his client as was Maness' advice to invoke the constitutional privilege against compulsory self-incrimination.

The Court's opinion and MR. JUSTICE WHITE's concurring opinion fully explain the circumstances that in this case justified Maness' advice to his client to refuse to comply with the trial judge's order to produce the subpoenaed material. Under these circumstances Maness did no more than properly perform the conventional service of a lawyer. To punish him for performing his professional duty in good faith would be an arbitrary interference with his client's right to the presence and advice of retained counsel—and thus a denial of due process of law.

MR. JUSTICE WHITE, concurring in the result.

The issue in this case is not simply whether a lawyer may be held in contempt for advising his client to plead the Fifth Amendment. Obviously, put that

way, he may not. The issue is whether, after his client's self-incrimination objection to testifying or complying with a subpoena is overruled and his client is ordered to answer, the lawyer is in contempt of court when he advises the client not to obey the court's order. I agree with the Court's judgment that the contempt judgment against the lawyer cannot stand in the circumstances of this case.

Although the proceeding in which he is called is not criminal, it is established that a witness may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him. The object of the Amendment "was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892); *McCarthy* v. *Arndstein,* 266 U. S. 34, 40 (1924); *Lefkowitz* v. *Turley,* 414 U. S. 70, 77 (1973). In any of these noncriminal contexts, therefore, "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Id.,* at 78; *Kastigar* v. *United States,* 406 U. S. 441 (1972).

If the witness, having objected on Fifth Amendment grounds, is granted immunity against the use of his testimony and its fruits in a later prosecution, our cases hold that the danger of self-incrimination is removed and the privilege wholly satisfied. The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not to protect private information. Testimony demanded of a witness may be very private indeed, but unless it is incriminating and protected by

the Amendment or unless protected by one of the evidentiary privileges, it must be disclosed. When the objection interposed is that of self-incrimination, a grant of immunity removes any ground for a refusal to answer and for a good-faith suggestion by counsel that the client not answer, however private his information may be. Should the attorney then advise his client not to answer, there should be no barrier to his conviction for contempt.

But what of the case, such as we have here, where the claim of privilege is overruled because the witness has not carried his burden of demonstrating to the satisfaction of the trial judge that the sought-after answer may incriminate him and there is apparently no occasion for an assurance of immunity? It seems to me that in such event the witness is nevertheless protected by a constitutionally imposed use immunity if he answers in response to the order and under threat of contempt. If, contrary to the expectations of the judge but consistent with the claim of the witness and his lawyer, the State later finds the answer or its fruits incriminating and offers either against the witness in a criminal prosecution, the witness has a valid objection to the evidence on the ground that he was coerced by a court order to reveal it and that it is therefore compelled self-incrimination barred from use by the Fifth Amendment.

In *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), the State Attorney General summoned police officers to an inquiry into the fixing of traffic tickets. Following warnings that if they did not answer they would be removed from office and that anything they said might be used against them in a criminal proceeding, they were interrogated about the conduct of their official duties. No immunity of any kind was offered or available under state law. The questions were answered and the answers later used over their objections in a conspiracy prosecution of

the officers. The Court held that "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." *Id.,* at 500. *Lefkowitz* v. *Turley, supra,* reaffirmed this holding, 414 U. S., at 79–80, and declared that absent formal immunity protections, "if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram* v. *United States,* [168 U. S. 532 (1897)]; *Boyd* v. *United States,* [116 U. S. 616 (1886)]." *Id.,* at 78.

Given this ultimate immunity from being incriminated by his responses to his interrogation, a refusal to answer should subject the witness to contempt without the necessity of appellate review extending to the merits of the Fifth Amendment claim. If the State makes sufficiently clear that it recognizes this established rule, the attorney would have no business advising his client to disobey the court's order to answer. But the possibility, much less the reality, of a compelled answer, along with its fruits, being immunized from later use was hardly brought home to this petitioner or to his client. Had the client been granted immunity or had he been advised of its functional equivalent—that although he was not immune from criminal prosecution with respect to the subject matter of his answers, neither his answer nor its fruits could later be used against him, *Kastigar* v. *United States, supra*—it may well have been that his choice, and the advice of petitioner, would have been quite different.

As the matter stands, nothing of the sort was clear in this case to either the petitioner or to his client. As far as can be ascertained from this record, the trial judge insisted that petitioner's client answer without any assur-

ance *then* that the forthcoming answers could not be used to convict him in the event that the judge was wrong about their not being incriminating. I therefore agree that it was error to hold the attorney in contempt for advising his client not to answer. Cf. *Lefkowitz* v. *Turley, supra; Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Sanitation Men* v. *Sanitation Comm'r,* 392 U. S. 280 (1968). At the very least, if there were still a live controversy between the State and petitioner's client, which apparently there is not, the contempt judgment would be vacated and the client would be given another opportunity to answer, having in mind the controlling constitutional principles. *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 80 (1964).

Syllabus

COUSINS ET AL. *v.* WIGODA ET AL.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 73–1106. Argued November 11, 1974—
Decided January 15, 1975

Petitioners (Cousins delegates) challenged before the National Democratic Party Credentials Committee, as violative of Party guidelines, the seating of respondents (Wigoda delegates) who had been elected from Chicago districts at the March 1972 Illinois primary election as delegates to the 1972 Democratic National Convention to be held in July 1972. The Committee decided that the Cousins delegates should be seated instead of the Wigoda delegates, who, on July 8, 1972, two days before the Convention opened, were granted an injunction by the Illinois Circuit Court enjoining the Cousins group from acting as delegates at the Convention. The Cousins delegates nevertheless were seated by the Convention and functioned as delegates. The Illinois Appellate Court affirmed, holding that "[t]he right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code," and that the "interest of the State in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect." In another suit, which had been brought in the District Court for the District of Columbia, one Keane, a Wigoda delegate, challenged the constitutionality of the Party guidelines allegedly violated in the Wigoda delegates' selection. The District Court sustained one of the challenged guidelines and dismissed Keane's suit while denying the Party's counterclaim for an injunction against the Wigoda delegates' proceeding with the state-court action. The Court of Appeals on July 5 affirmed the dismissal but granted the counterclaim. This Court in a *per curiam* opinion stayed the judgment of the Court of Appeals and later, having granted Keane's petition for certiorari, vacated the Court of Appeals' judgment and remanded for a determination of mootness. The Court of Appeals thereafter held the case moot insofar as it involved the seating of delegates at the completed Convention and affirmed dismissal of the Keane suit. In addition to their arguments on the merits, petitioners contend that language in the

per curiam established the Convention's right to decide the Chicago credentials contest, and that this Court's action in staying, but not vacating, the Court of Appeals' judgment left that judgment as a res judicata bar to the injunction. *Held:*

1. This Court's *per curiam* unqualifiedly suspended the operative effects of the Court of Appeals judgment without resolving the merits of the controversy; and petitioners' res judicata contention is not open for consideration, not having been pleaded and proved in the Circuit Court as required by state law. Pp. 485–487.

2. In the selection of candidates for national office a National Party Convention serves the pervasive national interest, which is paramount to any interest of a State in protecting the integrity of its electoral process, and the Circuit Court erred in issuing an injunction that abridged the associational rights of petitioners and their Party and the Party's right to determine the composition of its National Convention in accordance with Party standards. Pp. 487–491.

14 Ill. App. 3d 460, 302 N. E. 2d 614, reversed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed an opinion concurring in the result, in which BURGER, C. J., and STEWART, J., joined, *post*, p. 491. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 496.

Wayne W. Whalen argued the cause for petitioners. With him on the briefs were *John R. Schmidt, Douglas A. Poe, Robert L. Tucker,* and *John C. Tucker.*

Jerome H. Torshen argued the cause for respondents. With him on the brief were *Lawrence H. Eiger, Earl L. Neal,* and *Gayle F. Haglund.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

At the March 1972 Illinois primary election, Chicago's Democratic voters elected the 59 respondents (Wigoda

**Joseph L. Rauh, Jr., John Silard,* and *Elliott Lichtman* filed a brief for Americans for Democratic Action et al. as *amici curiae* urging reversal.

delegates) as delegates to the 1972 Democratic National Convention to be held in July 1972 in Miami, Fla. Some of the 59 petitioners (Cousins delegates) challenged the seating of the Wigoda delegates before the Credentials Committee of the National Democratic Party on the ground, among others, that the slate-making procedures under which the Wigoda delegates were selected violated Party guidelines incorporated in the Call of the Convention. On June 30, 1972, the Credentials Committee sustained the Findings and Report of a Hearing Officer that the Wigoda delegates had been chosen in violation of the guidelines,[1] and also adopted the Hearing Offi-

[1] The Hearing Officer found violations of Guidelines A–1 (minority group participation), A–2 (women and youth participation), A–5 (existence of party rules), C–1 (adequate public notice of party affairs), C–4 (timing of delegate selection), and C–6 (slate-making). Findings and Report of Cecil F. Poole, Hearing Officer (June 25, 1972). Guideline C–6 was as follows:

"C–6 Slate-making

"In mandating a full and meaningful opportunity to participate in the delegate selection process, the 1968 Convention meant to prohibit any practice in the process of selection which made it difficult for Democrats to participate. Since the process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected, the Commission requires State Parties to extend to the nominating process all guarantees of full and meaningful opportunity to participate in the delegate selection process. When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose.

"Furthermore, whenever slates are presented to caucuses, meetings, conventions, committees, or to voters in a primary, the Commission requires State Parties to adopt procedures which assure that:

"1. the bodies making up the slates have been elected, assembled, or appointed for the slate-making task with adequate public notice that they would perform such task;

"2. those persons making up each slate have adopted procedures that will facilitate widespread participation in the slate-making

cer's recommendation that the Wigoda delegates be unseated and the Cousins delegates (who had been chosen in June at private caucuses in Chicago) be seated in their stead.

On July 8, 1972, two days before the Convention opened, the Wigoda delegates obtained from the Circuit Court of Cook County, Ill., an injunction that enjoined each of the 59 petitioners "from acting or purporting to act as a delegate to the Democratic National Convention . . . [and] from performing the functions of delegates . . . [and] from receiving or accepting any credentials, badges or other indicia of delegate status . . . ." [2]

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process, with the proviso that any slate presented in the name of a presidential candidate in a primary State be assembled with due consultation with the presidential candidate or his representative.

"3. adequate procedural safeguards are provided to assure that the right to challenge the presented slate is more than perfunctory and places no undue burden on the challengers.

"When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose."

For comments on the development of the guidelines, see Schmidt & Whalen, Credentials Contests and the 1968 and 1972 Democratic National Conventions, 82 Harv. L. Rev. 1438 (1969); Segal, Delegate Selection Standards: The Democratic Party's Experience, 38 Geo. Wash. L. Rev. 873 (1970); Report of Commission on Party Structure and Delegate Selection: Mandate for Reform (1970), reprinted at 117 Cong. Rec. 32909 (1971).

[2] The injunction was obtained in a Circuit Court action filed April 19, 1972, by the Wigoda delegates against the Cousins delegates. In the interval between the filing of the suit and the action of the Credentials Committee on June 30, 1972, two proceedings occurred in the District Court for the Northern District of Illinois related to the suit. On April 20 petitioners removed the case to that federal court. On May 17 the case was remanded on the ground that there was no basis for federal jurisdiction. *Wigoda* v. *Cousins,* 342 F. Supp. 82. On June 30, the Court of Appeals for the Seventh Circuit, in an

Nevertheless when the Convention on July 10 adopted the Credentials Committee's recommendation and seated the Cousins delegates, they took their seats and participated fully as delegates throughout the Convention. In consequence, proceedings to adjudge petitioners in criminal contempt of the July 8 injunction are pending in the Circuit Court awaiting this Court's decision in this case.

The Illinois Appellate Court affirmed the injunction, 14 Ill. App. 3d 460, 302 N. E. 2d 614 (1973),[3] and the Supreme Court of Illinois, without opinion, on November 29, 1973, denied leave to appeal. The Appellate Court held that "[t]he right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code," *id.*,

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unpublished order, affirmed the remand. *Wigoda* v. *Cousins,* No. 72–1384.

While the remand issue was pending, petitioners filed their own action in the District Court for the Northern District of Illinois seeking an injunction against respondents proceeding with the Circuit Court suit on the ground that it violated their First Amendment rights. On June 9, after trial, a preliminary injunction issued barring respondents from proceeding with the state-court action. *Cousins* v. *Wigoda,* Civil No. 72C 1108. That injunction was reversed by the Seventh Circuit on June 29. *Cousins* v. *Wigoda,* 463 F. 2d 603. Petitioners' application to MR. JUSTICE REHNQUIST, Circuit Justice, for a stay of the Court of Appeals order was denied on July 1. 409 U. S. 1201.

[3] The Appellate Court also affirmed another injunction of the Circuit Court entered August 2, 1972, barring petitioners from participating as delegates at a post-convention caucus on August 5, 1972, to select the Illinois representatives to the Democratic National Committee to serve until the 1976 Convention. Petitioners complied with that injunction and respondents participated in the August 5 caucus. Since the National Committee plans the National Convention the question of the validity of the August 2 injunction is analytically indistinguishable from the question of the validity of the July 8 injunction, and our decision today applies to both injunctions.

at 472, 302 N. E. 2d, at 626, and rejected the Cousins delegates' contention that the injunction attempting to enforce that Code, by preventing them from participating as delegates at the Convention, violated their right, and the right of the National Democratic Party, to freedom of political activity and association assured them under the First and Fourteenth Amendments. The Appellate Court stated:

> "[T]he purposes and guidelines for reform adopted by the Democratic National Party in its Call for the 1972 Democratic National Convention . . . in no way take precedence in the State of Illinois over the Illinois Election Code (Ill. Rev. Stat. 1971, ch. 46, § 7–1 *et seq.*). The opening section of Article 7 of the Election Code, which deals with the making of nominations by political parties (§ 7–1), is most clear when in discussing the selection of delegates to National nominating conventions, it states:
> "'. . . [D]elegates and alternate delegates to National nominating conventions by all political parties . . . shall be made in the manner provided in this Article 7, and not otherwise.'" *Id.*, at 471, 302 N. E. 2d, at 625.
> "[T]he law of the state is supreme and party rules to the contrary are of no effect. . . ." *Id.*, at 475, 302 N. E. 2d, at 627.
> "The interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect. . . ." *Id.*, at 477, 302 N. E. 2d, at 629.
> "Since [respondents] were admittedly elected to the position of delegates to the 1972 Democratic National Convention by operation of the Election Code, an Illinois statute, this court finds the trial court's

> injunctions did not abrogate [petitioners'] fundamental constitutional rights of free political association. . . ." *Id.*, at 479, 302 N. E. 2d, at 631.

We granted certiorari to decide the important question presented whether the Appellate Court was correct in according primacy to state law over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention. 415 U. S. 956 (1974).[4] We reverse.

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[4] We emphasize that this is the only question that we decide today. There are not before us in this case, and we intimate no views upon the merits of, such questions as:

(1) whether the decisions of a national political party in the area of delegate selection constitute state or governmental action, and, if so, whether or to what extent principles of the political question doctrine counsel against judicial intervention. Respondents concede, and we agree, that "[i]n the context of the instant case, it is not necessary to determine whether Convention action is 'state action' . . . ." Brief for Respondents 47. See *Brown* v. *O'Brien,* 152 U. S. App. D. C. 157, 469 F. 2d 563 (1972); *Georgia* v. *National Democratic Party,* 145 U. S. App. D. C. 102, 447 F. 2d 1271 (1971); *Smith* v. *State Executive Committee of Democratic Party of Georgia,* 288 F. Supp. 371 (ND Ga. 1968); *Lynch* v. *Torquato,* 343 F. 2d 370 (CA3 1965). See also the Texas White Primary Cases, *Nixon* v. *Herndon,* 273 U. S. 536 (1927); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Terry* v. *Adams,* 345 U. S. 461 (1953). For the differing views of commentators, see Note, Legal Issues of the 1972 Democratic Convention and Beyond, 4 Loyola U. of Chi. L. J. 137 (1973); Note, Regulation of Political Parties: Vote Dilution in the Presidential Nomination Procedure, 54 Iowa L. Rev. 471 (1968); Chambers & Rotunda, Reform of Presidential Nominating Conventions, 56 Va. L. Rev. 179 (1970); Note, Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions, 78 Yale L. J. 1228 (1969); Comment, One Man, One Vote and Selection of Delegates to National Nominating Conventions, 37 U. Chi. L. Rev. 536 (1970); Bellamy, Applicability of the Fourteenth Amendment to the Allocation of Delegates to the Democratic National Convention, 38 Geo. Wash. L. Rev. 892 (1970); Raymar, Judicial Review of Cre-

I

There is a threshold question to be decided before we discuss the merits of the constitutional issue. During June and July 1972 the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit twice considered an action brought by one of the Wigoda delegates, Thomas E. Keane, against the National Democratic Party. That action challenged the constitutionality of the Party guidelines allegedly violated in the selection of the Wigoda delegates. The Cousins delegates intervened and the Party counterclaimed for an injunction enjoining the Wigoda delegates from proceeding with the state-court action. The case was initially dismissed on appeal because the Credentials Committee had not yet decided the petitioners' challenge, *Keane* v. *National Democratic Party,* No. 1010–72 (DC June 19, 1972); *Keane* v. *National Democratic Party,*

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dentials Contests: The Experience of the 1972 Democratic National Convention, 42 Geo. Wash. L. Rev. 1 (1973); Note, Judicial Intervention in the Presidential Candidate Selection Process: One Step Backwards, 47 N. Y. U. L. Rev. 1184 (1972).

(2) whether national political parties are subject to the principles of the reapportionment decisions, or other constitutional restraints, in their methods of delegate selection and allocation. Compare *Bode* v. *National Democratic Party,* 146 U. S. App. D. C. 373, 452 F. 2d 1302 (1971), with *Irish* v. *Democratic-Farmer-Labor Party,* 399 F. 2d 119 (CA8 1968); and see *Gray* v. *Sanders,* 372 U. S. 368, 378 n. 10 (1963). For a history of a century of resolutions of credentials disputes through party procedures and machinery see R. Bain & J. Parris, Convention Decisions and Voting Records (2d ed. 1973); Goldstein, One Man, One Vote and the Political Convention, 40 U. Cin. L. Rev. 1 (1971).

(3) whether or to what extent national political parties and their nominating conventions are regulable by, or only by, Congress. See *Newberry* v. *United States,* 256 U. S. 232, 275 (1921) (Pitney, J., dissenting); R. Horn, Groups and the Constitution 17–18 (1956); Note, Freedom of Association and the Selection of Delegates to National Political Conventions, 56 Cornell L. Rev. 148, 152–160 (1970).

No. 72–1562 (DC Cir. June 20, 1972). After the Credentials Committee announced its adoption of the Hearing Officer's Findings and Report, the suit proceeded. The District Court sustained the constitutionality of Guideline C–6, see n. 1, *supra*, and dismissed Keane's suit, while denying the counterclaim. The Court of Appeals, on July 5, affirmed the dismissal but granted the counterclaim directing the entry of an order enjoining the Wigoda delegates from proceeding with the Circuit Court suit. *Brown* v. *O'Brien,* 152 U. S. App. D. C. 157, 469 F. 2d 563. This Court, however, at a Special Term on July 7, stayed the judgment of the Court of Appeals, 409 U. S. 1. On October 10, 1972, we granted Keane's petition for certiorari, vacated the judgment of the Court of Appeals, and remanded for a determination of mootness. 409 U. S. 816. The Court of Appeals, on February 16, 1973, held the case moot insofar as it concerned seating of delegates at the July Convention, found no basis for relief as to any other matter, and entered a judgment affirming the District Court's order of July 3 dismissing Keane's suit, 155 U. S. App. D. C. 18, 475 F. 2d 1287.

Based upon these events, petitioners argue that the Illinois Circuit Court was without jurisdiction to enter its July 8 injunction notwithstanding this Court's July 7 stay of the Court of Appeals' judgment. The argument relies upon the reference in the Court's *per curiam* opinion supporting the stay to "the large public interest in allowing the political processes to function free from judicial supervision," 409 U. S., at 5, which, petitioners argue, "established the right, in the particular circumstances of this case, of the 1972 Democratic National Convention to decide the Chicago credentials contest." Brief for Petitioners 20. The argument is without merit. The *per curiam* did not decide the question before us in this case.

The stay order, in terms, unambiguously suspended the operative effect of the Court of Appeals' judgment without qualification and in its entirety, and nothing in the quoted excerpt from the *per curiam* opinion in any wise qualified that effect.[5] We agree with the Illinois Appellate Court, therefore, that the stay order "completely froze the order of the Court of Appeals, including the injunction order directed to the Circuit Court of Illinois, thereby allowing the Circuit Court to proceed." 14 Ill. App. 3d, at 468, 302 N. E. 2d, at 622–623.

Petitioners argue further that in any event the stay order "did not alter the binding collateral estoppel and res judicata effect of that [Court of Appeals] judgment so as to permit collateral attack in the Illinois state courts." Brief for Petitioners 28. We need not address the merits of that argument. The Illinois Appellate Court rejected it on the ground that the res judicata defense had not been pleaded and proved in the Circuit Court as required by Illinois law established in *Svalina* v. *Saravana*, 341 Ill. 236, 173 N. E. 281 (1930). 14 Ill. App. 3d, at 469, 302 N. E. 2d, at 623.[6] We have no basis for disagreement with the holding of the Appellate Court

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[5] Our order provided that "[t]he applications for stays of the judgments of the Court of Appeals are granted." 409 U. S., at 5. This order applied also to *Keane*'s companion case, *O'Brien* v. *Brown*, 409 U. S. 1 (1972), which concerned challenges to the California delegation to the 1972 Democratic National Convention.

[6] The Illinois Appellate Court also found res judicata unavailable for other reasons, including a difference between the issue before it and the issue in *Keane:*

"The issue which is central to the instant cause is the Illinois Election Code (Ill. Rev. Stat. 1971, ch. 46, § 7–1 *et seq.*), and the right of the plaintiffs who were elected pursuant to its provisions to serve in their elective office. The issue which was central to the litigation which ensued in *Keane* v. *National Democratic Party* was the constitutionality of the guidelines of the National Democratic Party . . . ." 14 Ill. App. 3d 460, 468–469, 302 N. E. 2d 614, 623.

"that the [petitioners] neither formally pleaded nor attempted to prove their claim of *res judicata* based on the decision of the Court of Appeals for the District of Columbia Circuit." *Ibid.*[7] This constitutes an adequate state ground that forecloses any jurisdiction that we might possess to review the merits of the res judicata defense. See, *e. g., Louisville & N. R. Co.* v. *Woodford,* 234 U. S. 46 (1914). Accordingly, we turn to consideration of the merits of the constitutional question.

II

The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes,* 414 U. S. 51, 56–57 (1973). "And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." *Williams* v. *Rhodes,* 393 U. S. 23, 30–31 (1968). Moreover, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adher-

[7] Indeed, petitioners maintain only that the Court of Appeals' decision was "presented" and "argued" before the Circuit Court judge, not that res judicata was formally pleaded. See Brief for Petitioners 16, 45. Moreover, while petitioners argued in the Circuit Court that the Court of Appeals' injunction against the state proceeding was effective despite this Court's stay, they did not couch the argument in terms of the Court of Appeals' decision having res judicata effect. Transcript of July 8, 1972, pp. 25–30, 32 *et seq.*

ents." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957); see *NAACP* v. *Button,* 371 U. S. 415, 431 (1963).

Petitioners rely upon these principles and contend that, since the July 8 Circuit Court injunction was fashioned to effectuate state law by barring them from serving as delegates at their Party's National Convention, the injunction constituted an unconstitutional "significant interference" with protected rights of political association. *Bates* v. *Little Rock,* 361 U. S. 516, 523 (1960); see also *Kusper* v. *Pontikes, supra,* at 58.

The Illinois Appellate Court conceded that petitioners and the Party enjoyed "fundamental constitutional rights of free political association." 14 Ill. App. 3d, at 470, 302 N. E. 2d, at 624. The Appellate Court justified the injunction, however, on the ground that the "interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect." *Id.,* at 477, 302 N. E. 2d, at 629. In other words, the Appellate Court identified as the State's legitimate interest the protection of votes cast at the primary from the impairment that would result from stripping the respondents of their elected-delegate status.

We observe at the outset that petitioners' compliance with the injunction would not have assured effectuation of the state objective to seat respondents at the Convention. The Convention was under no obligation to seat the respondents but was free, as respondents concede,[8] to leave the Chicago seats vacant and thus defeat the objective.

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[8] "It is possible that the Convention would have rejected the elected delegates and that Chicago, Illinois would have been without representation at the convention." Brief for Respondents 46. Thus, respondents concede that their protected rights of political association do not entitle them to relief compelling the Party to accept them as delegates.

We proceed, however, to considering whether the asserted state interest justifies the injunction. Even though legitimate, the " 'subordinating interest of the State must be compelling' . . ." to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association. *NAACP* v. *Alabama,* 357 U. S. 449, 463 (1958).

Respondents argue that Illinois had a compelling interest in protecting the integrity of its electoral processes and the right of its citizens under the State and Federal Constitutions to effective suffrage. They rely on the numerous statements of this Court that the right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886); *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964); *Williams* v. *Rhodes,* 393 U. S., at 31; *Kramer* v. *Union School District,* 395 U. S. 621, 626 (1969); *Dunn* v. *Blumstein,* 405 U. S. 330, 336 (1972). But respondents overlook the significant fact that the suffrage was exercised at the primary election to elect delegates to a National Party Convention. Consideration of the special function of delegates to such a Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest. Delegates perform a task of supreme importance to every citizen of the Nation regardless of their State of residence. The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice President of the United States. To that end, the state political parties are "affiliated with a national party through acceptance of the national call to send state delegates to the national convention." *Ray* v. *Blair,* 343 U. S. 214, 225 (1952). The States themselves have no constitutionally mandated role in the great task of the

selection of Presidential and Vice-Presidential candidates.[9] If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law "each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result." *Wigoda* v. *Cousins,* 342 F. Supp. 82, 86 (ND Ill. 1972). Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates—a process which usually involves coalitions cutting across state lines.[10] The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State. The paramount necessity for effective performance of the Convention's task is underscored by Mr. Justice Pitney's admonition "that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry* v. *United States,* 256 U. S. 232, 286 (1921) (dissenting opinion).

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[9] Early Presidential nominations were made by caucuses of Members of Congress belonging to the National Parties. See W. Goodman, The Two-Party System in the United States 153–158 (3d ed. 1964). There have been recent proposals that parties use regional or national primaries to choose their nominees. See, *e. g.,* New York Times, Apr. 18, 1972, p. 12, col. 5 (five regional primaries proposed by Senator Packwood; national primary proposed by Senators Mansfield and Aiken).

[10] Several delegations selected according to state law have been denied seating in Convention resolution of disputes. See, *e. g.,* R. Bain & J. Parris, Convention Decisions and Voting Records 283–284, 323 (2d ed. 1973) (1952 Republican Convention, Georgia delegation; 1968 Democratic Convention, Mississippi delegation).

Thus, Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention. Whatever the case of actions presenting claims that the Party's delegate selection procedures are not exercised within the confines of the Constitution—and no such claims are made here—this is a case where "the convention itself [was] the proper forum for determining intra-party disputes as to which delegates [should] be seated." *O'Brien* v. *Brown,* 409 U. S. 1, 4 (1972).

Reversed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring in the result.

We agree with the Court that the members of political parties enjoy a constitutionally protected right of freedom of association secured by the First and Fourteenth Amendments to the United States Constitution. The right of members of a political party to gather in a national political convention in order to formulate proposed programs and nominate candidates for political office is at the very heart of the freedom of assembly and association which has been established in earlier cases decided by the Court. *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *Bates* v. *Little Rock,* 361 U. S. 516, 523 (1960); *Healy* v. *James,* 408 U. S. 169 (1972).

We also agree that the interest of the State of Illinois in protecting its electoral processes for primary delegate selection is not sufficient to authorize a flat prohibition against petitioners' efforts to have the 1972 National Democratic Convention seat them as party delegates from Illinois. The operation of the injunction issued by the Illinois Circuit Court in this case was as direct and

severe an infringement of the right of association as can be conceived. Beside it, the sort of "subtle governmental interference" which was referred to in *Bates* v. *Little Rock, supra,* pales. We would by no means downplay the legitimacy of the interest of the State in assuring that delegates to the Party Convention chosen pursuant to its electoral processes, and presumably representing the view of the majority of the party's electors in that State, are seated at the Convention. But since it is conceded that the National Convention, and not the State, had the ultimate authority to choose among contesting delegations, we do not believe the State's interest is sufficient to support a total restriction on the petitioners' right to assemble, associate with fellow members of a political party, and urge upon the Convention their claim to be seated as delegates.

While the Court arrives at substantially the same conclusion, in the process of doing so it seems to us to use unnecessarily broad language, to intimate views on questions on which it disclaims any intimation of views, and to turn virtually on its head the Court's opinion in *O'Brien* v. *Brown,* 409 U. S. 1 (1972).

Footnote 4 of the Court's opinion disclaims any intimation of views on the following questions: "(1) whether the decisions of a national political party in the area of delegate selection constitute state or governmental action . . . . (2) whether national political parties are subject to the principles of the reapportionment decisions, or other constitutional restraints, in their methods of delegate selection and allocation. . . . (3) whether or to what extent national political parties and their nominating conventions are regulable by, or only by, Congress." But immediately following the disclaimer, the Court proceeds to cite numerous opinions of courts of appeals and district courts, as well as law review commentaries, which to the unsophisticated mind might seem to portend an

answer to each of these questions. Conspicuous by its absence in the footnote is any reference to this Court's opinion in *O'Brien* v. *Brown, supra,* decided slightly more than two years ago, where we reviewed two cases from the United States Court of Appeals for the District of Columbia Circuit. That court in those cases had taken the view that action by the National Party did constitute "state action" for purposes of the Fourteenth Amendment, and proceeded to apply its interpretation of that Amendment to action of the Credentials Committee of the Democratic National Convention. We stayed the orders of the Court of Appeals in those cases, saying:

> "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action and, if so, the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, *we entertain grave doubts as to the action taken by the Court of Appeals.*" 409 U. S., at 4–5. (Emphasis supplied.)

In the same opinion, we distinguished the cases of *Terry* v. *Adams,* 345 U. S. 461 (1953), and *Smith* v. *Allwright,* 321 U. S. 649 (1944), both cited in n. 4 of the

Court's opinion in the present case, on the ground that they involved invidious discrimination based on race in a primary contest within a single State. 409 U. S., at 4.

We see no reason to recede from any of the language we used in *O'Brien* v. *Brown, supra,* and therefore find the Court's citation of that case to be a virtual repudiation of it. The Court says, *ante,* at 491:

> "Whatever the case of actions presenting claims that the Party's delegate selection procedures are not exercised within the confines of the Constitution—and no such claims are made here—this is a case where '. . . the convention itself [was] the proper forum for determining intra-party disputes as to which delegates [should] be seated.' *O'Brien* v. *Brown,* 409 U. S. 1, 4 (1972)."

In *O'Brien* v. *Brown* we *were* dealing, as we need not deal here, with actions presenting claims that the Party's delegate selection procedures were not exercised within the confines of the Constitution, and it was in that context that the earlier quoted language from that case was used. That issue is not present in this case, nor are the others on which the Court disclaims any views, and for that reason we would think it better judicial procedure not to go beyond what we have already said in *O'Brien* v. *Brown,* and foreshadow results in cases not before us.[1]

[1] Gratuitous observations are particularly inappropriate in this area where the Court has long eschewed passing on issues not required for resolution of the case presented. *Gray* v. *Sanders,* 372 U. S. 368, 378 n. 10 (1963). The crucial and sensitive nature of questions relating to the process of Presidential selection was pointed out by James Wilson, a delegate to the Constitutional Convention, in commenting on the manner of Presidential selection set forth in the Constitution:

"This subject has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide." 2 M. Farrand, Records of the Federal Convention of 1787, p. 501 (Rev. ed. 1937).

The Court states, *ante,* at 490, that the National Convention "serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." While this may be a perfectly apt statement of a political fact, we believe it is an unnecessarily broad and vague statement to be contained in an opinion of this Court. The political fact—that the interest served by national political conventions transcends the boundaries of any single State—weighs in favor of petitioners on the scale which balances their constitutional claim against the State's interest in the integrity of its electoral process. But the dissenting opinion of Mr. Justice Pitney in *Newberry* v. *United States,* 256 U. S. 232, 285 (1921), without more, does not establish for us that there is a "national interest" which standing alone, apart from valid congressional legislation or constitutional provision, would override state regulation in this situation.

Nor can we agree with the Court's characterization of the role of the States in this process when it says that "[t]he States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Ante,* at 489–490. Under Art. II, § 1, the States are given the power to "appoint, in such Manner as the Legislature thereof may direct" Presidential electors.[2] See *In re Green,* 134 U. S. 377, 379 (1890); *McPherson* v. *Blacker,* 146 U. S. 1, 27–28 (1892); *Ray* v. *Blair,* 343 U. S. 214 (1952); *Oregon* v. *Mitchell,* 400 U. S. 112, 291 (1970) (opinion of STEWART, J., joined by BURGER, C. J., and BLACKMUN, J.).

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[2] Article II, § 1, provides in part:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . . The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes . . . ."

Under our constitutional system, the States also have residual authority in all areas not taken from them by the Constitution or by validly enacted congressional legislation. The question for us, therefore, is not whether the States have a "constitutionally mandated role" in the task of selecting Presidential and Vice-Presidential candidates, but whether the authority of the State of Illinois is sufficient in this case to authorize an injunction flatly prohibiting petitioners from asserting before the Democratic National Convention their claim to be seated as delegates. We do not believe that it is, and therefore concur in the result reached by the Court. But we would rest the result unequivocally on the freedom to assemble and associate guaranteed by the First and Fourteenth Amendments, and neither discuss nor hint at resolution of issues neither presented here nor previously resolved by our cases.

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

I agree that the National Convention of the Democratic Party could not be compelled to seat respondents. I disagree, however, that the Illinois courts are without power to enjoin petitioners from sitting *as delegates representing districts in that State.* To this limited extent, I dissent.

The Illinois Legislature has enacted a comprehensive scheme for regulating the election of delegates to national party conventions, Ill. Rev. Stat., c. 46, § 7–1 *et seq.* (1973), including a means by which a defeated candidate may challenge the election. § 7–63. Respondents were duly elected in primaries held in various election districts in the city of Chicago. Petitioners, for the most part, were people who had lost in these primaries and who eventually were selected in private caucuses as a challenge delegation. They made no challenge under state law but, rather, they successfully unseated respondents at

the Convention and had themselves seated as delegates representing the districts in which the ousted delegates had been elected.

The Illinois Appellate Court concluded that the Democratic Party

> "most certainly could not seat people of their choice and force them upon the people of Illinois as their representatives, contrary to their elective mandate." 14 Ill. App. 3d 460, 479, 302 N. E. 2d 614, 631 (1973).

I agree with this statement. Had the court's decision been limited to this conclusion, it would not have infringed in any way the associational rights of petitioners or the Democratic Party. The National Convention of the Party may seat whomever it pleases, including petitioners, as delegates at large. The State of Illinois, on the other hand, has a legitimate interest in protecting its citizens from being *represented* by delegates who have been rejected by these citizens in a democratic election. Accordingly I would affirm the injunctions of the trial court insofar as they barred petitioners from purporting, contrary to Illinois law, to represent certain election districts of that State.*

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* I also agree with the Court that this case intimates no views regarding other efforts to regulate party conventions. Congressional regulation of national conventions or state regulation of state primaries or conventions for state offices raises different considerations requiring a wholly different balance.

SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* BALLARD

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

No. 73–776. Argued October 15, 1974—Decided January 15, 1975

Appellee, a naval officer with more than nine years of active service, who failed for a second time to be selected for promotion and thus under 10 U. S. C. § 6382 (a) was subject to mandatory discharge, brought this action claiming that application of that statute to him when compared to 10 U. S. C. § 6401 (under which had he been a woman officer he would have been entitled to 13 years of commissioned service before a mandatory discharge for want of promotion) was an unconstitutional discrimination based on sex in violation of the Fifth Amendment's Due Process Clause. A three-judge District Court, relying on *Frontiero* v. *Richardson,* 411 U. S. 677, concluded that the challenged mandatory-discharge provisions are supported solely by considerations of fiscal and administrative policy, and upheld appellee's claim. *Held:* The challenged legislative classification is completely rational and does not violate the Due Process Clause. Pp. 505–510.

(a) The different treatment of men and women naval officers under §§ 6382 and 6401 results, not from mere administrative or fiscal convenience, but from the fact that female line officers because of restrictions on their participating in combat and most sea duty do not have opportunities for professional service equal to those of male line officers, and Congress could rationally conclude that a longer period of tenure for women officers comported with the goal of providing women officers with "fair and equitable career advancement programs." *Frontiero* v. *Richardson, supra; Reed* v. *Reed,* 404 U. S. 71, distinguished. Pp. 505–508.

(b) In naval corps where male and female officers *are* similarly situated Congress made no tenure distinctions, thus underscoring the rationality of the legislative classification. P. 509.

(c) The challenged statutes further a flow of promotions commensurate with the Navy's current needs and serve to motivate qualified commissioned officers so to conduct themselves that they may realistically anticipate higher command levels. P. 510.

360 F. Supp. 643, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 511. WHITE, J., filed a dissenting statement, *post*, p. 521.

Harriet S. Shapiro argued the cause for appellants. On the briefs were *Solicitor General Bork, Assistant Attorney General Hills, Deputy Solicitor General LaFontant, Edmund W. Kitch, Robert E. Kopp,* and *Michael Kimmel.*

Charles R. Khoury, Jr., argued the cause for appellee. With him on the brief was *Morris S. Dees, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Appellee Robert C. Ballard is a lieutenant in the United States Navy. After more than nine years of active service as a commissioned officer, he failed, for a second time, to be selected for promotion to the grade of lieutenant commander, and was therefore subject to mandatory discharge under 10 U. S. C. § 6382 (a).[1] He

[1] Title 10 U. S. C. § 6382 provides:

"(a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, and each officer on the active list of the Marine Corps serving in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time. However, if he so requests, he may be honorably discharged at any time during that fiscal year.

. . . . . .

"(d) This section does not apply to women officers appointed under section 5590 of this title or to officers designated for limited duty."

Ballard's scheduled discharge carried with it an entitlement to a "lump-sum" severance payment of approximately $15,000, 10 U. S. C. § 6382 (c), but would have terminated Ballard's total service time

brought suit in federal court claiming that if he had been a woman officer, he would have been subject to a different separation statute, 10 U. S. C. § 6401, under which he would have been entitled to 13 years of commissioned service before a mandatory discharge for want of promotion.[2] He claimed that the application of § 6382 to him, when compared with the treatment of women officers subject to § 6401, was an unconstitutional discrimination based on sex in violation of the Due Process Clause of the Fifth Amendment.[3]

The District Judge issued a temporary restraining order prohibiting Ballard's discharge. Subsequently, a three-judge District Court was convened to hear the claim pursuant to 28 U. S. C. §§ 2282, 2284. After hearings upon motions by the Government defendants, that court issued a preliminary injunction against Ballard's discharge.

(including seven years of enlisted service) short of the 20 years of service necessary for substantially greater retirement benefits.

[2] Title 10 U. S. C. § 6401 (a) provides:

"Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant and each woman officer on the active list of the Marine Corps who holds a permanent appointment in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which—

"(1) she is not on a promotion list; and

"(2) she has completed 13 years of active commissioned service in the Navy or in the Marine Corps.

"However, if she so requests, she may be honorably discharged at any time during that fiscal year."

[3] The Fifth Amendment to the Constitution of the United States provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law." Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe,* 347 U. S. 497, 499. See also *Schneider* v. *Rusk,* 377 U. S. 163, 168.

350 F. Supp. 167. Thereafter, the case came before the three-judge court for decision on the merits. Relying upon *Frontiero* v. *Richardson,* 411 U. S. 677, and concluding that the challenged mandatory-discharge provisions are supported solely by considerations of fiscal and administrative policy, the court held that § 6382 is unconstitutional because the 13-year tenure provision of § 6401 discriminates in favor of women without sufficient justification. 360 F. Supp. 643. Accordingly, the court enjoined the Navy from discharging Ballard for failure to be promoted to the grade of lieutenant commander before the expiration of 13 years of commissioned service. *Id.,* at 648. We noted probable jurisdiction of this appeal from that injunctive order. 415 U. S. 912. See 28 U. S. C. § 1253.

I

At the base of the system governing the promotion and attrition of male line officers in the Navy is a congressional designation of the authorized number of the Navy's enlisted personnel, 10 U. S. C. § 5401, and a correlative limitation upon the number of active line officers as a percentage of that figure. § 5403.[4] Congress has also established the ratio of distribution of line officers in the several grades above lieutenant in fixed proportions to the total number of line officers. §§ 5442, 5447 (a).

The Secretary of the Navy is required periodically to convene selection boards to consider and recommend for promotion male line officers in each of the separate ranks, § 5701, and must provide the boards so convened with the number of male line officers that may be recom-

[4] Similarly, the authorized strength of the Supply Corps and the Civil Engineers Corps is established in set proportions to the authorized number of line officers. 10 U. S. C. § 5404 (a). More complicated formulas set the bounds for the numbers of staff officers in other corps. *E. g.,* § 5404 (b).

mended for promotion to the next higher grade. § 5756. Eligible officers are then recommended for promotion by the selection boards, based upon merit, and are placed on a promotion list and promoted in due course as vacancies occur in the higher ranks. § 5769. Because the number of lieutenant commanders is set by statute, the number of lieutenants, like Ballard, who may be recommended for promotion and placed on a promotion list in any year depends upon the number of vacancies existing and estimated for the coming year in the rank of lieutenant commander. § 5756.

Wholly separate promotion lines are established for the various categories of officers. Thus, in addition to the selection boards that are convened to review the promotion of male line officers, different selection boards are convened to recommend for promotion staff corps officers (except for women officers appointed under § 5590), § 5702, male officers in the Marine Corps, § 5703, women line officers, § 5704 (a), and women staff officers who are appointed under § 5590. § 5704 (b). The convening of these separate selection boards permits naval officers within each category to be considered for promotion in comparison with other officers with similar opportunities and experience.

Because the Navy has a pyramidal organizational structure, fewer officers are needed at each higher rank than are needed in the rank below. In the absence of some mandatory attrition of naval officers, the result would be stagnation of promotion of younger officers and disincentive to naval service. If the officers who failed to be promoted remained in the service, the promotion of younger officers through the ranks would be retarded. Accordingly, a basic "up or out" philosophy was developed to maintain effective leadership by heightening competition for the higher ranks while providing junior

officers with incentive and opportunity for promotion. It is for this reason, and not merely because of administrative or fiscal policy considerations, that § 6382 (a) requires that lieutenants be discharged when they are "considered as having failed of selection for promotion to the grade of lieutenant commander . . . for the second time." [5] Similar selection-out rules apply to officers in different ranks who are twice passed over for promotion.[6]

The phrase "failed of selection for promotion" in § 6382 (a) is a statutory term of art. It does not embrace all eligible officers who have been considered and not selected for promotion. Before an officer is considered to have failed of selection for the first time, he must have been placed within a "promotion zone" established by the Secretary of the Navy. The Secretary each year establishes "promotion zones" of officers who will either be selected for promotion to the next higher grade or who will be considered to have failed of selection for promotion for the first time. See §§ 5764, 5776. The number of officers in the zones, established for each grade, is set at a level to ensure a flow of promotions consistent with the appropriate terms of service in each grade, see § 5768, and to provide opportunity for promotion of others in succeeding years. The number

[5] See S. Rep. No. 2120, 75th Cong., 3d Sess., 4. Parts of the Officer Personnel Act of 1947 that affected naval officers were codified in 10 U. S. C. § 5401 *et seq.*, by the Act of Aug. 10, 1956, 70A Stat. 297. Title 10 U. S. C. § 6382 (a) is a codification of § 312 (h) of the Officer Personnel Act of 1947, 61 Stat. 860, and that section was based, in turn, on § 12 (c) of the Act of June 23, 1938, 52 Stat. 949.

[6] Title 10 U. S. C. § 6382 (b) calls for the mandatory discharge of lieutenants (junior grade) who twice fail to be selected for promotion to the grade of lieutenant. In the grades above lieutenant, statutory provisions require the mandatory retirement, instead of discharge, of officers twice passed over for promotion. 10 U. S. C. §§ 6376, 6379, 6380.

of officers within each zone is thus based on "a consideration of the number of vacancies estimated for the next higher grade in each of the next five years, the number of officers who will be eligible for selection in each of those years, and the terms of service that those officers will have completed." § 5764 (a).

Section 6401 is the mandatory-attrition provision that applies to women officers appointed under § 5590, including all women line officers and most women officers in the Staff Corps.[7] It provides for mandatory discharge of a woman officer appointed under § 5590 when she "is not on a promotion list" [8] and "has completed 13 years of active commissioned service in the Navy." § 6401. Section 6401 was initially intended approximately to equate the length of service of women officers before mandatory discharge for want of promotion with that of male lieutenants discharged under § 6382 (a).[9] Subsequently, however, Congress

[7] Section 6401 does not apply to women officers, appointed pursuant to 10 U. S. C. §§ 5574, 5578, 5578a, and 5579, who are in the Medical, Dental, Judge Advocate General's, and Medical Service Corps. These women staff officers are, like male officers, subject to § 6382 (a).

[8] The reason for the "not on a promotion list" language of § 6401, as contrasted with the "failed of selection" language of § 6382 (a), is in part historical. Section 6401 was enacted as § 207 (j) of the Women's Armed Services Integration Act of 1948, 62 Stat. 368. The "promotion zone" system was not established for women appointed under § 5590 until 1967. Pub. L. 90–130, 81 Stat. 374 (1967). See § 5764 (d).

[9] See Hearings on S. 1527 before the Senate Committee on Armed Services (subsequently S. 1641), 80th Cong., 1st Sess., 39. Although the statutory *eligibility* periods for promotion through the ranks to lieutenant commander is somewhat shorter, § 5751 (b), the *normal* time in service as an ensign, lieutenant (junior grade), and lieutenant is 12 years under peacetime conditions. § 5768 (a). Accordingly, a male line officer who had achieved the rank of lieutenant would typically have completed 12 years of service before

specifically recognized that the provisions of § 6401 would probably result in longer tenure for women lieutenants than for male lieutenants under § 6382. When it enacted legislation eliminating many of the former restrictions on women officers' participation in the naval service in 1967,[10] Congress expressly left undisturbed the 13-year tenure provision of § 6401. And both the House and the Senate Reports observed that the attrition provisions governing women line officers would parallel "present provisions with respect to male officers *except that the discharge of male officers probably occurs about 2 years earlier.*" S. Rep. No. 676, 90th Cong., 1st Sess., 12; H. R. Rep. No. 216, 90th Cong., 1st Sess., 17 (emphasis added).[11]

II

It is against this background that we must decide whether, agreeably to the Due Process Clause of the

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being considered for the rank of lieutenant commander, and would have completed 13 years of service before being passed over twice for promotion to the grade of lieutenant commander.

[10] See Pub. L. 90–130, 81 Stat. 374 (1967). This Act repealed numerical and percentage restrictions on women officers in certain grades, removed restrictions on permanent appointment of women officers to the rank of captain, and authorized women officers under certain circumstances to be eligible for flag rank. Congress also established a "promotion zone" system for women officers and indicated that the promotion and attrition of female officers were generally to correspond to the treatment of male officers. S. Rep. No. 676, 90th Cong., 1st Sess., 2.

[11] According to the brief of the Solicitor General, the tenure differential has since been increased by the removal of time-in-grade restrictions and accelerated promotions resulting from the Vietnam conflict. See Exec. Order No. 11437, Dec. 2, 1968, 3 CFR 754 (1966–1970 Comp.). Thus in recent years the discharge of male officers under § 6382 (a) may have occurred about four years earlier than the discharge of women officers under § 6401, instead of the two years' difference acknowledged by Congress in 1967.

Fifth Amendment, the Congress may accord to women naval officers a 13-year tenure of commissioned service under § 6401 before mandatory discharge for want of promotion, while requiring under § 6382 (a) the mandatory discharge of male lieutenants who have been twice passed over for promotion but who, like Ballard, may have had less than 13 years of commissioned service. In arguing that Congress has acted unconstitutionally, appellee relies primarily upon the Court's recent decisions in *Frontiero* v. *Richardson,* 411 U. S. 677, and *Reed* v. *Reed,* 404 U. S. 71.

In *Frontiero* the Court was concerned with "the right of a female member of the uniformed services to claim her spouse as a 'dependent' for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members." 411 U. S., at 678. Under the governing statutes, a serviceman could automatically claim his spouse as a "dependent," but a servicewoman's male spouse was not considered to be a "dependent" unless he was shown in fact to be dependent upon his wife for more than one-half of his support. The challenged classification was based exclusively on gender, and the Government conceded that the different treatment of men and women service members was based solely upon considerations of administrative convenience. The Court found this disparity of treatment constitutionally invalid. In the words of the plurality opinion:

> "[A]ny statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative

> choice forbidden by the [Constitution] . . . .' *Reed* v. *Reed,* 404 U. S., at 77, 76. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband." *Id.,* at 690–691.

The case of *Reed* v. *Reed, supra,* involved quite similar considerations. In that case the Court considered the constitutionality of an Idaho probate code provision that, in establishing who would administer a decedent's estate, gave a "mandatory" preference to men over women when they were in the same degree of relationship to the decedent. The Idaho law permitted no consideration of the individual qualifications of particular men or women as potential administrators, but simply preferred males in order to reduce probate expenses by eliminating contests over the relative qualifications of men and women otherwise similarly situated. The Court held that "[b]y providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." 404 U. S., at 77.

In both *Reed* and *Frontiero* the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution. In *Reed,* the assumption underlying the Idaho statute was that men would generally be better estate administrators than women. In *Frontiero,* the assumption underlying the Federal Armed Services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.

In contrast, the different treatment of men and women naval officers under §§ 6382 and 6401 reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty. Specifically, "women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports." 10 U. S. C. § 6015. Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. In enacting and retaining § 6401, Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs." H. R. Rep. No. 216, *supra,* at 5. Cf. *Kahn* v. *Shevin,* 416 U. S. 351.[12]

[12] The dissenting opinion argues that, in retaining § 6401 in 1967, Congress may not have intended to give a longer tenure to women line officers than to their male counterparts, because "it is certainly plausible to conclude that Congress continued to believe, as it had in 1948, that the separation provisions for men and women would, given the opportunity to work properly, result in equal average tenure for both sexes." *Post,* at 517. This conclusion cannot, however, be reconciled with Congress' recognition that mandatory retirement provisions for women line officers "parallel present provisions with respect to male officers *except that the discharge of male officers probably occurs about 2 years earlier.*" S. Rep. No. 676, *supra,* at 12; H. R. Rep. No. 216, 90th Cong., 1st Sess., 17 (emphasis added). Alternatively, the dissent seems to imply that the "anomalous" retention in 1967 of the 13-year tenure provision of § 6401 may have resulted from congressional inadvertence. *Post,* at 514–515. But this

The complete rationality of this legislative classification is underscored by the fact that in corps where male and female lieutenants *are* similarly situated, Congress has not differentiated between them with respect to tenure. Thus women staff officers not appointed under § 5590 are subject to the same mandatory attrition rule of § 6382 (a) as are male officers. These include officers in the Medical, Dental, Judge Advocate General's, and Medical Service Corps. See 10 U. S. C. §§ 5574, 5578, 5578a, 5579. Conversely, active male lieutenants who are members of the Nurse Corps, like female lieutenants in that Corps, are within the ambit of 10 U. S. C. § 6396 (c), which contains a 13-year tenure provision like § 6401.

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view cannot be squared with the legislative history either. A major factor prompting the 1967 amendments was Congress' express concern that unless restrictions on promotions of women naval officers were lifted, the operation of § 6401 would cause excessive forced retirement of women lieutenants. In discussing the problem, the House Report explicitly described the 13-year provision:

"A particularly severe problem of promotion stagnation exists among WAVE officers in the Navy. The present grade limitations on promotion of WAVE officers to the grades of commander-lieutenant commander have so reduced the vacancies that the Navy will be forced to discharge most regular WAVE lieutenants when they reach their 13th year of service if relief is not provided.

. . . . . .

"Present law (sec. 6401, title 10, United States Code) provides that women officers on the active list of the Navy in the grade of lieutenant must be discharged on June 30 of the fiscal year in which they complete 13 years of active commissioned service if not on a promotion list that year. The Navy estimates that without legislative relief, the attrition among women line lieutenants will average 50 percent or more over the next 5 years. The Navy considers such heavy attrition unacceptable." H. R. Rep. No. 216, *supra,* at 6.

It is thus clear that Congress in 1967 intentionally retained the 13-year tenure provision of § 6401, and did so with specific knowledge that it gave women line officers a longer tenure than their male counterparts.

In both *Reed* and *Frontiero* the reason asserted to justify the challenged gender-based classifications was administrative convenience, and that alone. Here, on the contrary, the operation of the statutes in question results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command. This Court has recognized that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth* v. *Quarles,* 350 U. S. 11, 17. See also *Orloff* v. *Willoughby,* 345 U. S. 83, 94. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see U. S. Const., Art. I, § 8, cls. 12–14, and with the President. See U. S. Const., Art. II, § 2, cl. 1. We cannot say that, in exercising its broad constitutional power here, Congress has violated the Due Process Clause of the Fifth Amendment.[13]

The judgment is reversed.

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[13] We observe that because of the restrictions that were removed from women officers' participation in naval service in 1967, see Act of Nov. 8, 1967, 81 Stat. 374; S. Rep. No. 676, 90th Cong., 1st Sess., more opportunity has become available for women officers. We are told by the Solicitor General that since 1967, the Secretary of the Navy has implemented a program for acceleration of women officers' promotion and that today women are being considered for promotion within the same time periods as are men. Apparently believing that the need for a tenure differential has subsided, the Department of Defense has submitted a bill to Congress that would substitute for § 6401 the same rule that governs male lieutenants. See §§ 2 (5) and 4 (18)(L) of H. R. 12405 (93d Cong., 2d Sess.), which contains a new provision as a proposed replacement of both § 6382 and § 6401. These developments no more than reinforce the view that it is for Congress, and not for the courts, to decide when the policy goals sought to be served by § 6401 are no longer necessary to the Navy's officer promotion and attrition programs.

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

The Court concludes that the statutory scheme which results in different periods of tenure for male and female line lieutenants of the Navy does not contravene the Due Process Clause of the Fifth Amendment because "Congress may . . . quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with 'fair and equitable career advancement programs.'" *Ante,* at 508. I believe, however, that a legislative classification that is premised solely upon gender must be subjected to close judicial scrutiny. *Frontiero* v. *Richardson,* 411 U. S. 677 (1973); *Kahn* v. *Shevin,* 416 U. S. 351 (1974) (BRENNAN, J., dissenting). Such suspect classifications can be sustained only if the Government demonstrates that the classification serves compelling interests that cannot be otherwise achieved. Here, the Government as much as concedes that the gender-based distinctions in separation provisions for Navy officers fulfill no compelling purpose.

Further, the Court goes far to conjure up a legislative purpose which *may* have underlain the gender-based distinction here attacked. I find nothing in the statutory scheme or the legislative history to support the supposition that Congress intended, by assuring women but not men line lieutenants in the Navy a 13-year tenure, to compensate women for other forms of disadvantage visited upon them by the Navy.[1] Thus, the gender-

[1] Indeed, I find quite troublesome the notion that a gender-based difference in treatment can be justified by another, broader, gender-based difference in treatment imposed directly and currently by the Navy itself. While it is true that the restrictions upon women officers' opportunities for professional service are not here directly under attack, they are obviously implicated on the Court's

based classification of which appellee complains is not related, rationally or otherwise, to any legitimate legislative purpose fairly to be inferred from the statutory scheme or its history, and cannot be sustained.

I

As the Court recounts, § 6401 was enacted as part of the Women's Armed Services Integration Act of 1948, 62 Stat. 368. This Act, while providing for the first time a permanent role for women in the military, severely limited their career opportunities. Among other things, it provided that women in the Navy could not be permanently promoted above the rank of commander, and it set the number of women lieutenants, lieutenant commanders, and commanders at a small percentage of the number of regular women officers on active duty. Perhaps because these limitations upon promotion opportunities made it impractical to guarantee women line officers promotion at any uniform rate, the promotion zone system provided for men by the Officer Personnel Act of 1947, 61 Stat. 860, was not applied to them. And, as explained by the Court, without a promotion zone system, the basis for determining involuntary separation under § 6382 (a), whether an officer has twice "failed of selection for promotion," has no meaning.[2] Therefore,

chosen ground for decision, and the Court ought at least to consider whether they *may* be valid before sustaining a provision it conceives to be based upon them.

[2] Also, even if it were possible to devise some alternative way of deciding when a woman officer had "failed of selection for promotion," the limitation upon promotion opportunities for women meant that retention until two failures of selection could have been indefinite retention. In 1967, in fact, the statutory grade limitations upon promotions for women had produced such limited vacancies in the upper ranks that, but for the fact that some of the limitations were removed by the 1967 Act, promotions of lieutenants in the WAVES would have had to be suspended altogether for four or five

the separation provisions for women line officers, given the rest of the statutory provisions applicable to them, had to be pegged to time served rather than to opportunities for promotion. The number of years selected for women line lieutenants, 13, corresponded exactly to the normal number of years Congress intended to precede separation for a male officer not chosen for promotion. See *ante,* at 504–505, n. 9.[3] Thus, Congress' original purpose in enacting slightly different separation provisions for men and women is quite certain—to create the *same* tenure in years for women lieutenants as for the average male lieutenant before involuntary separation was permitted.

However, for reasons not entirely clear upon the record in this case, the promotion zone system for men did not, as administered by the Navy, result in the normal 13-year tenure for men before involuntary separation contemplated by §§ 5764 and 5768.[4] Rather, in 1967 the

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years. H. R. Rep. No. 216, 90th Cong., 1st Sess., 6 (1967). See Hearings on H. R. 5894 before Subcommittee No. 1 of the House Committee on Armed Services, 90th Cong., 1st Sess., 384 (1967). If involuntary separation had been keyed to failure of selection, no WAVE line lieutenants could have been separated during those five years.

[3] Section 5768 sets out the normal times of service for male officers in the line of the Navy. Section 5764, the section establishing the promotion zone system, specifies that the number of officers in the promotion zone each year shall be chosen "in order to maintain a flow of promotion consistent with the terms of service set out in section 5768 . . . and in order best to assure to individuals in succeeding years equality of opportunity for promotion." Thus, the "normal terms of service," § 5768, were to be achieved through the administrative determination of promotion zones each year.

[4] The explanation seemingly lies in the provisions permitting suspension of these sections. Section 48 of the Act of Aug. 10, 1956, provided that:

"(a) Except as they may apply to women officers of the Regular Navy . . . appointed under section 5590 of title 10, . . . the following

normal tenure for men seems to have been about 11 years, see H. R. Rep. No. 216, 90th Cong., 1st Sess., 17; S. Rep. No. 676, 90th Cong., 1st Sess., 12; and in 1972, when respondent was due for discharge, it was eight or nine years. Brief for Appellants 16.

In 1967, Congress decided to eliminate many of the provisions restricting career opportunities for women. In doing so it wished, as the Court notes, to provide women with "fair and equitable career advancement programs." H. R. Rep. No. 216, *supra,* at 5. However, contrary to the Court's assumption, Congress determined to achieve this goal, not by providing special compensatory treatment for women, but by removing most of the restrictions upon them and then subjecting them to the *same* provisions generally governing men. *Id.,* at 3; S. Rep. No. 676, *supra,* at 2.

First, the entire structure of the 1967 Act is directed toward assimilating as much as possible the promotion structure for women line officers to that of men. The Act, for example, provided for a promotion zone system for women line officers in the Navy, 10 U. S. C. § 5764 (d), and applied the "failure of selection" designation to

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sections of title 10 cease to operate whenever the number of male officers serving on active duty in the grade of ensign or above in the line of the Navy does not exceed the number of male officers holding permanent appointments in the grade of ensign or above on the active list in the line of the Regular Navy: Sections . . . 5764–5770 . . . ." 70A Stat. 639.

Also, 10 U. S. C. § 5785 provides that:

"(b) During a war or national emergency, the President may suspend any provision of the preceding sections of this chapter relating to officers of the Navy . . . , other than women officers appointed under section 5590 of this title."

Because these sections do not apply to women covered by § 6401, any suspensions could have the effect of shortening normal tenure for men without affecting the tenure of women. See *ante,* at 505 n. 11.

women by amending 10 U. S. C. § 5776.[5] These additions make the retention of 13-year tenure for women line lieutenants somewhat anomalous, since the "failure of selection" designation appears to have no function except as an aid to determining involuntary separation. Thus, as the hesitant language the Court uses in describing Congress' possible compensatory purpose recognizes, it is impossible to divine from the structure of the Act itself a reason for retaining the 13-year tenure for women but not for men.

Second, the legislative history of the 1967 Act makes quite clear that Congress' purpose in retaining the 13-year tenure for women line lieutenants was *not* to take account of the limited opportunities available to women in the Navy. Congress explicitly recognized that

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[5] Other examples of the degree to which women officers were subjected to the same promotion and retention system as men are:

(1) The amendment of 10 U. S. C. § 5771 so that women officers on a promotion list, like men, can be promoted as soon as vacancies occur. This was done to prevent a delay of six to eight months in promotion which caused "women officers to fall behind their male contemporaries." H. R. Rep. No. 216, *supra,* at 15; S. Rep. No. 676, 90th Cong., 1st Sess., 10.

(2) The amendment of 10 U. S. C. §§ 5704, 5711, and related sections so that all women line officers on active duty, including Reserve officers, will, like all men line officers on active duty, be considered for promotion by the same selection boards and in the same way.

Aside from § 6401, some distinctions between the promotion systems for male and female line officers did survive the 1967 Act. See, *e. g.,* 10 U. S. C. § 5707 (difference between men and women on standard for selection below lieutenant commander). It is significant, however, that as a result of the 1967 amendments, the tenure in years for unrestricted men and women line officers is the *same* for all grades in which involuntary separation or retirement is linked for both to years served. Compare 10 U. S. C. §§ 6376 and 6379 with § 6398; § 6380 with § 6400. However, in most instances men cannot be involuntarily retired until they have twice failed of selection *and* reached the required tenure in years, while for women failure to be promoted within the requisite number of years is sufficient.

in some instances involuntary retirement and separation provisions "permit women to remain on active duty for longer periods than male officers." It believed that "[u]nder current circumstances, *there is no logical basis for these differences.*" S. Rep. No. 676, *supra,* at 2. (Emphasis supplied.) See H. R. Rep. No. 216, *supra,* at 2–3; Hearing on H. R. 4772, 4903, 5894, before the Senate Committee on Armed Services, 90th Cong., 1st Sess., 41 (1967). The 1967 Act was to "apply the standard attrition provisions of male officers promotion and retirement laws to women officers. The *only* exception to this would be the selective continuation of nurses." H. R. Rep. No. 216, *supra,* at 3.[6] (Emphasis supplied.) See S. Rep. No. 676, *supra,* at 2. In light of these statements, Congress could not have had the purpose of compensating women line officers for their inferior position in the Navy by retaining longer tenure periods for women.

Moreover, the legislative history is replete with indications of a decision *not* to give women any special advantage. "The purpose of the legislation has been limited to the removal of arbitrary restrictions. No effort has been made to provide special assurances to women officers, and none is recommended." Letter from General Counsel, Department of Defense, in S. Rep. No. 676, *supra,* at 5; H. R. Rep. No. 216, *supra,* at 9. "The purpose of the bill is to create *parity only* in respect to recognizing merit and performance." *Id.,* at 7. See S. Rep. No. 676, *supra,* at 3.[7] (Emphasis supplied.)

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[6] Congressman Rivers, Chairman of the House Committee on Armed Services, stated flatly during floor debate on H. R. 5894 that the bill assured that women "have the *same* tenure as male officers of the same grade." 113 Cong. Rec. 11303 (May 1, 1967). (Emphasis supplied.)

[7] Senator Thurmond, floor manager of the bill, made much the same point during hearings on the bill. He said: "[T]he purpose of this bill is not to provide special promotional opportunities for women

To infer a determination purposely to perpetuate a longer retention period for women line officers is, therefore, entirely to misconceive Congress' perception of the problem and of the proper solution. While the reason for the failure to revise §§ 6382 and 6401 is not clear, it is certainly plausible to conclude that Congress continued to believe, as it had in 1948, that the separation provisions for men and women would, given the opportunity to work properly, result in equal average tenure for both sexes.[8]

II

Given this analysis of the relationship between § 6382 and § 6401, the difference in tenure which resulted in fact from the operation of these sections manifestly serves no overriding or compelling governmental interest. Indeed, appellants concede as much in discussing proposed H. R. 12405 (93d Cong., 2d Sess.), §§ 2 (5) and 4 (18), to which the Court refers, *ante,* at 510 n. 13: "The Department of Defense considers that the separate rule for women, while serving a *legitimate* governmental purpose . . . is on balance no longer *needed* as a matter of military personnel policy." Brief for Appellants 18. (Emphasis supplied.) Since the executive department most intimately concerned with the promotion policy in

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or to give them any advantage, but it is to place them on a parity with or give them equal opportunities . . . ." Hearing on H. R. 4772, 4903, 5894 before the Senate Committee on Armed Services, 90th Cong., 1st Sess., 46 (1967).

[8] In addition, there are indications in the hearings on the bill that the reason for not changing §§ 6382 and 6401 was that the promotional systems for all services were then under review, and that the Armed Services therefore did not want to change in the interim provisions believed basically to apply equitably to both sexes. See Hearings on H. R. 5894 before Subcommittee No. 1 of the House Committee on Armed Services, 90th Cong., 1st Sess., 383 (1967) (remarks of Assistant Secretary Morris); Hearings, Senate Committee on Armed Services, *supra,* at 44 (remarks of General Berg).

the Navy can perceive no *need* for the gender-based classification under attack, the interest served by the classification, if any, can hardly be overriding or compelling.[9]

Further, while I believe that "providing special benefits for a needy segment of society long the victim of purposeful discrimination and neglect" can serve "the compelling . . . interest of achieving equality for such groups," *Kahn* v. *Shevin*, 416 U. S., at 358–359 (BRENNAN, J., dissenting), I could not sustain this statutory scheme even if I accepted the Court's supposition that such a purpose lay behind this classification. Contrary to the Court's intimation, *ante*, at 508, women do not compete directly with men for promotion in the Navy. Rather, selection boards for women are separately convened, 10 U. S. C. § 5704, the number of women officers to be selected for promotion is separately determined, 10 U. S. C. § 5760, promotion zones for women are separately designated, 10 U. S. C. § 5764, and women's fitness for promotion is judged as compared to other women, 10 U. S. C. § 5707. In this situation, it is hard to see how women are disadvantaged in their opportunity for promotion by the fact that their duties in the Navy are limited, or how increas-

[9] The Court comments that the submission of H. R. 12405 "no more than reinforce[s] the view that it is for Congress, and not for the courts, to decide when the policy goals sought to be served by § 6401 are no longer necessary to the Navy's officer promotion and attrition programs." *Ante*, at 510 n. 13. But the Court does not, and could not, show that the gender-based classification underlying § 6401 was ever *necessary* to the Navy's program; it only ventures that Congress *"may . . . rationally," ante*, at 508 (emphasis supplied), have believed the policy to be wise or fair. Further, the close scrutiny which I believe gender-based classifications require necessitates that courts evaluate both the strength of the asserted interest and the need for the means chosen toward that end. Implicit in this task is that the courts do not necessarily accept the legislature's decisions about the need for certain legislation when gender-based distinctions are involved.

ing their tenure before separation for nonpromotion is necessary to compensate for other disadvantages.

III

The Court suggests no purpose other than compensation for disadvantages of women which might justify this gender-based classification. I agree that the "up or out" philosophy "was developed to maintain effective leadership by heightening competition for the higher ranks while providing junior officers with incentive and opportunity for promotion." *Ante,* at 502–503. But the purpose behind the "up or out" philosophy applies as well to women as to men. The issue here is not whether the treatment accorded either women or men under the statutory scheme would, if applied evenhandedly to both sexes, forward a legitimate or compelling state interest, but whether the *differences* in the provisions applicable to men and women can be justified by a governmental purpose.[10]

For this same reason, the invocation of the deference due Congress in determining how best to assure the readi-

[10] In neither *Reed* v. *Reed,* 404 U. S. 71 (1971), nor *Frontiero* v. *Richardson,* 411 U. S. 677 (1973), was it doubted that the statutes in question forwarded legitimate governmental goals, absent the classifications by sex. In *Reed,* the Court expressly noted that "the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy," 404 U. S., at 76, and it noted that the statutory scheme set up non-sex-based classifications toward the same end, which it seemingly approved. *Id.,* at 77. Similarly, in *Frontiero,* the inquiry focused upon the "difference in treatment," 411 U. S., at 679, accorded women and men in determining eligibility for dependents' benefits, not upon the strength of the Government's interest in according dependents' benefits to members of the Armed Services. Thus, I fail to see how the strength of the governmental interest in the "up or out" system can distinguish *Reed* or *Frontiero.* See also *James* v. *Strange,* 407 U. S. 128, 141 (1972); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 173 (1972).

ness of our Armed Forces for battle cannot settle the issue before us. As *Frontiero* v. *Richardson,* 411 U. S. 677 (1973), illustrates, the fact that an equal protection claim arises from statutes concerning military personnel policy does not itself mandate deference to the congressional determination, at least if the sex-based classification is not itself relevant to and justified by the military purposes.

Thus, the validity of the statutory scheme must stand or fall upon the Court's asserted compensatory goal. Yet, as the analysis in Part I, *supra,* demonstrates, this purpose was not in fact behind either the original enactment of § 6401 or its retention in 1967. While we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications, see *McGowan* v. *Maryland,* 366 U. S. 420, 425–428 (1961), we have recently declined to manufacture justifications in order to save an apparently invalid statutory classification. Cf. *James* v. *Strange,* 407 U. S. 128 (1972); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972). Moreover, we have analyzed asserted governmental interests to determine whether they were in fact the legislative purpose of a statutory classification, *Eisenstadt* v. *Baird,* 405 U. S. 438, 442–443 (1972), and have limited our inquiry to the legislature's stated purposes when these purposes are clearly set out in the statute or its legislative history. *Johnson* v. *Robison,* 415 U. S. 361, 376 (1974). Never, to my knowledge, have we endeavored to sustain a statute upon a supposition about the legislature's purpose in enacting it when the asserted justification can be shown conclusively *not* to have underlain the classification in any way.[11]

[11] Indeed, to do so is to undermine the very premises of deference to legislative determination. If a legislature, considering the competing factors, determines that it is wise policy to treat two groups of people differently in pursuit of a certain goal, courts often defer to that legislative determination. But when a legislature has decided

Since the Government here has advanced no governmental interest fairly to be gleaned from §§ 6382 and 6401 or their history which can justify this gender-based classification, I would affirm the judgment below.

MR. JUSTICE WHITE, dissenting.

Agreeing for the most part with MR. JUSTICE BRENNAN's dissenting opinion, I also dissent from the judgment of the Court.

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not to pursue a certain goal, upholding a statute on the basis of that goal is not properly deference to a legislative decision at all; it is deference to a decision which the legislature could have made but did not. See Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 44–45 (1972).

TAYLOR *v.* LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 73–5744. Argued October 16, 1974—Decided January 21, 1975

Appellant, a male, was convicted of a crime by a petit jury selected from a venire on which there were no women and which was selected pursuant to a system resulting from Louisiana constitutional and statutory requirements that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. The State Supreme Court affirmed, having rejected appellant's challenge to the constitutionality of the state jury-selection scheme. *Held:*

1. Appellant had standing to make his constitutional claim, there being no rule that such a claim may be asserted only by defendants who are members of the group excluded from jury service. *Peters* v. *Kiff*, 407 U. S. 493. P. 526.

2. The requirement that a petit jury be selected from a representative cross section of the community, which is fundamental to the jury trial guaranteed by the Sixth Amendment, is violated by the systematic exclusion of women from jury panels, which in the judicial district here involved amounted to 53% of the citizens eligible for jury service. Pp. 526–533.

3. No adequate justification was shown here for the challenged jury-selection provisions and the right to a jury selected from a fair cross section of the community cannot be overcome on merely rational grounds. Pp. 533–535.

4. It can no longer be held that women as a class may be excluded from jury service or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost all male, and contrary implications of prior cases, *e. g.*, *Hoyt* v. *Florida*, 368 U. S. 57, cannot be followed. Pp. 535–537.

282 So. 2d 491, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., concurred in the result. REHNQUIST, J., filed a dissenting opinion, *post*, p. 538.

William McM. King argued the cause and filed a brief for appellant.

Kendall L. Vick, Assistant Attorney General of Louisiana, argued the cause for appellee. On the brief were *William J. Guste, Jr.,* Attorney General, *Walter Smith,* and *Woodrow W. Erwin.*

MR. JUSTICE WHITE delivered the opinion of the Court.

When this case was tried, Art. VII, § 41,[1] of the Louisiana Constitution, and Art. 402 of the Louisiana Code of Criminal Procedure [2] provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. The constitutionality of these provisions is the issue in this case.

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[1] La. Const., Art. VII, § 41, read, in pertinent part:

"The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service."

As of January 1, 1975, this provision of the Louisiana Constitution was repealed and replaced by the following provision, La. Const., Art. V, § 33:

"(A) Qualifications.

"A citizen of the state who has reached the age of majority is eligible to serve as a juror within the parish in which he is domiciled. The legislature may provide additional qualifications.

"(B) Exemptions.

"The supreme court shall provide by rule for exemption of jurors."

[2] La. Code Crim. Proc., Art. 402, provided:

"A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

This provision has been repealed, effective January 1, 1975. The repeal, however, has no effect on the conviction obtained in this case.

I

Appellant, Billy J. Taylor, was indicted by the grand jury of St. Tammany Parish, in the Twenty-second Judicial District of Louisiana, for aggravated kidnaping. On April 12, 1972, appellant moved the trial court to quash the petit jury venire drawn for the special criminal term beginning with his trial the following day. Appellant alleged that women were systematically excluded from the venire and that he would therefore be deprived of what he claimed to be his federal constitutional right to "a fair trial by jury of a representative segment of the community . . . ."

The Twenty-second Judicial District comprises the parishes of St. Tammany and Washington. The appellee has stipulated that 53% of the persons eligible for jury service in these parishes were female, and that no more than 10% of the persons on the jury wheel in St. Tammany Parish were women.[3] During the period from December 8, 1971, to November 3, 1972, 12 females were among the 1,800 persons drawn to fill petit jury venires in St. Tammany Parish. It was also stipulated that the discrepancy between females eligible for jury service and those actually included in the venire was the result of the operation of La. Const., Art. VII, § 41, and La. Code Crim. Proc., Art. 402.[4] In the present case, a venire totaling 175 persons was drawn for jury service beginning April 13, 1972. There were no females on the venire.

Appellant's motion to quash the venire was denied that same day. After being tried, convicted, and sentenced to death, appellant sought review in the Supreme Court of Louisiana, where he renewed his claim that the

[3] The stipulation appears in the Appendix, at 82–84, filed in *Edwards* v. *Healy*, No. 73–759, now pending before the Court.

[4] *Ibid.*

petit jury venire should have been quashed. The Supreme Court of Louisiana, recognizing that this claim drew into question the constitutionality of the provisions of the Louisiana Constitution and Code of Criminal Procedure dealing with the service of women on juries, squarely held, one justice dissenting, that these provisions were valid and not unconstitutional under federal law. 282 So. 2d 491, 497 (1973).[5]

Appellant appealed from that decision to this Court. We noted probable jurisdiction, 415 U. S. 911 (1974), to consider whether the Louisiana jury-selection system deprived appellant of his Sixth and Fourteenth Amendment right to an impartial jury trial. We hold that it did and that these Amendments were violated in this case by the operation of La. Const., Art. VII, § 41, and La. Code Crim. Proc., Art. 402. In consequence, appellant's conviction must be reversed.

II

The Louisiana jury-selection system does not disqualify women from jury service, but in operation its conceded systematic impact is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury service. In this case, no women were on the venire from which the petit jury was drawn. The issue we have, therefore, is whether a jury-selection system which operates to exclude from jury service an identifiable class of citizens constituting 53%

[5] The death sentence imposed on appellant was annulled and set aside by the Supreme Court of Louisiana in accord with this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), with instructions to the District Court to impose a life sentence on remand. The Supreme Court of Louisiana granted a rehearing to appellant on certain other issues not relevant to this appeal, 282 So. 2d 491, 500 (1973), and later denied a second petition for rehearing.

of eligible jurors in the community comports with the Sixth and Fourteenth Amendments.

The State first insists that Taylor, a male, has no standing to object to the exclusion of women from his jury. But Taylor's claim is that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women. Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service. In *Peters* v. *Kiff*, 407 U. S. 493 (1972), the defendant, a white man, challenged his conviction on the ground that Negroes had been systematically excluded from jury service. Six Members of the Court agreed that petitioner was entitled to present the issue and concluded that he had been deprived of his federal rights. Taylor, in the case before us, was similarly entitled to tender and have adjudicated the claim that the exclusion of women from jury service deprived him of the kind of factfinder to which he was constitutionally entitled.

III

The background against which this case must be decided includes our holding in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), that the Sixth Amendment's provision for jury trial is made binding on the States by virtue of the Fourteenth Amendment. Our inquiry is whether the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions.

The Court's prior cases are instructive. Both in the

course of exercising its supervisory powers over trials in federal courts and in the constitutional context, the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community. A unanimous Court stated in *Smith* v. *Texas,* 311 U. S. 128, 130 (1940), that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." To exclude racial groups from jury service was said to be "at war with our basic concepts of a democratic society and a representative government." A state jury system that resulted in systematic exclusion of Negroes as jurors was therefore held to violate the Equal Protection Clause of the Fourteenth Amendment. *Glasser* v. *United States,* 315 U. S. 60, 85–86 (1942), in the context of a federal criminal case and the Sixth Amendment's jury trial requirement, stated that "[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government," and repeated the Court's understanding that the jury " 'be a body truly representative of the community' . . . and not the organ of any special group or class."

A federal conviction by a jury from which women had been excluded, although eligible for service under state law, was reviewed in *Ballard* v. *United States,* 329 U. S. 187 (1946). Noting the federal statutory "design to make the jury 'a cross-section of the community' " and the fact that women had been excluded, the Court exercised its supervisory powers over the federal courts and reversed the conviction. In *Brown* v. *Allen,* 344 U. S. 443, 474 (1953), the Court declared that "[o]ur duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source

reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."

Some years later in *Carter* v. *Jury Comm'n,* 396 U. S. 320, 330 (1970), the Court observed that the exclusion of Negroes from jury service because of their race "contravenes the very idea of a jury—'a body truly representative of the community' . . . ." (Quoting from *Smith* v. *Texas, supra.*) At about the same time it was contended that the use of six-man juries in noncapital criminal cases violated the Sixth Amendment for failure to provide juries drawn from a cross section of the community, *Williams* v. *Florida,* 399 U. S. 78 (1970). In the course of rejecting that challenge, we said that the number of persons on the jury should "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." *Id.,* at 100. In like vein, in *Apodaca* v. *Oregon,* 406 U. S. 404, 410–411 (1972) (plurality opinion), it was said that "a jury will come to such a [commonsense] judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . on the question of a defendant's guilt." Similarly, three Justices in *Peters* v. *Kiff,* 407 U. S., at 500, observed that the Sixth Amendment comprehended a fair possibility for obtaining a jury constituting a representative cross section of the community.

The unmistakable import of this Court's opinions, at least since 1940, *Smith* v. *Texas, supra,* and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. Recent federal legislation governing jury selection within the federal court system has a similar thrust. Shortly prior to this Court's decision

in *Duncan* v. *Louisiana, supra,* the Federal Jury Selection and Service Act of 1968 [6] was enacted. In that Act, Congress stated "the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U. S. C. § 1861. In that Act, Congress also established the machinery by which the stated policy was to be implemented. 28 U. S. C. §§ 1862–1866. In passing this legislation, the Committee Reports of both the House [7] and the Senate [8] recognized that the jury plays a political function in the administration of the law and

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[6] Pub. L. 90–274, 82 Stat. 53, 28 U. S. C. § 1861 *et seq.*

[7] H. R. Rep. No. 1076, 90th Cong., 2d Sess., 8 (1968):

"It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent."

See S. Rep. No. 92–516, p. 3 (1971).

[8] S. Rep. No. 891, 90th Cong., 1st Sess., 9 (1967): "A jury chosen from a representative community sample is a fundamental of our system of justice."

Both the Senate and House Reports made reference to the decision of the Court of Appeals in *Rabinowitz* v. *United States,* 366 F. 2d 34, 57 (CA5 1966), which, in sustaining an attack on the composition of grand and petit jury venires in the Middle District of Georgia, had held that both the Constitution and 28 U. S. C. § 1861, prior to its amendment in 1968, required a system of jury selection "that will probably result in a fair cross-section of the community being placed on the jury rolls." See S. Rep. No. 891, *supra,* at 11, 18; H. R. Rep. No. 1076, *supra,* n. 7, at 4, 5.

Elimination of the "key man" system throughout the federal courts was the primary focus of the Federal Jury Selection and Service Act of 1968. See H. R. Rep. No. 1076, *supra,* at 4 and n. 1.

that the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice. Debate on the floors of the House and Senate on the Act invoked the Sixth Amendment,[9] the Constitution generally,[10] and prior decisions of this Court [11] in support of the Act.

We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. *Duncan* v. *Louisiana,* 391 U. S., at 155–156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly

[9] 114 Cong. Rec. 3992 (1968) (remarks of Mr. Rogers). See also 118 Cong. Rec. 6939 (1972) (remarks of Mr. Poff).

[10] 114 Cong. Rec. 3999 (1968) (remarks of Mr. Machen).

[11] *Id.,* at 6609 (remarks of Sen. Tydings).

because sharing in the administration of justice is a phase of civic responsibility." *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 227 (1946) (Frankfurter, J., dissenting).

IV

We are also persuaded that the fair-cross-section requirement is violated by the systematic exclusion of women, who in the judicial district involved here amounted to 53% of the citizens eligible for jury service. This conclusion necessarily entails the judgment that women are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied. This very matter was debated in *Ballard* v. *United States, supra.* Positing the fair-cross-section rule—there said to be a statutory one—the Court concluded that the systematic exclusion of women was unacceptable. The dissenting view that an all-male panel drawn from various groups in the community would be as truly representative as if women were included, was firmly rejected:

> "The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is

among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." 329 U. S., at 193–194.[12]

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[12] Compare *Peters* v. *Kiff*, 407 U. S. 493, 502–504 (1972) (opinion of MARSHALL, J., joined by DOUGLAS and STEWART, JJ.):

"These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

. . . . .

"But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. . . .

"Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (Footnote omitted.)

Controlled studies of the performance of women as jurors conducted subsequent to the Court's decision in *Ballard* have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result. See generally Rudolph, Women on Juries—Voluntary or Compulsory?, 44 J. Am. Jud. Soc. 206 (1961); 55 J. Sociology & Social Research 442 (1971); 3 J. Applied Social Psychology 267 (1973); 19 Sociometry 3 (1956).

In this respect, we agree with the Court in *Ballard:* If the fair-cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be systematically excluded from jury panels from which petit juries are drawn. This conclusion is consistent with the current judgment of the country, now evidenced by legislative or constitutional provisions in every State and at the federal level qualifying women for jury service.[13]

V

There remains the argument that women as a class serve a distinctive role in society and that jury service would so substantially interfere with that function that the State has ample justification for excluding women from service unless they volunteer, even though the result is that almost all jurors are men. It is true that *Hoyt* v. *Florida,* 368 U. S. 57 (1961), held that such a system [14] did not deny due process of law or equal pro-

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[13] This is a relatively modern development. Under the English common law, women, with the exception of the trial of a narrow class of cases, were not considered to be qualified for jury service by virtue of the doctrine of *propter defectum sexus,* a "defect of sex." 3 W. Blackstone, Commentaries *362. This common-law rule was made statutory by Parliament in 1870, 33 & 34 Vict., c. 77, and then rejected by Parliament in 1919, 9 & 10 Geo. 5, c. 71. In this country women were disqualified by state law to sit as jurors until the end of the 19th century. They were first deemed qualified for jury service by a State in 1898, Utah Rev. Stat. Ann., Tit. 35, § 1297 (1898). Today, women are qualified as jurors in all the States. The jury-service statutes and rules of most States do not on their face extend to women the type of exemption presently before the Court, although the exemption provisions of some States do appear to treat men and women differently in certain respects.

[14] Florida Stat. 1959, § 40.01 (1), provided that grand and petit jurors be taken from male and female citizens of the State possessed of certain qualifications and also provided that "the name of no female person shall be taken for jury service unless said person has registered

tection of the laws because there was a sufficiently rational basis for such an exemption.[15] But *Hoyt* did not involve a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community and the prospect of depriving him of that right if women as a class are systematically excluded. The right to a proper jury cannot be overcome on merely rational grounds.[16] There must be weightier reasons if a distinctive class representing 53% of the eligible jurors is for all practical purposes to be excluded from jury service. No such basis has been tendered here.

The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare. *Rawlins* v. *Georgia,* 201 U. S. 638 (1906). It would not appear that such exemptions would pose substantial threats that the remaining pool of jurors would not be representative of the community. A system excluding all women, however, is a wholly different matter. It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot

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with the clerk of the circuit court her desire to be placed on the jury list." *Hoyt* v. *Florida,* 368 U. S. 57, 58 (1961).

[15] The state interest, as articulated by the Court, was based on the assumption that "woman is still regarded as the center of home and family life." *Hoyt* v. *Florida, supra,* at 62. Louisiana makes a similar argument here, stating that its grant of an automatic exemption from jury service to females involves only the State's attempt "to regulate and provide stability to the state's own idea of family life." Brief for Appellee 12.

[16] In *Hoyt,* the Court determined both that the underlying classification was rational and that the State's proffered rationale for extending this exemption to females without family responsibilities was justified by administrative convenience. 368 U. S., at 62–63.

spare *any* women from their present duties.[17] This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.

VI

Although this judgment may appear a foregone conclusion from the pattern of some of the Court's cases over the past 30 years, as well as from legislative developments at both federal and state levels, it is nevertheless true that until today no case had squarely held that the exclusion of women from jury venires deprives a criminal

[17] In *Hoyt* v. *Florida, supra,* the Court placed some emphasis on the notion, advanced by the State there and by Louisiana here in support of the rationality of its statutory scheme, that "woman is still regarded as the center of home and family life." 368 U. S., at 62. Statistics compiled by the Department of Labor indicate that in October 1974, 54.2% of all women between 18 and 64 years of age were in the labor force. United States Dept. of Labor, Women in the Labor Force (Oct. 1974). Additionally, in March 1974, 45.7% of women with children under the age of 18 were in the labor force; with respect to families containing children between the ages of six and 17, 67.3% of mothers who were widowed, divorced, or separated were in the work force, while 51.2% of the mothers whose husbands were present in the household were in the work force. Even in family units in which the husband was present and which contained a child under three years old, 31% of the mothers were in the work force. United States Dept. of Labor, Marital and Family Characteristics of the Labor Force, Table F (March 1974). While these statistics perhaps speak more to the evolving nature of the structure of the family unit in American society than to the nature of the role played by women who happen to be members of a family unit, they certainly put to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home.

defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community. It is apparent that the first Congress did not perceive the Sixth Amendment as requiring women on criminal jury panels; for the direction of the First Judiciary Act of 1789 was that federal jurors were to have the qualifications required by the States in which the federal court was sitting [18] and at the time women were disqualified under state law in every State. Necessarily, then, federal juries in criminal cases were all male, and it was not until the Civil Rights Act of 1957, 71 Stat. 638, 28 U. S. C. § 1861 (1964 ed.), that Congress itself provided that all citizens, with limited exceptions, were competent to sit on federal juries. Until that time, federal courts were required by statute to exclude women from jury duty in those States where women were disqualified. Utah was the first State to qualify women for juries; it did so in 1898, n. 13, *supra*. Moreover, *Hoyt* v. *Florida* was decided and has stood for the proposition that, even if women as a group could not be constitutionally disqualified from jury service, there was ample reason to treat all women differently from men for the purpose of jury service and to exclude them unless they volunteered.[19]

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[18] Section 29 of that Act provided that "the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State . . . ." 1 Stat. 88.

[19] *Hoyt* v. *Florida*, as had *Fay* v. *New York*, 332 U. S. 261, 289–290 (1947), also referred to the historic view that jury service could constitutionally be confined to males: "We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this Court's dictum in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, to the effect that a State may constitutionally 'confine' jury duty 'to males.' This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the Court, see *Fay* v. *New York*, *supra*, at 289–290, and had been reflected, until 1957, in congressional policy respecting jury service in the federal

Accepting as we do, however, the view that the Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male. To this extent we cannot follow the contrary implications of the prior cases, including *Hoyt* v. *Florida.* If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed. If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today. Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place. Nothing persuasive has been presented to us in this case suggesting that all-male venires in the parishes involved here are fairly representative of the local population otherwise eligible for jury service.

VII

Our holding does not augur or authorize the fashioning of detailed jury-selection codes by federal courts. The

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courts themselves." 368 U. S., at 60. (Footnote omitted.) See also *Glasser* v. *United States,* 315 U. S. 60, 64–65, 85–86 (1942).

It is most interesting to note that *Strauder* v. *West Virginia* itself stated:

"[T]he constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." 100 U. S. 303, 308 (1880).

fair-cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community. *Carter* v. *Jury Comm'n, supra,* as did *Brown* v. *Allen, supra; Rawlins* v. *Georgia, supra,* and other cases, recognized broad discretion in the States in this respect. We do not depart from the principles enunciated in *Carter.* But, as we have said, Louisiana's special exemption for women operates to exclude them from petit juries, which in our view is contrary to the command of the Sixth and Fourteenth Amendments.

It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay* v. *New York,* 332 U. S. 261, 284 (1947); *Apodaca* v. *Oregon,* 406 U. S., at 413 (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

The judgment of the Louisiana Supreme Court is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

MR. CHIEF JUSTICE BURGER concurs in the result.

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion reverses a conviction without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the

manner in which his jury was selected. In so doing, the Court invalidates a jury-selection system which it approved by a substantial majority only 13 years ago. I disagree with the Court and would affirm the judgment of the Supreme Court of Louisiana.

The majority opinion canvasses various of our jury trial cases, beginning with *Smith* v. *Texas,* 311 U. S. 128 (1940). Relying on carefully chosen quotations, it concludes that the "unmistakable import" of our cases is that the fair-cross-section requirement "is an essential component of the Sixth Amendment right to a jury trial." I disagree. Fairly read, the only "unmistakable import" of those cases is that due process and equal protection prohibit jury-selection systems which are likely to result in biased or partial juries. *Smith* v. *Texas, supra,* concerned the equal protection claim of a Negro who was indicted by a grand jury from which Negroes had been systematically excluded. *Glasser* v. *United States,* 315 U. S. 60 (1942), dealt with allegations that the only women selected for jury service were members of a private organization which had conducted pro-prosecution classes for prospective jurors. *Brown* v. *Allen,* 344 U. S. 443 (1953), rejected the equal protection and due process contentions of several black defendants that members of their race had been discriminatorily excluded from their juries. *Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970), similarly dealt with equal protection challenges to a jury-selection system, but the persons claiming such rights were blacks who had sought to serve as jurors.

In *Hoyt* v. *Florida,* 368 U. S. 57 (1961), this Court gave plenary consideration to contentions that a system such as Louisiana's deprived a defendant of equal protection and due process. These contentions were rejected, despite circumstances which were much more suggestive of possible bias and prejudice than are those here—the de-

fendant in *Hoyt* was a woman whose defense to charges of murdering her husband was that she had been driven temporarily insane by his suspected infidelity and by his rejection of her efforts at reconciliation. *Id.*, at 58–59. The complete swing of the judicial pendulum 13 years later must depend for its validity on the proposition that during those years things have changed in constitutionally significant ways. I am not persuaded of the sufficiency of either of the majority's proffered explanations as to intervening events.

The first determinative event, in the Court's view, is *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). Because the Sixth Amendment was there held applicable to the States, the Court feels free to dismiss *Hoyt* as a case which dealt with entirely different issues—even though in fact it presented the identical problem. But *Duncan*'s rationale is a good deal less expansive than is suggested by the Court's present interpretation of that case. *Duncan* rests on the following reasoning:

> "The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those ' "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," ' *Powell* v. *Alabama,* 287 U. S. 45, 67 (1932); whether it is 'basic in our system of jurisprudence,' *In re Oliver,* 333 U. S. 257, 273 (1948); and whether it is 'a fundamental right, essential to a fair trial,' *Gideon* v. *Wainwright,* 372 U. S. 335, 343–344 (1963); *Malloy* v. *Hogan,* 378 U. S. 1, 6 (1964); *Pointer* v. *Texas,* 380 U. S. 400, 403 (1965). . . . *Because we believe that trial by*

jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases . . . ." *Id.,* at 148–149. (Emphasis added.)

That this is a sturdy test, one not readily satisfied by every discrepancy between federal and state practice, was made clear not only in *Williams* v. *Florida,* 399 U. S. 78 (1970), and *Apodaca* v. *Oregon,* 406 U. S. 404 (1972), but also in *Duncan* itself. In explaining the conclusion that a jury trial is fundamental to our scheme of justice, and therefore should be required of the States, the Court pointed out that jury trial was designed to be a defense "against arbitrary law enforcement," 391 U. S., at 156, and "to prevent oppression by the Government." *Id.,* at 155. The Court stated its belief that jury trial for serious offenses is "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.,* at 158.

I cannot conceive that today's decision is necessary to guard against oppressive or arbitrary law enforcement, or to prevent miscarriages of justice and to assure fair trials. Especially is this so when the criminal defendant involved makes no claims of prejudice or bias. The Court does accord some slight attention to justifying its ruling in terms of the basis on which the right to jury trial was read into the Fourteenth Amendment. It concludes that the jury is not effective, as a prophylaxis against arbitrary prosecutorial and judicial power, if the "jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Ante,* at 530. It fails, however, to provide any satisfactory explanation of the mechanism by which the Louisiana system undermines the prophylactic role of the jury, either in general or in this case. The best it can do is to

posit " 'a flavor, a distinct quality,' " which allegedly is lost if either sex is excluded. *Ante,* at 532. However, this "flavor" is not of such importance that the Constitution is offended if any given petit jury is not so enriched. *Ante,* at 538. This smacks more of mysticism than of law. The Court does not even purport to practice its mysticism in a consistent fashion—presumably doctors, lawyers, and other groups, whose frequent exemption from jury service is endorsed by the majority, also offer qualities as distinct and important as those at issue here.

In *Hoyt,* this Court considered a stronger due process claim than is before it today, but found that fundamental fairness had not been offended. I do not understand how our intervening decision in *Duncan* can support a different result. After all, *Duncan* imported the Sixth Amendment into the Due Process Clause only because, and only to the extent that, this was perceived to be required by fundamental fairness.

The second change since *Hoyt* that appears to undergird the Court's turnabout is societal in nature, encompassing both our higher degree of sensitivity to distinctions based on sex, and the "evolving nature of the structure of the family unit in American society." *Ante,* at 535 n. 17. These are matters of degree, and it is perhaps of some significance that in 1961 Mr. Justice Harlan saw fit to refer to the "enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men." *Hoyt,* 368 U. S., at 61–62. Nonetheless, it may be fair to conclude that the Louisiana system is in fact an anachronism, inappropriate at this "time or place." *Ante,* at 537. But surely constitutional adjudication is a more canalized function than enforcing as against the States this Court's perception of modern life.

Absent any suggestion that appellant's trial was unfairly conducted, or that its result was unreliable, I would not require Louisiana to retry him (assuming the State can once again produce its evidence and witnesses) in order to impose on him the sanctions which its laws provide.

UNITED STATES *v.* MAZURIE ET AL.

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

No. 73–1018. Argued November 12, 1974—Decided January 21, 1975

Respondents, who operated a bar on non-Indian land on the outskirts of an unincorporated village within the Wind River Reservation and who had been denied a tribal liquor license by the Wind River Tribes pursuant to their option under 18 U. S. C. § 1161 to regulate the introduction of liquor into Indian country, were convicted at a nonjury trial of introducing spirituous beverages into Indian country in violation of 18 U. S. C. § 1154. Section 1154 (c) defines the term "Indian country" as not including fee-patented lands in non-Indian communities, but does not define the term "non-Indian communities." In entering the judgment of conviction, the District Court, on the basis of testimony about the bar's location and the racial composition of residents of the surrounding area as being largely Indian families, concluded that the bar was located within "Indian country" and held that federal authority could reach non-Indians located on privately held land within a reservation's boundaries. The Court of Appeals reversed, holding that the prosecution had not met its burden of proving beyond a reasonable doubt that the bar was not excluded from Indian country by the § 1154 (c) exception for "fee-patented lands in non-Indian communities"; that § 1154 was fatally defective because of the indefiniteness and vagueness of the term "non-Indian community"; and that insofar as § 1161 authorized Indian tribes to control the introduction of alcoholic beverages onto non-Indian land, it was an invalid congressional attempt to delegate authority. *Held:*

1. Section 1154 is not unconstitutionally vague. Given the nature of the bar's location and the surrounding population, the statute was sufficient to advise respondents that their bar was not excepted from tribal regulation by virtue of being located in a non-Indian community. Pp. 550–553.

2. Congress has the authority under Art. I, § 8, of the Constitution to regulate the distribution of alcoholic beverages by establishments such as respondents' bar. Such authority is adequate,

even though the land was held in fee by non-Indians and the persons regulated were non-Indians. Pp. 553–556.

3. Congress could validly delegate such authority to a reservation's tribal council. The independent authority of Indian tribes over matters that affect the internal and social relations of tribal life is sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes" under Art. I, § 8. Pp. 556–557.

487 F. 2d 14, reversed.

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

Harry R. Sachse argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Johnson, Jacques B. Gelin,* and *Lawrence E. Shearer.*

Charles E. Hamilton argued the cause and filed a brief for respondents.

Jerome F. Statkus, Assistant Attorney General, argued the cause for the State of Wyoming as *amicus curiae* urging affirmance. With him on the brief was *Sterling A. Case,* Deputy Attorney General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The respondents were convicted of introducing spirituous beverages into Indian country, in violation of 18 U. S. C. § 1154.[1] The Court of Appeals for the Tenth

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**Marvin J. Sonosky* and *Glen A. Wilkinson* filed a brief for the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation as *amici curiae* urging reversal.

[1] Title 18 U. S. C. § 1154 provides in pertinent part:

"(a) [W]hoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each sub-

Circuit reversed. 487 F. 2d 14 (1973). We granted certiorari, 415 U. S. 947 (1974), in order to consider the Solicitor General's contentions that 18 U. S. C. § 1154 is not unconstitutionally vague, that Congress has the constitutional authority to control the sale of alcoholic beverages by non-Indians on fee-patented land within the boundaries of an Indian reservation, and that Congress could validly make a delegation of this authority to a reservation's tribal council. We reverse the Court of Appeals.

I

The Wind River Reservation was established by treaty in 1868. Located in a rather arid portion of central Wyoming, at least some of its 2,300,000 acres have been described by Mr. Justice Cardozo as "fair and fertile," *Shoshone Tribe* v. *United States,* 299 U. S. 476, 486 (1937). It straddles the Wind River, with its remarkable canyon, and lies in a mile-high basin at the foot of the Wind River Mountains, whose rugged, glaciated peaks and ridges form a portion of the Continental Divide.[2] The reservation is occupied by the Shoshone and Arapahoe Tribes. Although these tribes were once "ancestral foes," *ibid.,* they are today jointly known as the Wind River Tribes. As a result of various patents, substantial tracts of non-Indian-held land are scattered within the reservation's boundaries.

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sequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

. . . . .

"(c) The term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto."

[2] F. Harmston, Wind River Basin 2 (1953); H. Granger et al., Mineral Resources of the Glacier Primitive Area, Wyoming, Geological Survey Bull. No. 1319–F, pp. F2–F5 (1971).

It was on such non-Indian land that respondents Martin and Margaret Mazurie operated their bar, which did business under the corporate name of the Blue Bull, Inc.

Before 1953 federal law generally prohibited the introduction of alcoholic beverages into "Indian country." 18 U. S. C. § 1154 (a). "Indian country" was defined by 18 U. S. C. § 1151 to include non-Indian-held lands "within the limits of any Indian reservation." [3] In 1949, the term was given a narrower meaning, insofar as relevant to the liquor prohibition, so as to exclude both fee-patented lands within "non-Indian communities" and rights-of-way through reservations. Act of May 24, 1949, 63 Stat. 94, 18 U. S. C. § 1154 (c), *supra*, n. 1. The quoted term is not defined, a fact which creates problems with which we shall shortly deal. In 1953 Congress passed local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated. Act of Aug. 15, 1953, 67 Stat. 586, 18 U. S. C. § 1161.[4] The Wind River Tribes responded to this option by adopting an ordinance which permitted

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[3] Title 18 U. S. C. § 1151 provides in pertinent part:

"Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . ."

[4] Title 18 U. S. C. § 1161 provides:

"The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

liquor sales on the reservation if made in accordance with Wyoming law. When the Blue Bull originally opened, a liquor license had been issued to it by Fremont County, Wyo., and its operation was therefore consistent with that tribal ordinance. But in 1971 the Wind River Tribes adopted a new liquor ordinance, Ordinance No. 26.[5] That ordinance required that retail liquor outlets within Indian country obtain both tribal and state licenses.

In 1972, the Mazuries applied for a tribal license, after warnings that they would be subject to criminal charges if they continued to operate without one. The tribes held a public hearing which Martin Mazurie and the Mazuries' lawyer attended. Witnesses protested grant of the license, complaining of singing and shooting at late hours, disturbances of elderly residents of a nearby housing development, and the permitting of Indian minors in the bar. The application was denied.

Thereafter, the Mazuries closed the Blue Bull. Three weeks later they reopened it. It remained in operation for approximately a year, until federal officers seized its alcoholic beverages, and this criminal prosecution was initiated.[6]

The case was tried to the District Court without a jury. Since most of the factual issues were disposed of by stipulations,[7] the testimony at trial primarily dealt with

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[5] The ordinance was properly approved by the Secretary of the Interior and published in the Federal Register. 37 Fed. Reg. 1253–1254 (1972).

[6] The Blue Bull was reopened after the decision of the Court of Appeals. In April 1974, however, Fremont County refused to renew its license and it was again closed. Brief for United States 5 n. 4; Brief for Respondents 20 n. 8.

[7] It was stipulated that the Blue Bull was being operated without the license required by Ordinance No. 26, that alcoholic beverages had been sold at the Blue Bull, that the Blue Bull was located within the Wind River Reservation, but on land which it owned in

whether the bar was within "Indian country." On the basis of testimony about the Blue Bull's location, and about the racial composition of residents of the surrounding area, the court concluded that the bar was so located. Holding that federal authority could reach non-Indians located on privately held land within a reservation's boundaries, the court entered judgments of conviction. Each respondent was fined $100.

The Court of Appeals reversed the convictions. It concluded that the prosecution had not carried its burden of proving beyond a reasonable doubt that the bar was not excluded from Indian country by the § 1154 (c) exception for "fee-patented lands in non-Indian communities." [8] This conclusion was tied directly to the more basic holding:

> "[T]he terminology of 'non-Indian community' is not capable of sufficiently precise definition to serve as

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fee, and that the Blue Bull had been properly licensed by state authorities.

[8] The District Court did not make a specific finding of fact that the Blue Bull was not located in a non-Indian community. The court did find that it was in "Indian Country," that it was situated "at a site known as Fort Washakie, Wyoming," that "Fort Washakie is not an incorporated non-Indian community with recognized boundaries," and that the bar had been operated in violation of 18 U. S. C. § 1154 (which contains the exclusion from "Indian country" of fee-patented lands in non-Indian communities). The ambiguity in the trial court's findings is readily explained by respondents' failure to focus on the issue at trial. The nature of defense testimony and cross-examination is discussed *infra*, at 552. That respondents failed to contest the issue is further established by the motion to dismiss at the close of the Government's evidence. The basis of the motion was failure "to prove beyond a doubt that [respondents] *are* operating in an *Indian* community," App. 64 (emphasis added), which even if true is plainly irrelevant under the wording of § 1154 (c). Respondents' counsel then proceeded with an argument based on respondents' unrestricted fee ownership of the property on which the bar was located. App. 64. In addition, respondents'

> an element of the crime herein considered . . . . The statute is thus fatally defective by reason of this indefinite and vague terminology." 487 F. 2d, at 18.

As a second basis for reversal, the court held that insofar as 18 U. S. C. § 1161 authorized Indian tribes to adopt ordinances controlling the introduction by non-Indians of alcoholic beverages onto non-Indian land, it was an invalid congressional attempt to delegate authority. The Court of Appeals also suggested that Congress itself could not regulate the sale of alcohol by non-Indians on fee-patented non-Indian lands within Indian reservations.

II

It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *United States* v. *National Dairy Products Corp.*, 372 U. S. 29 (1963). In determining whether § 1154 (c) is unconstitutionally vague as to respondents, we must therefore first consider the evidence as to the location of the Blue Bull.[9]

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counsel did not dispute the court's statement at the close of the trial that the "sole issue" was "whether or not the Tribal Council has jurisdiction over deeded land held by these parties in fee . . . ." 2 Record on Appeal 140. The court went on to state:

"[I]t is in Indian Country. There is not any question. You do not need to cite a single case that this bar and this ten acres is [*sic*] located in Indian Country. I am not saying it is Indian land, but it is Indian Country." *Ibid.*

Again, respondents' counsel made no objection. He also apparently did not seek to focus the court's attention on the issue by filing either a post-trial brief or proposed findings of fact and conclusions of law; while both parties had the opportunity to make such submissions, only the prosecution's appears in the record on appeal.

[9] We assume, *arguendo,* as has the Government in its arguments before this court, that the prosecution has the burden of proving

The evidence showed that the bar was located on the outskirts of Fort Washakie, Wyo., an unincorporated village bearing the name of the man who was chief of the Shoshones during their early years on the Wind River Reservation. *Shoshone Tribe* v. *United States,* 299 U. S., at 486; Harmston, *supra,* n. 2, at 3–4. Fort Washakie is the location of the Wind River Agency of the Bureau of Indian Affairs, and of the Tribal Headquarters of the Wind River Tribes. One witness testified that the village was an "Indian community." App 49. The evidence also showed that of the 212 families living within a 20-square-mile area roughly centered on the Blue Bull, 170 were Indian families, 41 were non-Indians, and one was mixed. A large-scale United States Geological Survey map was introduced to show the limits of this housing survey. It indicates that the survey included all settlements within the Fort Washakie area, and that the nearest not-included concentrations of housing were at Saint James Church and Ethete, some four miles beyond the boundaries of the survey and some six miles from Fort Washakie. The evidence also established that the state school serving Fort Washakie, and located about two and one-half miles from the Blue Bull, had a total enrollment of 243 students, 223 of whom were Indian.

Other evidence bearing on whether the Blue Bull was located in a non-Indian community was Martin Mazurie's testimony that the bar served both Indians and non-Indians, and that: "We are kind of out there by ourselves, you know." App. 70. A transcript of the hearing on

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that the § 1154 (c) statutory exceptions are not applicable. Because of this assumption, and because we conclude that the Government in any event did carry this burden, we need not consider whether the exception must be pleaded and proved by criminal defendants. Cf. *United States* v. *Vuitch,* 402 U. S. 62, 70 (1971) (dealing with a criminal statute in which "an exception is incorporated in the *enacting clause* of a statute"). (Emphasis supplied.)

the Mazuries' application to the tribes for a retail liquor license was also admitted at the trial. That transcript indicates that the Blue Bull was located near a public housing development populated largely if not entirely by Indians. Residents of this development complained that persons leaving the bar late at night, and for one reason or another having either no transportation or no destination, would wander into the development.

There was no testimony that the Blue Bull was in a non-Indian community. The defense did obtain acknowledgments by prosecution witnesses that they could not precisely state the boundaries of the Fort Washakie *Indian* community. Otherwise, examination by the defense was directed at establishing that the term "Indian" was without precise meaning, and that the State of Wyoming generally had jurisdiction over non-Indians and their lands within the reservation.

We think that the foregoing evidence was sufficient to justify the District Court's implied conclusion that Fort Washakie and its surrounding settlements did not compose a non-Indian community. We do not read the opinion of the Court of Appeals as reaching a conclusion contrary to that which we have just stated. That court instead based its decision on the proposition that such proof did not go far enough, a view generated by its opinion of the requirements this statute must meet in order to avoid the vice of vagueness. The Court of Appeals was looking for proof beyond a reasonable doubt of precisely defined concepts of "Indian" and "community." We gather that it expected persons treated as "Indians" in the housing and school surveys to be proved to satisfy a specific statutory definition. Similarly, it apparently expected that proof concerning the "community" should have conformed to some specific statutory definition, presumably one keyed to a geographical area with precise boundaries.

We believe that the Court of Appeals erred by holding that the Constitution requires proof of such precisely defined concepts. The prosecution was required to do no more than prove that the Blue Bull was not located in a non-Indian community, where that term has a meaning sufficiently precise for a man of average intelligence to "reasonably understand that his contemplated conduct is proscribed." *United States* v. *National Dairy Products Corp.*, 372 U. S., at 32–33. Given the nature of the Blue Bull's location and surrounding population, the statute was sufficient to advise the Mazuries that their bar was not excepted from tribal regulation by virtue of being located in a non-Indian community.[10]

III

The Court of Appeals expressed doubt that "the Government has the power to regulate a business on the land it granted in fee without restrictions." 487 F. 2d, at 18. Because that court went on to hold that even if Congress did possess such power, it could not be delegated to an Indian tribe, that court did not find it necessary to

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[10] We note that the § 1154 (c) exception is available for fee-patented lands which *are* in *non-Indian* communities, rather than for those which *are not* in *Indian* communities. This fact renders irrelevant the inability of prosecution witnesses to specify precise boundaries of the Fort Washakie *Indian* community.

We need not detain ourselves with an issue which seemed to cause the Court of Appeals some difficulties, that of what qualifies a person as an "Indian." The record plainly establishes that, in the circumstances of this case, the distinction between Indians and non-Indians was generally understood. Those who testified about the housing and school surveys displayed no difficulty in making such classifications. Nor did Mr. Mazurie. He testified that when there was trouble at his bar he would call the county sheriff to deal with a non-Indian, but would call the tribal police to deal with an Indian. When his counsel questioned him as to how he determined which was which, he simply replied: "Because I knew them." App. 70.

resolve the issue of congressional power. We do, however, reach the issue, because we hereinafter conclude that federal authority was properly delegated to the Indian tribes. We conclude that federal authority is adequate, even though the lands were held in fee by non-Indians, and even though the persons regulated were non-Indians.

Article I, § 8, of the Constitution gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This Court has repeatedly held that this clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country.[11] *United States* v. *Holliday,* 3 Wall. 407, 417–418 (1866); *United States* v. *Forty-three Gallons of Whiskey,* 93 U. S. 188, 194–195 (1876); *Ex parte Webb,* 225 U. S. 663, 683–684 (1912); *Perrin* v. *United States,* 232 U. S. 478, 482 (1914); *Johnson* v. *Gearlds,* 234 U. S. 422, 438–439 (1914); *United States* v. *Nice,* 241 U. S. 591, 597 (1916).

Perrin v. *United States, supra,* demonstrates the controlling principle. It dealt with the sale of intoxicating beverages within premises owned by non-Indians, on privately held land in an organized non-Indian municipality. The land originally had been included in the Yankton Sioux Indian Reservation, but had been ceded to the United States. The cession agreement, as ratified and confirmed by Congress, specified that alcoholic beverages would never be sold on the ceded land. The land

[11] It is undisputed that the Wind River Tribes have not been emancipated from federal guardianship and control. There is thus no doubt that this case is properly analyzed in terms of Congress exclusive constitutional authority to deal with Indian tribes.

was subsequently opened to private non-Indian settlers. In upholding Perrin's conviction, this Court stated:

> "The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' and in part from the recognized relation of tribal Indians to the Federal Government." 232 U. S., at 482.

Seymour v. *Superintendent,* 368 U. S. 351 (1962), is a more recent indication of congressional authority over events occurring on non-Indian land within a reservation. The case concerned an Indian's challenge to a state burglary conviction. The Indian contended that because the offense took place within "Indian country," it was within the exclusive jurisdiction of the United States by virtue of 18 U. S. C. § 1153. This Court agreed, despite the fact that the crime occurred on land patented in fee to non-Indians. While the opinion did not address the constitutional issue, it did reject a variety of statutory arguments for excluding the crime's situs from 18 U. S. C. § 1151's definition of "Indian country." Of significance for our purposes is the fact that Congress' authority to define "Indian country" so broadly, and to supersede state jurisdiction within the defined area, went both unchallenged by the parties and unquestioned by this Court.

We hold that neither the Constitution nor our previous cases leave any room for doubt that Congress pos-

sesses the authority to regulate the distribution of alcoholic beverages by establishments such as the Blue Bull.

IV

The Court of Appeals said, however, that even if Congress possessed authority to regulate the Blue Bull, it could not delegate such authority to the Indian tribes. The court reasoned as follows:

> "The tribal members are citizens of the United States. It is difficult to see how such an association of citizens could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization. The situation is in no way comparable to a city, county, or special district under state laws. There cannot be such a separate 'nation' of United States citizens within the boundaries of the United States which has any authority, other than as landowners, over individuals who are excluded as members.
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> . . . . .
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> "The purported delegation of authority to the tribal officials contained in 18 U. S. C. § 1161 is therefore invalid. Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located. It is obvious that the authority of Congress under the Constitution to regulate commerce with Indian Tribes is broad, but it cannot encompass the relationships here concerned." 487 F. 2d, at 19.

This Court has recognized limits on the authority of Congress to delegate its legislative power. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935). Those limitations are, however, less stringent in cases where the entity

exercising the delegated authority itself possesses independent authority over the subject matter. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–322 (1936). Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations . . . ," *United States* v. *Kagama*, 118 U. S. 375, 381–382 (1886); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 173 (1973).

Cases such as *Worcester, supra,* and *Kagama, supra,* surely establish the proposition that Indian tribes within "Indian country" are a good deal more than "private, voluntary organizations," and they thus undermine the rationale of the Court of Appeals' decision. These same cases, in addition, make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes." Cf. *United States* v. *Curtiss-Wright Export Corp., supra.*

The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress

could not subject them to the authority of the Tribal Council with respect to the sale of liquor,[12] is answered by this Court's opinion in *Williams* v. *Lee,* 358 U. S. 217 (1959). In holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians, we stated:

> "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 564–566." *Id.,* at 223 (citations omitted).

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[12] Respondents attempt to bolster this claim with the argument that "the basic rights and principles of equal protection and due process [are] currently not available to non-Indians within the tribal councils." Brief for Respondents 24. However, respondents make no claim that the tribal decision to deny them a license constituted a denial of equal protection or that it resulted from a hearing which lacked due process. Whether and to what extent the Fifth Amendment would be available to correct arbitrary or discriminatory tribal exercise of its delegated federal authority must therefore await decision in a case in which the issue is squarely presented and appropriately briefed. This observation is also applicable with regard to § 202 of Pub. L. 90–284, 82 Stat. 77, 25 U. S. C. § 1302, which provides: "No Indian tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." Quite apart from these potential sources of protection against arbitrary tribal action, such protection is to some extent assured by § 1161's requirement that delegated authority be exercised pursuant to a tribal ordinance which itself has been approved by the Secretary of the Interior.

For the foregoing reasons the judgment of the Court of Appeals must be reversed, and the convictions of respondents reinstated.

Reversed.

STANDARD PRESSED STEEL CO. *v.* DEPARTMENT OF REVENUE OF WASHINGTON

APPEAL FROM THE COURT OF APPEALS OF WASHINGTON

No. 73–1697. Argued December 16, 1974—Decided January 22, 1975

Appellant manufacturer, with a home office and manufacturing plant in Pennsylvania and another plant in California, challenges the constitutionality of Washington State's business and occupation tax which was levied on the unapportioned gross receipts of appellant resulting from its sale of aerospace fasteners to Boeing, its principal Washington customer. Appellant's one Washington-based employee, an engineer, whose office was in his home but who took no fastener orders from Boeing, primarily consulted with Boeing regarding its anticipated fastener needs and followed up any difficulties in the use of fasteners after delivery. The state taxing authorities found that appellant's business activities in Washington were sufficient to sustain the tax, and that decision was affirmed on appeal. *Held:* Washington's business and occupation tax on appellant is constitutional. Pp. 562–564.

(a) There is no violation of due process as the measure of the tax bears a relationship to the benefits conferred on appellant by the State. P. 562.

(b) The tax is not repugnant to the Commerce Clause, appellant having made no showing of multiple taxation on its interstate business, the tax being apportioned to the activities taxed, all of which are intrastate. *General Motors Corp.* v. *Washington,* 377 U. S. 436. Pp. 562–564.

10 Wash. App. 45, 516 P. 2d 1043, affirmed.

DOUGLAS, J., wrote the opinion for a unanimous Court.

Kenneth L. Cornell argued the cause for appellant. With him on the briefs was *Harold S. Fardal.*

Slade Gorton, Attorney General of Washington, argued the cause for appellee. With him on the brief were *Timothy R. Malone,* Senior Assistant Attorney General, and *William D. Dexter,* Assistant Attorney General.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. CHIEF JUSTICE BURGER.

Appellant, a manufacturer of industrial and aerospace fasteners (nuts and bolts generally), has its home office in Pennsylvania, one manufacturing plant there and another in California. Its principal customer in the State of Washington is the Boeing Company, in Seattle. In the years relevant here it had one employee, one Martinson, in Washington who was paid a salary and who operated out of his home near Seattle. He was an engineer whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of appellant's product after delivery. Martinson was assisted by a group of engineers of appellant who visited Boeing about three days every six weeks, their meetings being arranged by Martinson. Martinson did not take orders from Boeing; they were sent directly to appellant. Orders accepted would be filled and shipment made by common carrier to Boeing direct, all payments being made directly to appellant. Martinson had no office except in his home; he had no secretary; but appellant maintained an answering service in the Seattle area which received calls for Martinson, bills for that service being sent direct to appellant.

The State Board of Tax Appeals found that the activities of Martinson were necessary to appellant in making it aware of which products Boeing might use, in obtaining the engineering design of those products, in securing the testing of sample products to qualify them for sale to Boeing, in resolving problems of their use after receipt by Boeing, in obtaining and retaining good will and rapport with Boeing personnel, and in keeping the invoicing personnel of appellant up to date on Boeing's lists of purchasing specialists or control buyers. The Board sustained the assessment of the Washington business and occupation

tax, Wash. Rev. Code § 82.04.270 (1972), levied on the unapportioned gross receipts of appellant resulting from its sale of fasteners to Boeing.[1] The Superior Court affirmed the Board, and the Court of Appeals in turn affirmed, 10 Wash. App. 45, 516 P. 2d 1043 (1973). The Supreme Court denied review. The constitutionality, as applied, of the Washington statute being challenged, we noted probable jurisdiction, 417 U. S. 966 (1974).

Appellant argues that imposition of the tax violates due process because the in-state activities were so thin and inconsequential as to make the tax on activities occurring beyond the borders of the State one which has no reasonable relation to the protection and benefits conferred by the taxing State, *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940). In other words the question is "whether the state has given anything for which it can ask return," *id.*, at 444. We think the question in the context of the present case verges on the frivolous. For appellant's employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing.

The case is argued on the interstate commerce aspect as if Washington were taxing the privilege of doing an interstate business with only orders being sent from within the State and filled outside the State, *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944). Much reliance is placed on *Norton Co.* v. *Department of Revenue*, 340 U. S. 534 (1951), where a Massachusetts corporation qualified to do business in Illinois and maintained an office there from which it made local sales at retail. It was accordingly subjected to the Illinois gross receipts tax on retailers. There were, however, orders sent by Illinois buyers directly to Massachusetts, filled there, and shipped directly

[1] Appellant paid the taxes under protest, and it is stipulated that should appellant prevail it would be entitled to a refund of $33,444.91.

to the customer. As to these a divided Court held that the income from those sales was not taxable by Illinois by reason of the Commerce Clause. The disagreement in the Court was not over the governing principle; it concerned the burden of showing a nexus between the local office and interstate sales—whether a nexus could be assumed and whether the taxpayer had carried the burden of establishing its immunity.

General Motors Corp. v. *Washington,* 377 U. S. 436 (1964), is almost precisely in point so far as the present controversy goes. While the zone manager for sales of the Chevrolet, Pontiac, and Oldsmobile divisions was in Portland, Ore., district managers lived and operated within Washington. Each operated from his home, having no separate office. Each had from 12 to 30 dealers under supervision. He called on each of these dealers, kept tabs on the sales forces, and advised as to promotional and training plans. He also advised on used car inventory control. He worked out with the dealer estimated needs over a 30-, 60-, and 90-day projection of orders. General Motors also had in Washington service representatives who called on dealers regularly, assisted in any troubles experienced, and checked the adequacy of the service department's inventory. They conducted service clinics, teaching dealers and employees efficient service techniques. We held that these activities served General Motors as effectively when administered from "homes" as from "offices" and that those services were substantial "with relation to the establishment and maintenance of sales, upon which the tax was measured," *id.,* at 447.

We noted in *General Motors* that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it, *id.,* at 449. The corporation made no such showing there. Nor is any effort made to establish it here. This very tax was

involved in *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434 (1939). The taxpayer was a Washington corporation, doing business there and shipping fruit from Washington to places of sale in the various States and in foreign countries. The Court held the tax, as applied, unconstitutional under the Commerce Clause.

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." *Id.,* at 439.

In the instant case, as in *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1 (1892),[2] the tax is on the gross receipts from sales made to a local consumer, which may have some impact on commerce. Yet as we said in *Gwin, White & Prince, supra,* at 440, in describing the tax in *Ficklen,* it is "apportioned exactly to the activities taxed," all of which are intrastate.

Affirmed.

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[2] In that case the taxpayers did business as brokers in Tennessee. They solicited local customers and sent their orders to out-of-state vendors who shipped directly to the purchaser. Tennessee levied a tax on their gross commissions. The Court, in distinguishing the "drummer" cases illustrated by *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489 (1887), stated that in *Ficklen* Tennessee did not tax more than its own internal commerce.

Syllabus

GOSS ET AL. *v.* LOPEZ ET AL.

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

No. 73–898. Argued October 16, 1974—Decided January 22, 1975

Appellee Ohio public high school students, who had been suspended from school for misconduct for up to 10 days without a hearing, brought a class action against appellant school officials seeking a declaration that the Ohio statute permitting such suspensions was unconstitutional and an order enjoining the officials to remove the references to the suspensions from the students' records. A three-judge District Court declared that appellees were denied due process of law in violation of the Fourteenth Amendment because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that the statute and implementing regulations were unconstitutional, and granted the requested injunction. *Held:*

1. Students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment. Pp. 572–576.

(a) Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred, and must recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Due Process Clause, and that may not be taken away for misconduct without observing minimum procedures required by that Clause. Pp. 573–574.

(b) Since misconduct charges if sustained and recorded could seriously damage the students' reputation as well as interfere with later educational and employment opportunities, the State's claimed right to determine unilaterally and without process whether that misconduct has occurred immediately collides with the Due Process Clause's prohibition against arbitrary deprivation of liberty. Pp. 574–575.

(c) A 10-day suspension from school is not *de minimis* and may not be imposed in complete disregard of the Due Process

Clause. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary. Pp. 575–576.

2. Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. Generally, notice and hearing should precede the student's removal from school, since the hearing may almost immediately follow the misconduct, but if prior notice and hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, thus justifying immediate removal from school, the necessary notice and hearing should follow as soon as practicable. Pp. 577–584.

372 F. Supp. 1279, affirmed.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 584.

Thomas A. Bustin argued the cause for appellants. With him on the briefs were *James J. Hughes, Jr.*, *Robert A. Bell*, and *Patrick M. McGrath*.

Peter D. Roos argued the cause for appellees. With him on the brief were *Denis Murphy* and *Kenneth C. Curtin*.*

**John F. Lewis* filed a brief for the Buckeye Association of School Administrators et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *David Bonderman*, *Peter Van N. Lockwood*, *Paul L. Tractenberg*, *David Rubin*, and *W. William Hodes* for the National Committee for Citizens in Education et al.; by *Alan H. Levine*, *Melvin L. Wulf*, and *Joel M. Gora* for the American Civil Liberties Union; by *Robert H. Kapp*, *R. Stephen Browning*, and *Nathaniel R. Jones* for the National Association for the Advancement of Colored People et al.; and by *Marian Wright Edelman* for the Children's Defense Fund of the Washington Research Project, Inc., et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal by various administrators of the Columbus, Ohio, Public School System (CPSS) challenges the judgment of a three-judge federal court, declaring that appellees—various high school students in the CPSS—were denied due process of law contrary to the command of the Fourteenth Amendment in that they were temporarily suspended from their high schools without a hearing either prior to suspension or within a reasonable time thereafter, and enjoining the administrators to remove all references to such suspensions from the students' records.

I

Ohio law, Rev. Code Ann. § 3313.64 (1972), provides for free education to all children between the ages of six and 21. Section 3313.66 of the Code empowers the principal of an Ohio public school to suspend a pupil for misconduct for up to 10 days or to expel him. In either case, he must notify the student's parents within 24 hours and state the reasons for his action. A pupil who is expelled, or his parents, may appeal the decision to the Board of Education and in connection therewith shall be permitted to be heard at the board meeting. The Board may reinstate the pupil following the hearing. No similar procedure is provided in § 3313.66 or any other provision of state law for a suspended student. Aside from a regulation tracking the statute, at the time of the imposition of the suspensions in this case the CPSS itself had not issued any written procedure applicable to suspensions.[1] Nor, so far as the record reflects, had any of

[1] At the time of the events involved in this case, the only administrative regulation on this subject was § 1010.04 of the Administrative Guide of the Columbus Public Schools which provided: "Pupils may be suspended or expelled from school in accordance with the provisions of Section 3313.66 of the Revised Code." Subse-

the individual high schools involved in this case.[2] Each, however, had formally or informally described the conduct for which suspension could be imposed.

The nine named appellees, each of whom alleged that he or she had been suspended from public high school in Columbus for up to 10 days without a hearing pursuant to § 3313.66, filed an action under 42 U. S. C. § 1983 against the Columbus Board of Education and various administrators of the CPSS. The complaint sought a

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quent to the events involved in this lawsuit, the Department of Pupil Personnel of the CPSS issued three memoranda relating to suspension procedures, dated August 16, 1971, February 21, 1973, and July 10, 1973, respectively. The first two are substantially similar to each other and require no factfinding hearing at any time in connection with a suspension. The third, which was apparently in effect when this case was argued, places upon the principal the obligation to "investigate" "before commencing suspension procedures"; and provides as part of the procedures that the principal shall discuss the case with the pupil, so that the pupil may "be heard with respect to the alleged offense," unless the pupil is "unavailable" for such a discussion or "unwilling" to participate in it. The suspensions involved in this case occurred, and records thereof were made, prior to the effective date of these memoranda. The District Court's judgment, including its expunction order, turns on the propriety of the procedures existing at the time the suspensions were ordered and by which they were imposed.

[2] According to the testimony of Phillip Fulton, the principal of one of the high schools involved in this case, there was an informal procedure applicable at the Marion-Franklin High School. It provided that in the routine case of misconduct, occurring in the presence of a teacher, the teacher would describe the misconduct on a form provided for that purpose and would send the student, with the form, to the principal's office. There, the principal would obtain the student's version of the story, and, if it conflicted with the teacher's written version, would send for the teacher to obtain the teacher's oral version—apparently in the presence of the student. Mr. Fulton testified that, if a discrepancy still existed, the teacher's version would be believed and the principal would arrive at a disciplinary decision based on it.

declaration that § 3313.66 was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. It also sought to enjoin the public school officials from issuing future suspensions pursuant to § 3313.66 and to require them to remove references to the past suspensions from the records of the students in question.[3]

The proof below established that the suspensions arose out of a period of widespread student unrest in the CPSS during February and March 1971. Six of the named plaintiffs, Rudolph Sutton, Tyrone Washington, Susan Cooper, Deborah Fox, Clarence Byars, and Bruce Harris, were students at the Marion-Franklin High School and were each suspended for 10 days[4] on account of disruptive or disobedient conduct committed in the presence of the school administrator who ordered the suspension. One of these, Tyrone Washington, was among a group of students demonstrating in the school auditorium while a class was being conducted there. He was ordered by the school principal to leave, refused

[3] The plaintiffs sought to bring the action on behalf of all students of the Columbus Public Schools suspended on or after February 1971, and a class action was declared accordingly. Since the complaint sought to restrain the "enforcement" and "operation" of a state statute "by restraining the action of any officer of such state in the enforcement or execution of such statute," a three-judge court was requested pursuant to 28 U. S. C. § 2281 and convened. The students also alleged that the conduct for which they could be suspended was not adequately defined by Ohio law. This vagueness and overbreadth argument was rejected by the court below and the students have not appealed from this part of the court's decision.

[4] Fox was given two separate 10-day suspensions for misconduct occurring on two separate occasions—the second following immediately upon her return to school. In addition to his suspension, Sutton was transferred to another school.

to do so, and was suspended. Rudolph Sutton, in the presence of the principal, physically attacked a police officer who was attempting to remove Tyrone Washington from the auditorium. He was immediately suspended. The other four Marion-Franklin students were suspended for similar conduct. None was given a hearing to determine the operative facts underlying the suspension, but each, together with his or her parents, was offered the opportunity to attend a conference, subsequent to the effective date of the suspension, to discuss the student's future.

Two named plaintiffs, Dwight Lopez and Betty Crome, were students at the Central High School and McGuffey Junior High School, respectively. The former was suspended in connection with a disturbance in the lunchroom which involved some physical damage to school property.[5] Lopez testified that at least 75 other students were suspended from his school on the same day. He also testified below that he was not a party to the destructive conduct but was instead an innocent bystander. Because no one from the school testified with regard to this incident, there is no evidence in the record indicating the official basis for concluding otherwise. Lopez never had a hearing.

Betty Crome was present at a demonstration at a high school other than the one she was attending. There she was arrested together with others, taken to the police station, and released without being formally charged. Before she went to school on the following day, she was

[5] Lopez was actually absent from school, following his suspension, for over 20 days. This seems to have occurred because of a misunderstanding as to the length of the suspension. A letter sent to Lopez after he had been out for over 10 days purports to assume that, being over compulsory school age, he was voluntarily staying away. Upon asserting that this was not the case, Lopez was transferred to another school.

notified that she had been suspended for a 10-day period. Because no one from the school testified with respect to this incident, the record does not disclose how the McGuffey Junior High School principal went about making the decision to suspend Crome, nor does it disclose on what information the decision was based. It is clear from the record that no hearing was ever held.

There was no testimony with respect to the suspension of the ninth named plaintiff, Carl Smith. The school files were also silent as to his suspension, although as to some, but not all, of the other named plaintiffs the files contained either direct references to their suspensions or copies of letters sent to their parents advising them of the suspension.

On the basis of this evidence, the three-judge court declared that plaintiffs were denied due process of law because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that Ohio Rev. Code Ann. § 3313.66 (1972) and regulations issued pursuant thereto were unconstitutional in permitting such suspensions.[6] It was ordered that all references to plaintiffs' suspensions be removed from school files.

Although not imposing upon the Ohio school administrators any particular disciplinary procedures and leaving them "free to adopt regulations providing for fair suspension procedures which are consonant with the educational goals of their schools and reflective of the characteristics of their school and locality," the District Court declared

[6] In its judgment, the court stated that the statute is unconstitutional in that it provides "for suspension . . . without *first* affording the student due process of law." (Emphasis supplied.) However, the language of the judgment must be read in light of the language in the opinion which expressly contemplates that under some circumstances students may properly be removed from school before a hearing is held, so long as the hearing follows promptly.

that there were "minimum requirements of notice and a hearing prior to suspension, except in emergency situations." In explication, the court stated that relevant case authority would: (1) permit "[i]mmediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property"; (2) require notice of suspension proceedings to be sent to the student's parents within 24 hours of the decision to conduct them; and (3) require a hearing to be held, with the student present, within 72 hours of his removal. Finally, the court stated that, with respect to the nature of the hearing, the relevant cases required that statements in support of the charge be produced, that the student and others be permitted to make statements in defense or mitigation, and that the school need not permit attendance by counsel.

The defendant school administrators have appealed the three-judge court's decision. Because the order below granted plaintiffs' request for an injunction—ordering defendants to expunge their records—this Court has jurisdiction of the appeal pursuant to 28 U. S. C. § 1253. We affirm.

II

At the outset, appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules

entitling the citizen to certain benefits. *Board of Regents* v. *Roth,* 408 U. S. 564, 577 (1972).

Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. *Connell* v. *Higginbotham,* 403 U. S. 207 (1971); *Wieman* v. *Updegraff,* 344 U. S. 183, 191–192 (1952); *Arnett* v. *Kennedy,* 416 U. S. 134, 164 (POWELL, J., concurring), 171 (WHITE, J., concurring and dissenting) (1974). So may welfare recipients who have statutory rights to welfare as long as they maintain the specified qualifications. *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), applied the limitations of the Due Process Clause to governmental decisions to revoke parole, although a parolee has no constitutional right to that status. In like vein was *Wolff* v. *McDonnell,* 418 U. S. 539 (1974), where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits accumulated under state law, although those benefits were not mandated by the Constitution.

Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Rev. Code Ann. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. Ohio Rev. Code Ann. § 3321.04 (1972). It is true that § 3313.66 of the Code permits school principals to suspend students for up to 10 days; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the

grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. *Arnett* v. *Kennedy, supra,* at 164 (POWELL, J., concurring), 171 (WHITE, J., concurring and dissenting), 206 (MARSHALL, J., dissenting).

Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not "shed their constitutional rights" at the schoolhouse door. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 506 (1969). "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 637 (1943). The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.

The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied. *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437 (1971); *Board of Regents* v. *Roth, supra,* at 573. School authorities here suspended appellees from school for periods of up to 10 days

based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.[7] It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a "severe detriment or grievous loss." The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest

[7] Appellees assert in their brief that four of 12 randomly selected Ohio colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended. Brief for Appellees 34–35 and n. 40. Appellees also contend that many employers request similar information. *Ibid.*

Congress has recently enacted legislation limiting access to information contained in the files of a school receiving federal funds. Section 513 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 571, 20 U. S. C. § 1232g (1970 ed., Supp. IV), adding § 438 to the General Education Provisions Act. That section would preclude release of "verified reports of serious or recurrent behavior patterns" to employers without written consent of the student's parents. While subsection (b)(1)(B) permits release of such information to "other schools . . . in which the student intends to enroll," it does so only upon condition that the parent be advised of the release of the information and be given an opportunity at a hearing to challenge the content of the information to insure against inclusion of inaccurate or misleading information. The statute does not expressly state whether the parent can contest the underlying basis for a suspension, the fact of which is contained in the student's school record.

at stake." *Board of Regents* v. *Roth, supra,* at 570–571. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. *Fuentes* v. *Shevin,* 407 U. S. 67, 86 (1972). The Court's view has been that as long as a property deprivation is not *de minimis,* its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 342 (1969) (Harlan, J., concurring); *Boddie* v. *Connecticut,* 401 U. S. 371, 378–379 (1971); *Board of Regents* v. *Roth, supra,* at 570 n. 8. A 10-day suspension from school is not *de minimis* in our view and may not be imposed in complete disregard of the Due Process Clause.

A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," *Brown* v. *Board of Education,* 347 U. S. 483, 493 (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.[8]

[8] Since the landmark decision of the Court of Appeals for the Fifth Circuit in *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150, cert. denied, 368 U. S. 930 (1961), the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion. *Hagopian* v. *Knowlton,* 470 F. 2d 201, 211 (CA2 1972); *Wasson* v. *Trowbridge,* 382 F. 2d 807, 812 (CA2 1967);

III

"Once it is determined that due process applies, the question remains what process is due." *Morrissey* v. *Brewer,* 408 U. S., at 481. We turn to that question, fully

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Esteban v. *Central Missouri State College,* 415 F. 2d 1077, 1089 (CA8 1969), cert. denied, 398 U. S. 965 (1970); *Vought* v. *Van Buren Public Schools,* 306 F. Supp. 1388 (ED Mich. 1969); *Whitfield* v. *Simpson,* 312 F. Supp. 889 (ED Ill. 1970); *Fielder* v. *Board of Education of School District of Winnebago, Neb.,* 346 F. Supp. 722, 729 (Neb. 1972); *DeJesus* v. *Penberthy,* 344 F. Supp. 70, 74 (Conn. 1972); *Soglin* v. *Kauffman,* 295 F. Supp. 978, 994 (WD Wis. 1968), aff'd, 418 F. 2d 163 (CA7 1969); *Stricklin* v. *Regents of University of Wisconsin,* 297 F. Supp. 416, 420 (WD Wis. 1969), appeal dismissed, 420 F. 2d 1257 (CA7 1970); *Buck* v. *Carter,* 308 F. Supp. 1246 (WD Wis. 1970); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F. R. D. 133, 147–148 (WD Mo. 1968) (en banc). The lower courts have been less uniform, however, on the question whether removal from school for some shorter period may ever be so trivial a deprivation as to require no process, and, if so, how short the removal must be to qualify. Courts of Appeals have held or assumed the Due Process Clause applicable to long suspensions, *Pervis* v. *LaMarque Ind. School Dist.,* 466 F. 2d 1054 (CA5 1972); to indefinite suspensions, *Sullivan* v. *Houston Ind. School Dist.,* 475 F. 2d 1071 (CA5), cert. denied, 414 U. S. 1032 (1973); to the addition of a 30-day suspension to a 10-day suspension, *Williams* v. *Dade County School Board,* 441 F. 2d 299 (CA5 1971); to a 10-day suspension, *Black Students of North Fort Myers Jr.-Sr. High School* v. *Williams,* 470 F. 2d 957 (CA5 1972); to "mild" suspensions, *Farrell* v. *Joel,* 437 F. 2d 160 (CA2 1971), and *Tate* v. *Board of Education,* 453 F. 2d 975 (CA8 1972); and to a three-day suspension, *Shanley* v. *Northeast Ind. School Dist., Bexar County, Texas,* 462 F. 2d 960, 967 n. 4 (CA5 1972); but inapplicable to a seven-day suspension, *Linwood* v. *Board of Ed. of City of Peoria,* 463 F. 2d 763 (CA7), cert. denied, 409 U. S. 1027 (1972); to a three-day suspension, *Dunn* v. *Tyler Ind. School Dist.,* 460 F. 2d 137 (CA5 1972); to a suspension for not "more than a few days," *Murray* v. *West Baton Rouge Parish School Board,* 472 F. 2d 438 (CA5 1973); and to all suspensions no matter how short, *Black Coalition* v. *Portland School District No. 1,*

realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961). We are also mindful of our own admonition:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Epperson* v. *Arkansas,* 393 U. S. 97, 104 (1968).

There are certain bench marks to guide us, however. *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306

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484 F. 2d 1040 (CA9 1973). The Federal District Courts have held the Due Process Clause applicable to an interim suspension pending expulsion proceedings in *Stricklin* v. *Regents of University of Wisconsin, supra,* and *Buck* v. *Carter, supra;* to a 10-day suspension, *Banks* v. *Board of Public Instruction of Dade County,* 314 F. Supp. 285 (SD Fla. 1970), vacated, 401 U. S. 988 (1971) (for entry of a fresh decree so that a timely appeal might be taken to the Court of Appeals), aff'd, 450 F. 2d 1103 (CA5 1971); to suspensions of under five days, *Vail* v. *Board of Education of Portsmouth School Dist.,* 354 F. Supp. 592 (NH 1973); and to all suspensions, *Mills* v. *Board of Education of the Dist. of Columbia,* 348 F. Supp. 866 (DC 1972), and *Givens* v. *Poe,* 346 F. Supp. 202 (WDNC 1972); but inapplicable to suspensions of 25 days, *Hernandez* v. *School District Number One, Denver, Colorado,* 315 F. Supp. 289 (Colo. 1970); to suspensions of 10 days, *Baker* v. *Downey City Board of Education,* 307 F. Supp. 517 (CD Cal. 1969); and to suspensions of eight days, *Hatter* v. *Los Angeles City High School District,* 310 F. Supp. 1309 (CD Cal. 1970), rev'd on other grounds, 452 F. 2d 673 (CA9 1971). In the cases holding no process necessary in connection with short suspensions, it is not always clear whether the court viewed the Due Process Clause as inapplicable, or simply felt that the process received was "due" even in the absence of some kind of hearing procedure.

(1950), a case often invoked by later opinions, said that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313. "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane* v. *Central Hanover Trust Co., supra*, at 314. See also *Armstrong* v. *Manzo*, 380 U. S. 545, 550 (1965); *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 168–169 (1951) (Frankfurter, J., concurring). At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale*, 1 Wall. 223, 233 (1864).

It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. *Cafeteria Workers* v. *McElroy, supra*, at 895; *Morrissey* v. *Brewer, supra*, at 481. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never

unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . ." "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Anti-Fascist Committee* v. *McGrath, supra,* at 170, 171–172 (Frankfurter, J., concurring).[9]

[9] The facts involved in this case illustrate the point. Betty Crome was suspended for conduct which did not occur on school grounds, and for which mass arrests were made—hardly guaranteeing careful

We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.[10]

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individualized factfinding by the police or by the school principal. She claims to have been involved in no misconduct. However, she was suspended for 10 days without ever being told what she was accused of doing or being given an opportunity to explain her presence among those arrested. Similarly, Dwight Lopez was suspended, along with many others, in connection with a disturbance in the lunchroom. Lopez says he was not one of those in the lunchroom who was involved. However, he was never told the basis for the principal's belief that he was involved, nor was he ever given an opportunity to explain his presence in the lunchroom. The school principals who suspended Crome and Lopez may have been correct on the merits, but it is inconsistent with the Due Process Clause to have made the decision that misconduct had occurred without at some meaningful time giving Crome or Lopez an opportunity to persuade the principals otherwise.

We recognize that both suspensions were imposed during a time of great difficulty for the school administrations involved. At least in Lopez' case there may have been an immediate need to send home everyone in the lunchroom in order to preserve school order and property; and the administrative burden of providing 75 "hearings" of any kind is considerable. However, neither factor justifies a disciplinary suspension without *at any time* gathering facts relating to Lopez specifically, confronting him with them, and giving him an opportunity to explain.

[10] Appellants point to the fact that some process is provided under Ohio law by way of judicial review. Ohio Rev. Code Ann. § 2506.01

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. Lower courts which have addressed the question of the *nature* of the procedures required in short suspension cases have reached the same conclusion. *Tate* v. *Board of Education,* 453 F. 2d 975, 979 (CA8 1972); *Vail* v. *Board of Education,* 354 F. Supp. 592, 603 (NH 1973). Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should fol-

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(Supp. 1973). Appellants do not cite any case in which this general administrative review statute has been used to appeal from a disciplinary decision by a school official. If it be assumed that it could be so used, it is for two reasons insufficient to save inadequate procedures at the school level. First, although new proof may be offered in a § 2501.06 proceeding, *Shaker Coventry Corp.* v. *Shaker Heights Planning Comm'n,* 18 Ohio Op. 2d 272, 176 N. E. 2d 332 (1961), the proceeding is not *de novo. In re Locke,* 33 Ohio App. 2d 177, 294 N. E. 2d 230 (1972). Thus the decision by the school—even if made upon inadequate procedures—is entitled to weight in the court proceeding. Second, without a demonstration to the contrary, we must assume that delay will attend any § 2501.06 proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits.

low as soon as practicable, as the District Court indicated.

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. Indeed, according to the testimony of the principal of Marion-Franklin High School, that school had an informal procedure, remarkably similar to that which we now require, applicable to suspensions generally but which was not followed in this case. Similarly, according to the most recent memorandum applicable to the entire CPSS, see n. 1, *supra,* school principals in the CPSS are now required by local rule to provide at least as much as the constitutional minimum which we have described.

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and argu-

ments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

IV

The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is

Affirmed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today invalidates an Ohio statute that permits student suspensions from school without a hearing

"for not more than ten days." [1] The decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education. The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.[2]

The Court's decision rests on the premise that, under Ohio law, education is a property interest protected by the Fourteenth Amendment's Due Process Clause and therefore that any suspension requires notice and a hearing.[3] In my view, a student's interest in education is

[1] The Ohio statute, Ohio Rev. Code Ann. § 3313.66 (1972), actually is a limitation on the time-honored practice of school authorities themselves determining the appropriate duration of suspensions. The statute allows the superintendent or principal of a public school to suspend a pupil "for *not more than ten days* . . ." (italics supplied); and requires notification to the parent or guardian in writing within 24 hours of any suspension.

[2] Section 3313.66 also provides authority for the expulsion of pupils, but requires a hearing thereon by the school board upon request of a parent or guardian. The rights of pupils expelled are not involved in this case, which concerns only the limited discretion of school authorities to suspend for not more than 10 days. Expulsion, usually resulting at least in loss of a school year or semester, is an incomparably more serious matter than the brief suspension, traditionally used as the principal sanction for enforcing routine discipline. The Ohio statute recognizes this distinction.

[3] The Court speaks of "exclusion from the educational process for more than a trivial period . . . ," *ante,* at 576, but its opinion makes clear that even one day's suspension invokes the constitutional procedure mandated today.

not infringed by a suspension within the limited period prescribed by Ohio law. Moreover, to the extent that there may be some arguable infringement, it is too speculative, transitory, and insubstantial to justify imposition of a *constitutional* rule.

I

Although we held in *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 35 (1973), that education is not a right protected by the Constitution, Ohio has elected by statute to provide free education for all youths age six to 21, Ohio Rev. Code Ann. §§ 3313.48, 3313.64 (1972 and Supp. 1973), with children under 18 years of age being compelled to attend school. § 3321.01 *et seq.* State law, therefore, extends the right of free public school education to Ohio students in accordance with the education laws of that State. The right or entitlement to education so created is protected in a proper case by the Due Process Clause. See, *e. g., Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Arnett* v. *Kennedy,* 416 U. S. 134, 164 (1974) (POWELL, J., concurring). In my view, this is not such a case.

In identifying property interests subject to due process protections, the Court's past opinions make clear that these interests "are created and their *dimensions are defined* by existing rules or understandings that stem from an independent source such as state law." *Board of Regents* v. *Roth, supra,* at 577 (emphasis supplied). The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days. Ohio Rev. Code Ann. §§ 3313.48, 3313.64, 3313.66 (1972 and Supp. 1973). Thus the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is

encompassed in the entire package of statutory provisions governing education in Ohio—of which the power to suspend is one.

The Court thus disregards the basic structure of Ohio law in posturing this case as if Ohio had conferred an unqualified right to education, thereby compelling the school authorities to conform to due process procedures in imposing the most routine discipline.[4]

But however one may define the entitlement to education provided by Ohio law, I would conclude that a deprivation of not more than 10 days' suspension from school, imposed as a routine disciplinary measure, does not assume constitutional dimensions. Contrary to the Court's assertion, our cases support rather than "refute" appel-

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[4] The Court apparently reads into Ohio law by implication a qualification that suspensions may be imposed only for "cause," thereby analogizing this case to the civil service laws considered in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). To be sure, one may assume that pupils are not suspended at the whim or caprice of the school official, and the statute does provide for notice of the suspension with the "reasons therefor." But the same statute draws a sharp distinction between suspension and the far more drastic sanction of expulsion. A hearing is required only for the latter. To follow the Court's analysis, one must conclude that the legislature nevertheless intended—without saying so—that suspension also is of such consequence that it may be imposed only for causes which can be justified at a hearing. The unsoundness of reading this sort of requirement into the statute is apparent from a comparison with *Arnett*. In that case, Congress *expressly* provided that nonprobationary federal employees should be discharged only for "cause." This requirement reflected congressional recognition of the seriousness of discharging such employees. There simply is no analogy between *termination* of nonprobationary employment of a civil service employee and the *suspension* of a public school pupil for not more than 10 days. Even if the Court is correct in implying some concept of justifiable cause in the Ohio procedure, it could hardly be stretched to the constitutional proportions found present in *Arnett*.

lants' argument that "the Due Process Clause . . . comes into play only when the State subjects a student to a 'severe detriment or grievous loss.' " *Ante,* at 575. Recently, the Court reiterated precisely this standard for analyzing due process claims:

> "Whether *any* procedural protections are due depends on the extent to which an individual will be 'condemned to suffer *grievous* loss.' *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg* v. *Kelly,* 397 U. S. 254, 263 (1970)." *Morrissey* v. *Brewer,* 408 U. S. 471, 481 (1972) (emphasis supplied).

In *Morrissey* we applied that standard to require due process procedures for parole revocation on the ground that revocation "inflicts a 'grievous loss' on the parolee and often on others." *Id.,* at 482. See also *Board of Regents* v. *Roth,* 408 U. S., at 573 ("seriously damage" reputation and standing); *Bell* v. *Burson,* 402 U. S. 535, 539 (1971) ("important interests of the licensees"); *Boddie* v. *Connecticut,* 401 U. S. 371, 379 (1971) ("significant property interest").[5]

The Ohio suspension statute allows no serious or sig-

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[5] Indeed, the Court itself quotes from a portion of Mr. Justice Frankfurter's concurrence in *Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 171 (1951), which explicitly refers to "a person in jeopardy of *serious loss.*" See *ante,* at 580 (emphasis supplied).

Nor is the *"de minimis"* standard referred to by the Court relevant in this case. That standard was first stated by Mr. Justice Harlan in a concurring opinion in *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 342 (1969), and then quoted in a footnote to the Court's opinion in *Fuentes* v. *Shevin,* 407 U. S. 67, 90 n. 21 (1972). Both *Sniadach* and *Fuentes,* however, involved resolution of property disputes between two private parties claiming an interest in the same property. Neither case pertained to an interest conferred by the State.

nificant infringement of education. It authorizes only a maximum suspension of eight school days, less than 5% of the normal 180-day school year. Absences of such limited duration will rarely affect a pupil's opportunity to learn or his scholastic performance. Indeed, the record in this case reflects no educational injury to appellees. Each completed the semester in which the suspension occurred and performed at least as well as he or she had in previous years.[6] Despite the Court's unsupported speculation that a suspended student could be "seriously damage[d]" (*ante*, at 575), there is no factual showing of any such damage to appellees.

The Court also relies on a perceived deprivation of "liberty" resulting from any suspension, arguing—again without factual support in the record pertaining to these appellees—that a suspension harms a student's reputation. In view of the Court's decision in *Board of Regents* v. *Roth, supra,* I would have thought that this argument was plainly untenable. Underscoring the need for "serious damage" to reputation, the *Roth* Court held that a nontenured teacher who is not rehired by a public university could not claim to suffer sufficient reputational injury to require constitutional protections.[7] Surely a brief suspension is of less serious consequence to the reputation of a teenage student.

II

In prior decisions, this Court has explicitly recognized that school authorities must have broad discretionary au-

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[6] 2 App. 163–171 (testimony of Norval Goss, Director of Pupil Personnel). See opinion of the three-judge court, 372 F. Supp. 1279, 1291 (SD Ohio 1973).

[7] See also *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437 (1971), quoting the "grievous loss" standard first articulated in *Anti-Fascist Committee* v. *McGrath, supra.*

thority in the daily operation of public schools. This includes wide latitude with respect to maintaining discipline and good order. Addressing this point specifically, the Court stated in *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 507 (1969):

> "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." [8]

Such an approach properly recognizes the unique nature of public education and the correspondingly limited role of the judiciary in its supervision. In *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968), the Court stated:

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

The Court today turns its back on these precedents. It can hardly seriously be claimed that a school principal's decision to suspend a pupil for a single day would "directly and sharply implicate basic constitutional values." *Ibid.*

Moreover, the Court ignores the experience of mankind, as well as the long history of our law, recognizing

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[8] In dissent on the First Amendment issue, Mr. Justice Harlan recognized the Court's basic agreement on the limited role of the judiciary in overseeing school disciplinary decisions:

"I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions." 393 U. S., at 526.

that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office. Until today, and except in the special context of the First Amendment issue in *Tinker,* the educational rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students. Even with respect to the First Amendment, the rights of children have not been regarded as "co-extensive with those of adults." *Tinker, supra,* at 515 (STEWART, J., concurring).

A

I turn now to some of the considerations which support the Court's former view regarding the comprehensive authority of the States and school officials "to prescribe and control conduct in the schools." *Id.,* at 507. Unlike the divergent and even sharp conflict of interests usually present where due process rights are asserted, the interests here implicated—of the State through its schools and of the pupils—are essentially congruent.

The State's interest, broadly put, is in the proper functioning of its public school system for the benefit of *all* pupils and the public generally. Few rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process. Suspensions are one of the traditional means—ranging from keeping a student after class to permanent expulsion—used to maintain discipline in the schools. It is common knowledge that maintaining order and reasonable de-

corum in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years.[9] Often the teacher, in protecting the rights of other children to an education (if not his or their safety), is compelled to rely on the power to suspend.

The facts set forth in the margin [10] leave little room for doubt as to the magnitude of the disciplinary problem in the public schools, or as to the extent of reliance upon the right to suspend. They also demonstrate that if hearings were required for a substantial percentage of short-term suspensions, school authorities would have time to do little else.

B

The State's generalized interest in maintaining an orderly school system is not incompatible with the indi-

[9] See generally S. Bailey, Disruption in Urban Secondary Schools (1970), which summarizes some of the recent surveys on school disruption. A Syracuse University study, for example, found that 85% of the schools responding reported some type of significant disruption in the years 1967–1970.

[10] An *amicus* brief filed by the Children's Defense Fund states that *at least 10%* of the junior and senior high school students in the States sampled were suspended *one or more* times in the 1972–1973 school year. The data on which this conclusion rests were obtained from an extensive survey prepared by the Office for Civil Rights of the Department of Health, Education, and Welfare. The Children's Defense Fund reviewed the suspension data for five States—Arkansas, Maryland, New Jersey, Ohio, and South Carolina.

Likewise, an *amicus* brief submitted by several school associations in Ohio indicates that the number of suspensions is significant: in 1972–1973, 4,054 students out of a school enrollment of 81,007 were suspended in Cincinnati; 7,352 of 57,000 students were suspended in Akron; and 14,598 of 142,053 students were suspended in Cleveland. See also the Office of Civil Rights Survey, *supra*, finding that approximately 20,000 students in New York City, 12,000 in Cleveland, 9,000 in Houston, and 9,000 in Memphis were suspended at least once during the 1972–1973 school year. Even these figures are probably somewhat conservative since some schools did not reply to the survey.

vidual interest of the student. Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority [11]—an invitation which rebellious or even merely spirited teenagers are likely to accept.

The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned. Mr. Justice Black summed it up:

> "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens." *Tinker,* 393 U. S., at 524 (dissenting opinion).

In assessing in constitutional terms the need to protect pupils from unfair minor discipline by school authorities, the Court ignores the commonality of interest of the State and pupils in the public school system. Rather, it thinks in traditional judicial terms of an adversary

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[11] See generally J. Dobson, Dare to Discipline (1970).

situation. To be sure, there will be the occasional pupil innocent of any rule infringement who is mistakenly suspended or whose infraction is too minor to justify suspension. But, while there is no evidence indicating the frequency of unjust suspensions, common sense suggests that they will not be numerous in relation to the total number, and that mistakes or injustices will usually be righted by informal means.

C

One of the more disturbing aspects of today's decision is its indiscriminate reliance upon the judiciary, and the adversary process, as the means of resolving many of the most routine problems arising in the classroom. In mandating due process procedures the Court misapprehends the reality of the normal teacher-pupil relationship. There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute.[12] It is rarely adversary in nature except with respect to the chronically disruptive or insubordinate pupil whom the teacher must be free to discipline without frustrating formalities.[13]

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[12] The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education.

[13] In this regard, the relationship between a student and teacher is manifestly different from that between a welfare administrator and a recipient (see *Goldberg* v. *Kelly*, 397 U. S. 254 (1970)), a motor vehicle department and a driver (see *Bell* v. *Burson*, 402 U. S. 535 (1971)), a debtor and a creditor (see *Sniadach* v. *Family Finance Corp., supra; Fuentes* v. *Shevin, supra; Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974)), a parole officer and a parolee (see *Morrissey* v. *Brewer*, 408 U. S. 471 (1972)), or even an employer and an employee (see *Arnett* v. *Kennedy*, 416 U. S. 134 (1974)). In many of these noneducation settings there is—for purposes of this analy-

The Ohio statute, providing as it does for due notice both to parents and the Board, is compatible with the teacher-pupil relationship and the informal resolution of mistaken disciplinary action. We have relied for generations upon the experience, good faith and dedication of those who staff our public schools,[14] and the nonadversary means of airing grievances that always have been available to pupils and their parents. One would have thought before today's opinion that this informal method of resolving differences was more compatible with the interests of all concerned than resort to any constitutionalized procedure, however blandly it may be defined by the Court.

D

In my view, the constitutionalizing of routine classroom decisions not only represents a significant and unwise extension of the Due Process Clause, but it also was quite unnecessary in view of the safeguards prescribed by the Ohio statute. This is demonstrable from a com-

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sis—a "faceless" administrator dealing with an equally "faceless" recipient of some form of government benefit or license; in others, such as the garnishment and repossession cases, there is a conflict-of-interest relationship. Our public school system, however, is premised on the belief that teachers and pupils should not be "faceless" to each other. Nor does the educational relationship present a typical "conflict of interest." Rather, the relationship traditionally is marked by a coincidence of interests.

Yet the Court, relying on cases such as *Sniadach* and *Fuentes*, apparently views the classroom of teenagers as comparable to the competitive and adversary environment of the adult, commercial world.

[14] A traditional factor in any due process analysis is "the protection implicit in the office of the functionary whose conduct is challenged . . . ." *Anti-Fascist Committee* v. *McGrath*, 341 U. S., at 163 (Frankfurter, J., concurring). In the public school setting there is a high degree of such protection since a teacher has responsibility for, and a commitment to, his pupils that is absent in other due process contexts.

parison of what the Court mandates as required by due process with the protective procedures it finds constitutionally insufficient.

The Ohio statute, limiting suspensions to not more than eight school days, requires *written* notice including the "reasons therefor" to the student's parents and to the Board of Education within 24 hours of any suspension. The Court only requires oral *or* written notice to the pupil, with no notice being required to the parents or the Board of Education. The mere fact of the statutory requirement is a deterrent against arbitrary action by the principal. The Board, usually elected by the people and sensitive to constituent relations, may be expected to identify a principal whose record of suspensions merits inquiry. In any event, parents placed on written notice may exercise their rights as constituents by going directly to the Board or a member thereof if dissatisfied with the principal's decision.

Nor does the Court's due process "hearing" appear to provide significantly more protection than that already available. The Court holds only that the principal must listen to the student's "version of the events," either before suspension or thereafter—depending upon the circumstances. *Ante*, at 583. Such a truncated "hearing" is likely to be considerably less meaningful than the opportunities for correcting mistakes already available to students and parents. Indeed, in this case all of the students and parents were offered an opportunity to attend a conference with school officials.

In its rush to mandate a constitutional rule, the Court appears to give no weight to the practical manner in which suspension problems normally would be worked out under Ohio law.[15] One must doubt, then, whether

[15] The Court itself recognizes that the requirements it imposes are, "if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions." *Ante*, at 583.

the constitutionalization of the student-teacher relationship, with all of its attendant doctrinal and practical difficulties, will assure in any meaningful sense greater protection than that already afforded under Ohio law.

III

No one can foresee the ultimate frontiers of the new "thicket" the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process. Teachers and other school authorities are required to make many decisions that may have serious consequences for the pupil. They must decide, for example, how to grade the student's work, whether a student passes or fails a course,[16] whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics [17] or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available schools are nearby, and whether he should be placed in a "general," "vocational," or "college-preparatory" track.

In these and many similar situations claims of impairment of one's educational entitlement identical in principle to those before the Court today can be asserted with equal or greater justification. Likewise, in many of these situations, the pupil can advance the same types of speculative and subjective injury given critical weight in this case. The District Court, relying upon generalized opinion evidence, concluded that a suspended student may suffer psychological injury in one or more of

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[16] See *Connelly* v. *University of Vermont,* 244 F. Supp. 156 (Vt. 1956).

[17] See *Kelley* v. *Metropolitan County Board of Education of Nashville,* 293 F. Supp. 485 (MD Tenn. 1968).

the ways set forth in the margin below.[18] The Court appears to adopt this rationale. See *ante,* at 575.

It hardly need be said that if a student, as a result of a day's suspension, suffers "a blow" to his "self esteem," "feels powerless," views "teachers with resentment," or feels "stigmatized by his teachers," identical psychological harms will flow from many other routine and necessary school decisions. The student who is given a failing grade, who is not promoted, who is excluded from certain extracurricular activities, who is assigned to a school reserved for children of less than average ability, or who is placed in the "vocational" rather than the "college preparatory" track, is unlikely to suffer any less psychological injury than if he were suspended for a day for a relatively minor infraction.[19]

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[18] The psychological injuries so perceived were as follows:

"1. The suspension is a blow to the student's self-esteem.

"2. The student feels powerless and helpless.

"3. The student views school authorities and teachers with resentment, suspicion and fear.

"4. The student learns withdrawal as a mode of problem solving.

"5. The student has little perception of the reasons for the suspension. He does not know what offending acts he committed.

"6. The student is stigmatized by his teachers and school administrators as a deviant. They expect the student to be a troublemaker in the future." 372 F. Supp., at 1292.

[19] There is, no doubt, a school of modern psychological or psychiatric persuasion that maintains that *any* discipline of the young is detrimental. Whatever one may think of the wisdom of this unproved theory, it hardly affords dependable support for a *constitutional* decision. Moreover, even the theory's proponents would concede that the magnitude of injury depends primarily upon the individual child or teenager. A classroom reprimand by the teacher may be more traumatic to the shy, timid introvert than expulsion would be to the aggressive, rebellious extrovert. In my view we tend to lose our sense of perspective and proportion in a case of this kind. For average, normal children—the vast majority—suspension for a few days is simply *not* a detriment; it is a com-

If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed. The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards,[20] and the 2,000,000[21] teachers who heretofore have been responsible for the administration of the American public school system. If the Court perceives a rational and analytically sound distinction between the discretionary decision by school authorities to suspend a pupil for a brief period, and the types of discretionary school decisions described above, it would be prudent to articulate it in today's opinion. Otherwise, the federal courts should prepare themselves for a vast new role in society.

IV

Not so long ago, state deprivations of the most significant forms of state largesse were not thought to require due process protection on the ground that the deprivation resulted only in the loss of a state-provided "benefit." *E. g., Bailey* v. *Richardson,* 86 U. S. App. D. C. 248, 182 F. 2d 46 (1950), aff'd by an equally divided Court, 341 U. S. 918 (1951). In recent years the Court, wisely in my view, has rejected the "wooden distinction between 'rights' and 'privileges,' " *Board of Regents* v. *Roth,* 408 U. S., at 571, and looked instead to the significance of the state-created or state-enforced right and to

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monplace occurrence, with some 10% of all students being suspended; it leaves no scars; affects no reputations; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday.

[20] This estimate was supplied by the National School Board Association, Washington, D. C.

[21] See U. S. Office of Education, Elementary and Secondary Public School Statistics, 1972–1973.

the substantiality of the alleged deprivation. Today's opinion appears to abandon this reasonable approach by holding in effect that government infringement of any interest to which a person is entitled, no matter what the interest or how inconsequential the infringement, requires *constitutional* protection. As it is difficult to think of any less consequential infringement than suspension of a junior high school student for a single day, it is equally difficult to perceive any principled limit to the new reach of procedural due process.[22]

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[22] Some half dozen years ago, the Court extended First Amendment rights under limited circumstances to public school pupils. Mr. Justice Black, dissenting, viewed the decision as ushering in "an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools' . . . is in ultimate effect transferred to the Supreme Court." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 515 (1969). There were some who thought Mr. Justice Black was unduly concerned. But his prophecy is now being fulfilled. In the few years since *Tinker* there have been literally hundreds of cases by schoolchildren alleging violation of their constitutional rights. This flood of litigation, between pupils and school authorities, was triggered by a narrowly written First Amendment opinion which I could well have joined on its facts. One can only speculate as to the extent to which public education will be disrupted by giving every schoolchild the power to contest *in court* any decision made by his teacher which arguably infringes the state-conferred right to education.

NORTH GEORGIA FINISHING, INC. *v.* DI-CHEM, INC.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 73–1121. Argued November 18, 1974—
Decided January 22, 1975

Georgia statutes permitting a writ of garnishment to be issued by an officer authorized to issue an attachment or a court clerk in pending suits on an affidavit of the plaintiff or his attorney containing only conclusory allegations, prescribing filing of a bond as the only method of dissolving the garnishment, which deprives the defendant of the use of the property in the garnishee's hands pending the litigation, and making no provision for an early hearing, violate the Due Process Clause of the Fourteenth Amendment, *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337; *Fuentes* v. *Shevin*, 407 U. S. 67. *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, distinguished. That this case involved garnishment of a corporation's sizable bank account, rather than a consumer's household necessities, is immaterial, since the probability of irreparable injury if the garnishment proves unjustified is sufficiently great to require some procedure to guard against initial error. Pp. 605–608.

231 Ga. 260, 201 S. E. 2d 321, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. STEWART, J., filed a concurring statement, *post*, p. 608. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 609. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, J., joined, and in numbered paragraph 5 of which BURGER, C. J., joined, *post*, p. 614.

Warren N. Coppedge, Jr., argued the cause for petitioner. With him on the brief was *Nathaniel Hansford.*

Lemuel Hugh Kemp argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

Under the statutes of the State of Georgia, plaintiffs in pending suits are "entitled to the process of garnish-

ment." Ga. Code Ann. § 46–101.[1] To employ the process, plaintiff or his attorney must make an affidavit before "some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action . . . and that he has reason to apprehend the loss of the same

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[1] The relevant provisions of the Georgia Code Annotated are as follows:

§ 46–101

"Right to writ; wages exempt until after final judgment

"In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly or monthly wages of any person residing in this State until after final judgment shall have been had against said defendant: Provided, further, that the wages of a share cropper shall also be exempt from garnishment until after final judgment shall have been had against said share cropper: Provided, further, that nothing in this section shall be construed as abridging the right of garnishment in attachment before judgment is obtained."

§ 46–102

"Affidavit; necessity and contents. Bond

"The plaintiff, his agent, or attorney at law shall make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action, or on such judgment, and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue, and shall give bond, with good security, in a sum at least equal to double the amount sworn to be due, payable to the defendant in the suit or judgment, as the case may be, conditioned to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment, in the event that the plaintiff shall fail to recover in the suit, or it shall appear that the amount sworn to be due on such judgment was not due, or that the property or money sought to be garnished was not subject to process of garnishment. No person shall be taken as security on the bond who is an attorney for the plaintiff or a nonresident unless the non-

or some part thereof unless process of garnishment shall issue." § 46–102. To protect defendant against loss or damage in the event plaintiff fails to recover, that section also requires plaintiff to file a bond in a sum double the amount sworn to be due. Section 46–401 permits the defendant to dissolve the garnishment by filing a bond "conditioned for the payment of any judgment that shall be rendered on said garnishment." Whether these provisions satisfy the Due Process Clause of the Fourteenth Amendment is the issue before us in this case.

On August 20, 1971, respondent filed suit against petitioner in the Superior Court of Whitfield County,

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resident is possessed of real estate in the county where the garnishment issues of the value of the amount of such bond."

§ 46–103

"Affidavit by agent or attorney

"When the affidavit shall be made by the agent or attorney at law of the plaintiff, he may swear according to the best of his knowledge and belief, and may sign the name of the plaintiff to the bond, who shall be bound thereby in the same manner as though he had signed it himself."

§ 46–104

"Affidavit and bond by one of firm, etc.

"When the debt for recovery of which garnishment is sought shall be due to partners or several persons jointly, any one of said partners or joint creditors may make the affidavit and give bond in the name of the plaintiff, as prescribed in cases of attachment."

§ 46–401

"Dissolution of garnishments; bond; judgment on bond

"When garnishment shall have been issued, the defendant may dissolve such garnishment upon filing in the clerk's office of the court, or with the justice of the peace, where suit is pending or judgment was obtained, a bond with good security, payable to the plaintiff, conditioned for the payment of any judgment that shall be rendered on said garnishment. The plaintiff may enter up judgment upon such bond against the principal and securities, as judgment may be entered against securities upon appeal, whenever said plaintiff shall obtain the judgment of the court against the property or funds against which garnishment shall have been issued."

Ga., alleging an indebtedness due and owing from petitioner for goods sold and delivered in the amount of $51,279.17. Simultaneously with the filing of the complaint and prior to its service on petitioner, respondent filed affidavit and bond for process of garnishment, naming the First National Bank of Dalton as garnishee. The affidavit asserted the debt and "reason to apprehend the loss of said sum or some part thereof unless process of Garnishment issues." [2] The clerk of the Superior Court forthwith issued summons of garnishment to the bank, which was served that day. On August 23, petitioner filed a bond in the Superior Court conditioned to pay any final judgment in the main action up to the amount claimed, and the judge of that court thereupon discharged the bank as garnishee. On September 15, petitioner filed a motion to dismiss the writ of garnishment and to discharge its bond, asserting, among other things, that the statutory garnishment procedure was unconstitutional in that it violated "defendant's due process and equal protection rights guaranteed him by the Constitution of the

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[2] The affidavit in its entirety was as follows:

"SUPERIOR COURT OF *Whitfield* COUNTY GEORGIA, *Whitfield* COUNTY.

"Personally appeared *R. L. Foster, President of Di-Chem, Inc.*, who on oath says that he is *President of Di-Chem, Inc.*, plaintiff herein and that *North Georgia Finishing, Inc.*, defendant, is indebted to said plaintiff in the sum of $51,279.17 DOLLARS, principal, $....., interest, $..... attorney's fees, and $..... cost and that said plaintiff has—a suit pending—*returnable to the* Superior Court of *Whitfield* County, and that affiant has reason to apprehend the loss of said sum or some part thereof unless process of Garnishment issues.

"Sworn to and subscribed before me, this *August* 20, 1971.

"*/s/ R. L. Foster,* Affiant.

"*/s/ Dual Broadrick,* Clerk

"Superior Court of *Whitfield* County." App. 3–4.

United States and the Constitution of the State of Georgia." App. 11. The motion was heard and overruled on November 29. The Georgia Supreme Court,[3] finding that the issue of the constitutionality of the statutory garnishment procedure was properly before it, sustained the statute and rejected petitioner's claims that the statute was invalid for failure to provide notice and hearing in connection with the issuance of the writ of garnishment. 231 Ga. 260, 201 S. E. 2d 321 (1973).[4] We granted certiorari. 417 U. S. 907 (1974). We reverse.

The Georgia court recognized that *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), had invalidated a statute permitting the garnishment of wages without notice and opportunity for hearing, but considered that case to have done nothing more than to carve out an exception, in favor of wage earners, "to the general rule of legality of garnishment statutes." 231 Ga., at 264, 201 S. E. 2d, at 323. The garnishment of other assets or properties pending the outcome of the main action, although the effect was to " 'impound [them] in the hands of the garnishee,' " *id.*, at 263, 201 S. E. 2d, at 323, was apparently thought not to implicate the Due Process Clause.

This approach failed to take account of *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), a case decided by this Court

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[3] Appeal was taken in the first instance to the Georgia Supreme Court. That court, without opinion, transferred the case to the Georgia Court of Appeals. The latter court issued an opinion, 127 Ga. App. 593, 194 S. E. 2d 508 (1972). The Georgia Supreme Court then issued certiorari, 230 Ga. 623, 198 S. E. 2d 284 (1973).

[4] Subsequent to the Georgia Supreme Court's decision in this case, a three-judge federal court, sitting in the Northern District of Georgia declared these same statutory provisions unconstitutional. *Morrow Electric Co.* v. *Cruse*, 370 F. Supp. 639 (1974).

more than a year prior to the Georgia court's decision. There the Court held invalid the Florida and Pennsylvania replevin statutes which permitted a secured installment seller to repossess the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the clerk of the court at the behest of the seller. That the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause. "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." *Id.*, at 86. Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort. Because the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment.

The Georgia statute is vulnerable for the same reasons. Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer.

Nor is the statute saved by the more recent decision in *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974). That case upheld the Louisiana sequestration statute which per-

mitted the seller-creditor holding a vendor's lien to secure a writ of sequestration and, having filed a bond, to cause the sheriff to take possession of the property at issue. The writ, however, was issuable only by a judge upon the filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration. The Louisiana law also expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued.

The Georgia garnishment statute has none of the saving characteristics of the Louisiana statute. The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. § 46–103. The affidavit, like the one filed in this case, need contain only conclusory allegations. The writ is issuable, as this one was, by the court clerk, without participation by a judge. Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee. Here a sizable bank account was frozen, and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be.[5]

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[5] Petitioner so asserts, relying on *Jackson* v. *Barksdale,* 17 Ga. App. 461, 87 S. E. 691 (1916); *Powell* v. *Powell,* 95 Ga. App. 122, 97 S. E. 2d 193 (1957). Respondent, without citation of authority states that "[c]ounsel could have attacked the garnishment in other ways either in the State or Federal Courts. . . ." Brief for Respondent 5.

Respondent also argues that neither *Fuentes* nor *Mitchell* is apposite here because each of those cases dealt with the application of due process protections to consumers who are victims of contracts of adhesion and who might be irreparably damaged by temporary deprivation of household necessities, whereas this case deals with its application in the commercial setting to a case involving parties of equal bargaining power. See also *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). It is asserted in addition that the double bond posted here gives assurance to petitioner that it will be made whole in the event the garnishment turns out to be unjustified. It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause. *Fuentes* v. *Shevin*, 407 U. S., at 89–90.

Enough has been said, we think, to require the reversal of the judgment of the Georgia Supreme Court. The case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE STEWART, concurring.

It is gratifying to note that my report of the demise of *Fuentes* v. *Shevin*, 407 U. S. 67, see *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 629–636 (dissenting opinion), seems to have been greatly exaggerated. Cf. S. Clemens, cable from Europe to the Associated Press, quoted in 2 A. Paine, Mark Twain: A Biography 1039 (1912).

MR. JUSTICE POWELL, concurring in the judgment.

I join in the Court's judgment, but I cannot concur in the opinion as I think it sweeps more broadly than is necessary and appears to resuscitate *Fuentes* v. *Shevin,* 407 U. S. 67 (1972). Only last term in *Mitchell* v. *W. T. Grant, Co.* 416 U. S. 600 (1974), the Court significantly narrowed the precedential scope of *Fuentes.* In my concurrence in *Mitchell,* I noted:

> "The Court's decision today withdraws significantly from the full reach of [*Fuentes'*] principle, and to this extent I think it fair to say that the *Fuentes* opinion is overruled." 416 U. S., at 623 (POWELL, J., concurring).

Three dissenting Justices, including the author of *Fuentes,* went further in their description of the impact of *Mitchell:*

> "[T]he Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change . . . that might justify this total disregard of *stare decisis.*" 416 U. S., at 635 (STEWART, J., joined by DOUGLAS and MARSHALL, JJ., dissenting).

The Court's opinion in this case, relying substantially on *Fuentes,* suggests that that decision will again be read as calling into question much of the previously settled law governing commercial transactions. I continue to doubt whether *Fuentes* strikes a proper balance, especially in cases where the creditor's interest in the property may be as significant or even greater than that of the debtor. Nor do I find it necessary to relegate *Mitchell* to its narrow factual setting in order to determine that the Georgia garnishment statutes fail to satisfy the requirements of procedural due process.

As we observed in *Mitchell,* the traditional view of procedural due process had been that " '[w]here only

property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.'" *Id.*, at 611, quoting *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597 (1931). Consistent with this view, the Court in the past unanimously approved prejudgment attachment liens similar to those at issue in this case. *McKay* v. *McInnes*, 279 U. S. 820 (1929); *Coffin Bros.* v. *Bennett*, 277 U. S. 29 (1928); *Ownbey* v. *Morgan*, 256 U. S. 94 (1921). See generally *Mitchell, supra*, at 613–614. But the recent expansion of concepts of procedural due process requires a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 263–266 (1970); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). Under this analysis, the Georgia provisions cannot stand.

Garnishment and attachment remedies afford the actual or potential judgment creditor a means of assuring, under appropriate circumstances, that the debtor will not remove from the jurisdiction, encumber, or otherwise dispose of certain assets then available to satisfy the creditor's claim.[1] Garnishment may have a seriously adverse impact on the debtor, depriving him of the use of his assets during the period that it applies. But this fact alone does not give rise to constitutional objection. The State's legitimate interest in facilitating creditor recovery through the provision of garnishment remedies has never been seriously questioned.

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[1] Garnishment and attachment remedies also serve to insure that the State will retain jurisdiction to adjudicate the underlying controversy. The advent of the more liberal interpretation of the States' power to exert jurisdiction over nonresidents who are not present in the State, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), diminishes the importance of this function.

Pregarnishment notice and a prior hearing have not been constitutionally mandated in the past. Despite the ambiguity engendered by the Court's reliance on *Fuentes*, I do not interpret its opinion today as imposing these requirements for the future.[2] Such restrictions, antithetical to the very purpose of the remedy, would leave little efficacy to the garnishment and attachment laws of the 50 States.

In my view, procedural due process would be satisfied where state law requires that the garnishment be preceded by the garnishor's provision of adequate security and by his establishment before a neutral officer[3] of a factual basis of the need to resort to the remedy as a means of preventing removal or dissipation of assets required to satisfy the claim. Due process further requires that the State afford an opportunity for a prompt postgarnishment judicial hearing in which the garnishor has

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[2] The Court also cites *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), which established an exception for garnishment of an individual's wages. In such cases, the Due Process Clause requires notice and a hearing *prior* to application of the garnishment remedy. As the opinion itself indicates, however, the *Sniadach* rule is limited to wages, "a specialized type of property presenting distinct problems in our economic system." *Id.*, at 340. The Court did not purport to impose requirements of pregarnishment notice and hearing in other instances. *Ibid.* I therefore do not consider *Sniadach* to be more than peripherally relevant to the present case.

[3] I am not in accord with the Court's suggestion that the Due Process Clause might require that a *judicial* officer issue the writ of garnishment. The basic protection required for the debtor is the assurance of a prompt postgarnishment hearing before a judge. Such a hearing affords an opportunity to rectify any error in the initial decision to issue the garnishment. When combined with the availability of the garnishor's bond to compensate for any harm caused, the possibility of prompt correction of possible error suffices to satisfy the requirements of procedural due process in this context. It thus should be sufficient for a clerk or other officer of the court to issue the original writ upon the filing of a proper affidavit.

the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt. Since the garnished assets may bear no relation to the controversy giving rise to the alleged debt, the State also should provide the debtor an opportunity to free those assets by posting adequate security in their place.

The Georgia provisions fall short of these requirements. Garnishment may issue on the basis of a simple and conclusory affidavit that the garnishor has reason to apprehend the loss of money allegedly owed. See Ga. Code Ann. § 46–101, set forth in full in the Court's opinion, *ante,* at 602 n. 1. As shown by the affidavit filed in this case, see *ante,* at 604 n. 2, an unrevealing assertion of apprehension of loss suffices to invoke the issuance of garnishment.[4] This is insufficient to enable a neutral officer to make even the most superficial preliminary assessment of the creditor's asserted need.[5]

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[4] The Georgia courts have not amplified the statutory affidavit requirement through the process of judicial construction. See *Wilson* v. *Fulton Metal Bed Mfg. Co.,* 88 Ga. App. 884, 886, 78 S. E. 2d 360, 362 (1953).

[5] Since garnishment can issue in Georgia only in cases in which suit is pending or judgment has been rendered, see Ga. Code Ann. § 46–101, the issuing officer need not preliminarily inquire into the allegation of the existence of a debt. Nor do I contemplate that the initial showing of probable inability to collect the debt absent the issuance of the garnishment need be elaborate.

The facts of this case serve to illustrate the point. From the record and oral argument, it appears that the respondent feared that the only accessible and unencumbered assets of North Georgia Finishing were its bank accounts. At oral argument, counsel for petitioner indicated that North Georgia Finishing's holdings in real estate and tangible property in the State of Georgia were encumbered by mortgages and factoring contracts. It thus appears that respondent's apprehension of eventual inability to recover the debt

The most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing. Under Georgia law, garnishment is a separate proceeding between the garnishor and the garnishee. The debtor is not a party and can intervene only by filing a dissolution bond and substituting himself for the garnishee. *Leake* v. *Tyner*, 112 Ga. 919, 38 S. E. 343 (1901); *Powell* v. *Powell*, 95 Ga. App. 122, 97 S. E. 2d 193 (1957). As noted above, the issuance of the garnishment may impose serious hardship on the debtor. In this context, due process precludes imposing the additional burden of conditioning the debtor's ability to question the validity of its issuance or continuation on the filing of a bond. Moreover, the Georgia statute contains no provision enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of fact,[6] nor any indication that the garnishor bears the burden of proving entitlement to the garnishment.

I consider the combination of these deficiencies to be fatal to the Georgia statute. Quite simply, the Georgia

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may well have been entirely sufficient to justify the garnishment for the brief period required to conduct the post-garnishment hearing.

Bank accounts are readily susceptible to almost immediate transfer or dissipation, and this occurrence is often a likelihood where the debtor is a foreign corporation or a nonresident of the State. An affidavit in support of the garnishment or attachment of a nonresident's bank account would normally be sufficient for the writ if it averred that other less transitory assets were not available within the State to satisfy any prospective judgment.

[6] Petitioner asserts, without contradiction by the respondent, that Georgia law does not authorize the alleged debtor to question the facts contained in the garnishor's affidavit or to make a contrary submission of fact indicating that the garnishor's apprehension of possible loss is misconceived or is insufficient to warrant the continuation of the writ of garnishment.

provisions fail to afford fundamental fairness in their accommodation of the respective interests of creditor and debtor. For these reasons, I join in the judgment of the Court.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Court once again—for the third time in less than three years—struggles with what it regards as the due process aspects of a State's old and long-unattacked commercial statutes designed to afford a way for relief to a creditor against a delinquent debtor. On this third occasion, the Court, it seems to me, does little more than make very general and very sparse comparisons of the present case with *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), on the one hand, and with *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974), on the other; concludes that this case resembles *Fuentes* more than it does *Mitchell;* and then strikes down the Georgia statutory structure as offensive to due process. One gains the impression, particularly from the final paragraph of its opinion, that the Court is endeavoring to say as little as possible in explaining just why the Supreme Court of Georgia is being reversed. And, as a result, the corresponding commercial statutes of all other States, similar to but not exactly like those of Florida or Pennsylvania or Louisiana or Georgia, are left in questionable constitutional status, with little or no applicable standard by which to measure and determine their validity under the Fourteenth Amendment. This, it seems to me, is an undesirable state of affairs, and I dissent. I do so for a number of reasons:

1. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969), mentioned in passing by the Court in its present opinion, *ante,* at 605–606, was correctly regarded by the Georgia Supreme Court, 231 Ga. 260, 263–264, 201 S. E.

2d 321, 323 (1973), as a case relating to the garnishment of *wages*. The opinion in *Sniadach* makes this emphasis:

> "We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process." 395 U. S., at 340.

It goes on to speak of possible "tremendous hardship on wage earners with families to support," *ibid.*, and the "enormous" leverage of the creditor "on the wage earner," *id.*, at 341. *Sniadach* should be allowed to remain in its natural environment—wages—and not be expanded to arm's-length relationships between business enterprises of such financial consequence as North Georgia Finishing and Di-Chem.

2. The Court, *ante*, at 606, regards the narrow limitations of *Sniadach* as affected by *Fuentes*. It also bows to *Morrow Electric Co.* v. *Cruse*, 370 F. Supp. 639 (ND Ga. 1974), and the three-judge holding there that the Georgia statutes before us are unconstitutional. *Ante*, at 605 n. 4. Indeed, perhaps *Sniadach* for a time was so expanded (somewhat surprisingly, I am sure, to the *Sniadach* Court) by the implications and overtones of *Fuentes*. But *Mitchell* came along and *Morrow* was more than three months pre-*Mitchell*. *Sniadach*'s expansion was surely less under *Mitchell* than it might have appeared to be under *Fuentes*.

3. I would have thought that, whatever *Fuentes* may have stood for in this area of debtor-creditor commercial relationships, with its 4–3 vote by a bobtailed Court, it was substantially cut back by *Mitchell*. Certainly, MR. JUSTICE STEWART, the author of *Fuentes* and the writer of the dissenting opinion in *Mitchell*, thought so:

> "The deprivation of property in this case is iden-

tical to that at issue in *Fuentes*, and the Court does not say otherwise." 416 U. S., at 631.

"In short, this case is constitutionally indistinguishable from *Fuentes* v. *Shevin*, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent." *Id.*, at 634.

"Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old . . . . The only perceivable change that has occurred since the *Fuentes* case is in the makeup of this Court." *Id.*, at 635.

Surely, MR. JUSTICE BRENNAN thought so when he asserted in dissent that he was "in agreement that *Fuentes* . . . requires reversal" of the Louisiana judgment. *Id.*, at 636. And surely, MR. JUSTICE POWELL thought so, substantially, when, in his concurrence, he observed:

"The Court's decision today withdraws significantly from the full reach of [the *Fuentes*] principle, and to this extent I think it fair to say that the *Fuentes* opinion is overruled." *Id.*, at 623.

I accept the views of these dissenting and concurring Justices in *Mitchell* that *Fuentes* at least was severely limited by *Mitchell*, and I cannot regard *Fuentes* as of much influence or precedent for the present case.

4. *Fuentes*, a constitutional decision, obviously should not have been brought down and decided by a 4–3 vote when there were two vacancies on the Court at the time of argument. It particularly should not have been decided by a 4–3 vote when Justices filling the vacant seats had qualified and were on hand and available to participate on reargument.[1] Announcing the constitutional

[1] *Fuentes* was decided June 12, 1972. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST had taken their respective seats as Mem-

decision, with a four-Justice majority of a seven-Justice shorthanded Court, did violence to Mr. Chief Justice Marshall's wise assurance, in *Briscoe* v. *Commonwealth's Bank of Kentucky,* 8 Pet. 118, 122 (1834), that the practice of the Court "except in cases of absolute necessity" is not to decide a constitutional question unless there is a majority "of the whole court."

The Court encountered the same situation a century ago with respect to the *Legal Tender Cases;* mishandled the decisional process similarly; and came to regret the error. Originally, in *Hepburn* v. *Griswold,* 8 Wall. 603 (1870),[2] the Court, assertedly by a 5–3 vote, with one vacancy, held the Legal Tender Act of 1862, 12 Stat. 345, to be unconstitutional with respect to prior debts. Mr. Justice Grier, who was in failing health, was noted as concurring. 8 Wall., at 626. It was stated that the case "was decided in conference" on November 27, 1869, and the opinion "directed to be read" on January 29, 1870. *Ibid.* Mr. Justice Grier, however, had submitted his resignation to the President in December 1869, effective February 1, 1870, and it had been accepted on December 15. The Justice last sat on January 31. 8 Wall., at vii-viii. The opinion and judgment in *Hepburn* actually were rendered on February 7, when Mr. Justice Grier was no longer on the bench.

A year later, with the two vacancies filled, the Court, by a 5–4 vote, overruled *Hepburn* and held the Legal Tender Act constitutional with respect to all debts. *Legal Tender Cases,* 12 Wall. 457 (1871). The Court said:

> "That case [*Hepburn* v. *Griswold*] was decided by a divided court, and by a court having a less number of

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bers of the Court five months before, on January 7. 404 U. S. xi-xvii. *Fuentes* had been argued November 9, 1971.

[2] See also *Broderick's Executor* v. *Magraw,* 8 Wall. 639 (1870).

> judges than the law then in existence provided this court shall have. . . . We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right [citing *Briscoe* v. *Commonwealth's Bank of Kentucky*]. We are not accustomed to hear them in the absence of a full court, if it can be avoided." *Id.*, at 553–554.

The failure in *Hepburn* to recall or adhere to the practice announced by the Marshall Court resulted in confusion, prompt reversal of position, embarrassment, and recrimination. See the opinion of Mr. Chief Justice Chase in dissent. 12 Wall., at 572.[3]

Later, Mr. Justice Burton called attention to this lapse and heartily endorsed the practice of withholding decision on a constitutional issue by less than a majority of a full Court, that is, today, by less than five votes when vacancies exist and are waiting to be filled or have been filled. Burton, The Legal Tender Cases: A Celebrated Supreme Court Reversal, 42 A. B. A. J. 231 (1956), reprinted as Chapter IX in The Occasional Papers of Mr. Justice Burton (E. Hudon ed. 1969). We allowed his advice, as well as that of the Marshall Court, to go unheeded when we permitted *Fuentes* to come down with only four supporting votes when a nine-Justice Court already was available on any reargument.

The admonition of the Great Chief Justice, in my view, should override any natural, and perhaps understandable, eagerness to decide. Had we bowed to that wisdom when

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[3] Mr. Chief Justice Hughes described the result in the *Legal Tender Cases* as one of "three notable instances [in which] the Court has suffered severely from self-inflicted wounds." C. Hughes, The Supreme Court of the United States 50 (1928). The others he named were the *Dred Scott* decision, *Scott* v. *Sandford*, 19 How. 393 (1857), and the *Income Tax Case, Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895), on rehearing, 158 U. S. 601 (1895).

Fuentes was before us, and waited a brief time for reargument before a full Court, whatever its decision might have been, I venture to suggest that we would not be immersed in confusion, with *Fuentes* one way, *Mitchell* another, and now this case decided in a manner that leaves counsel and the commercial communities in other States uncertain as to whether their own established and long-accepted statutes pass constitutional muster with a wavering tribunal off in Washington, D. C. This Court surely fails in its intended purpose when confusing results of this kind are forthcoming and are imposed upon those who owe and those who lend.

5. Neither do I conclude that, because this is a garnishment case, rather than a lien or vendor-vendee case, it is automatically controlled by *Sniadach*. *Sniadach,* as has been noted, concerned and reeks of wages. North Georgia Finishing is no wage earner. It is a corporation engaged in business. It was protected (a) by the fact that the garnishment procedure may be instituted in Georgia only after the primary suit has been filed or judgment obtained by the creditor, thus placing on the creditor the obligation to initiate the proceedings and the burden of proof, and assuring a full hearing to the debtor; (b) by the respondent's statutorily required and deposited double bond; and (c) by the requirement of the respondent's affidavit of apprehension of loss. It was in a position to dissolve the garnishment by the filing of a single bond. These are transactions of a day-to-day type in the commercial world. They are not situations involving contracts of adhesion or basic unfairness, imbalance, or inequality. See *D. H. Overmyer Co.* v. *Frick Co.,* 405 U. S. 174 (1972); *Swarb* v. *Lennox,* 405 U. S. 191 (1972). The clerk-judge distinction, relied on by the Court, surely is of little significance so long as the court officer is not an agent of the creditor. The Georgia system, for me, affords commercial entities all the protection

that is required by the Due Process Clause of the Fourteenth Amendment.

6. Despite its apparent disclaimer, the Court now has embarked on a case-by-case analysis (weighted heavily in favor of *Fuentes* and with little hope under *Mitchell*) of the respective state statutes in this area. That road is a long and unrewarding one, and provides no satisfactory answers to issues of constitutional magnitude.

I would affirm the judgment of the Supreme Court of Georgia.

MR. CHIEF JUSTICE BURGER dissents for the reasons stated in numbered paragraph 5 of the opinion of MR. JUSTICE BLACKMUN.

Reporter's Note

The next page is purposely numbered 801. The numbers between 620 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1973 THROUGH JANUARY 20, 1975

Cases Dismissed in Vacation

No. 73–1779. Thevis *v.* United States. C. A. 5th Cir. Certiorari dismissed August 16, 1974, under this Court's Rule 60. Reported below: 490 F. 2d 73.

No. 73–1796. Thevis *v.* United States. C. A. 5th Cir. Certiorari dismissed August 16, 1974, under this Court's Rule 60. Reported below: 490 F. 2d 76.

No. 73–6766. Strickland *v.* United States. C. A. 5th Cir. Certiorari dismissed August 16, 1974, under this Court's Rule 60. Reported below: 493 F. 2d 182.

No. 74–153. Loughran *v.* New Jersey. Super. Ct. N. J. Certiorari dismissed September 16, 1974, under this Court's Rule 60. Reported below: 127 N. J. Super. 370, 317 A. 2d 414.

No. 73–6592. Del Valle *v.* United States. C. A. 9th Cir. Certiorari dismissed September 24, 1974, under this Court's Rule 60.

October 9, 1974

Probable Jurisdiction Noted

No. 74–165. Blanchette et al., Trustees of Property of Penn Central Transportation Co. *v.* Connecticut General Insurance Corp. et al.;

No. 74–166. Smith, Trustee of Property of New York, New Haven & Hartford Railroad Co. *v.* United States et al.;

No. 74–167. UNITED STATES RAILWAY ASSN. *v.* CONNECTICUT GENERAL INSURANCE CORP. ET AL.; and

No. 74–168. UNITED STATES ET AL. *v.* CONNECTICUT GENERAL INSURANCE CORP. ET AL. Appeals from D. C. E. D. Pa. Motions of Brock Adams et al. and National Industrial Traffic League for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted. Cases consolidated and a total of three hours allotted for oral argument. Motion to expedite granted and cases set for oral argument on Wednesday, October 23, 1974. Reported below: 383 F. Supp. 510.

OCTOBER 11, 1974

Miscellaneous Orders

No. A–232. MINNESOTA ET AL. *v.* RESERVE MINING CO. ET AL.; and

No. A–262. UNITED STATES *v.* RESERVE MINING CO. ET AL. Respective applications for an order vacating or modifying stay order of the United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, are both denied. Four Justices, however, state explicitly that these denials are without prejudice to applicants' renewal of their applications to vacate if the litigation has not been finally decided by the Court of Appeals by January 31, 1975. Reported below: 498 F. 2d 1073.

MR. JUSTICE DOUGLAS, dissenting.

I would vacate the stay issued by the Court of Appeals.

District Judge Lord made detailed findings, 380 F. Supp. 11, 16 (Minn. 1974), as to the health hazard of respondent Reserve Mining Co.'s discharges into the air and into the waters of Lake Superior, findings which I attach as an Appendix to this opinion. The Court of Appeals disagreed with Judge Lord's conclusion

but it stopped short of holding that his findings were "clearly erroneous" within the meaning of Fed. Rule Civ. Proc. 52 (a). Even in its view, the issue, however, was close or rather neatly balanced.[1] It therefore decided that being "a court of law" it was "governed by rules of proof" and that "unknowns may not be substituted for proof of a demonstrable hazard to the public health." [2]

That position, however, with all respect, makes "maximizing profits" the measure of the public good, not health of human beings or life itself. Property is, of course, protected under the Due Process Clause of the Fifth Amendment against federal intrusion. But so are life and liberty. Where the scales are so evenly divided, we cannot say that the findings on health were "clearly erroneous" nor am I able to discover how "maximizing profits" becomes a governing principle overriding the health hazards. If equal justice is the federal standard, we should be as alert to protect people and their rights

[1] The Solicitor General, at 2–3 of the brief he filed with us in No. A–262, states:

"In all of this the court of appeals has proceeded on an admittedly preliminary assessment, based on limited exposure to the voluminous record, of the question whether the continued daily discharge of some 67,000 tons of suspended solid waste into Lake Superior and some 100 tons of particulate matter into the air constitutes a significant threat to public health. While we believe that the court of appeals' conclusion in this regard rests upon crucial assumptions that are refuted by the substantial evidence of record here, we do not think it appropriate to attempt to argue such evidentiary issues to this Court on an even more limited record. Suffice it to say that there is no serious dispute that the amphibole discharges in question are widely believed to entail a risk of asbestosis, cancer, and other adverse health consequences, and the only real dispute concerns the quantitative assessment of the likelihood of such consequences—an assessment that is particularly difficult here because of the apparently long-term and cumulative results of exposure to such materials."

[2] 498 F. 2d 1073, 1084.

as the Court of Appeals was to protect "maximizing profits." If, as the Court of Appeals indicates, there is doubt, it should be resolved in favor of humanity, lest in the end our judicial system be part and parcel of a regime that makes people, the sovereign power in this Nation, the victims of the great god Progress which is behind the stay permitting this vast pollution of Lake Superior and its environs. I am not aware of a constitutional principle that allows either private or public enterprises to despoil any part of the domain that belongs to all of the people. Our guiding principle should be Mr. Justice Holmes' dictum that our waterways, great and small, are treasures,[3] not garbage dumps or cesspools.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

(3) The particles when deposited into the water are dispersed throughout Lake Superior and into Wisconsin and Michigan.

(4) The currents in the lake, which are largely influenced by the discharge, carry many of the fibers in a southwesterly direction toward Duluth and are found in substantial quantities in the Duluth drinking water.

(5) Many of these fibers are morphologically and chemically identical to amosite asbestos and an even larger number are similar to amosite asbestos.

(6) Exposure to these fibers can produce asbestosis, mesothelioma, and cancer of the lung, gastrointestinal tract and larynx.

(7) Most of the studies dealing with this problem are concerned with the inhalation of fibers; however, the available evidence indicates that the fibers pose a risk when ingested as well as when inhaled.

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[3] *New Jersey* v. *New York*, 283 U. S. 336, 342 (1931).

(8) The fibers emitted by the defendant into Lake Superior have the potential for causing great harm to the health of those exposed to them.

(9) The discharge into the air substantially endangers the health of the people of Silver Bay and surrounding communities as far away as the eastern shore in Wisconsin.

(10) The discharge into the water substantially endangers the health of the people who procure their drinking water from the western arm of Lake Superior including the communities of Beaver Bay, Two Harbors, Cloquet, Duluth, and Superior, Wisconsin.

(11) The present and future industrial standard for a safe level of asbestos fibers in the air is based on the experience related to asbestosis and not to cancer. In addition its formulation was influenced more by technological limitations than health considerations.

(12) The exposure of a non-worker populace cannot be equated with industrial exposure if for no other reason than the environmental exposure, as contrasted to a working exposure, is for every hour of every day.

(13) While there is a dose-response relationship associated with the adverse effects of asbestos exposure and may be therefore a threshold exposure value below which no increase in cancer would be found, this exposure threshold is not now known.

No. A–256. Hill, Attorney General of Texas, et al. *v.* Printing Industries of the Gulf Coast et al. Application for stay of judgment of the United States District Court for the Southern District of Texas presented to Mr. Justice Powell, and by him referred to the Court, granted pending timely docketing of an appeal and final disposition thereon. Mr. Justice Douglas would deny the application. Reported below: 382 F. Supp. 801.

October 15, 1974

Affirmed on Appeal

No. 73–1495. Cahill et al. *v.* Cedar County, Iowa, et al. Affirmed on appeal from D. C. N. D. Iowa. Reported below: 367 F. Supp. 39.

No. 73–1675. Beame, Mayor of New York City, et al. *v.* Lavine, Commissioner of Social Services of New York. Affirmed on appeal from D. C. S. D. N. Y.

No. 73–1760. Bush, dba Bush Distributing Co. *v.* Texas Highway Department et al. Affirmed on appeal from D. C. N. D. Tex.

No. 73–1777. Iowa Beef Processors, Inc. *v.* United States. Affirmed on appeal from D. C. N. D. Iowa.

No. 73–1829. Bud Brown Enterprises, Inc. *v.* Morton, Secretary of the Interior, et al. Affirmed on appeal from D. C. D. C.

No. 73–1835. Debrow *v.* Boswell, Commissioner of Revenue. Affirmed on appeal from D. C. M. D. Ala.

No. 73–1956. Yellow Cab of Boca Raton, Inc. *v.* United States et al. Affirmed on appeal from D. C. S. D. Fla.

No. 73–1964. Jones et al. *v.* Butz, Secretary of Agriculture, et al. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 374 F. Supp. 1284.

No. 73–6914. Almeida *v.* Lucey. Affirmed on appeal from D. C. Mass. Reported below: 372 F. Supp. 109.

No. 73–7082. OWENS ET AL. *v.* I. F. P. CORP., DBA OLSHINE'S CREDIT CLOTHING CO., ET AL. Affirmed on appeal from D. C. W. D. Ky. Reported below: 374 F. Supp. 1032.

No. 73–1473. ANN ARBOR RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.;

No. 73–1490. KANSAS CITY SOUTHERN RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.; and

No. 73–1670. UNITED STATES *v.* INTERSTATE COMMERCE COMMISSION. Affirmed on appeals from D. C. E. D. Pa. MR. JUSTICE DOUGLAS would remand No. 73–1670 to the Interstate Commerce Commission for a finding on the reasonableness of the prescribed rate. MR. JUSTICE POWELL took no part in the consideration or decision of these appeals. Reported below: 368 F. Supp. 101.

No. 73–1831. SCOTT PAPER CO. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. E. D. Pa. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 372 F. Supp. 721.

Appeals Dismissed

No. 73–1370. PHELPS *v.* MORGAN, U. S. DISTRICT JUDGE, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–1615. CALDERON *v.* BOARD OF EDUCATION OF EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 35 Cal. App. 3d 490, 110 Cal. Rptr. 916.

No. 73–1729. JOHNSON *v.* LARAMIE COUNTY SCHOOL DISTRICT No. 1. Appeal from Sup. Ct. Wyo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–1817. BROTHERS, DBA A-ADVANCED PRODUCTS CO. ET AL. *v.* CALIFORNIA. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–1928. PUBLIC UTILITY DISTRICT No. 1 OF DOUGLAS COUNTY ET AL. *v.* MADDEN ET AL. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 83 Wash. 2d 219, 517 P. 2d 585.

No. 73–1965. SHEPHERD *v.* ARKANSAS. Appeal from Sup. Ct. Ark. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 256 Ark. 134, 506 S. W. 2d 553.

No. 73–6591. SMITH *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Alameda, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–6704. SAFFIOTI *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–6957. BORUSKI *v.* UNITED STATES ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a

petition for writ of certiorari, certiorari denied. Reported below: 493 F. 2d 301.

No. 73–6965. FALKNER ET UX. *v.* GOODHART, JUDGE, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 298 So. 2d 161.

No. 74–43. BARNES *v.* BELL ET AL. Appeal from Ct. App. Ohio, Wyandot County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–1400. UPPER MISSOURI RIVER CORP. *v.* BOARD OF REVIEW, WOODBURY COUNTY. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 210 N. W. 2d 828.

No. 73–6933. DUCHEIN *v.* MAYOR OF NEW YORK CITY ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 34 N. Y. 2d 636, 311 N. E. 2d 508.

No. 73–7096. EPPS ET AL. *v.* MARYLAND. Appeal from Ct. App. Md. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 272 Md. 85, 321 A. 2d 516.

No. 73–1504. CONSOLIDATED DISTILLED PRODUCTS, INC., ET AL. *v.* MAHIN, DIRECTOR, DEPARTMENT OF REVENUE, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 56 Ill. 2d 110, 306 N. E. 2d 465.

No. 73–1589. PIATAK *v.* OHIO. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question.

No. 73–1692. STRECKFUS *v.* CITY OF ST. LOUIS. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 505 S. W. 2d 70.

No. 73–1738. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* LOUISIANA PUBLIC SERVICE COMMISSION. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 290 So. 2d 816.

No. 73–1814. INTERNATIONAL DEVELOPMENT, INC. *v.* UTAH-LOUISIANA INVESTMENT CO. ET AL. Appeal from Ct. App. La., 1st Cir., dismissed for want of substantial federal question. Reported below: 289 So. 2d 264.

No. 73–1826. PETTITT ET UX. *v.* CITY OF FRESNO ET AL. Appeal from Ct. App. Cal., 5th App. Dist., dismissed for want of substantial federal question. Reported below: 34 Cal. App. 3d 813, 110 Cal. Rptr. 262.

No. 73–1953. CANNON *v.* OVIATT. Appeal from Sup. Ct. Utah dismissed for want of substantial federal question. Reported below: 520 P. 2d 883.

No. 74–33. WOODSIDE SAVINGS & LOAN ASSN. *v.* GALLMAN ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 34 N. Y. 2d 674, 312 N. E. 2d 180.

No. 74–112. MANDARELLI *v.* CITY OF AUBURN. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 320 A. 2d 22.

No. 74–120. GORMLEY *v.* COMMITTEE ON EXAMINATIONS AND ADMISSIONS OF THE SUPREME COURT OF ARIZONA. Appeal from Sup. Ct. Ariz. dismissed for want of substantial federal question.

No. 73–1555. MITSUBISHI ELECTRIC CORP. *v.* UNITED STATES. Appeal from D. C. N. D. Cal. dismissed for want of jurisdiction.

No. 73–1579. MITSUBISHI ELECTRIC CORP. ET AL. *v.* UNITED STATES. Appeal from D. C. N. D. Cal. dismissed for want of jurisdiction.

No. 73–1907. SUMPTER *v.* INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of jurisdiction. Reported below: 261 Ind. 471, 306 N. E. 2d 95.

No. 73–6918. SMITH *v.* PROJECT CONSTRUCTION CO. Appeal from Sup. Ct. Okla. dismissed for want of jurisdiction.

No. 73–6693. GARGALLO *v.* PRESIDING JUDGE, FRANKLIN COUNTY COMMON PLEAS COURT, ET AL. Appeal from Ct. App. Ohio, Franklin County. Motion to defer consideration denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–420. BATES ET AL. *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. Appeal from Sup. Ct. La. Motion of appellees to docket and dismiss appeal pursuant to this Court's Rule 14 (3) granted. Reported below: 294 So. 2d 532.

Vacated and Remanded on Appeal

No. 73–1669. CONGRESS OF RAILWAY UNIONS *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Judgment vacated and case remanded with directions to dismiss case as moot. Reported below: See 373 F. Supp. 1339.

No. 73–1758. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* JOBST. Appeal from D. C.

W. D. Mo. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of the Social Security Amendments of 1972, § 301 *et seq.*, 86 Stat. 1465, 42 U. S. C. § 1381 *et seq.* (1970 ed., Supp. II). Reported below: 368 F. Supp. 909.

No. 73–1998. DRISKELL ET AL. *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. Appeal from D. C. W. D. La. Judgment vacated and case remanded with directions to enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. See *Wilson* v. *City of Port Lavaca,* 391 U. S. 352 (1968). Reported below: 374 F. Supp. 1.

Certiorari Granted—Vacated and Remanded

No. 73–1392. RANDOM HOUSE, INC. *v.* GORDON. C. A. 3d Cir. Motions of Association of American Publishers, Inc., and Philadelphia Newspapers, Inc., for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974). MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 486 F. 2d 1356.

No. 73–1926. HOUSING AUTHORITY OF LOUISVILLE ET AL. *v.* FLETCHER; and

No. 73–1934. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. *v.* FLETCHER. C. A. 6th Cir. Motion of respondent in both cases for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of § 201 of the Housing and Community Development Act of 1974, 88 Stat. 653, 42 U. S. C. §§ 1437–1437j (1970 ed., Supp. IV). Reported below: 491 F. 2d 793.

No. 73–1972. CANNON, WARDEN, ET AL. *v.* THOMAS ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wolff* v. *McDonnell,* 418 U. S. 539 (1974). Reported below: 493 F. 2d 151.

No. 73–6255. TERRELL *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States Court of Appeals for the Sixth Circuit for further proceedings, including re-entry of its judgment affirming petitioner's conviction and consideration of appointment of counsel for petitioner in connection with seeking review in this Court of the judgment of the Court of Appeals. *Schreiner* v. *United States,* 404 U. S. 67 (1971).

No. 73–6349. ANALLA *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his brief for the United States filed July 26, 1974, judgment vacated and case remanded for further consideration in light of the position presently asserted by the Government. Reported below: 490 F. 2d 1204.

Miscellaneous Orders

No. A–151. DOE *v.* MUNDY, DIRECTOR, INSTITUTIONS AND DEPARTMENTS OF MILWAUKEE COUNTY, ET AL. D. C. E. D. Wis. Application for stay presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. A–196. SAVE CRYSTAL BEACH ASSN. ET AL. *v.* CALLAWAY, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Application for further extension of temporary restraining order, presented to MR. JUSTICE DOUGLAS, and by him

referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application pending timely filing and disposition of a petition for writ of certiorari.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE). Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parties within 45 days. Reply briefs, if any, to such exceptions may be filed within 30 days. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier orders herein, see, *e. g.*, 409 U. S. 17 and 909.]

No. 31, Orig. UTAH *v.* UNITED STATES. Exceptions to the Report of the Special Master set for oral argument in due course. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier orders herein, see, *e. g.*, 416 U. S. 932.]

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parties within 45 days. Reply briefs, if any, to such exceptions may be filed within 30 days. [For earlier orders herein, see, *e. g.*, 408 U. S. 917.]

No. 48, Orig. MISSISSIPPI *v.* ARKANSAS, 415 U. S. 302. Parties are directed to submit a proposed amended decree which has the approval of the Special Master.

No. 52, Orig. UNITED STATES *v.* FLORIDA. Exceptions to the Report of the Special Master set for oral argument in due course. [For earlier orders herein, see, *e. g.*, 415 U. S. 905.]

No. 64, Orig. NEW HAMPSHIRE *v.* MAINE. Motion of New Hampshire Commercial Fishermen's Assn. et al. for

leave to intervene referred to Special Master. [For earlier orders herein, see, *e. g.*, 414 U. S. 996.]

No. 73–203. EISEN *v.* CARLISLE & JACQUELIN ET AL., 417 U. S. 156. Motion of petitioner to assess costs denied.

No. 73–477. GERSTEIN *v.* PUGH. C. A. 5th Cir. [Restored to calendar for reargument, 416 U. S. 933.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted.

No. 73–434. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.;

No. 73–435. ALLEN PARK PUBLIC SCHOOLS ET AL. *v.* BRADLEY ET AL.; and

No. 73–436. GROSSE POINTE PUBLIC SCHOOL SYSTEM *v.* BRADLEY ET AL., 418 U. S. 717. Motion of respondents to require each party to bear its own costs denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant the motion.

No. 73–628. ALLENBERG COTTON CO., INC. *v.* PITTMAN. Appeal from Sup. Ct. Miss. [Probable jurisdiction postponed, 415 U. S. 988.] Motion to strike all or certain portions of brief filed by American Cotton Shippers Assn. as *amicus curiae* denied.

No. 73–690. AIR POLLUTION VARIANCE BOARD OF COLORADO *v.* WESTERN ALFALFA CORP., 416 U. S. 861. Motion of respondent to reassess costs denied.

No. 73–711. CRYAN, SHERIFF, ET AL. *v.* HAMAR THEATRES, INC., ET AL. Appeal from D. C. N. J. [Probable jurisdiction noted, 416 U. S. 954.] Motion of appellees for divided argument granted; however, no additional time granted.

No. 73–696. EMPORIUM CAPWELL CO. *v.* WESTERN ADDITION COMMUNITY ORGANIZATION ET AL.; and

No. 73–830. NATIONAL LABOR RELATIONS BOARD *v.* WESTERN ADDITION COMMUNITY ORGANIZATION ET AL. C. A. D. C. Cir. [Certiorari granted, 415 U. S. 913.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes are allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument. Motion of National Retail Merchants Assn., Inc., for leave to file a brief as *amicus curiae* granted.

No. 73–748. AMERICAN RADIO ASSN., AFL–CIO, ET AL. *v.* MOBILE STEAMSHIP ASSN., INC., ET AL. Sup. Ct. Ala. [Certiorari granted, 415 U. S. 947.] Motion of respondents for divided argument granted.

No. 73–759. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* HEALY ET AL. Appeal from D. C. E. D. La. [Probable jurisdiction noted, 415 U. S. 911.] Consideration of appellants' suggestion of mootness deferred to hearing of case on the merits.

No. 73–765. INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL–CIO *v.* QUALITY MANUFACTURING CO. ET AL. C. A. 4th Cir. [Certiorari granted, 416 U. S. 968.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 73–822. FRY ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. [Certiorari granted, 415 U. S. 912.] Motion of Coalition of American Public Employees for leave to file a brief as *amicus curiae* granted.

No. 73–848. FUSARI, COMMISSIONER OF LABOR *v.* STEINBERG ET AL. Appeal from D. C. Conn. [Probable

jurisdiction noted, 415 U. S. 912.] Motion of Ellenmae Crow et al. for leave to file a brief as *amici curiae* granted.

No. 73–1015. CROW ET AL. *v.* CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL. C. A. 9th Cir. Motion of petitioners to expedite consideration to permit consolidation with No. 73–848 [immediately *supra*] for oral argument denied.

No. 73–1016. LASCARIS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF ONONDAGA COUNTY *v.* SHIRLEY ET AL.; and

No. 73–1095. LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* SHIRLEY ET AL. Appeals from D. C. N. D. N. Y. [Probable jurisdiction noted, 417 U. S. 943.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 73–1106. COUSINS ET AL. *v.* WIGODA ET AL. App. Ct. Ill., 1st Dist. [Certiorari granted, 415 U. S. 956.] Motion of petitioners for additional time for oral argument denied.

No. 73–1162. UNITED STATES *v.* WILSON ET AL. C. A. 2d Cir. [Certiorari granted, 416 U. S. 981.] Motion of respondents for divided argument granted; however, no additional time granted.

No. 73–1231. LINDEN LUMBER DIVISION, SUMMER & CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 73–1234. NATIONAL LABOR RELATIONS BOARD *v.* TRUCK DRIVERS UNION LOCAL NO. 413 ET AL. C. A. D. C. Cir. [Certiorari granted, 416 U. S. 955.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents in No. 73–1234 also allotted 15 additional minutes for oral argument. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 73–1256. CONNELL CONSTRUCTION CO., INC. *v.* PLUMBERS & STEAMFITTERS LOCAL UNION NO. 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO. C. A. 5th Cir. [Certiorari granted, 416 U. S. 981.] Motion of petitioner for additional time for oral argument denied.

No. 73–1313. INTERNATIONAL TELEPHONE & TELEGRAPH CORP., COMMUNICATIONS EQUIPMENT & SYSTEMS DIVISION *v.* LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO. C. A. 7th Cir. [Certiorari granted, 416 U. S. 981.] Motion of the Solicitor General for additional time for oral argument denied without prejudice to a divided argument.

No. 73–1346. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL. *v.* DECHAMPLAIN. Appeal from D. C. D. C. [Probable jurisdiction postponed, 418 U. S. 904.] Motion of appellee to dismiss for failure of appellants to prosecute appeal in a timely manner denied. MR. JUSTICE DOUGLAS would grant motion to dismiss.

No. 73–1377. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CITY OF NEW YORK ET AL. C. A. D. C. Cir.; and

No. 73–1378. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CAMPAIGN CLEAN WATER, INC. C. A. 4th Cir. [Certiorari granted, 416 U. S. 969.] Motion of the State of Michigan for leave to participate in oral argument as *amicus curiae* denied.

No. 73–1475. HARRIS COUNTY COMMISSIONERS COURT ET AL. *v.* MOORE ET AL. Appeal from D. C. S. D. Tex. [Probable jurisdiction noted, 417 U. S. 928.] Motion of appellees for divided argument granted; however, no additional time granted.

No. 73–1446. ROE ET AL. *v.* DOE. Ct. App. N. Y. [Certiorari granted, 417 U. S. 907.] Motion to seal record and appendix granted.

No. 73–1595. COLONIAL PIPELINE CO. *v.* TRAIGLE, COLLECTOR OF REVENUE OF LOUISIANA. Appeal from Sup. Ct. La. [Probable jurisdiction noted, 417 U. S. 966.] Motion of Chapman L. Sanford to permit Whit M. Cook II, Esquire, to argue *pro hac vice* on behalf of appellee granted.

No. 73–1750. PITT COUNTY TRANSPORTATION CO. *v.* CAROLINA FREIGHT CARRIERS CORP., FOR USE AND BENEFIT OF LIBERTY MUTUAL INSURANCE CO., ET AL. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 73–2006. COLORADO MAGNETICS, INC., DBA SOUND VALUES, INC., ET AL. *v.* EDWARD B. MARKS MUSIC CORP. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 73–6935. YOUAKIM ET AL. *v.* MILLER, DIRECTOR, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, ET AL. Appeal from D. C. N. D. Ill. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 74–54. TRANSAMERICAN FREIGHT LINES, INC. *v.* BRADA MILLER FREIGHT SYSTEMS, INC., ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 73–5677. SCHICK *v.* REED, CHAIRMAN, UNITED STATES BOARD OF PAROLE, ET AL. C. A. D. C. Cir. [Certiorari granted, 416 U. S. 955.] Motion of Robert N. Sayler to permit Homer E. Moyer Jr., Esquire, to argue *pro hac vice* on behalf of petitioner granted.

No. 73–6033. ROE ET AL. *v.* NORTON, COMMISSIONER OF WELFARE. Appeal from D. C. Conn. [Probable jurisdiction noted, 415 U. S. 912.] Motion of American Academy of Child Psychiatry et al. for leave to file a brief as *amici curiae* granted.

No. A–175 (74–339). WOLMAN ET AL. *v.* ESSEX ET AL. Appeal from D. C. S. D. Ohio. Application for an injunction presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the injunction to enjoin Ohio's state aid to parochial schools. See *Marburger* v. *Public Funds for Public Schools of New Jersey,* 417 U. S. 961. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would grant application.

No. 73–6867. BERKLEY *v.* WARDEN, U. S. PENITENTIARY, TERRE HAUTE, INDIANA, ET AL.;

No. 73–6893. KURTH *v.* WARDEN, MARYLAND PENITENTIARY;

No. 73–6922. SCOTT *v.* UNITED STATES;

No. 73–6953. PHILLIPS *v.* WARDEN, NEVADA STATE PRISON;

No. 73–7013. SOUDER *v.* MCGUIRE, HOSPITAL SUPERINTENDENT, ET AL.;

No. 73–7091. TAYLOR *v.* ESTELLE, CORRECTIONS DIRECTOR;

No. 73–7117. DORROUGH *v.* HOGAN, WARDEN;

No. 74–5018. RANDO *v.* ESTELLE, CORRECTIONS DIRECTOR;

No. 74–5085. MERRILL *v.* MATTHES, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.;

No. 74–5164. IN RE MCGHEE; and

No. 74–5172. WILLIAMS *v.* PROCUNIER, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 74–5188. ANDERSON *v.* ILLINOIS; and

No. 74–5230. DAVIS *v.* NEW YORK. Motions for leave to file petitions for writs of habeas corpus denied.

No. 73–1625. WILLIAMSON ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS;

No. 73–1690. PHELPS *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL.;

No. 73–1957. BEARDEN ET AL. *v.* FULTON, CHIEF JUDGE, U. S. DISTRICT COURT;

No. 73–6588. ANDERSON *v.* UNITED STATES;

No. 73–6660. MITCHELL *v.* NEW HAMPSHIRE;

No. 73–6862. CARTER *v.* RAYBURN, JUDGE;

No. 73–6952. HOUSE *v.* MARYLAND ET AL.;

No. 73–6954. ROSS *v.* LARKINS, U. S. DISTRICT JUDGE;

No. 73–7027. HARRELSON *v.* UNITED STATES ET AL.;

No. 73–7029. RANSOM *v.* FLORIDA;

No. 73–7111. DOLLAR *v.* NELSON, WARDEN;

No. 74–12. REA ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT; and

No. 74–5084. FEATHERINGHAM *v.* OHIO ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 73–1822. PHELPS *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL.;

No. 73–1976. TALLANT ET AL. *v.* MOYE, U. S. DISTRICT JUDGE; and

No. 73–6740. PEARSON *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ET AL. Motions for leave to file petitions for writs of mandamus and/or prohibition denied.

No. 73–6817. KIMBLE *v.* HAMILTON, JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition and other relief denied.

Probable Jurisdiction Noted

No. 73–1701. UNITED STATES *v.* NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 374 F. Supp. 95.

No. 73–1723. HILL, ATTORNEY GENERAL OF TEXAS *v.* STONE ET AL. Appeal from D. C. N. D. Tex. Probable jurisdiction noted. Reported below: 377 F. Supp. 1016.

No. 73–1765. MEEK ET AL. *v.* PITTENGER, SECRETARY OF EDUCATION, ET AL. Appeal from D. C. E. D. Pa. Probable jurisdiction noted. Reported below: 374 F. Supp. 639.

No. 73–1869. BEER ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 374 F. Supp. 363.

No. 73–1892. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WIESENFELD. Appeal from D. C. N. J. Probable jurisdiction noted. Reported below: 367 F. Supp. 981.

No. 73–1942. ERZNOZNIK *v.* CITY OF JACKSONVILLE. Appeal from Dist. Ct. App. Fla., 1st Dist. Probable jurisdiction noted. Reported below: 288 So. 2d 260.

No. 73–2060. AUSTIN ET AL. *v.* NEW HAMPSHIRE ET AL. Appeal from Sup. Ct. N. H. Probable jurisdiction noted. Reported below: 114 N. H. 137, 316 A. 2d 165.

No. 73–1966. ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.; and

No. 73–1971. UNITED STATES ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL. Appeals from D. C. D. C. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. MR. JUSTICE

POWELL took no part in the consideration or decision of this order. Reported below: 371 F. Supp. 1291.

Certiorari Granted

No. 73–1452. OREGON *v.* HASS. Sup. Ct. Ore. Certiorari granted. Reported below: 267 Ore. 489, 517 P. 2d 671.

No. 73–1541. REID ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. Reported below: 492 F. 2d 251.

No. 73–1742. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 489 F. 2d 390.

No. 73–1773. FOSTER *v.* DRAVO CORP. C. A. 3d Cir. Certiorari granted. Reported below: 490 F. 2d 55.

No. 73–1923. EASTLAND ET AL. *v.* UNITED STATES SERVICEMEN'S FUND ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 159 U. S. App. D. C. 352, 488 F. 2d 1252.

No. 73–1977. ALYESKA PIPELINE SERVICE CO. *v.* WILDERNESS SOCIETY ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 161 U. S. App. D. C. 446, 495 F. 2d 1026.

No. 73–2024. WARTH ET AL. *v.* SELDIN ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 495 F. 2d 1187.

No. 74–13. MULLANEY ET AL. *v.* WILBUR. C. A. 1st Cir. Certiorari granted. Reported below: 496 F. 2d 1303.

No. 73–1708. BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* ALCALA ET AL. C. A. 8th Cir. Motions of respondents Doe et al. for leave to

proceed *in forma pauperis* and certiorari granted. Reported below: 494 F. 2d 743.

No. 73–1808. LAING *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari granted and case set for oral argument with No. 74–75, immediately *infra*. Reported below: 496 F. 2d 853.

No. 74–75. UNITED STATES ET AL. *v.* HALL. C. A. 6th Cir. Certiorari granted and case set for oral argument with No. 73–1808, immediately *supra*. Reported below: 493 F. 2d 1211.

No. 73–2050. UNITED STATES *v.* ORTIZ. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with Nos. 73–6848 and 74–114, immediately *infra*.

No. 73–6848. BOWEN *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 73–2050, immediately *supra*, and No. 74–114, immediately *infra*. Reported below: 500 F. 2d 960.

No. 74–114. UNITED STATES *v.* BRIGNONI-PONCE. C. A. 9th Cir. Certiorari granted and case set for oral argument with Nos. 73–2050 and 73–6848, immediately *supra*. Reported below: 499 F. 2d 1109.

No. 73–6336. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 488 F. 2d 512.

No. 74–5140. CASSIUS *v.* ARIZONA. Sup. Ct. Ariz. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 110 Ariz. 485, 520 P. 2d 1109.

Certiorari Denied. (See also Nos. 73–1370, 73–1615, 73–1729, 73–1817, 73–1928, 73–1965, 73–6591, 73–6693, 73–6704, 73–6957, 73–6965, and 74–43, *supra.*)

No. 73–1291. BRUCE *v.* UNITED STATES; and

No. 73–1558. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1224.

No. 73–1379. FORKERT *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 73–1387. FITHIAN *v.* FITHIAN. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 3d 592, 517 P. 2d 449.

No. 73–1418. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 1318.

No. 73–1420. DELLACROCE *v.* UNITED STATES; and

No. 73–1547. CATALANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 268.

No. 73–1447. WAGNER *v.* WAGNER. Sup. Ct. Wis. Certiorari denied.

No. 73–1448. PRESTA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–1454. THOMPSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 491 F. 2d 780.

No. 73–1459. MAHONEY ET AL. *v.* LAUNDRY, DRY CLEANING & DYE HOUSE WORKERS INTERNATIONAL UNION, LOCAL 93, OF SPRINGFIELD, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 491 F. 2d 1029.

No. 73–1468. TEXEIRA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–1488. PACELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 1108.

No. 73–1494. MAHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1399.

No. 73–1496. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 1237.

No. 73–1509. ABRAMO *v.* UNITED STATES; and
No. 73–1527. D'AMATO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 359.

No. 73–1511. MILLER, COMMISSIONER, DEPARTMENT OF MENTAL HYGIENE OF NEW YORK, ET AL. *v.* DALE; and
No. 73–6673. DALE *v.* MILLER, COMMISSIONER, DEPARTMENT OF MENTAL HYGIENE OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 76.

No. 73–1520. THOMAS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 285 So. 2d 148.

No. 73–1522. MARQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1383.

No. 73–1523. HEMPT BROS., INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 490 F. 2d 1172.

No. 73–1530. MALNIK *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 682.

No. 73–1538. RAFTER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 752.

No. 73–1540. SECHREST ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 102.

No. 73–1549. SCAPPATONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–1552. RURAL FOODS, INC., T/A SHOP & SAVE SUPER MARKETS *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. 4th Cir. Certiorari denied. Reported below: 489 F. 2d 754.

No. 73–1553. GREEN ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 312 A. 2d 788.

No. 73–1557. CASAMENTO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1398.

No. 73–1559. FAIRVIEW NURSING HOME *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1400.

No. 73–1561. MARIHART ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 492 F. 2d 897.

No. 73–1574. ARROYO *v.* UNITED STATES;
No. 73–6610. PEREZ *v.* UNITED STATES;
No. 73–6913. GONZALEZ *v.* UNITED STATES; and
No. 73–6986. SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 494 F. 2d 1316.

No. 73–1577. DOLLOFF INDUSTRIES, INC. *v.* LAMBROS, U. S. DISTRICT JUDGE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–1582. CONTRACTING PLUMBERS COOPERATIVE RESTORATION CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 488 F. 2d 684.

No. 73–1588. ANDERSON ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 203 Ct. Cl. 412, 490 F. 2d 921.

No. 73–1593. Provision House Workers Union Local 274, AFL–CIO *v.* National Labor Relations Board et al. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 1249.

No. 73–1594. Cement Transport, Inc. *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. Reported below: 490 F. 2d 1024.

No. 73–1599. Kirtley et al. *v.* Bickerstaff, District Director of Internal Revenue, et al. C. A. 10th Cir. Certiorari denied. Reported below: 488 F. 2d 768.

No. 73–1603. Borgman, aka Miller, et al. *v.* United States;

No. 73–1674. Frank *v.* United States;

No. 73–1849. Hemlock *v.* United States; and

No. 73–1850. Hoffer *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 494 F. 2d 145.

No. 73–1611. Campbell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 1407.

No. 73–1613. Lam Man Chung *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 73–1614. Wolder et ux. *v.* Commissioner of Internal Revenue; and

No. 73–1752. Commissioner of Internal Revenue *v.* Estate of Boyce et al. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 608.

No. 73–1616. Madden *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 73–1617. Shrout et ux. *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied.

No. 73–1619. Peterson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 645.

No. 73–1631. OSTRER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 70.

No. 73–1633. O'CONNELL *v.* CITY OF CINCINNATI. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 73–1636. SOKOLSKY ET AL. *v.* CLE-WARE INDUSTRIES, INC., ET AL.; and

No. 73–1762. WHALEN ET AL. *v.* CLE-WARE INDUSTRIES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 863.

No. 73–1641. KNAPP-SHERRILL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 655.

No. 73–1645. DONAHOE ET AL. *v.* BEECH AIRCRAFT CO. C. A. 9th Cir. Certiorari denied.

No. 73–1646. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* BEARD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–1649. EYRAUD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–1652. YOUR HOST, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 73–1687. COMMISSIONER OF INTERNAL REVENUE *v.* CHEF FOODS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 957.

No. 73–1654. LEONA LEE CORP. ET AL. *v.* INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS, LOCAL 66, AFL–CIO. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 1032.

No. 73–1656. SIMMONS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 504 S. W. 2d 465.

No. 73–1659. ZANFARDINO *v.* UNITED STATES; and
No. 73–6864. BORIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 496 F. 2d 887.

No. 73–1660. SHADLETSKY, AKA SHAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 677.

No. 73–1661. KOVASH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 519 P. 2d 517.

No. 73–1662. TIBBITTS ET UX. *v.* CUSSEN, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied.

No. 73–1664. BAILEY *v.* IOWA BEEF PROCESSORS, INC. Sup. Ct. Iowa. Certiorari denied. Reported below: 213 N. W. 2d 642.

No. 73–1665. CARIBTOW CORP. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. C. A. 1st Cir. Certiorari denied. Reported below: 493 F. 2d 1064.

No. 73–1677. BORG-WARNER CORP. *v.* KING-SEELEY THERMOS CO. C. A. 7th Cir. Certiorari denied.

No. 73–1678. DONALDSON *v.* CITY COUNCIL, CITY OF PLANTATION. Sup. Ct. Fla. Certiorari denied. Reported below: 287 So. 2d 92.

No. 73–1681. GEORGE STEINBERG & SON, INC. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 988.

No. 73–1684. GARNER *v.* LOUISIANA STATE BOARD OF EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 91.

No. 73–1685. ARBER ET AL. *v.* ESSEX WIRE CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 490 F. 2d 414.

No. 73–1691. Paris, dba General Security Services, Inc. *v.* Wedren, Director, Department of Commerce, et al. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 73–1694. Brenner *v.* United States. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 678.

No. 73–1695. Rosenberg *v.* Laffal et al. C. A. D. C. Cir. Certiorari denied. Reported below: 160 U. S. App. D. C. 148, 489 F. 2d 1272.

No. 73–1696. Stamatakos *v.* Hunter Shipping Co., S. A. C. A. 3d Cir. Certiorari denied.

No. 73–1698. Jackson *v.* New York City Transit Authority. Ct. App. N. Y. Certiorari denied.

No. 73–1699. Travelers Insurance Co. *v.* Sheris. C. A. 4th Cir. Certiorari denied. Reported below: 491 F. 2d 603.

No. 73–1703. Boatel, Inc. *v.* National Labor Relations Board et al. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 990.

No. 73–1704. Peterson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 666.

No. 73–1706. Pitt River Tribe *v.* United States. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 988, 485 F. 2d 660.

No. 73–1707. Collier *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 327.

No. 73–1712. Local 445, International Union of Electrical, Radio & Machine Workers, AFL–CIO *v.* Sperry Systems Management Division, Sperry Rand Corp., et al. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 63.

No. 73–1709. SNEIDERS *v.* HENRY. C. A. 9th Cir. Certiorari denied. Reported below: 490 F. 2d 315.

No. 73–1713. SMYZER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 73–1714. BARDAHL MANUFACTURING CORP. ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–1715. WALDROP ET AL. *v.* HITE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1406.

No. 73–1716. LAING *v.* MINNESOTA VIKINGS FOOTBALL CLUB, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 492 F. 2d 1381.

No. 73–1717. FRITZ ET UX. *v.* TOWN OF CLERMONT. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 292 N. E. 2d 258.

No. 73–1719. PONZIO *v.* UNITED STATES;
No. 73–1759. SOMERS *v.* UNITED STATES; and
No. 73–6628. LASANE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 496 F. 2d 723.

No. 73–1720. IMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 1372.

No. 73–1721. ABETTA ELECTRIC SERVICE CORP. *v.* LEVINE, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 42 App. Div. 2d 1050, 348 N. Y. S. 2d 955.

No. 73–1725. IRVING BERLIN MUSIC CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 203 Ct. Cl. 1, 487 F. 2d 540.

No. 73–1730. Rose et ux. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 581.

No. 73–1731. Davidson et al. *v.* Miller, an infant by Leggett, et al. Super. Ct. Baltimore City, Md. Certiorari denied.

No. 73–1732. City of Chattanooga *v.* Cox. Ct. App. Tenn. Certiorari denied.

No. 73–1733. Kimbell et ux. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 203.

No. 73–1735. Gorden *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 308.

No. 73–1736. Weiss et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 460.

No. 73–1743. Goldman *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 34 N. Y. 2d 539, 309 N. E. 2d 872.

No. 73–1744. Foster *v.* American Machine & Foundry Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 1317.

No. 73–1748. Bishop et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 492 F. 2d 1361.

No. 73–1749. Walters *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 255 Ark. 904, 503 S. W. 2d 895.

No. 73–1751. Ringsby Truck Lines, Inc., et al. *v.* National Small Shipments Traffic Conference, Inc., et al. C. A. 10th Cir. Certiorari denied. Reported below: 490 F. 2d 620.

No. 73–1754. INTERNATIONAL SHOE MACHINE CORP. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 491 F. 2d 157.

No. 73–1756. BIDDLE, ADMINISTRATRIX *v.* BOWSER. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 73–1761. DISTRIGAS CORP. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 1, 495 F. 2d 1057.

No. 73–1769. THOMPSON *v.* UNITED STATES; and
No. 73–6622. TERESI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 305.

No. 73–1771. SPRINGER ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 491 F. 2d 239.

No. 73–1775. BRADFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 493 F. 2d 1282.

No. 73–1778. RODGERS *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 228.

No. 73–1781. NICKEY CHEVROLET SALES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 493 F. 2d 103.

No. 73–1784. GONZALES ET VIR *v.* CHECKER CABS, INC., ET AL. Sup. Ct. La. Certiorari denied. Reported below: 290 So. 2d 333.

No. 73–1785. WELLMAN INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 427.

No. 73–1786. DUCKSTEIN *v.* GENERAL DYNAMICS CORP., FORT WORTH DIVISION. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 499 S. W. 2d 907.

No. 73–1787. OHIO HOLDING CO. *v.* MASHETER, DIRECTOR OF HIGHWAYS. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 38 Ohio App. 2d 49, 313 N. E. 2d 413.

No. 73–1788. LOCAL UNION No. 2188, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 161 U. S. App. D. C. 168, 494 F. 2d 1087.

No. 73–1792. WILLIAMS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 262 S. C. 186, 203 S. E. 2d 436.

No. 73–1793. MARKS *v.* FLOURNOY, CONTROLLER OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–1794. KLEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 494 F. 2d 394.

No. 73–1797. MILAM *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–1803. MURTAGH ET AL. *v.* UNIVERSITY COMPUTING CO. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 810.

No. 73–1806. SMITH *v.* MORTON, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 489 F. 2d 1275.

No. 73–1807. PAPIERZ ET AL. *v.* RAUTH. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 16 Ill. App. 3d 574, 306 N. E. 2d 532.

No. 73–1810. SMITH ET AL. *v.* INDIANA STATE BOARD OF HEALTH ET AL. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 303 N. E. 2d 50.

No. 73–1815. NORTHWAY COIN-CLEAN, INC. *v.* BORG-WARNER CORP. C. A. 3d Cir. Certiorari denied. Reported below: 487 F. 2d 1395.

No. 73–1816. PERRY ET UX. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 314 A. 2d 766.

No. 73–1821. GORDON ET AL. *v.* LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 612, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 490 F. 2d 133.

No. 73–1833. RACHAL *v.* UNITED STATES BUREAU OF PRISONS. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1404.

No. 73–1839. WEST INDIA CARRIERS, INC. *v.* TWENTY GRAND OFFSHORE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 679.

No. 73–1840. MERCK & CO., INC. *v.* MCGARVEY. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1401.

No. 73–1841. MORNING PIONEER, INC. *v.* BISMARCK TRIBUNE CO. C. A. 8th Cir. Certiorari denied. Reported below: 493 F. 2d 383.

No. 73–1843. ACANFORA *v.* BOARD OF EDUCATION OF MONTGOMERY COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 491 F. 2d 498.

No. 73–1844. PHELPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 490 F. 2d 644.

No. 73–1845. Brown et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1397.

No. 73–1847. Burgess et ux. *v.* Fabrizi et ux. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1406.

No. 73–1848. Bond et al. *v.* Beneficial Finance Company of New York, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 494 F. 2d 302.

No. 73–1851. R. E. Huntley Cotton Co. et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1241.

No. 73–1852. Sayre, Trustee in Bankruptcy *v.* City of Cleveland. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 64.

No. 73–1853. Griffin *v.* Griffin. Ct. App. Ohio, Summit County. Certiorari denied.

No. 73–1854. Rogers *v.* Rogers et al. Sup. Ct. Miss. Certiorari denied. Reported below: 290 So. 2d 631.

No. 73–1857. Whitney *v.* New York Stock Exchange et al. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1399.

No. 73–1858. Mon Valley Terminal, Inc., et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1401.

No. 73–1860. Makah Development Corp. et al. *v.* Stanley T. Scott & Co., Inc. C. A. 9th Cir. Certiorari denied. Reported below: 496 F. 2d 525.

No. 73–1861. South Gwinnett Venture et al. *v.* Pruitt et al. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 5.

No. 73–1862. LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* ALBANY WELFARE RIGHTS ORGANIZATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1319.

No. 73–1863. ZIM'S FOODLINER, INC., DBA ZIM'S IGA FOODLINER, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 1131.

No. 73–1864. BROWN *v.* GEORGIA POWER CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 117.

No. 73–1865. SHAWNEE PLASTICS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 869.

No. 73–1866. TURETSKY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 73–1867. SCHEIN ET AL. *v.* CAESAR'S WORLD, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 17.

No. 73–1871. NOGA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 925.

No. 73–1872. PARKER *v.* MCKEITHEN, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 553.

No. 73–1873. HAWK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 497 F. 2d 365.

No. 73–1874. ROSSI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 495 F. 2d 1369.

No. 73–1875. H & M Cake Box, Inc. *v.* Bakery & Confectionery Workers International Union of America, Local No. 45. C. A. 1st Cir. Certiorari denied. Reported below: 493 F. 2d 1226.

No. 73–1876. Brewington *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 1396.

No. 73–1877. Glatstein *v.* Walsh. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1397.

No. 73–1879. Humphrey *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 231 Ga. 855, 204 S. E. 2d 603.

No. 73–1880. Chicago Patrolmen's Assn. et al. *v.* City of Chicago et al. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 503, 309 N. E. 2d 3.

No. 73–1881. Ernest Renda Contracting Co., Inc. *v.* Male, Commissioner, Department of Labor and Industry, et al. Sup. Ct. N. J. Certiorari denied. Reported below: 64 N. J. 199, 314 A. 2d 361.

No. 73–1883. Lake Transport, Inc. *v.* Railroad Commission of Texas et al. Sup. Ct. Tex. Certiorari denied. Reported below: 505 S. W. 2d 781.

No. 73–1885. United Transportation Union General Committee of Adjustment *v.* Baker et al., Trustees of Property of Penn Central Transportation Co. C. A. 7th Cir. Certiorari denied. Reported below: 499 F. 2d 727.

No. 73–1886. Gesser et al. *v.* Dann, Commissioner of Patents. C. C. P. A. Certiorari denied.

No. 73–1889. Whitlock, Executrix *v.* Commissioner of Internal Revenue. C. A. 10th Cir. Certiorari denied. Reported below: 494 F. 2d 1297.

No. 73–1891. SEA-LAND SERVICE, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 57, 493 F. 2d 1357.

No. 73–1893. BLOHM & VOSS AG *v.* PRUDENTIAL-GRACE LINES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 489 F. 2d 231.

No. 73–1895. TEXAS ET AL. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 5th Cir. Certiorari denied.

No. 73–1898. MICHIGAN NATIONAL BANK *v.* GRIGG ET AL. Ct. App. Mich. Certiorari denied.

No. 73–1899. MARTAIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–1900. TWILLEY ET AL. *v.* GOVERNOR OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 271 Md. 320, 317 A. 2d 477.

No. 73–1904. DIGILAB, INC., ET AL. *v.* SECRETARY OF LABOR ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 495 F. 2d 323.

No. 73–1905. DOLLAR GENERAL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 1230.

No. 73–1909. ALFIN *v.* INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL–CIO. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 641.

No. 73–1910. RADIOCALL PAGING SERVICE *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 519 P. 2d 1360.

No. 73–1911. CHASE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 508 S. W. 2d 605.

No. 73–1912. CARVER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 510 S. W. 2d 349.

No. 73–1913. BRAY ET AL. *v.* ELISON ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–1916. BLANKS *v.* REGISTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 493 F. 2d 697.

No. 73–1918. PEREZ-LOPEZ ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 73–1920. RUGGIERO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 492 F. 2d 1239.

No. 73–1921. WELLCO CHEMICAL PRODUCTS CO. *v.* CASCADE CHEMICAL COATINGS, INC. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 15 Ill. App. 3d 1056, 305 N. E. 2d 595.

No. 73–1927. FREUDMANN *v.* BLANKSTEIN, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 816.

No. 73–1936. SECRETARY OF SOCIAL AND REHABILITATION SERVICES OF KANSAS *v.* SENECA NURSING HOME ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 490 F. 2d 1324.

No. 73–1937. BRANDYS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 15 Ill. App. 3d 379, 304 N. E. 2d 471.

No. 73–1938. EFFLER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 508 S. W. 2d 809.

No. 73–1939. GILLIGAN ET AL. *v.* KORZEN ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 387, 308 N. E. 2d 613.

No. 73–1940. ALTSMAN ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 73–1941. COASTAL PETROLEUM CO. *v.* TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 973.

No. 73–1945. DEMOON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 16 Ill. App. 3d 510, 306 N. E. 2d 618.

No. 73–1948. PERRY *v.* MAS ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 1396.

No. 73–1949. NIXON HOTEL, INC. *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF BUTLER. Pa. Commw. Ct. Certiorari denied. Reported below: 11 Pa. Commw. 519, 315 A. 2d 366.

No. 73–1954. ALPHA DISTRIBUTING COMPANY OF CALIFORNIA, INC. *v.* JACK DANIEL DISTILLERY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 1355.

No. 73–1958. MOHASCO INDUSTRIES, INC., ET AL. *v.* ACME FAST FREIGHT, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1082.

No. 73–1959. ADEY *v.* UNITED ACTION FOR ANIMALS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1397.

No. 73–1961. LOPEZ *v.* RIVERA, JUDGE. Super. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 73–1962. BERMAN *v.* GROUP HEALTH ASSN., INC. Ct. App. D. C. Certiorari denied. Reported below: 316 A. 2d 863.

No. 73–1963. PORDUM *v.* BOARD OF REGENTS OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 1281.

No. 73–1968. GROSS ET AL. *v.* NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., ET AL. C. A. D. C. Cir. Certiorari denied.

No. 73–1969. WINKLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 506 S. W. 2d 891.

No. 73–1970. DEBLASIS *v.* COUNTY OF SAN BERNARDINO ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–1974. HOME INSURANCE CO. ET AL. *v.* GARCY CORP. C. A. 7th Cir. Certiorari denied. Reported below: 496 F. 2d 479.

No. 73–1981. GLIMCO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–1986. INDUSTRO MOTIVE CORP. ET AL. *v.* MONOGRAM MODELS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1281.

No. 73–1989. SIMON ET AL. *v.* ESTATE OF ALLEN ET AL. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied. Reported below: 497 S. W. 2d 800.

No. 73–1991. CITY OF NAPLES *v.* PREPAKT CONCRETE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 182 and 494 F. 2d 511.

No. 73–1993. SIGNAL MOUNTAIN PORTLAND CEMENT, DIVISION OF GENERAL PORTLAND CEMENT CO. *v.* COOLIDGE ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 1373.

No. 73–2002. PHILADELPHIA HOUSING AUTHORITY ET AL. *v.* ALDERMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 496 F. 2d 164.

No. 73–2012. SEATTLE TRUST & SAVINGS BANK ET AL. *v.* BANK OF CALIFORNIA, N. A., ET AL.; and

No. 73–2037. HART, SUPERVISOR, DIVISION OF BANKING *v.* BANK OF CALIFORNIA, N. A., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 48.

No. 73–2016. ARANDA *v.* COMMITTEE ON EXAMINATIONS AND ADMISSIONS FOR STATE BAR OF ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 73–2017. BROCK & BLEVINS CO., INC., ET AL. *v.* BRYAN. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 563.

No. 73–2019. MAILMAN DEVELOPMENT CORP. ET AL. *v.* CITY OF HOLLYWOOD. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 286 So. 2d 614.

No. 73–2020. LEWIS *v.* HUDSON WATERWAYS CORP. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 604.

No. 73–2021. OUTLAW ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 152, 494 F. 2d 1376.

No. 73–2026. HERNANDEZ *v.* TRAVELERS INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 721.

No. 73–2031. TOLEDO, PEORIA & WESTERN RAILROAD CO. *v.* WASSON, DBA WASSON TOWING CO., ET AL.; and

No. 73–2035. WASSON, DBA WASSON TOWING CO., ET AL. *v.* TOLEDO, PEORIA & WESTERN RAILROAD CO. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 571.

No. 73–1996. McNeal *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 73–2033. Kuklevich et ux. *v.* Union Local School District. Ct. App. Ohio, Belmont County. Certiorari denied.

No. 73–2034. Wilson *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 52 Ala. App. 680, 296 So. 2d 774.

No. 73–2041. Sewell et al. *v.* Penn Central Transportation Co. et al. C. A. 7th Cir. Certiorari denied.

No. 73–2044. Karp, Executrix, et al. *v.* Cooley et al. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 408.

No. 73–2049. Straub et al. *v.* Woodahl, Attorney General of Montana, et al. Sup. Ct. Mont. Certiorari denied. Reported below: 164 Mont. 141, 520 P. 2d 776.

No. 73–2052. Pope et ux. *v.* Texas et al. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied.

No. 73–2059. Broge et al. *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 288 So. 2d 280.

No. 73–6215. Comcowich *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 1397.

No. 73–6280. Kelley *v.* United States;

No. 73–6407. Alonso et al. *v.* United States; and

No. 73–6413. Ziruolo *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 748, 749, 750, and 752.

No. 73–6348. JERROLD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 490 F. 2d 199.

No. 73–6358. GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 485 F. 2d 1378.

No. 73–6375. WEST *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 73–6435. GANOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6458. MACIAS-GONZALEZ ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 73–6462. ADAMS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 73–6463. COOK *v.* SAXBE, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 667.

No. 73–6466. CARTER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 34 Cal. App. 3d 748, 110 Cal. Rptr. 324.

No. 73–6467. GOODWIN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 212 N. W. 2d 399.

No. 73–6488. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 990.

No. 73–6490. PATTERSON *v.* UNITED STATES; and
No. 73–6594. LANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 995.

No. 73–6492. FULFORD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied.

No. 73–6501. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 175.

No. 73–6507. GILKERSON *v.* CURRY, REGISTRAR, BUREAU OF MOTOR VEHICLES. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 73–6510. JAMISON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 823.

No. 73–6517. GROVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 492 F. 2d 1240.

No. 73–6521. BAD HORSE *v.* BAD HORSE. Sup. Ct. Mont. Certiorari denied. Reported below: 163 Mont. 445, 517 P. 2d 893.

No. 73–6527. MEFFORD *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 73–6536. BECTON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 506 S. W. 2d 137.

No. 73–6541. WALLACE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 504 S. W. 2d 67.

No. 73–6544. HIGHTOWER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–6548. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 1355.

No. 73–6549. SEAY ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 286 So. 2d 532.

No. 73–6550. CHRISCO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 493 F. 2d 232.

No. 73–6551. TARLTON *v.* DILL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 973.

No. 73–6554. CAREW, AKA CARUSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1397.

No. 73–6555. McClure *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 73–6556. Bush *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 921, 308 N. E. 2d 451.

No. 73–6561. Gregg *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1401.

No. 73–6563. Farmer *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 73–6564. Doe (Dyman) *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1398.

No. 73–6567. Harbolt *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 78.

No. 73–6568. Stephens *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1406.

No. 73–6569. Thompson *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 73–6571. Lewis *v.* Henderson, Warden. C. A. 5th Cir. Certiorari denied.

No. 73–6572. Quigg *v.* Warden, Montana State Prison, et al. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 343.

No. 73–6576. Mason *v.* United States; and
No. 73–6581. Taylor *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 492 F. 2d 1240.

No. 73–6577. Rose *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1401.

No. 73–6578. GRANT *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 9 Wash. App. 260, 511 P. 2d 1013.

No. 73–6583. CAMPBELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1406.

No. 73–6586. JAMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 323.

No. 73–6593. GRANT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 494 F. 2d 120.

No. 73–6595. MCCALL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 359.

No. 73–6596. FELICIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 495 F. 2d 353.

No. 73–6599. BOEHM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6600. FARMER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 14 Ill. App. 3d 1073, 303 N. E. 2d 162.

No. 73–6604. SCHELLENBERG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–6605. FOLKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 1311.

No. 73–6606. BARTHOLOMEW, DBA ECOLOGISTICS INSTITUTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 728.

No. 73–6607. GULLEDGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 679.

No. 73–6611. HEARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–6612. Rosa *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1191.

No. 73–6616. Angel *v.* Coiner, Warden. C. A. 4th Cir. Certiorari denied.

No. 73–6624. Brown *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1398.

No. 73–6625. Coulter *v.* United States. Ct. Cl. Certiorari denied.

No. 73–6632. Rimka *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 73–6634. Conlon et al. *v.* United States. Ct. Cl. Certiorari denied.

No. 73–6635. Thompson *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 73–6638. Mitchell *v.* Ohio. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 73–6640. Weaver *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1406.

No. 73–6643. McNellis *v.* United States; and
No. 73–6887. Millette *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1399.

No. 73–6648. Ervin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 990.

No. 73–6651. Sims *v.* United States; and
No. 73–6731. Seals *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 492 F. 2d 1240.

No. 73–6656. WILFORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 730.

No. 73–6657. FOREMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 505 S. W. 2d 564.

No. 73–6658. ALLISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 286.

No. 73–6661. LYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 290.

No. 73–6662. CLARK *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1389.

No. 73–6664. GAINES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 52 Ala. App. 29, 288 So. 2d 810.

No. 73–6665. MADDOX ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 104.

No. 73–6667. POLLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1387.

No. 73–6668. WILLIAMS *v.* COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 73–6669. ROJAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 288 So. 2d 234.

No. 73–6671. TRAPNELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 22.

No. 73–6672. HERSHIPS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6674. MYERS, DBA ROMYCO STEREO *v.* AMPEX, INC., ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–6675. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 160 U. S. App. D. C. 384, 492 F. 2d 650.

No. 73–6676. STEPHENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1367.

No. 73–6677. MORALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6678. CURTIS *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 73–6679. FARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1400.

No. 73–6681. LILES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 494 F. 2d 1216.

No. 73–6683. CRANDALL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1401.

No. 73–6685. HOOD ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 677.

No. 73–6686. STAFFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 1374.

No. 73–6687. SQUIRES ET AL. *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6689. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–6690. BIBBS *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 504 S. W. 2d 319.

No. 73–6691. LOGAN *v.* BUTLER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–6692. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 1375.

No. 73–6694. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 377.

No. 73–6695. JORDAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 1374.

No. 73–6697. OVERSHON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 494 F. 2d 894.

No. 73–6698. BROWN *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1241.

No. 73–6699. CHATTERTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6701. CAMPBELL *v.* CALIFORNIA ET AL. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 73–6702. SULLIVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6703. OLIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–6705. HOLLAND *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1243.

No. 73–6706. MORROW *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 52 Ala. App. 145, 290 So. 2d 209.

No. 73–6707. GUBINS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6709. HARMON *v.* FALGOUST ET VIR. Sup. Ct. La. Certiorari denied. Reported below: 289 So. 2d 161.

No. 73–6710. ZAUN ET UX. *v.* FANN, SHERIFF, ET AL. C. A. 8th Cir. Certiorari denied.

No. 73–6711. LANDAW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 492 F. 2d 1246.

No. 73–6712. EMERINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 1374.

No. 73–6713. FRANKENBERRY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 73–6714. STEBBINS *v.* KEYSTONE INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 73–6715. DAWSON *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 1407.

No. 73–6716. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 178.

No. 73–6717. HICKS *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–6718. HACKETT ET AL. *v.* HUNT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 36 Cal. App. 3d 134, 111 Cal. Rptr. 456.

No. 73–6720. POLITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 679.

No. 73–6722. JOHNSON *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 756.

No. 73–6723. Perez et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1241.

No. 73–6724. Dunn *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 494 F. 2d 1280.

No. 73–6725. Coleman *v.* United States; and
No. 73–6728. Coleman *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 1374.

No. 73–6726. Chaney *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 1370.

No. 73–6727. Knight *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 502 F. 2d 1160.

No. 73–6729. Vessi *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1402.

No. 73–6730. Witt et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 1311.

No. 73–6734. Young et al. *v.* Wainwright, Corrections Director, et al. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 96.

No. 73–6736. D'Andrea *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 495 F. 2d 1170.

No. 73–6737. Hysell *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–6738. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 24.

No. 73–6741. HICKSON *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied.

No. 73–6742. FRUGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1163.

No. 73–6744. HILLIARD *v.* MCCARTHY. C. A. 9th Cir. Certiorari denied.

No. 73–6745. KELTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–6746. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 505 S. W. 2d 267.

No. 73–6747. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 731.

No. 73–6748. JOHNSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 73–6749. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 492 F. 2d 1240.

No. 73–6750. DIXON *v.* UNITED STATES; and
No. 73–6803. BLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 1370.

No. 73–6751. LEFEBRE *v.* SCHMIDT, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 492 F. 2d 1245.

No. 73–6753. OLLIS *v.* PADERICK, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–6755. SHIPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 1374.

No. 73–6756. CAMPBELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 991.

No. 73–6757. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1050.

No. 73–6762. STEBBINS *v.* INSURANCE COMPANY OF NORTH AMERICA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 73–6763. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 73–6764. WELCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 496 F. 2d 861.

No. 73–6765. DAVIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 284 N. C. 701, 202 S. E. 2d 770.

No. 73–6768. KOPAS ET AL. *v.* UNITED STATES ET AL.; and

No. 73–6775. KOPAS ET AL. *v.* UNITED STATES TAX COURT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1243.

No. 73–6771. TORBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 496 F. 2d 154.

No. 73–6772. BOWSER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 F. 2d 1017.

No. 73–6773. YATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6777. St. Lawrence *v.* United States. C. A. D. C. Cir. Certiorari denied.

No. 73–6778. Eggleston *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 1370.

No. 73–6779. Hall *v.* Witzenfeld, Sheriff, et al. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1400.

No. 73–6780. Bailey *v.* Michigan. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 1218.

No. 73–6782. Wilson et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1160.

No. 73–6783. King *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 917, 308 N. E. 2d 451.

No. 73–6784. Lombera *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 491 F. 2d 167.

No. 73–6785. Rodriguez *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1400.

No. 73–6786. Ault et al. *v.* Purcell, Sheriff. Ct. App. Ore. Certiorari denied. Reported below: 16 Ore. App. 664, 519 P. 2d 1285.

No. 73–6787. Williams *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 73–6788. Salinas *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 73–6789. Roe *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 495 F. 2d 600.

No. 73–6790. MIRIN *v.* CLARK COUNTY TAXICAB AUTHORITY ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 90 Nev. 46, 518 P. 2d 597.

No. 73–6792. HURST, AKA SHULTZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1388.

No. 73–6793. MONTGOMERY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 1375.

No. 73–6794. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 473.

No. 73–6796. BAILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6797. SINGLETON *v.* ATKINS, ACTING WARDEN. C. A. 10th Cir. Certiorari denied.

No. 73–6798. REED *v.* CARLYLE & MARTIN, INC., ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 214 Va. 592, 202 S. E. 2d 874.

No. 73–6799. HOLDEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 73–6801. HUBBARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6802. VARACALLI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 73–6806. SOTELO ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1244.

No. 73–6808. ALVAREZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 42 App. Div. 2d 1051, 348 N. Y. S. 2d 960.

No. 73–6811. PATRIZZI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 496 F. 2d 510.

No. 73–6812. JONES *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 73–6813. JOHNSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1405.

No. 73–6814. SHIRD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 492 F. 2d 1240.

No. 73–6815. FERGUSON *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 73–6816. HERNANDEZ *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 502 F. 2d 1160.

No. 73–6818. WEEMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–6819. STROUPE *v.* TIDWELL, COMMISSIONER OF REVENUE. Sup. Ct. Tenn. Certiorari denied. Reported below: 510 S. W. 2d 77.

No. 73–6820. COOPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–6821. MOUNCE *v.* ROSS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1271.

No. 73–6822. BOYD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 285 N. C. 86, 203 S. E. 2d 59.

No. 73–6823. JOHNSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 378.

No. 73–6824. LITTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 490 F. 2d 686.

No. 73–6825. ERBER *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 73–6827. KREAGER *v.* GENERAL ELECTRIC CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 468.

No. 73–6829. KINNELL *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 73–6831. DIGGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 391.

No. 73–6832. SIMMONS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1404.

No. 73–6833. COTHRUM *v.* OKLAHOMA COUNTY DISTRICT COURT ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 73–6834. TURMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6836. HOLLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 581.

No. 73–6837. BORUSKI *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 73–6838. TERRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1406.

No. 73–6839. GRIFFITH ET AL. *v.* EDWARDS, SHERIFF. C. A. 8th Cir. Certiorari denied. Reported below: 493 F. 2d 495.

No. 73–6843. RICH *v.* UNITED STATES; and

No. 73–6858. RICH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 1374.

No. 73–6844. CRAWFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 491 F. 2d 942.

No. 73–6845. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1402.

No. 73–6850. CAMPBELL *v.* GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1405.

No. 73–6854. CARRATELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6855. LONIS *v.* CAMPBELL. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 1406.

No. 73–6856. ROBINSON *v.* JEFFERSON COUNTY BOARD OF EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 1381.

No. 73–6857. MCWILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–6859. UNTIEDT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 493 F. 2d 1056.

No. 73–6860. CRUZ-GUERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 1295.

No. 73–6863. BACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6865. GRAYSON *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 73–6866. MULHALL *v.* INMONT CORP. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 924.

No. 73–6869. HARDY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–6870. HAYES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6871. SAPPINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 1374.

No. 73–6872. OHMERT *v.* YOUNG. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6873. BONNER ET AL. *v.* MARKS ET AL. C. A. 8th Cir. Certiorari denied.

No. 73–6880. MARTLEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 519 P. 2d 544.

No. 73–6881. NEAL *v.* SMITH, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 73–6882. MURPHREE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 497 F. 2d 395.

No. 73–6883. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–6886. O'QUINN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1272.

No. 73–6888. GIOVINE *v.* MACK TRUCKS ET AL. Super. Ct. N. J. Certiorari denied.

No. 73–6889. SCHMIDT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6892. BEASLEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–6897. LANSBERRY ET AL. *v.* PITTSBURGH NATIONAL BANK. Sup. Ct. Pa. Certiorari denied.

No. 73–6898. MAYO *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1399.

No. 73–6900. WILSON *v.* JERRY MILLER, INC. Sup. Ct. Ind. Certiorari denied.

No. 73–6904. WARD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 505 S. W. 2d 832.

No. 73–6905. DEVOTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1398.

No. 73–6910. MATLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 491 F. 2d 504.

No. 73–6912. LEE *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 73–6915. HURD *v.* SUPREME COURT OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–6916. CANTONI *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 73–6928. CHANEY *v.* MCINTOSH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 990.

No. 73–6929. FONGONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 464 F. 2d 1280.

No. 73–6930. HUCKABAY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6932. WEBB ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6937. INGLE *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 73–6939. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 485.

No. 73–6944. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 4th Jud. Dist. Certiorari denied. Reported below: 13 Ill. App. 3d 1020, 304 N. E. 2d 681.

No. 73–6946. CORDOVA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6949. JONES *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–6951. KANE, DBA KANE'S DIESEL & TRUCK REPAIR *v.* THE LEDA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 899.

No. 73–6955. CARTER *v.* MONEY TREE CO. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied.

No. 73–6964. OLENZ *v.* TELETYPE CORP. ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–6966. PARKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 15 Ill. App. 3d 774, 305 N. E. 2d 228.

No. 73–6972. ALLEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 536, 309 N. E. 2d 544.

No. 73–6982. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 521 P. 2d 832.

No. 73–6985. JORDAN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6988. SANTANA *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–6989. BRYANT *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–6995. HERSHIPS *v.* YOUNG, JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6998. COLLINS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 391 Mich. 798.

No. 73–7001. STEJSKAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–7004. CAMM ET VIR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 294 So. 2d 318.

No. 73–7005. POWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 498 F. 2d 890.

No. 73–7008. BROWN *v.* GROOMES, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 73–7012. HERNANDEZ *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–7015. BLONDELL *v.* JURAS, ADMINISTRATOR, PUBLIC WELFARE DIVISION. Ct. App. Ore. Certiorari denied. Reported below: 15 Ore. App. 321, 515 P. 2d 727.

No. 73–7018. GUSICK *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–7020. GANCI *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–7024. CAESAR *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1404.

No. 73–7025. JOHNSON *v.* HUNT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–7030. POLK *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 288 So. 2d 452.

No. 73–7035. THOMPSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 285 N. C. 181, 203 S. E. 2d 781.

No. 73–7038. CHRISTOFORA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 43 App. Div. 2d 766, 350 N. Y. S. 2d 772.

No. 73–7041. CRONIN *v.* WILSON, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–7042. PARKER *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL. Super. Ct. Pa. Certiorari denied.

No. 73–7046. WIENER *v.* CHANCE ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–7047. PAGEL *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 16 Ore. App. 412, 518 P. 2d 1037.

No. 73–7060. HERNON *v.* REVERE COPPER & BRASS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 494 F. 2d 705.

No. 73–7063. SHIFLETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 52 Ala. App. 476, 294 So. 2d 444.

No. 73–7064. GRANT *v.* GRANT. Ct. Civ. App. Ala. Certiorari denied. Reported below: 52 Ala. App. 365, 292 So. 2d 660.

No. 73–7070. WHITE *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–7086. MARTIN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1120.

No. 73–7087. TRUDEAU *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 51 Mich. App. 766, 216 N. W. 2d 450.

No. 73–7092. WHISNANT *v.* LUTTRELL, CORRECTIONS COMMISSIONER, ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–7095. BROWN *v.* GROOMES, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 73–7098. GONZALES *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 521 P. 2d 512.

No. 73–7116. EVANS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 74–1. CARDIN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 74–2. BILL SWAD CHRYSLER-PLYMOUTH CO. *v.* 565 EAST BROAD, INC. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 74–5. REA ET AL. *v.* FORD MOTOR CO. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 577.

No. 74–6. ANCHOR MOTOR FREIGHT, INC. *v.* SCOTT. C. A. 6th Cir. Certiorari denied. Reported below: 496 F. 2d 276.

No. 74–16. CHERAMIE *v.* TUCKER, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 586.

No. 74–20. JACOBS *v.* GROMATSKY, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 513.

No. 74–24. England, Trustee in Bankruptcy *v.* Chrysler Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 269.

No. 74–35. Olden *v.* Foss et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–39. Klebs *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 305 N. E. 2d 781.

No. 74–47. Fibreboard Paper Products Corp. et al. *v.* Borel. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1076.

No. 74–48. Local 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al. *v.* Pilot Freight Carriers, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 497 F. 2d 311.

No. 74–52. Lee et al. *v.* City of Chattanooga et al. Ct. App. Tenn. Certiorari denied. Reported below: 500 S. W. 2d 917.

No. 74–53. Devita *v.* Burlington Northern, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 494 F. 2d 347.

No. 74–56. Carey *v.* Davis et al. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 247, 498 F. 2d 789.

No. 74–59. Stockmen's Insurance Agency, Inc. *v.* Guarantee Reserve Life Insurance Company of Hammond, Indiana. Sup. Ct. N. D. Certiorari denied. Reported below: 217 N. W. 2d 455.

No. 74–61. Niles Sand & Gravel Co., Inc., et al. *v.* Alameda County Water District. Ct. App. Cal., 1st

App. Dist. Certiorari denied. Reported below: 37 Cal. App. 3d 924, 112 Cal. Rptr. 846.

No. 74–66. HETTLEMAN ET AL. *v.* CHICAGO LAW INSTITUTE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 74–68. CLARION CORP. *v.* AMERICAN HOME PRODUCTS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 494 F. 2d 860.

No. 74–73. KANSAS CITY STAR CO., FLAMBEAU PAPER COMPANY DIVISION *v.* DEPARTMENT OF INDUSTRY, LABOR, AND HUMAN RELATIONS ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 60 Wis. 2d 591, 211 N. W. 2d 488, and 62 Wis. 2d 783, 217 N. W. 2d 666.

No. 74–74. RONSON CORP. *v.* LIQUIFIN AG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 394.

No. 74–84. MILES ET AL *v.* PULLMAN CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 926.

No. 74–87. MIHALOPOULOS *v.* IDEAL CEMENT CO. C. A. 9th Cir. Certiorari denied.

No. 74–91. MOULTON ET UX. *v.* FORD MOTOR CO. ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 511 S. W. 2d 690.

No. 74–103. WILLIAMSON MARINE TRANSPORT, INC., ET AL. *v.* LOUISIANA TAX COMMISSION. Sup. Ct. La. Certiorari denied. Reported below: 294 So. 2d 839.

No. 74–147. AAACON AUTO TRANSPORT, INC. *v.* LASKER, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied.

No. 74–245. HUTTER ET AL. *v.* CITY OF CHICAGO. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 74–5001. CLARK *v.* CARBERRY. C. A. 9th Cir. Certiorari denied.

No. 74–5002. COPPOLA *v.* GRIGGS, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 74–5007. PATTERSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 37.

No. 74–5009. HARRISON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 74–5019. HYMES *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 74–5031. MOORE ET AL. *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 110 Ariz. 404, 519 P. 2d 1145.

No. 74–5080. NICHOLS *v.* FULLER. C. A. 1st Cir. Certiorari denied.

No. 74–5099. CURRY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 74–5139. DILLINGHAM *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 291 So. 2d 128.

No. 74–5154. L'AQUARIUS, AKA LEWELLEN *v.* ANDERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 74–5155. DAVIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 73–1281. TONASKET ET AL. *v.* THOMPSON ET AL. C. A. 9th Cir. Motion of Hoopa Valley Tribe of Indians for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 315 and 316.

No. 73–1308. WHITE *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 1335.

No. 73–1390. DORNAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 473.

No. 73–1407. YSRAEL *v.* GUAM FEDERATION OF TEACHERS, LOCAL 1581, AMERICAN FEDERATION OF TEACHERS, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 438.

No. 73–1486. SOTOMURA ET UX. *v.* COUNTY OF HAWAII ET AL. Sup. Ct. Hawaii. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 55 Haw. 176, 517 P. 2d 57.

No. 73–1501. BRAMBLETT *v.* DESOBRY ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 490 F. 2d 405.

No. 73–1512. KRISTOVICH *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1521. LOSCHIAVO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 1399.

No. 73–1544. WINGATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 1407.

No. 73–1560. MARION *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 1399.

No. 73–1604. NIEZEK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 489 F. 2d 703.

No. 73–1621. DIOGUARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 70.

No. 73–1624. ANDREA DUMON, INC., ET AL. *v.* CLAIROL, INC. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 14 Ill. App. 3d 641, 303 N. E. 2d 177.

No. 73–1632. SMITH ET AL. *v.* STEWART ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 14 Ill. App. 3d 1039, 304 N. E. 2d 3.

No. 73–1638. GOLD ON BEHALF OF SUSQUEHANNA CORP. *v.* SCURLOCK ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 340.

No. 73–1658. PACIFIC FAR EAST LINE, INC. *v.* HARTFORD FIRE INSURANCE CO. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 960.

No. 73–1668. BARBOUR *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 573.

No. 73–1671. SMALLWOOD *v.* PEARL BREWING CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 489 F. 2d 579.

No. 73–1676. WAHBA *v.* NEW YORK UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 96.

No. 73–1700. NATIONAL NUTRITIONAL FOODS ASSN. ET AL. *v.* SCHMIDT, COMMISSIONER OF FOOD AND DRUGS DIVISION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 1141.

No. 73–1705. WOODRUFF & SONS, INC., ET AL. *v.* LASER ALIGNMENT, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 866.

No. 73–1710. KAN KAM LIN ET AL. *v.* RINALDI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 1229.

No. 73–1747. COORS PORCELAIN CO. *v.* COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 183 Colo. 325, 517 P. 2d 838.

No. 73–1757. FEDERAL ELECTRIC CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 202 Ct. Cl. 1028, 486 F. 2d 1377.

No. 73–1767. BURCHETT *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 492.

No. 73–1770. SILVERMAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 1367.

No. 73–1774. ANDERSON ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1782. HOWARD *v.* CITY OF CINCINNATI. Ct. App. Ohio, Hamilton County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1812. WILLIS ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1819. CRAMER ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 214 Va. 561, 202 S. E. 2d 911.

No. 73–1828. HOCHFELDER ET AL. *v.* MIDWEST STOCK EXCHANGE ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 503 F. 2d 364.

No. 73–1836. LIMBACK *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 1406.

No. 73–1868. TERRACIANO *v.* SMITH, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 682.

No. 73–1914. WESTERMAYER ET AL. *v.* PULLMAN CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1935. PAYNE, A MINOR, BY PAYNE *v.* CITY OF FORT LAUDERDALE ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1944. FORD WHOLESALE CO., INC. *v.* FIBREBOARD PAPER PRODUCTS CORP. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 1204.

No. 73–6302. RECHTMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 1402.

No. 73–6365. PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 449.

No. 73–6379. LEGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6414. BURNS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 319.

No. 73–6425. CHAMBERS *v.* DELANEY ET AL. Ct. App. Okla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6428. WHITFIELD *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 1118.

No. 73–6445. CUNNINGHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 664.

No. 73–6545. PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 449.

No. 73–6552. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 1300.

No. 73–6609. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 1240.

No. 73–6614. CLANTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 488 F. 2d 1069.

No. 73–6663. COLLINS *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 735.

No. 73–6680. JONES *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 1275.

No. 73–6684. MAUPIN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6696. CAULEY *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 130 Ga. App. 278, 203 S. E. 2d 239.

No. 73–6700. MATTHEWS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 161 U. S. App. D. C. 238, 494 F. 2d 1157.

No. 73–6733. ROBINSON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 505 S. W. 2d 237.

No. 73–6735. TAGGART *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 14 Ore. App. 408, 512 P. 2d 1359.

No. 73–6743. Nevarez-Alcantar, aka Martinez *v.* United States. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 495 F. 2d 678.

No. 73–6752. LeFebre *v.* Cady, Warden. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 492 F. 2d 1245.

No. 73–6758. Mora-Chavez *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 496 F. 2d 1181.

No. 73–6769. Lord *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 475 F. 2d 763.

No. 73–6776. Durkin *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 493 F. 2d 1398.

No. 73–6781. Artieri *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 491 F. 2d 440.

No. 73–6791. Overshon *v.* United States. C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 494 F. 2d 894.

No. 73–6804. Brinlee *v.* United States. C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 496 F. 2d 351.

No. 73–6852. McBride *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 503 F. 2d 1337.

No. 73–6911. Davis *v.* Johnson, Correctional Superintendent, et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 495 F. 2d 335.

No. 73–6925. ESTRADA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6941. CAMPBELL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 501 F. 2d 196.

No. 73–6948. THOMAS *v.* CANNON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 151.

No. 73–6958. LIEBSCH *v.* LIEBSCH. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6961. WILEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 415.

No. 73–7073. PRATT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–7077. RANDALL *v.* GOLDMARK, SECRETARY, EXECUTIVE OFFICE OF HUMAN RESOURCES OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 495 F. 2d 356.

No. 73–7085. LEPAGE ET AL. *v.* PICARD, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 495 F. 2d 26.

No. 74–34. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 336, AFL–CIO *v.* ILLINOIS BELL TELEPHONE CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 496 F. 2d 1.

No. 74–5023. EVERETT *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 110 Ariz. 429, 520 P. 2d 301.

No. 74–5034. RICE *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 1326.

No. 74–5163. PICKENS *v.* TEXAS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 981.

No. 73–1329. PENNSYLVANIA *v.* WOODS. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 455 Pa. 1, 312 A. 2d 357.

No. 73–1536. HENDERSON, WARDEN *v.* BARKSDALE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 73–1653. ENSLOW, SHERIFF *v.* WATSON. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 183 Colo. 435, 517 P. 2d 1346.

No. 73–1726. UNITED STATES *v.* HAMILTON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 490 F. 2d 598.

No. 73–1783. MONTICELLO *v.* MONTICELLO. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 271 Md. 168, 315 A. 2d 520.

No. 74–90. KELLER, SECRETARY, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA, ET AL. *v.* MIXON, A MINOR, BY CARTER, ET AL. Certiorari before

judgment to C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 73–1348. J. M. Fields, Inc. *v.* Brennan, Secretary of Labor. C. A. 5th Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 488 F. 2d 443.

No. 73–1414. Minnesota *v.* Andrews. Sup. Ct. Minn. Certiorari denied, it appearing that judgment below rests upon adequate state grounds. Reported below: 297 Minn. 260, 212 N. W. 2d 863.

No. 73–1576. Disheroon *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Mr. Justice Douglas and Mr. Justice Blackmun would grant certiorari. Reported below: 518 P. 2d 892.

No. 73–1642. International Association of Machinists & Aerospace Workers, AFL–CIO *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice White would grant certiorari. Reported below: 491 F. 2d 367.

No. 73–1644. Arends *v.* Arends. Sup. Ct. Utah. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 30 Utah 2d 328, 517 P. 2d 1019.

No. 73–1648. Ivanov *v.* United States. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Stewart would grant certiorari. Mr. Justice Marshall took no part in the consideration or decision of this petition. Reported below: 494 F. 2d 593.

No. 73–1655. RUHM *v.* TURNER, SHERIFF, ET AL. C. A. 10th Cir. Application for bail presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. See *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970).

No. 73–1657. ESTATE OF MEADE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE WHITE would grant certiorari. Reported below: 489 F. 2d 161.

No. 73–1688. CRONRATH *v.* JOHNSON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 488 F. 2d 820.

No. 73–1693. COMMISSIONER OF INTERNAL REVENUE *v.* MUTUAL BENEFIT LIFE INSURANCE CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 488 F. 2d 1101.

No. 73–1753. IN RE ESTATE OF CASSIDY ET AL. Sup. Jud. Ct. Me. Certiorari and other relief denied. Reported below: 313 A. 2d 435.

No. 73–1772. SOUTHERN CALIFORNIA GAS CO. *v.* FEDERAL POWER COMMISSION;

No. 73–1776. PACIFIC GAS & ELECTRIC CO. *v.* FEDERAL POWER COMMISSION;

No. 73–1790. SAN DIEGO GAS & ELECTRIC CO. *v.* FEDERAL POWER COMMISSION; and

No. 73–1825. CITY OF WILLCOX ET AL. *v.* FEDERAL POWER COMMISSION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 161 U. S. App. D. C. 6, 494 F. 2d 925.

No. 73–1672. UNITED STATES *v.* BANKERS TRUST CO. ET AL., TRUSTEES. C. A. 3d Cir. Motion to substitute Bank of New York et al. in place of Morgan Guaranty Trust Company of New York as parties respondent granted. Certiorari denied. Reported below: 494 F. 2d 270.

No. 73–1805. AMERICAN DAIRY OF EVANSVILLE, INC. *v.* KRAFTCO CORP. C. C. P. A. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 487 F. 2d 1407.

No. 73–1846. PERRY *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 499 F. 2d 797.

No. 73–1789. MR. STEAK, INC., ET AL. *v.* EDINA STATE BANK. C. A. 10th Cir. Motion of Stock Transfer Assn., Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 487 F. 2d 640.

No. 73–1887. TRIANO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari.

No. 73–1925. DELPHI COMMUNITY SCHOOL BUILDING CORP. *v.* NORTHEASTERN INSURANCE COMPANY OF HARTFORD ET AL. C. A. 7th Cir. Motion of Fred A. Mauck, Director of Insurance of Illinois, as Liquidator of Home Owners Insurance Co., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 492 F. 2d 268.

No. 73–2014. MISSOURI PORTLAND CEMENT CO. *v.* CARGILL, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would grant certiorari. MR. JUSTICE BLACKMUN took no part in the

consideration or decision of this petition. Reported below: 498 F. 2d 851.

No. 73–2038. CHURCHILL AREA SCHOOL DISTRICT ET AL. *v.* HOOTS ET AL. C. A. 3d Cir. Motion of respondents Knight et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 495 F. 2d 1095.

No. 73–6601. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would grant certiorari.

No. 73–6636. ANDREWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari.

No. 73–6805. GEARIN *v.* WEYERHAEUSER LINE. C. A. 9th Cir. Motion of Apostleship of the Sea for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 73–7079. HARDAWAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied as untimely filed. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would grant certiorari.

No. 74–10. NESTLER ET AL. *v.* RICHEY, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Certiorari denied as untimely filed.

No. 74–27. LONG ISLAND RAIL ROAD CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 2d Cir. Motion to consolidate with No. 74–360 [*Long Island Rail Road Co.* v. *United States*] and certiorari denied. Reported below: 487 F. 2d 179.

No. 74–50. HENDERSON ET AL. *v.* MOYE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 496 F. 2d 973.

No. 74–89. SWANK, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* RODRIGUEZ ET AL. C. A. 7th Cir. Motion of respondent Rodriguez for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 496 F. 2d 1110.

No. 74–97. DIAMOND ET AL. *v.* BLAND, SHERIFF, ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would grant certiorari. Reported below: 11 Cal. 3d 331, 521 P. 2d 460.

No. 74–102. KATZ *v.* CARTE BLANCHE CORP. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 496 F. 2d 747.

No. 74–129. TAUB, HUMMEL & SCHNALL, INC. *v.* I. C. HERMAN & CO., INC. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 497 F. 2d 1301.

Rehearing Denied

No. 72–863. FIORELLA ET AL. *v.* UNITED STATES, 417 U. S. 917;

No. 72–1713. SECRETARY OF THE NAVY *v.* AVRECH, 418 U. S. 676;

No. 72–5278. COX ET AL. *v.* UNITED STATES, 417 U. S. 918;

No. 73–507. HAMLING ET AL. *v.* UNITED STATES, 418 U. S. 87;

No. 73–781. SCHERK *v.* ALBERTO-CULVER CO., 417 U. S. 506;

No. 73–788. BROWN *v.* UNITED STATES, 418 U. S. 928;

No. 73–905. TALBERT *v.* UNITED STATES, 416 U. S. 982; and

No. 73–908. COTE *v.* UNITED STATES, 418 U. S. 954. Petitions for rehearing denied.

No. 73–933. PARSONS ET AL. *v.* KNOPP ET UX., 417 U. S. 908;

No. 73–1003. NATIONAL INDIAN YOUTH COUNCIL ET AL. *v.* BRUCE ET AL., 417 U. S. 920;

No. 73–1075. THEVIS *v.* UNITED STATES, 418 U. S. 932;

No. 73–1145. TECHNICAL DEVELOPMENT CORP. ET AL. *v.* UNITED STATES, 416 U. S. 983;

No. 73–1222. TIDEWATER OIL CO. *v.* UNITED STATES ET AL., 418 U. S. 906;

No. 73–1224. PHILLIPS PETROLEUM CO. *v.* UNITED STATES ET AL., 418 U. S. 906;

No. 73–1284. MERVIN *v.* FEDERAL TRADE COMMISSION, 417 U. S. 930;

No. 73–1355. KUNTZWEILER *v.* UNITED STATES, 417 U. S. 910;

No. 73–1361. BALDRIDGE ET AL. *v.* HADLEY ET AL., 417 U. S. 910;

No. 73–1429. LOWE ET AL. *v.* UNION OIL CO. OF CALIFORNIA ET AL., 417 U. S. 931;

No. 73–1463. KONIGSBERG ET AL. *v.* NIXON, 417 U. S. 931;

No. 73–1480. UMPHREY ET AL. *v.* MCGRAW-EDISON CO., 417 U. S. 912;

No. 73–1482. MANZARDO ET AL. *v.* PULLMAN CO. ET AL., 417 U. S. 912;

No. 73–1487. DEMICHELE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 417 U. S. 968;

No. 73–1529. GENERAL TIRE & RUBBER CO. *v.* FIRESTONE TIRE & RUBBER CO., 417 U. S. 932;

No. 73–5265. KOKOSZKA *v.* BELFORD, TRUSTEE IN BANKRUPTCY, 417 U. S. 642;

No. 73–5547. HUGUEZ *v.* CALIFORNIA, 418 U. S. 905; and

No. 73–6298. FRAZIER *v.* COMMISSIONER OF INTERNAL REVENUE, 416 U. S. 990. Petitions for rehearing denied.

No. 73–6305. O'Brien *v.* California, 417 U. S. 936;

No. 73–6328. O'Kelly *v.* Iowa, 417 U. S. 936;

No. 73–6397. Sims *v.* Utah, 417 U. S. 970;

No. 73–6447. McKernie *v.* United States. 417 U. S. 934;

No. 73–6518. Crandall *v.* Texas, 417 U. S. 902;

No. 73–6519. Winkfield *v.* Ohio, 417 U. S. 902;

No. 73–6525. Mendes *v.* Railway Express Agency, Inc., et al., 417 U. S. 916;

No. 73–6570. Hall *v.* Alabama, 417 U. S. 917;

No. 73–6597. Carter *v.* Estelle, Corrections Director, et al., 417 U. S. 966;

No. 73–6615. Lane *v.* Kern, Sheriff, 417 U. S. 972;

No. 73–6619. Hunter *v.* Appellate Court of Illinois, First District, Fourth Division, et al., 417 U. S. 966;

No. 73–6653. Bartos *v.* Brigham Young University et al., 417 U. S. 973;

No. 73–6654. Sangster *v.* United States, 417 U. S. 950; and

No. 73–6688. Kaplan *v.* Associated-East Mortgage Co., 417 U. S. 950. Petitions for rehearing denied.

No. 73–740. Chicago & Suburban Refuse Disposal Assn. et al. *v.* A. Cherney Disposal Co. et al., 414 U. S. 1131;

No. 73–1091. Peachtree News Co., Inc. *v.* United States, 418 U. S. 932;

No. 73–1161. Paris Adult Theatre I et al. *v.* Slaton, District Attorney, et al., 418 U. S. 939;

No. 73–1388. Mead et al. *v.* Horvitz Publishing Co. et al., 416 U. S. 985; and

No. 73–5150. O'Brien *v.* California, 414 U. S. 1006. Motions for leave to file petitions for rehearing denied.

No. 73–5863. VALLEY *v.* UNITED STATES, 416 U. S. 936; 417 U. S. 927; and

No. 73–6195. SAYLES *v.* GESELL, U. S. DISTRICT JUDGE, 416 U. S. 934; 417 U. S. 937. Motions for leave to file second petitions for rehearing denied.

No. 73–6589. SAYLES *v.* SIRICA, U. S. DISTRICT JUDGE, ET AL., 417 U. S. 943. Petition for rehearing and other relief denied.

OCTOBER 21, 1974

Affirmed on Appeal

No. 73–1371. NEW YORK ON BEHALF OF NEW YORK COUNTY ET AL. *v.* UNITED STATES ET AL.; and

No. 73–1740. NEW YORK ON BEHALF OF NEW YORK COUNTY ET AL. *v.* UNITED STATES ET AL. Affirmed on appeals from D. C. D. C.

No. 74–183. KOPLIN ET AL. *v.* VILLAGE OF HINSDALE ET AL. Affirmed on appeal from D. C. N. D. Ill.

No. 74–194. WALL ET AL. *v.* HARDWICK ET AL.; and

No. 74–196. HARDWICK ET AL. *v.* WALL ET AL. Affirmed on appeals from D. C. N. D. Ga. Reported below: 379 F. Supp. 175.

No. 73–1612. LUETKEMEYER ET AL. *v.* KAUFMANN ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 364 F. Supp. 376.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, dissenting.

Missouri provides bus transportation to school for public school children, but not for private school children, living specified distances from their schools. Mo. Rev. Stat. §§ 167.231, 167.251, 163.161 (1969). Appellant Urban Luetkemeyer, a Missouri taxpayer, sends his children, in accordance with his religious conscience, to

a school related to the Roman Catholic Church. He brought this lawsuit claiming that that the denial of bus transportation to parochial school children violates his and his children's due process, equal protection, and free exercise rights. The District Court, Judge Gibson dissenting, ruled in favor of appellees, and this Court now summarily affirms.

In *Everson* v. *Board of Education,* 330 U. S. 1 (1947), the Court upheld a state statute authorizing local school districts to provide bus transportation to school for parochial school children. This case presents the question whether in some circumstances a State may be constitutionally compelled to provide such transportation. This Court has never ruled on this question. Cf. *Norwood* v. *Harrison,* 413 U. S. 455, 462 (1973); *Everson* v. *Board of Education, supra,* at 16.

In *Everson* the Court noted that persons could not be excluded by a State *"because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." *Ibid.* (emphasis in original). The Court found that the New Jersey statute in question "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.,* at 18. Clearly this Court viewed the program of bus transportation as a service "so separate and so indisputably marked off from the religious function . . ." that it could not be considered aid to religious schools in violation of the Establishment Clause. *Ibid.* See also *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 781–782 (1973); *Board of Education* v. *Allen,* 392 U. S. 236, 242 (1968).

The District Court in this case rejected appellants' equal protection claim on the ground that the Missouri program, in excluding private school children from the bus service, was in pursuit of a valid state interest in

"maintaining a very high wall between church and state." 364 F. Supp. 376, 383 (WD Mo. 1973). The enforcement of church-state separation could in many instances be a valid state interest, but after *Everson* it would be difficult to assert that refusal to extend busing to parochial school children, without more, furthers a legitimate state interest in avoiding church-state entanglements. On the contrary, the "benefits of public welfare legislation"—here a "general program to help parents get their childen . . . safely and expeditiously to and from accredited schools," *Everson, supra,* at 16, 18—seem to be denied because certain students are seeking religious training. Without a valid interest supporting the different treatment accorded public school and parochial school students, that classification would violate federal equal protection principles. Moreover, the arbitrariness of the denial of a general public service raises the question whether the State has not become the "adversary" of the religion and has placed burdens on appellants' free exercise rights.

I would note probable jurisdiction and set this case for argument.

No. 73–1718. Franchise Tax Board of California et al. *v.* United Americans for Public Schools et al. Affirmed on appeal from D. C. N. D. Cal.

Mr. Justice White, joined by The Chief Justice and Mr. Justice Rehnquist, dissenting.

The District Court struck down the California statute providing state income-tax reductions for taxpayers sending their children to nonpublic schools. The Court summarily affirms this judgment. For the reasons stated in my dissent in *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 813–824 (1973), I disagree and respectfully dissent.

No. 74–377. KANAPAUX *v.* ELLISOR, DIRECTOR, SOUTH CAROLINA STATE ELECTION COMMISSION, ET AL. Appeal from D. C. S. C. Motions of John C. West et al. and Charles D. Ravenel for leave to file briefs as *amici curiae* granted. Judgment affirmed.

Appeals Dismissed

No. 73–7028. BULGREN *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–143. CAMP ET AL. *v.* STRAUGHN, DIRECTOR, DEPARTMENT OF REVENUE, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 293 So. 2d 689.

No. 74–148. SOUTHERN HAULERS, INC. *v.* DEPARTMENT OF PUBLIC SAFETY ET AL. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question. Reported below: 292 Ala. 380, 295 So. 2d 242.

No. 74–192. CITY OF VIRGINIA, MINNESOTA, ET AL. *v.* NYBERG ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE WHITE would postpone question of jurisdiction to hearing of case on the merits. Reported below: 495 F. 2d 1342.

Certiorari Granted—Vacated and Remanded

No. 73–2047. BUCK ET AL. *v.* IMPEACH NIXON COMMITTEE ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded to ascertain whether a case or controversy still exists, and, if so, for reconsideration in light of *Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974). Reported below: 498 F. 2d 37.

No. 73–6795. HAYLES *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his brief for the United States filed September 19, 1974, judgment of the United States Court of Appeals for the Fifth Circuit vacated and case remanded to the United States District Court for the Southern District of Texas to permit the Government to dismiss the charges against petitioner. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST dissent. Reported below: 492 F. 2d 125.

Miscellaneous Orders

No. 73–296. HUFFMAN ET AL. *v.* PURSUE, LTD. Appeal from D. C. N. D. Ohio. [Probable jurisdiction noted, 415 U. S. 974.] Brief for appellants does not comply with this Court's Rules 39 and 40 with respect to conciseness, statement of questions without unnecessary detail, and printing of appendices thereto. Accordingly, as provided in paragraph 5 of Rule 40, brief of appellants is hereby stricken. Counsel for appellants may file a brief complying with the Rules within 20 days of the date of this order. Oral argument will be allowed only by counsel who have filed briefs that conform to the Rules. MR. JUSTICE DOUGLAS dissents.

No. 73–1004. SOUTHEASTERN PROMOTIONS, LTD. *v.* CONRAD ET AL. C. A. 6th Cir. [Certiorari granted, 415 U. S. 912.] Motion of Charles H. Keating, Jr., for leave to file a brief as *amicus curiae* denied.

No. 73–1446. ROE ET AL. *v.* DOE. Ct. App. N. Y. [Certiorari granted, 417 U. S. 907.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* denied. Motions of Association of American Publishers, Inc., and American Psychiatric Assn. et al. for leave to file briefs as *amici curiae* granted.

No. 73–6033. Roe et al. *v.* Norton, Commissioner of Welfare. Appeal from D. C. Conn. [Probable jurisdiction noted, 415 U. S. 912.] Motion of children of appellants for divided argument with appellants and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Appellee also allotted 10 additional minutes for oral argument.

No. 74–167. United States Railway Assn. *v.* Connecticut General Insurance Corp. et al. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, *ante*, p. 802.] Motion of Trustees of Reading Co. for leave to file a brief as *amicus curiae* granted.

Probable Jurisdiction Noted or Postponed

No. 73–1461. Stanton *v.* Stanton. Appeal from Sup. Ct. Utah. Probable jurisdiction noted. Reported below: 30 Utah 2d 315, 517 P. 2d 1010.

No. 73–1933. United States *v.* Citizens & Southern National Bank et al. Appeal from D. C. N. D. Ga. Probable jurisdiction noted. Reported below: 372 F. Supp. 616.

No. 73–6587. Herring *v.* New York. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 43 App. Div. 2d 816, 351 N. Y. S. 2d 368.

No. 73–6739. Costarelli *v.* Massachusetts. Appeal from Municipal Ct. of Boston. Motion for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 73–1531. Johnson et al. *v.* Mississippi et al. C. A. 5th Cir. Certiorari granted. Reported below: 488 F. 2d 284.

No. 74–8. O'Connor *v.* Donaldson. C. A. 5th Cir. Certiorari granted. Reported below: 493 F. 2d 507.

No. 73–1994. Vella *v.* Ford Motor Co. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition which reads as follows: "Is a disabled seaman who contracted by trauma a permanent disease while in the service of a vessel entitled to maintenance and cure payments during the interim between the period the incident occurred and the time the disease was medically diagnosed and proclaimed incurable?" Reported below: 495 F. 2d 1374.

No. 73–1995. Breed, Director, California Youth Authority *v.* Jones. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 497 F. 2d 1160.

No. 73–2055. Securities Investor Protection Corp. *v.* Barbour et al. C. A. 6th Cir. Certiorari granted limited to the following questions:

1. Whether customers of a Member have an implied private right of action to compel SIPC to meet its alleged obligations to them under the Act, despite § 7 (b) thereof which grants that right only to the Securities and Exchange Commission?

2. If such a right of action can be implied, whether a receiver of a Member has standing to maintain it?

Reported below: 496 F. 2d 145.

No. 73–6650. Brown *v.* Illinois. Sup. Ct. Ill. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 56 Ill. 2d 312, 307 N. E. 2d 356.

No. 74–107. Preiser, Commissioner of Correctional Services of New York, et al. *v.* Newkirk. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma*

pauperis and certiorari granted. In addition to question presented by the petition, parties are directed to brief and argue question of mootness. Reported below: 499 F. 2d 1214.

No. 74–175. MIDDENDORF, SECRETARY OF THE NAVY, ET AL. *v.* HENRY ET AL.; and

No. 74–5176. HENRY ET AL. *v.* MIDDENDORF, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Motion of petitioner in No. 74–5176 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 493 F. 2d 1231.

Certiorari Denied. (See also Nos. 73–7028 and 74–192, *supra.*)

No. 73–1578. IVELI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 1237.

No. 73–1663. GARDNER *v.* UNITED STATES; and

No. 73–6631. SANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1399.

No. 73–1809. UNITED STATES *v.* BRADSHAW. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 1097.

No. 73–1838. CRISLER, COMMISSIONER OF PUBLIC SAFETY OF MISSISSIPPI, ET AL. *v.* MORROW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1053.

No. 73–1878. ZANE ET AL. *v.* UNITED STATES; and

No. 73–1901. PERSKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 683.

No. 73–1922. FIRST PRESBYTERIAN CHURCH OF FOREST PARK ET AL. *v.* LOWE ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 404, 308 N. E. 2d 801.

No. 73–1930. JEFFRIES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 315 A. 2d 163.

No. 73–1952. TOSINI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1371.

No. 73–1955. AMOS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 496 F. 2d 1269.

No. 73–1960. ANGIULO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 497 F. 2d 440.

No. 73–1975. FERRARO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 922.

No. 73–1988. TEXAS CITY DIKE & MARINA, INC. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1115.

No. 73–2003. SPIEGEL, INC. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 494 F. 2d 59.

No. 73–2009. SAVARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 490.

No. 73–2032. LOCAL 399, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 499 F. 2d 56.

No. 73–2036. INQUIPCO, INC., DBA INDUSTRIAL EQUIPMENT CO., ET AL. *v.* COMMERCE UNION BANK. Ct. App. Tenn. Certiorari denied. Reported below: 515 S. W. 2d 651.

No. 73–2046. FIVE SMITHS, INC. *v.* HOLLAWAY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 499 F. 2d 1321.

No. 73–2054. Hudson Berlind Corp. *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. Reported below: 494 F. 2d 1200.

No. 73–2067. Simpson *v.* Simpson. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 803.

No. 73–6682. Martinez-Miramontes *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 494 F. 2d 808.

No. 73–6774. Ephraim *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1405.

No. 73–6807. Bowden *v.* United States;
No. 73–6842. Adams *v.* United States; and
No. 73–6906. Jenkins *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 73–6841. Rosoto et al. *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 3d 939, 519 P. 2d 1065.

No. 73–6846. Penick *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 496 F. 2d 1105.

No. 73–6885. Downen et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 496 F. 2d 314.

No. 73–6901. Hodge *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1399.

No. 73–6924. Garcia *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 492 F. 2d 395.

No. 73–6927. Mitchell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 9.

No. 73–6960. WYNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6962. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6967. VILLONE *v.* UNITED STATES; and
No. 73–7002. PALMERI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6970. CAULTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 498 F. 2d 412.

No. 73–6974. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 753.

No. 73–6976. RODRIGUEZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1371.

No. 73–6977. BROOKS *v.* BLACKLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–6979. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1371.

No. 73–6984. WHITTINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 460.

No. 73–7000. HUNTLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 1370.

No. 73–7009. KILGARIFF *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–7011. WEEMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–7016. VIERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–7021. HOWARD *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–7023. WEST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 494 F. 2d 1314.

No. 73–7034. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 492.

No. 73–7043. RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 1.

No. 73–7044. DORROUGH *v.* CONGRESS OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–7048. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 434.

No. 73–7052. WARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 922.

No. 73–7053. BAILLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 19, 495 F. 2d 1075.

No. 73–7056. MARSHALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 1375.

No. 73–7057. DISHER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 F. 2d 1265.

No. 73–7062. KOPP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 73–7065. BODEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 1370.

No. 73–7068. Bowdach *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 1172.

No. 73–7072. Crowder *v.* Whitehead et al. C. A. 9th Cir. Certiorari denied.

No. 73–7078. Gisher *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 1403.

No. 73–7083. Ferguson *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 268, 498 F. 2d 1001.

No. 73–7100. Smith *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 74–38. Yokozeki *v.* State Bar of California. Sup. Ct. Cal. Certiorari denied. Reported below: 11 Cal. 3d 436, 521 P. 2d 858.

No. 74–42. Cubic Corp. *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 74–46. Equity Securities Corp. et al. *v.* El Khadem. C. A. 9th Cir. Certiorari denied. Reported below: 494 F. 2d 1224.

No. 74–60. Tillem *v.* New Jersey. Super. Ct. N. J. Certiorari denied. Reported below: 127 N. J. Super. 421, 317 A. 2d 738.

No. 74–64. Abate et al. *v.* Pittsburgh Plate Glass Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 494 F. 2d 799.

No. 74–72. Fletcher *v.* American Security & Trust Co., Trustee. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 481.

No. 74–79. Howard *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 226 Pa. Super. 22, 312 A. 2d 54.

No. 74–82. KITTYHAWK, LTD., ET AL. *v.* CITY OF MIDDLETOWN, OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 74–86. LEONARD *v.* STRAUSS. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 74–113. KEYS *v.* SAWYER. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 876.

No. 74–130. MOTORISTS MUTUAL INSURANCE CO. *v.* SIMPSON, ADMINISTRATRIX, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 494 F. 2d 850.

No. 74–134. HOLSAPPLE, A MINOR, BY HOLSAPPLE *v.* WOODS, SUPERINTENDENT, ODIN COMMUNITY UNIT SCHOOL DISTRICT NO. 700, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 2d 49.

No. 72–1727. VALEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 467.

No. 73–1950. WALLIS *v.* O'KIER. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 1323.

No. 73–2062. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6760. ROBINSON *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 65 N. J. 273, 321 A. 2d 234.

No. 73–6909. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 3.

No. 73–7022. CORBIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 498 F. 2d 1398.

No. 74–106. ALBERTO-CULVER CO. ET AL. *v.* LAMAUR, INC. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 496 F. 2d 618.

No. 74–5058. BAKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 495 F. 2d 1370.

No. 73–1477. PRICE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari in this case and summarily reverse the judgment. Reported below: 214 Va. 490, 201 S. E. 2d 798.

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

Petitioner, the manager of a movie theater, was convicted in the Corporation Court of the city of Danville, Va., of exhibiting an allegedly obscene motion picture entitled "Anomalies." The statute under which he was convicted, Va. Code Ann. § 18.1–230 (Supp. 1973), provides in pertinent part:

> "Every person who knowingly . . . [p]roduces, promotes, prepares, presents, manages, directs, carries on or participates in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture . . . shall be guilty of a misdemeanor."

As used in that section:

> "The word 'obscene' . . . shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." § 18.1–227 (1960).

The Virginia Supreme Court affirmed the conviction. This Court granted certiorari, vacated the judgment, and remanded the case to the Virginia Supreme Court for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 912. On remand, the Virginia Supreme Court again affirmed the conviction.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 18.1–230, as it incorporates the definition of "obscene" in § 18.1–227, is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, and because the judgment of the Virginia Supreme Court was rendered after *Miller,* I would reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

Heller v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed material was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1526. CANGIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari in this case and summarily reverse the judgment. Reported below: 491 F. 2d 906.

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

Petitioner was convicted in the United States District Court for the Eastern District of New York of transporting allegedly obscene materials in interstate commerce for the purpose of sale in violation of 18 U. S. C. § 1465, which provides in pertinent part as follows:

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print,

silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The Court of Appeals for the Second Circuit affirmed, 491 F. 2d 906 (1974).

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1465, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Second Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his con-

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

viction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1548. WINSLOW *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Miller v. California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari in this case and summarily reverse the judgment.

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

Petitioner was convicted in the Corporation Court of the city of Norfolk, Virginia, of selling and distributing an allegedly obscene movie and an allegedly obscene magazine. The statute under which he was convicted, Va. Code Ann. § 18.1–228 (Supp. 1973), provides in pertinent part:

> "Every person who knowingly . . . [p]ublishes, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene item . . . shall be guilty of a misdemeanor."

As used in that section:

> "The word 'obscene' . . . shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." § 18.1–227 (1960).

The Supreme Court of Virginia affirmed by order on

October 17, 1972. This Court granted certiorari, vacated the judgment of the Supreme Court of Virginia, and remanded the case for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 913. The Supreme Court of Virginia again affirmed the conviction.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 18.1–228, as it incorporates the definition of "obscene" in § 18.1–227, is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, and because the judgment of the Supreme Court of Virginia was rendered after *Miller,* I would reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–1562. JONES *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner, a lieutenant in the Air Force, was convicted by court-martial under Arts. 92 (failure to obey order or regulation), 10 U. S. C. § 892, and 134 (general article), 10 U. S. C. § 934, of the Uniform Code of Military Justice.

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

His offense was "failure to do monitor duty." Petitioner's punishment was a fine of $1,500, to be paid in six monthly installments to be deducted from his paycheck.[1] After exhausting his appeals, petitioner sought a writ of habeas corpus from the District Court, 28 U. S. C. § 2241, on the ground that Art. 92 is unconstitutionally vague. The writ was denied below on the sole ground that petitioner was not in "custody" as required by § 2241.

In my view, the District Court should have treated petitioner's complaint as either one seeking a declaration that his punishment was not lawfully imposed, 28 U. S. C. § 2201, or one to compel expunction of his conviction, 28 U. S. C. § 1361, and reached the merits. Several Courts of Appeals have entertained actions to remove penalties imposed by military tribunals where the aggrieved plaintiffs were not confined, but presented constitutional challenges to the imposition of punishment. See *Kauffman* v. *Secretary of the Air Force,* 135 U. S. App. D. C. 1, 415 F. 2d 991 (1969) (suit protesting discharge and forfeiture of all pay and allowances); *Ashe* v. *McNamara,* 355 F. 2d 277 (CA1 1965) (suit to compel correction of dishonorable discharge); *Smith* v. *McNamara,* 395 F. 2d 896 (CA10 1968) (dishonorable discharge); *Mindes* v. *Seaman,* 453 F. 2d 197 (CA5 1971) (protesting involuntary transfer to reserve status). See also *Ragoni* v. *United States,* 424 F. 2d 261 (CA3 1970) (bad-conduct discharge).[2]

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[1] The fine had not been fully paid when he filed the application for habeas corpus.

[2] In addition, the Court of Claims has reviewed alleged constitutional defects in a court-martial conviction in adjudicating claims for backpay, 28 U. S. C. § 1346; *Augenblick* v. *United States,* 180 Ct. Cl. 131, 377 F. 2d 586 (1967), rev'd on other grounds, 393 U. S. 348 (1969). In the two Courts of Appeals decisions to reject nonhabeas review, it did not appear that the complainant was under a continuing disability as a result of disciplinary action. In *Davies* v. *Clifford,*

Petitioner's lawsuit represents an effort to have his constitutional challenges to his conviction considered by an Art. III court. A determination of these claims by a federal court is an indispensable safeguard of the constitutional rights of an accused subject to military process. While the military tribunals have responded to some constitutional claims of criminal defendants—self-incrimination for example[3]—they have been less sensitive to others. We noted in *O'Callahan* v. *Parker*, 395 U. S. 258, 265–266 (1969), that the military justice system has been ill-equipped to deal with claims of overbreadth and vagueness. The Uniform Code of Military Justice itself is fraught with opportunity for conflict between military authority and individual liberties. Articles 88 (contempt toward officials), 10 U. S. C. § 888, 133 (conduct unbecoming an officer and a gentleman), 10 U. S. C. § 933, and 134 (general article), 10 U. S. C. § 934, permit military authority to overbear protected individual expression. When this occurs, it is not surprising that military tribunals, reared in a setting where obedience and conformity are the watchwords, should tend to come down on the side of authority.

Servicemen may challenge their confinement by habeas corpus to insure that constitutional objections to their

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393 F. 2d 496 (CA1 1968), the court dismissed a suit to set aside a military conviction, but the dishonorable discharge it had produced had already been changed to an honorable one, and the plaintiff alleged no continuing penalty. In *United States* v. *Carney*, 406 F. 2d 1328 (CA2 1969), the court dismissed a similar suit without mentioning the penalty.

[3] A privilege against self-incrimination is codified in Art. 31 of the Uniform Code of Military Justice, 10 U. S. C. § 831. By interpretation it has been expanded to include the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), by the Court of Military Appeals. See *United States* v. *Tempia*, 16 U. S. C. M. A. 629, 37 C. M. R. 249 (1967).

convictions received "fair consideration" before the military tribunals. *Burns* v. *Wilson,* 346 U. S. 137, 144 (1953). To withhold the same opportunity from servicemen subjected to nonconfinement penalties raises a substantial federal question of a denial of equal protection. The absence of confinement does not render the punishment trivial. Penalties not involving imprisonment—discharges, forfeitures, demotions—are frequently employed by military authorities, often with devastating effect upon the life and livelihood of the affected serviceman. Judge Edgerton, writing for the Court of Appeals in *Kauffman* v. *Secretary of the Air Force, supra,* stated the need for an alternative mechanism of review:

> "To hold that collateral review is contingent on confinement in every case would arbitrarily condition the serviceman's access to civilian review of constitutional errors upon a factor unrelated to the gravity of the offense, the punishment, and the violations of the serviceman's rights." 135 U. S. App. D. C., at 6, 415 F. 2d, at 996.

Moreover, refusal to entertain petitioner's lawsuit gives rise to the substantial constitutional question posed by denial of access to the federal courts. Whether the Constitution permits Congress to forbid an Art. III court to review constitutional challenge to administrative penalties is a question the Court has not addressed explicitly. Instead the Court has construed statutory review provisions to permit a limited scrutiny to assure fair proceedings, *Estep* v. *United States,* 327 U. S. 114 (1946); *Kessler* v. *Strecker,* 307 U. S. 22 (1939), and, on occasion, *de novo* determination of facts bearing upon constitutional claims, see *Ng Fung Ho* v. *White,* 259 U. S. 276 (1922); *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38 (1936); *Crowell* v. *Benson,* 285 U. S. 22 (1932).

See also 4 K. Davis, Administrative Law Treatise § 28.18 (1958). To hold that petitioner here is not entitled to a judicial determination of the constitutional objection is to impute to Congress a deliberate exclusion of review for a class of convictions, a course fraught with constitutional dangers which Congress has heretofore eschewed.

I would grant certiorari.

No. 73–1639. SULAIMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari in this case and summarily reverse the judgment. Reported below: 490 F. 2d 78.

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

Petitioners were convicted in the United States District Court for the Southern District of Florida of using the mails to distribute allegedly obscene materials in violation of 18 U. S. C. § 1461, which provides in pertinent part as follows:

> "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 . . .
>
> . . . . . .

"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 . . . of anything declared by this section . . . to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Fifth Circuit affirmed, 490 F. 2d 78 (1974).

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1461, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

their cases decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–1682. BLANK *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari in this case and summarily reverse the judgment.

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

Petitioner was convicted in the Municipal Court of Los Angeles of exhibiting an allegedly obscene motion picture in violation of Cal. Penal Code § 311.2 (a) (1970), which provides in pertinent part as follows:

> "Every person who knowingly . . . exhibits to others, any obscene matter is guilty of a misdemeanor."

As used in § 311.2:

> " 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." § 311 (a).

On appeal to the Appellate Department of the Superior Court of California for the County of Los Angeles, the case was held to await this Court's decisions in *Kaplan* v. *California,* 413 U. S. 115 (1973), and related cases. The Appellate Department then affirmed the conviction, and certification to the Court of Appeal was denied.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2, as it incorporates the definition of "obscene matter" in § 311 (a), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari and, since the judgment of the Appellate Department was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1974) (BRENNAN, J., dissenting).

Further, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ulti-

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

mately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1722. KAPLAN *v.* CALIFORNIA. App. Dept., Super Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari in this case and summarily reverse the judgment.

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

Petitioner was convicted in the Municipal Court of Los Angeles of selling an allegedly obscene book in violation of Cal. Penal Code § 311.2 (a) (1970), which provided in pertinent part at the time of the alleged offense as follows:

> "Every person who knowingly . . . prepares, publishes, or prints, . . . offers to distribute, distributes, or exhibits . . . any obscene matter is guilty of a misdemeanor."

As used in § 311.2, "obscene" means:

> "taken as a whole, the predominant appeal of [the matter] to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." § 311 (a).

On appeal, the Appellate Department of the Superior Court of California for the County of Los Angeles affirmed the conviction. Certification to the Court of Appeal was sought and denied. This Court then granted certiorari, vacated the judgment of the Appellate Department, and remanded for consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 115 (1973). On remand, the Appellate Department again affirmed the conviction.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2, as it incorporated the definition of "obscene" in § 311 (a), was constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari and, since the judgment of the Appellate Department was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Further, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1727. CIOFFI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 493 F. 2d 1111.

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

Petitioner was convicted of obstruction of justice and conspiracy to obstruct justice by threatening, intimidating, or otherwise endeavoring to influence a grand jury witness. The witness, one Perry Scheer, had been a principal in a collapsed brokerage house whose activities were under investigation by the SEC and the FBI; there was strong evidence that Scheer had been involved in at least seven illegal securities transactions. Petitioner, who was allegedly in league with various persons who could have been harmed by Scheer's testimony before a grand jury investigating the affairs of the brokerage house, met with Scheer on several occasions and sought to secure Scheer's silence through veiled threats and suggestions that Scheer "take the Fifth" (or, in more contemporary parlance, "stonewall it"). Unbeknownst to petitioner, Scheer by this time was cooperating fully with federal authorities, and had been fitted out with a recording device on which he recorded several of his conversations with petitioner; these recordings were introduced at trial to corroborate and supplement Scheer's own testimony, and were played several times for the jury. I am unable to agree that the use of recordings made under

such circumstances is consistent with constitutional guarantees.

In a series of decisions beginning with *On Lee* v. *United States*, 343 U. S. 747 (1952), this Court has held that electronic interception or recording of conversations with the consent of one party does not violate Fourth Amendment standards.[1] With one notable exception, however, these decisions were handed down prior to *Katz* v. *United States*, 389 U. S. 347 (1967), in which we formally interred much of their conceptual underpinning by holding that Fourth Amendment protections rest upon reasonable expectations of privacy rather than upon common-law property principles. That exception came in *United States* v. *White*, 401 U. S. 745 (1971), where four Members of the Court held that *On Lee* remained good law after *Katz*, four others Members maintained with equal adamancy that it did not, and Mr. Justice Black (adhering to his dissent in *Katz*) found it unnecessary to reach the issue.

At a bare minimum, *Katz* must be read to require that monitoring of this sort be conducted only pursuant to a warrant: " 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' *United States* v. *Jeffers*, 342 U. S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." 389 U. S., at 357 (footnotes omitted). In the absence of such judicial supervision, there is no effective safeguard against the possibility of an uncontrolled electronic police state.[2]

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[1] See, *e. g.*, *Lopez* v. *United States*, 373 U. S. 427 (1963); *Osborn* v. *United States*, 385 U. S. 323 (1966); *United States* v. *White*, 401 U. S. 745 (1971).

[2] See *United States* v. *White*, *supra*, at 760 (DOUGLAS, J., dissenting); *id.*, at 755–756 (BRENNAN, J., concurring in the result). In

In my view the Executive Branch acts unlawfully when it invades an individual's privacy through trickery or fraud. See, *e. g., Lewis* v. *United States,* 385 U. S. 206, 344–347 (1966) (DOUGLAS, J., dissenting); *Hoffa* v. *United States,* 385 U. S. 293, 347–348 (1966) (separate opinion of DOUGLAS, J.). The dangers posed by such invasions become particularly acute, however, when they are achieved through or accompanied by electronic monitoring of the sort presented here.[3]

I would grant certiorari.

No. 73–1728. DUNN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

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

Petitioner seeks review of the Service's order deporting him to Canada, his nation of citizenship. The Ninth Circuit noted that the Service's "discretion . . . might have been exercised with greater compassion," but none-

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Osborn v. *United States, supra,* the Court upheld the use of a recording of a face-to-face conversation where there had been prior judicial authorization for the recording. 385 U. S., at 329–330. In my dissent in *Osborn* and elsewhere, I have set forth my view that even prior judicial approval cannot validate intrusions into constitutionally protected zones of privacy for the seizure of mere evidentiary material; the need for this protection is particularly acute when the items to be seized are an individual's own words, thoughts, papers and personal effects, even if no Fifth Amendment problem is squarely presented. *Id.,* at 349–354 (DOUGLAS, J., dissenting); *Warden* v. *Hayden,* 387 U. S. 294, 319–325 (1967) (DOUGLAS, J., dissenting); *Couch* v. *United States,* 409 U. S. 322, 343 (1973) (DOUGLAS, J., dissenting). In light of the absence of any attempt to secure judicial authorization in the present case, I see no need to press that view further at this time.

[3] See, *e. g., Osborn* v. *United States, supra,* at 352–354 (DOUGLAS, J., dissenting); *United States* v. *White, supra,* at 762–765 (DOUGLAS, J., dissenting); *Lopez* v. *United States, supra,* at 463–471 (BRENNAN, J., dissenting).

theless upheld the order on the theory that "the scope of . . . review in this area is extremely narrow."

The facts are peculiar; or, more accurately, the Service's action is peculiar in light of the facts. Moving to this country with his parents in 1953 (at age 9), petitioner acquired permanent resident alien status. As such, he was subject to the draft, 62 Stat. 605, as amended, 65 Stat. 76, 50 U. S. C. App. § 454 (a), and he duly registered on his 18th birthday. In August 1966, he was ordered to report for induction on September 28, 1966. Possessing strong views against war and conscription, petitioner decided to go to Canada, rather than serve. At the border, he turned in his Alien Immigration Card but expressly refused to sign a formal renunciation of his permanent resident status. Very quickly, he thought better of his decision to leave. On September 28, his induction date, petitioner telephoned his draft board to announce that he was returning to the United States to surrender to a United States Attorney and to accept the legal penalty for refusing induction. On October 3, 1966, petitioner flew to Chicago and turned himself in to the United States Attorney. The Government took no action for 21 months, during which time petitioner studied at an American university.

Finally, in July 1968, petitioner was indicted under 62 Stat. 622, 50 U. S. C. App. § 462 (a), for "evad[ing] or refus[ing] . . . service in the armed forces." He pleaded guilty and was sentenced to six months' imprisonment and 18 months' probation, the latter conditioned on his doing civilian work of national importance. Petitioner served this sentence in full.

Two years later, the Service moved to deport him, on grounds that he had fled the country to evade the draft, 66 Stat. 184, 8 U. S. C. § 1182 (a)(22), and abandoned his immigrant status in the process, 66 Stat. 183, as amended,

79 Stat. 918, 8 U. S. C. § 1182 (a)(20). This was a surprise, for petitioner thought that the books on this matter had been balanced by his voluntary return to the United States, surrender to authorities, guilty plea, and service of sentence. The Service found that no Government official ever promised petitioner that such would be the case. Still, the reasonableness of petitioner's impression is clear enough. Prevailing law afforded aliens an exemption from Selective Service liability if they were willing to forfeit permanent resident status and any chance at eventual citizenship, 62 Stat. 606, 50 U. S. C. App. § 454 (a) (1964 ed.). Exercising this option meant an almost certain loss of an alien's right to remain in this country. Rather than exercise this option, petitioner accepted draft law liability, and the Government solemnized his choice with prosecution, conviction, and punishment under the draft laws. Now the same Government, in the guise of the Immigration Service, wishes to disregard his earlier choice, and the burdens imposed incident to it, and to deport petitioner as if none of this had happened. In my view, the two legal grounds asserted to support deportation do not overcome the obvious injustice of the order.

First: The Service found petitioner deportable for having re-entered the country, after his flight to Canada,

> "not in possession of a valid unexpired immigrant visa." 8 U. S. C. § 1182 (a)(20).

The theory is that petitioner abandoned permanent resident status, and thus his visa, when he turned in his alien card at the border. Standing alone, this theory would not be unreasonable. But I cannot square it with the fact the Government prosecuted petitioner for breaching an induction order premised on his status as a permanent resident. At the time, nonresident aliens were also subject to the draft, but only after remaining "in the United

States in a status other than that of a permanent resident for a period exceeding one year." 50 U. S. C. App. § 454 (a) (1964 ed.). If petitioner lost his permanent resident status at the border, his return would not have made him "liable for training and service in the Armed Forces" under § 454 (a) until a year later, and certainly that new liability would have required a new induction order.

By submitting his case promptly and in orderly fashion to the United States Attorney, petitioner rightfully expected a responsible examination of his case by the Government. In my judgment, the decision to prosecute, nearly two years later, implied Government adherence to the view, held by petitioner then as now, that his permanent resident status, and thus the legal premise of the induction order, had not been undermined by his brief démarche in Canada. Having led petitioner through the rigors of indictment, conviction, and punishment on this theory, the Government should now be precluded from changing its mind. Cf. *Raley* v. *Ohio,* 360 U. S. 423 (1959); *Cox* v. *Louisiana,* 379 U. S. 559 (1965).

Second: The Service also found petitioner deportable for having

> "departed from or . . . remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period . . . [of] national emergency." 8 U. S. C. § 1182 (a)(22).

The obvious purpose of § 1182 (a)(22) is to deny admission to the United States to aliens who have used foreign asylum to escape their liabilities under the draft law. It would appear that the provision reads in the disjunctive—"departed from or . . . remained outside"—so as to reach not only those who leave the country when faced with induction orders and fail to return to comply with them in time, but also those who receive their orders while already abroad and refuse to make timely return.

The Service reads the provision more broadly, so as to apply to any alien who departs with evasive motives, regardless of his subsequent conduct. This reading is implausible: It would prevent return of such an alien for the express purpose of reporting for induction on time. I cannot believe Congress intended the provision to apply to an alien who flirted with the idea of asylum but then made prompt return to face the music. It is true that petitioner's actual return occurred five days after his induction date. But he phoned the draft board on that date, announcing his intent to re-enter and turn himself in, an intention he carried out promptly. On these facts, I could not find that his purpose in "remain-[ing] outside the United States" for those five days was "to avoid or evade training or service."

Finally, it has been suggested that petitioner is nonetheless deportable as a convicted felon. But the Service did not base the deportation order on this ground, and I doubt that it could. Under 66 Stat. 204, 8 U. S. C. § 1251 (a)(4), an alien is deportable if

> "convicted of a crime involving moral turpitude within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more."

It is far from clear that refusing induction is a "crime involving moral turpitude." Cf. *Chaunt* v. *United States,* 364 U. S. 350, 353 (1960) (breach of peace not such a crime because "fraudulent conduct" not involved). To be eligible, the statutory crime must necessarily "involv[e] moral turpitude." *E. g., Ablett* v. *Brownell,* 240 F. 2d 625; *United States ex rel. Giglio* v. *Neelly,* 208 F. 2d 337; *United States ex rel. Guarino* v. *Uhl,* 107 F. 2d 399. It is feasible, and hardly uncommon, for induction to be refused on grounds which, while legally insufficient, demonstrate no moral fault. Moreover, it is unclear, at least

on the record before us, that petitioner's crime was committed within five years of an "entry" into the United States. Brief trips abroad by permanent resident aliens do not always result in a new statutory "entry." See *Rosenberg* v. *Fleuti,* 374 U. S. 449 (1963); *Vargas-Banuelos* v. *INS,* 466 F. 2d 1371. As noted above, the Service is hardly in a position to find an abandonment of permanent resident status by petitioner during his brief stay in Canada.

Because the factual setting of this case is unusual, the legal questions raised are unlikely often to recur. While this is normally a sound reason to deny review, the judgment before us is grossly unjust. The Service has noted that petitioner has a "penchant for botching up his life." Perhaps so, but the Government's botching up of this case has served to complete the wreckage.

I would grant certiorari and summarily reverse the judgment.

No. 73–1741. PERSICO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari as to Persico alone. Reported below: 491 F. 2d 1156.

No. 73–1746. JOHNSON *v.* OHIO. Ct. App. Ohio, Clark County. Certiorari denied.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Approximately one month after pleading guilty, petitioner sought to vacate her plea on the ground that she had not been adequately advised of the rights thereby waived. The record shows that before accepting petitioner's plea the trial judge advised her of her right to be tried by a jury and to confront witnesses against her. Petitioner's motion was denied by the trial court and the Ohio Court of Appeals affirmed.

In *Boykin* v. *Alabama,* 395 U. S. 238, 243 (1969), we emphasized that a guilty plea is a waiver of important constitutional rights designed to protect the fairness of a trial:

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan,* 378 U. S. 1. Second, is the right to trial by jury. *Duncan* v. *Louisiana,* 391 U. S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas,* 380 U. S. 400. We cannot presume a waiver of these three important federal rights from a silent record."

Waiver of such rights as these can be accomplished only by "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). Only recently we reaffirmed the stringent standard for demonstrating the waiver of rights designed to safeguard the accused at trial, *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 236–237 (1973).

The accused can waive only a *known* right, *Johnson* v. *Zerbst, supra,* and the State has the burden of demonstrating a knowing waiver. To repeat what we said in *Boykin,* "[w]e cannot presume a waiver . . . from a silent record." *Boykin* established that the State must demonstrate the defendant's knowing waiver of the three constitutional rights there enumerated. Two States have so interpreted *Boykin* as a constitutional minimum. *People* v. *Jaworski,* 387 Mich. 21, 194 N. W. 2d 868 (1972); *In re Tahl,* 1 Cal. 3d 122, 460 P. 2d 449 (1969). The record here fails to satisfy even this minimum standard, for the

trial judge failed to advert to the privilege against self-incrimination.

The *Boykin* enumeration was illustrative, not exhaustive. The necessity that one be found guilty beyond a reasonable doubt (*In re Winship,* 397 U. S. 358 (1970)) and the right to a speedy trial (*Barker* v. *Wingo,* 407 U. S. 514 (1972)) are likewise involved. Ohio seems to recognize the need to accommodate constitutional rights other than the three mentioned in *Boykin,* since its own Supreme Court has held that a trial judge must advise the defendant of his right to be proved guilty beyond a reasonable doubt before accepting a guilty plea. *State* v. *Griffey,* 35 Ohio St. 2d 101, 298 N. E. 2d 603 (1973). Yet the record here fails even to meet this standard.

Since the Court has now held that a guilty plea forecloses constitutional challenge to the process that brought the defendant to the bar, *Tollett* v. *Henderson,* 411 U. S. 258 (1973), strict scrutiny over the standards for acceptance of the plea becomes all the more imperative. I would grant certiorari.

No. 73–1764. TOBALINA *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508 (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment.

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

Petitioner was convicted in the Municipal Court of Los Angeles of exhibiting an allegedly obscene motion picture

in violation of Cal. Penal Code § 311.2 (a) (1970) which provides in pertinent part as follows:

> "Every person who knowingly . . . exhibits to others, any obscene matter is guilty of a misdemeanor."

As used in § 311.2:

> " 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." § 311 (a).

On appeal, the Appellate Department of the Superior Court of California for the County of Los Angeles affirmed the conviction. Certification to the Court of Appeal was sought and denied. This Court then granted certiorari, vacated the judgment of the Appellate Department, and remanded for consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 912. On remand, the Appellate Department again affirmed the conviction.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2, as it incorporates the definition of "obscene matter" in § 311 (a), is constitutionally over-

broad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari and, since the judgment of the Appellate Department was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Further, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1801. GOLDSTEIN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari in this case and summarily reverse the judgment.

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

Petitioner was convicted after a jury trial in the Corporation Court of the city of Norfolk, Virginia, of selling

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

obscene items. The statute under which he was convicted, Va. Code Ann. § 18.1–228 (Supp. 1973), provides in pertinent part:

> "Every person who knowingly . . . [p]ublishes, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene item . . . shall be guilty of a misdemeanor."

As used in that section:

> "The word 'obscene' . . . shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." § 18.1–227 (1960).

The Supreme Court of Virginia affirmed by order on July 11, 1972. This Court granted certiorari, vacated the judgment of the Supreme Court of Virginia, and remanded the case for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 912. The Supreme Court of Virginia again affirmed the conviction.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 18.1–228, as it incorporates the definition of "obscene" in § 18.1–227, is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,*

at 47, and because the judgment of the Supreme Court of Virginia was rendered after *Miller,* I would reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–1804. SHULTZ, DBA WALT SHULTZ EQUIPMENT CO., ET AL. *v.* MOORE. C. A. 10th Cir. Certiorari denied. Reported below: 491 F. 2d 294.

MR. JUSTICE DOUGLAS, dissenting.

This is an action for an injunction and damages for the infringement of a patent held by respondent Moore. Petitioner Shultz defended on the ground that the patent was invalid. The patented product is a "pants topper," used in the dry cleaning business for finishing and pressing men's trousers. Moore obtained his patent in 1955. At the trial there was evidence that patents on devices having functions similar to Moore's had issued prior to his patent; not all of these prior patents had been brought to the attention of the examiner who recommended that Moore be granted a patent. A jury verdict in Moore's favor was set aside by the trial court on the ground that the subject matter was "obvious . . . to a person having ordinary skill in the art," 35 U. S. C. § 103. The Court of Appeals reversed, holding that the patent carries a presumption of validity overcome only by clear and convincing evidence, and that obviousness is a factual question on which the trial judge should not override the jury. With all respect, that holding permits the standard of patentability to be diluted and haphazardly applied.

It bears repeating that patents derive from the specific constitutional authorization of Congress "[t]o promote

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do no insist that the case be decided on the merits.

the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries." Art. I, § 8, cl. 8. Writing against the backdrop of abuses by the Crown in granting monopolies, the Framers did not intend these "exclusive rights" to be granted freely. To justify the toll exacted by exclusivity, the invention had to make a distinctive contribution to the advancement of scientific knowledge. Besides novelty and utility, a distinctive contribution expanding the frontiers of scientific and industrial knowledge was demanded. This constitutional restraint on the dispensation of patents was once mirrored in our cases under the standard of "invention." See *Reckendorfer* v. *Faber*, 92 U. S. 347 (1876); *Smith* v. *Whitman Saddle Co.*, 148 U. S. 674 (1893); *Potts* v. *Creager*, 155 U. S. 597 (1895); *Concrete Appliances Co.* v. *Gomery*, 269 U. S. 177 (1925); *Mantle Lamp Co.* v. *Aluminum Products Co.*, 301 U. S. 544 (1937). The standard is now embodied in 35 U. S. C. § 103, which requires a "non-obvious subject matter." *Graham* v. *John Deere Co.*, 383 U. S. 1, 17 (1966).

Though the label has changed, the standard of patentability is at root a constitutional standard. In determining patent validity under the statute, a court simultaneously holds the statute true to its constitutional source. This is but a specific application of the principle that statutes are construed to avoid any overreaching of constitutional limitations. *E. g., Screws* v. *United States*, 325 U. S. 91, 98 (1945); *United States* v. *Rumely*, 345 U. S. 41, 47 (1953); *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring); *United States* v. *Seeger*, 380 U. S. 163, 188 (1965) (concurring opinion).

In every patent infringement suit a court is called upon to oversee obedience to the constitutional standard. It cannot be delegated to the jury on the supposition that only a question of fact is involved. Factual assessments are, of course, part of the process of judging validity.

The prior art must be ascertained and the unique features of the patentee's contribution identified. But the determination whether the patentee's distinctive contribution is of such a character as to justify the 17-year monopoly is one that demands reasoned elaboration and, therefore, treatment as a question of law. See *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Co.*, 340 U. S. 147, 155 (1950) (concurring opinion). Findings that identify the unique features of the patented device and explain why they advance the art are essential to permit appellate review to insure that constitutional limitations have not been exceeded. The responsibility belongs to the courts. It will not do to leave such matters to unarticulated resolution by the jury.

Nor can the courts rely upon the Patent Office always to apply the standard faithfully. The proceedings on an application are not adversary. No representative of the public appears to contest unwarranted claims; the examiner alone must face the persistent applicant. A disappointed applicant may appeal an adverse administrative decision, but no corresponding check is available to overturn an erroneous finding of patentability. It does not impugn the good faith of examiners to observe that errors on the side of patentability slip through such a process. Litigation of patent validity in infringement suits presents the only opportunity for judicial correction of the errors of generosity.

The decision below holding patentability a question of fact for the jury represents an abdication which is likely to produce haphazard application of the statutory and constitutional standard. Happily, two other circuits have not adopted this approach. See *Swofford* v. *B&W, Inc.*, 395 F. 2d 362 (CA5 1968); *Hensley Equipment Co.* v. *Esco Corp.*, 375 F. 2d 432 (CA9 1967). I would grant certiorari.

No. 73–6472. ISOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari in this case and summarily reverse the judgment. Reported below: 491 F. 2d 906.

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

Petitioner was convicted in the United States District Court for the Eastern District of New York of transporting allegedly obscene materials in interstate commerce for the purpose of sale in violation of 18 U. S. C. § 1465, which provides in pertinent part as follows:

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The Court of Appeals for the Second Circuit affirmed, *sub nom. Cangiano* v. *United States,* 491 F. 2d 906 (1974).

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1465, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene

material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Second Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–6522. SUNDSTROM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 859.

MR. JUSTICE DOUGLAS, dissenting.

Ordered by his local Selective Service board to report for a pre-induction physical examination in May 1970, petitioner arrived at the examining place attired in a black robe and wearing facial makeup, in a representation

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

of the symbol of death. Because of his appearance, petitioner was ejected from the examining station without undergoing a physical. The local board ordered petitioner to appear for a second physical examination in August 1970, but the notice failed to reach the petitioner, who at the time was traveling without a forwarding address.[1] Upon learning that the petitioner had failed to appear for the second scheduled examination, the local board, acting pursuant to a new Selective Service regulation then less than two months old, ordered the petitioner to report for immediate induction. Under former practice, an induction order could not issue until the registrant had been found physically qualified for military service and had received notice to that effect. The superseding regulation [2] authorized local boards to order for induction and simultaneous examination any registrant whose lottery number had been reached but who had failed to appear for a physical examination.

In September 1970, one week before his scheduled induction, petitioner returned to the board the induction order that had been mailed to him in August, stating in an accompanying letter his belief that the induction forms were "mailed in error" since he had not yet completed a physical examination and been found acceptable for military service. Although the board made no response to petitioner's letter, it did report him to the Department of Justice as a violator when it learned of his failure to report for induction. Apparently at the urging of the Justice Department, the board sent a second induction order to petitioner on December 2, 1970, directing him to

[1] A count that charged petitioner with violating 50 U. S. C. App. § 462 by failing to appear for the second physical examination was dismissed by the trial judge on the ground that the evidence did not support a "knowing" violation.

[2] Executive Order No. 11537, 3 CFR 936 (1966–1970 Comp.), revising 32 CFR § 1631.7 (1970).

appear for induction on the 15th. Again petitioner returned the order to the board, citing his belief that " 'an induction order cannot be served unless a pre-induction physical has been consummated and an acceptability statement [sent].' " The board did not respond to this letter. Petitioner's prosecution and conviction for failure to report for induction, 62 Stat. 622, 50 U. S. C. App. § 462 (a), followed.

The statute makes it a crime "*knowingly* [to] fail or neglect to perform [any] duty" required by the Selective Service laws. I do not see how petitioner can be deemed to have committed a knowing violation when the record demonstrates that the local board made absolutely no effort to correct the petitioner's erroneous belief, based upon a recently superseded regulation, that the board lacked power to summon him for induction.

Due process forbids the Government from actively misleading a citizen as to the law's commands. *Cox* v. *Louisiana,* 379 U. S. 559 (1965); *Raley* v. *Ohio,* 360 U. S. 423 (1959). A citizen may be misled as much by failure to correct an erroneous impression as by incorrect advice, affirmatively conveyed. Especially in Selective Service matters where registrants deal with the Government apparatus unaided by counsel, the Government has a duty to make reasonable efforts to keep the citizen from pursuing an inaccurate interpretation of law to his detriment. See *Simmons* v. *United States,* 348 U. S. 397, 404 n. 5 (1955).[3] The petitioner here advised the board on two occasions of his erroneous belief. On neither occasion

[3] The failure of a local board to correct a registrant's erroneous impression that he does not have a valid claim to an exemption as a conscientious objector has been held to vitiate a subsequent prosecution for failure to report for induction. See *United States* v. *Sanders,* 470 F. 2d 937, 939 (CA9 1972) ("[m]isleading conduct may consist of failure to correct an evident misunderstanding as well as to affirmatively convey incorrect information").

did the board respond, although a form letter or a copy of the new regulation would have dispelled petitioner's mistaken belief as to his status. Under these circumstances I would place upon the Government a duty to inform, and hold that failure to do so bars prosecution.

The new regulation was, to be sure, published. But the fiction that all men know the law, indulged in to provide a healthy incentive for men to learn the law's command,[4] need not be pressed so far as to impute knowledge of the labyrinthine passages of the Federal Register, when there is compelling evidence to the contrary. The salutary policy of the fiction will not be weakened if the rule is not absolute.[5] Notice by publication is not sufficient where it may reasonably be anticipated that the notice will not reach those it is intended to address. See *Lambert* v. *California*, 355 U. S. 225 (1957); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Here the petitioner's letters to the board unmistakably demonstrated that published notice was insufficient. Arguably, fairness, as well as efficiency, is served by placing the burden on the Government to advise petitioner of the change in regulations.[6]

I would grant certiorari.

No. 73–6623. CLAY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 495 F. 2d 700.

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[4] O. Holmes, The Common Law 40–41 (Howe ed. 1963).

[5] The Model Penal Code, for example, adopts a posture of moderation in providing for ignorance of law as a defense. § 2.04 Proposed Official Draft, 1962.

[6] In May 1972, the Director of Selective Service promulgated the Registrants Processing Manual, which provides that when a local board determines that a registrant has failed to appear for a scheduled physical examination it shall by letter so advise the registrant of this fact and that the registrant may be issued an order for induction and subsequent physical examination if his lottery number is reached. See 37 Fed. Reg. 10763 (May 27, 1972).

No. 73–6655. WINDSOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1364.

MR. JUSTICE DOUGLAS, dissenting.

The petitioner, convicted of failure to report for induction, 62 Stat. 622, 50 U. S. C. App. § 462 (a), challenges the induction order on the ground that he was improperly denied exemption from Selective Service as a conscientious objector. Petitioner completed high school under a student deferment in 1969. In January 1970, he was reclassified I–A and was ordered to report for a preinduction physical examination the following October. In January 1971, petitioner filed an application for reclassification as a conscientious objector. His local Selective Service board rejected this claim, advising petitioner by letter:

> "Your claim as a conscientious objector was considered by the Board on February 12, 1971, and in their opinion your professed belief in opposition to war is not a compelling or controlling force in your life, but is simply [an] expedient to avoid military service at this time and that you are not sincere in your professed belief."

Petitioner appealed to an appeal board, which affirmed without opinion the local board's denial of exemption.

The Court of Appeals, applying a rule announced in *United States* v. *Stetter,* 445 F. 2d 472 (CA5 1971), that when an applicant makes a prima facie case for exemption as a conscientious objector the board must give a statement of reasons for rejection of the application, construed the local board's letter to petitioner as a finding of insincerity of petitioner's asserted beliefs. The court then concluded that a finding of insincerity could be based upon the fact that petitioner waited for more than a year after his reclassification as I–A to file his application for exemption and did so only after passing

his preinduction physical examination. Accordingly, the court found that the board's "reason" had a basis in the record and affirmed petitioner's conviction.

Elsewhere I have expressed my view that an applicant for exemption as a conscientious objector is entitled, under the Due Process Clause of the Fifth Amendment, to a hearing before a local board on his claim. *Fein* v. *Selective Service System,* 405 U. S. 365, 382 (1972) (dissenting opinion). A statement of reasons accompanying a decision adverse to the applicant is no less a requirement of due process. Without a statement of reasons there is simply no way to ascertain whether the board has acted within its powers as prescribed by law.[1] See *Goldberg* v. *Kelly,* 397 U. S. 254, 271 (1970); *Joseph* v. *United States,* 405 U. S. 1006 (1972) (dissenting opinion). The only statement afforded petitioner is contained in the local board's February 1973 letter, a document insufficient in two respects to sustain the board's denial of exemption.

First, the board's statement that petitioner's belief "is not a compelling or controlling force in your life" gives little confidence that the board applied the correct legal standard for exemption under 62 Stat. 612, as amended, 50 U. S. C. App. § 456 (j). The statute authorizes exemption for any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." In *Clay* v. *United States,* 403 U. S. 698, 700 (1971), we said:

> "In order to qualify for classification as a conscientious objector, a registrant must satisfy three

[1] A statement of reasons accompanying an adverse decision by a local or appeal board is now required by the Military Selective Service Act, 85 Stat. 353, 50 U. S. C. App. § 471a (b)(4) (1970 ed., Supp. II), but this provision of the statute is inapplicable to petitioner's case because of its effective date.

basic tests. He must show that he is conscientiously opposed to war in any form. *Gillette* v. *United States,* 401 U. S. 437. He must show that this opposition is based upon religious training and belief, as the term has been construed in our decisions. *United States* v. *Seeger,* 380 U. S. 163; *Welsh* v. *United States,* 398 U. S. 333. And he must show that this objection is sincere. *Witmer* v. *United States,* 348 U. S. 375. In applying these tests, the Selective Service System must be concerned with the registrant as an individual, not with its own interpretation of the dogma of the religious sect, if any, to which he may belong. *United States* v. *Seeger, supra; Gillette* v. *United States, supra; Williams* v. *United States,* 216 F. 2d 350, 352."

The board's cryptic "compelling and controlling force" language in this case may have reflected a conclusion that although petitioner met the three tests above he did not qualify for an exemption because his belief was not lifelong. Such a decision would have been entirely improper, since, assuming a sincere belief, the length of time petitioner had held it would be irrelevant. *Schuman* v. *United States,* 208 F. 2d 801 (CA9 1953); *Taylor* v. *Chafee,* 327 F. Supp. 1131 (CD Cal. 1971). Or the board might have concluded, equally erroneously, that petitioner did not qualify for exemption because his belief had not heretofore "compelled" him to express it in some organized activity.

To be sure, the board's decision might have been based on a wholly proper application of the legal standard. The difficulty is that we cannot tell from the "statement" the board has given. It is a "simple but fundamental rule of administrative law . . . [that if] the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with

such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action." *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196–197 (1947). The Court of Appeals viewed the board's statement as a denial of the exemption because of insincerity. But the "compelling and controlling force" language appeared in addition to the statement that petitioner was not sincere, with no indication whether the former contributed to the rejection or served merely as a restatement of the latter ground. The board's decision cannot be sustained on the basis of the sincerity finding alone unless it is clear from the record that the board intended it to be a wholly independent ground of decision. Cf. *Sicurella* v. *United States*, 348 U. S. 385 (1955).

Even if the board's statement is viewed solely as a rejection of petitioner's application because of insincerity, it will not support the board's action because it contains no reasons but merely the board's conclusion. Applicants for exemption as conscientious objectors may be found insincere where the belief claimed is inconsistent with prior statements or conduct of the applicant, or where the applicant's demeanor in an appearance before the board deprives him of credibility. *Witmer* v. *United States*, 348 U. S. 375 (1955). Typically, reviewing courts have perused the record in order to discover evidence that would furnish a "basis in fact" for a denial of exemption because of insincerity. See, *e. g.*, *United States* v. *Abbott*, 425 F. 2d 910 (CA8 1970); *United States* v. *Weaver*, 423 F. 2d 1126 (CA9 1970). It is time to demand more of the local board: a statement that identifies the evidence supporting the conclusion that the applicant is not sincere. A statement of such specificity is indispensable to assure that the board has reasoned from

the evidence.[2] Such a statement will facilitate review; and requiring the familiarity with the record necessary to its preparation will enhance the decisionmaking process at the administrative level. Without such a statement, a board may too easily shield inattentiveness or misapplication of the law from judicial review behind the screen of a conclusory finding of insincerity.[3] This danger is especially real where, as here, the finding of insincerity is merely tacked onto other language that betrays possible confusion about the legal standard.

I would grant certiorari to consider the adequacy of the administrative action.

No. 73–6666. MURRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 178.

MR. JUSTICE DOUGLAS, dissenting.

Acting upon information received from the Los Angeles Police Department that a man of a specified description would arrive on a certain airplane carrying heroin inside a garment bag, a San Francisco sheriff's deputy observed petitioner arriving on the designated flight, matching the description given and carrying a garment bag. The

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[2] Such a requirement, advocated by several commentators, see Note, Administrative Findings in Selective Service Litigation, 57 Va. L. Rev. 477, 485 (1971); Hansen, The Basis-in-Fact Test in Judicial Review of Selective Service Classifications: A Critical Analysis, 37 Brooklyn L. Rev. 453 (1971), has recently gained approval of two Courts of Appeals. See *United States* v. *Stetter*, 445 F. 2d 472, 485 (CA5 1971); *United States ex rel. Hemes* v. *McNulty*, 432 F. 2d 1182, 1187 (CA7 1970).

[3] Instances of board members' lack of familiarity with all the facts relevant to a classification decision are, regrettably, amply documented. See *United States* v. *Thompson*, 431 F. 2d 1265 (CA3 1970); *United States* v. *Ford*, 431 F. 2d 1310 (CA1 1970). See also In Pursuit of Equity: Who Serves When Not All Serve?, Report of the National Advisory Commission on Selective Service 20–21 (1967).

deputy stopped petitioner, searched the bag, and discovered heroin that was used to secure petitioner's conviction for importing heroin into the United States. Petitioner appealed the conviction on the ground that the heroin should have been suppressed as the fruit of an unlawful search. The court below held that the report received from the Los Angeles police, as "corroborated" by petitioner's appearance on the flight designated and matching the description, furnished probable cause for the forcible inspection of petitioner's garment bag.

Because the court below failed to inquire into the origin of the information furnished by the Los Angeles police, it cannot be said that probable cause for the search has been established. Had the information been based upon the observations of a Los Angeles police officer, a proper assessment of probable cause would have necessitated examination of the observations on which he relied, to see whether they would have justified belief by a "man of reasonable caution" that petitioner was carrying contraband, *Carroll* v. *United States,* 267 U. S. 132, 162 (1925). Had the police report been based upon a tip received by the Los Angeles police from an informer, somewhat greater scrutiny would have been necessary to apply the requirements of *Aguilar* v. *Texas,* 378 U. S. 108 (1964), and *Spinelli* v. *United States,* 393 U. S. 410 (1969). These cases held that to furnish probable cause a tip must disclose the informer's observations upon which any conclusion is based and must be accompanied by information supporting the informer's credibility.* Neither kind

*These requirements were held satisfied in *United States* v. *Harris,* 403 U. S. 573 (1971), where the affiant alleged receiving "personal information" from a "prudent person" that the defendant had recently sold illicit liquor. However one may view *Harris,* it plainly furnishes no support for the search here. The Court relied on the fact that the unidentified informer made admissions against penal interest as well as certain assertions of "personal knowledge"—fac-

of inquiry occurred here, for the court below failed to go beyond the fact that the information came from the Los Angeles police. But the transmission of the information in the form of a Los Angeles "police report" is of no immediate analytical significance; the Los Angeles Department merely served as a conduit between the searching officer and a still undisclosed source. The fact that the searching officer received his information from another police officer does not alter the usual Fourth Amendment inquiry. On this point the holding of *Whiteley* v. *Warden,* 401 U. S. 560 (1971), is dispositive; the conclusions embodied in a police bulletin are not shielded from judicial scrutiny.

The court below viewed petitioner's arrival on the designated flight and his physical appearance as corroborative of the "tip" received from the Los Angeles police and relied upon *Draper* v. *United States,* 358 U. S. 307 (1959), in upholding the search. In *Draper* an informer predicted that the defendant would arrive on a certain train wearing certain clothing and carrying heroin that was recently purchased. The informer, whom the police viewed as reliable from prior dealings, had a few days earlier given information that the defendant was dealing in heroin. The Court held that when the defendant arrived on the designated train attired as the informer had predicted, the police had probable cause to make the search of his person that resulted in the discovery of heroin. *Draper* does not support the result here; it involved a known informer, having a reputation for reliability, who had given information previously. It is impossible to say that any of these factors were present here. The "corroboration" only established that someone was well acquainted with petitioner's travel plans.

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tors necessarily absent here on the present record because the origin of the observations was not explored.

As in *Whiteley* v. *Warden, supra,* nothing in petitioner's appearance when the police first met him tended to confirm the allegation of criminal conduct.

The decision below arguably represents a failure to follow the Fourth Amendment principles enunciated in our decisions. Accordingly I would grant certiorari.

No. 73–6719. Dorman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 496 F. 2d 438.

Mr. Justice Douglas, dissenting.

In 1973 Frank Dorman was sentenced by the District Court to a term of three years for violating the travel restrictions of his bond and to two concurrent seven-year terms for the interstate transportation of forged checks. In imposing sentence, the trial judge emphasized the "very, very substantial" record of Dorman's prior convictions. The trial judge learned of these state convictions from a presentence report, which had incorporated the convictions listed in an FBI summary. None of these documents revealed, and it has not been ascertained, whether Dorman had the assistance of counsel at the time these convictions were obtained. On appeal, Dorman sought to have his case remanded for a determination whether he lacked counsel at the time of the prior convictions, and if so for imposition of a new sentence. The Court of Appeals held that Dorman had waived any objection to the trial court's use of the prior convictions by his failure to object after disclosure of the presentence report.

Since the landmark case of *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), we have held that convictions obtained without the provision of counsel for the accused may not be used to enhance punishment under a recidivist statute, *Burgett* v. *Texas,* 389 U. S. 109 (1967), nor to influence the determination of a discretionary sentence, *United States* v. *Tucker,* 404 U. S. 443 (1972), nor to impeach

the credibility of a defendant at trial, *Loper* v. *Beto,* 405 U. S. 473 (1972). The guiding principle was stated in *Burgett* v. *Texas:*

> "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that . . . right." 389 U. S., at 115.

The Court of Appeals permits the defendant's sentence to stand, with ample demonstration that the sentencing judge relied heavily on prior convictions, and no demonstration in the record that he had counsel during the prosecutions involved. The decision below remits the defendant to collateral challenge to his sentence. Under Fourth Circuit practice, the defendant must apparently now challenge each state conviction through independent proceedings and, if successful, move to vacate the federal sentence now in issue under 28 U. S. C. § 2255. See *Brown* v. *United States,* 483 F. 2d 116 (CA4 1973). This result is consonant neither with sound judicial administration nor with fairness to the accused. The determination whether a defendant had counsel at the time of prior convictions should ordinarily be ascertainable from an examination of the records of conviction. I would place the burden of that examination, which surely would add only a small increment to the task of preparation for trial or sentencing, upon the Government. This procedure would centralize in one proceeding all inquiry relevant to the use of prior convictions and would give positive assurance in the record that *Gideon* was not undercut through impermissible collateral uses of uncounseled convictions.

In this case the sentencing occurred nearly a year after our decision in *United States* v. *Tucker, supra,* time enough for the Government to have assumed the burden of demonstrating the constitutional validity of each conviction used against the accused. I would grant certiorari and reverse the judgment below.

No. 73–6754. SEDILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 496 F. 2d 151.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was walking up a freeway on-ramp when he was stopped by an officer. Petitioner gave the officer his name but was unable to produce any identification. The officer noticed an envelope in petitioner's shirt pocket and saw through a window in the envelope that it was addressed to someone other than petitioner. He thought that the envelope contained a Treasury check, and he pulled it out of petitioner's pocket. The officer removed the check from the envelope and saw that it had been endorsed. Petitioner was arrested, and after further investigation was tried and convicted of forgery.

The Court of Appeals affirmed the conviction on the ground that the officer had probable cause to seize the check from petitioner's person and that the absence of a warrant is excused by the plain-view doctrine. 496 F. 2d 151, 152 (CA9 1974). Judge Hufstedler wrote a dissent in which she pointed out that the incriminating aspects of the item in petitioner's pocket simply were not in plain view. The check itself and in particular the endorsement were not visible until the envelope had been removed from petitioner's pocket and opened. "Nothing in the record of this case supports a conclusion that [the officer] at the time of the seizure had probable cause to believe that the envelope seen in Sedillo's pocket was

contraband, or that it contained contraband, or that it was evidence relevant to a crime that [the officer] had probable cause to believe had been committed. Accordingly, the plain-view doctrine cannot justify the seizure of the envelope and check." *Id.*, at 153 (footnote omitted).

In *Coolidge* v. *New Hampshire*, 403 U. S. 443, 466 (1971), the Court pointed out that the plain-view doctrine is applicable only "where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." To use the plain-view rationale in this case is to ignore the limitations on that exception to the warrant requirement which are explained by *Coolidge*.

It appears to me that the conviction here results from police conduct which violated the Fourth Amendment. The plain-view doctrine is not applicable, and I do not see how any other exceptions to the warrant requirement would justify the conduct of the police.* I would therefore grant certiorari and set this case for argument.

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*Obviously the search and seizure were not incident to arrest, since the arrest did not occur until after the envelope had been removed from petitioner's pocket and opened. I dissented in *Terry* v. *Ohio*, 392 U. S. 1 (1968), but even the majority position in that case would not justify the officer's conduct here. *Terry* permitted a "reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.*, at 27. But that doctrine clearly has no applicability here. As Judge Hufstedler put it: "No one contends in this case that [the officer's] seizure of the envelope from Sedillo's pocket or the examination of the envelope's contents was necessary to protect the officer's person." 496 F. 2d 151, 153.

No. 73–6943. JOHNSON *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 191 Neb. 535, 216 N. W. 2d 517.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner was convicted of violating a city gambling ordinance, carrying a maximum penalty of six months' imprisonment and a $500 fine. Following a trial before a municipal judge, petitioner was convicted and sentenced to 100 days in jail and fined $500. Under Nebraska law, trial by jury is unavailable in a prosecution in municipal court for violation of a city ordinance. The Nebraska courts rejected petitioner's assertion of a right to a jury trial under the Sixth Amendment, on the ground that no such right applies to prosecutions for offenses carrying a maximum penalty of imprisonment for six months or less.

The Constitution provides for trial by jury in two places. Article III, § 2, provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." And the Sixth Amendment provides in pertinent part:

> "In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." (Emphasis added.)

Despite these specific references to a jury in the trial of "all crimes" and in "all criminal prosecutions" the Court has held that the accused enjoys no right to demand trial by jury in prosecutions for "petty offenses."

The notion of a class of "petty offenses" for which prosecution would carry no right to jury trial first surfaced in this Court in the dicta of *Callan* v. *Wilson,* 127 U. S. 540, 555 (1888), which held that a conspiracy offense did not belong in the "petty" class. "Petty of-

fenses" were to be defined as those punishable by summary proceedings at common law prior to the adoption of the Constitution. The exclusion of petty-offense prosecutions from the jury trial guarantee was repeated in several later cases. *Natal* v. *Louisiana,* 139 U. S. 621 (1891), involved a Fourteenth Amendment challenge to a Louisiana ordinance regulating the location of private marketplaces. Prosecution for violation was before a magistrate only and was punishable by a $25 fine or imprisonment for 30 days. In holding that the absence of jury trial did not vitiate conviction under the ordinance, the Court repeated the *Callan* dicta, but the decision came more than 70 years before we held the federal right to jury trial applicable in state proceedings, *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). In *Schick* v. *United States,* 195 U. S. 65 (1904), the petty-offense exclusion was again repeated, but the holding of that case was that the defendant's waiver of jury trial in the District Court did not invalidate his conviction.

Not until *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937), did the Court squarely rule that certain prosecutions are outside the constitutional guarantee. That case involved a prosecution in the District of Columbia for violation of a statute making it a crime, punishable by a fine of $300 or less, or imprisonment of 90 days or less, to sell second-hand goods without a license. In holding that trial by jury was not required, the Court expanded the definition of "petty offenses" to embrace all those for which the authorized punishment failed to meet a requisite standard of severity. The degree of severity required to invoke the constitutional right was to be ascertained "by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." *Id.,* at 628. In the years since *Clawans,* the Court has struggled to achieve greater precision in drawing the line

that separates "petty" from "serious" crimes. See *Duncan* v. *Louisiana, supra,* at 160–162; *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968); *Frank* v. *United States,* 395 U. S. 147 (1969); *Baldwin* v. *New York,* 399 U. S. 66, 67–73 (1970). The Court's latest expression in this quest for certainty came last Term in *Codispoti* v. *Pennsylvania,* 418 U. S. 506 (1974). There it was said that "our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." *Id.,* at 512. What apparently began in *Callan* as a narrow exception to the jury trial guarantee based upon the nature of the offense [1] has become a rigid rule based upon the maximum authorized punishment.[2]

If the judgment were mine to make, I would entertain considerable doubt that petitioner's offense can be described as "petty." See *Frank* v. *United States, supra,* at 160 (Black, J., dissenting). Petitioner's offense carried a maximum penalty of six months' imprisonment and a $500 fine. A literal reading of the "fixed dividing line" stated in *Codispoti* would place petitioner's offense in the "serious" category, for it carries "a sentence of more than six months." I recognize, however, that the Court has never expressly considered how the interaction of authorized imprisonment and fines affects the dividing line, although it has adverted to the provisions of 18 U. S. C. § 1, defining as "petty" a crime in which both

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[1] Compare Mr. Justice Harlan's opinion for the Court in *Callan* v. *Wilson,* 127 U. S. 540 (1888), with his later dissenting opinion in *Schick* v. *United States,* 195 U. S. 65, 80–81 (1904).

[2] Special rules have been applied with respect to criminal contempts for which a maximum penalty is not specified. See *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968); *Frank* v. *United States,* 395 U. S. 147 (1969); *Taylor* v. *Hayes,* 418 U. S. 488 (1974).

six months' imprisonment and a $500 fine are authorized. See *e. g., Duncan* v. *Louisiana, supra,* at 161; *Frank* v. *United States, supra,* at 151. On the Court's own terms, certiorari should be granted to resolve the ambiguity.

For myself, I adhere to the views expressed by Mr. Justice Black, whom I joined, in *Baldwin* v. *New York, supra,* at 74–76, that the Constitution forbids the kind of line drawing in which the Court is now engaged. In making trial by jury applicable "in all criminal prosecutions," the Framers foreclosed any judicial freedom to decide that in certain prosecutions trial by jury is unwarranted. The point was forcefully made by Justices McReynolds and Butler in their separate opinion in *District of Columbia* v. *Clawans, supra:*

> "In a suit at common law to recover above $20.00, a jury trial is assured. And to us, it seems improbable that while providing for this protection in such a trifling matter the framers of the Constitution intended that it might be denied where imprisonment for a considerable time or liability for fifteen times $20.00 confronts the accused." 300 U. S., at 633–634.

Until the language of the Constitution is amended, we are not free to impose our judgment as to what offenses are "petty." Since, in my view, the right to trial by jury in all criminal prosecutions is among the privileges and immunities of citizens of the United States the States are forbidden by the Fourteenth Amendment from abridging, see *Gideon* v. *Wainwright,* 372 U. S. 335, 345–347 (1963) (concurring opinion), I would apply the same rule in both state and federal prosecutions. See also *Duncan* v. *Louisiana, supra,* at 162–171 (Black, J., concurring). The judgment below might arguably be permitted to stand under a view that the federal guarantee of trial by jury is not fully applicable to the States. This was

the view of Mr. Justice Harlan, expressed in, *e. g., Duncan* v. *Louisiana, id.,* at 171–193, and *Williams* v. *Florida,* 399 U. S. 78, 117–138 (1970). I do not share that view, see *id.,* at 106–107, and in any event it has not commanded a majority of this Court.

Petitioner was denied a jury in what is unquestionably a criminal prosecution. I would grant certiorari to consider his Sixth Amendment claim.

No. 73–7019. BAILEY *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied.

MR. JUSTICE WHITE, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART, dissenting.

The Court of Appeals for the Ninth Circuit, adhering to its previous decisions in *Stuckey* v. *Weinberger,* 488 F. 2d 904 (1973) (en banc), and *Wallace* v. *Weinberger,* 488 F. 2d 606 (1973) (en banc), cert. denied, 417 U. S. 913 (1974), held in this case that the decision of the Secretary of HEW on a request to reopen a previous denial on the merits of a claim for benefits is so far committed to agency discretion by the provisions of § 205 (h) of the Social Security Act, 49 Stat. 624, as amended, 53 Stat. 1371, 60 Stat. 1095, 67 Stat. 632, 42 U. S. C. § 405 (h), that review of that decision is not available pursuant to the Administrative Procedure Act. See 5 U. S. C. § 701 (a)(2). This holding is squarely in conflict with the holdings of three other Circuits in *Cappadora* v. *Celebrezze,* 356 F. 2d 1 (CA2 1966); *Davis* v. *Richardson,* 460 F. 2d 772 (CA3 1972); and *Maddox* v. *Richardson,* 464 F. 2d 617 (CA6 1972). It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict here presented. This Court's Rule 19 (1)(b). Perhaps the state of our docket will not permit us to resolve all disagreements between courts of appeals, or between federal and state courts, and perhaps we must tolerate the

fact that in some instances enforcement of federal law in one area of the country differs from its enforcement in another. These situations, it is hoped, will be few and far between. I would grant certiorari in this case.

MR. JUSTICE DOUGLAS, dissenting.

While I have joined MR. JUSTICE WHITE's dissent, I should add that the number of cases we take to review on the merits is well below the tolerable limit and that this case presents one of the most pressing problems on the modern scene. For the extent to which the ever-growing federal bureaucracy uses "discretion" to mask irresponsible action that evades review seems to me to be eroding basic rights of the citizen.

No. 74–96. DAMON, REFORMATORY SUPERINTENDENT *v.* LEESON; and

No. 74–5405. LEESON *v.* DAMON, REFORMATORY SUPERINTENDENT. C. A. 2d Cir. Motion of respondent in No. 74–96 for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE WHITE would grant certiorari in No. 74–96. Reported below: 496 F. 2d 718.

No. 74–126. SIGAL, AKA EDWARDS, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Application to recall and stay mandate, presented to MR. JUSTICE WHITE and by him referred to the Court, denied. Certiorari denied. Reported below: 500 F. 2d 1118.

Rehearing Denied

No. 73–1191. HOURIHAN *v.* DAKIN ET AL., 416 U. S. 951. Motion for leave to file petition 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 Seventh Circuit during the week of November 18, 1974, 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.

OCTOBER 25, 1974

Dismissal Under Rule 60

No. 74–5294. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 60.

OCTOBER 29, 1974

Dismissal Under Rule 60

No. 50, Orig. VERMONT *v.* NEW YORK ET AL. Bill of complaint dismissed under this Court's Rule 60. [See 417 U. S. 270.]

Affirmed on Appeal

No. 73–1870. HUFFMAN *v.* MONTANA SUPREME COURT ET AL. Affirmed on appeal from D. C. Mont. Reported below: 372 F. Supp. 1175.

No. 74–32. VALLIS ET AL. *v.* LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK, ET AL. Affirmed on appeal from D. C. S. D. N. Y.

No. 73–1902. NATIONAL INDEPENDENT COAL OPERATORS ASSN. ET AL. *v.* BRENNAN, SECRETARY OF LABOR. Affirmed on appeal from D. C. D. C. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 372 F. Supp. 16.

No. 73–2029. STAR ET AL. *v.* PRELLER ET AL. Affirmed on appeal from D. C. Md. Reported below: 375 F. Supp. 1093.

MR. JUSTICE DOUGLAS, dissenting.

Appellant Star owns several bookstores in Baltimore which contain, *inter alia,* coin-operated viewing machines showing portions of so-called "adult" motion pictures. After a number of raids in which these motion pictures were seized for lack of a proper license from the Maryland State Board of Censors, appellant sought injunctive relief against the enforcement of Maryland's film-licensing requirements on the ground that such requirements violate the freedoms protected by the First and Fourteenth Amendments. We held a predecessor Maryland statute unconstitutional in *Freedman* v. *Maryland,* 380 U. S. 51 (1965); the three-judge District Court, however, concluded that the defects identified in *Freedman* had been remedied by the present statute. 352 F. Supp. 530 (Md. 1972); 375 F. Supp. 1093 (Md. 1974).

The court below made much of the fact that the amended statute provides for a prompt judicial determination of obscenity after denial of a license by the Board, and that the Board must bear the burden of proof at all stages of the proceedings. I have previously set forth, at some length, my view that no form of censorship, no matter how speedy or efficient it may be, is constitutionally permissible. The cost and delay involved in contesting an adverse determination by the censor provide a very practical deterrent to free and open expression; the inevitable result is a reluctance even to attempt to disseminate ideas which, by virtue of their content, may attract the censor's attention or draw his wrath. Moreover, by imposing his sanctions in advance, the censor circumvents all the protections of the Bill of Rights which are called into play by a criminal prosecution after the

fact. The Maryland system has no place for the right of trial by jury, nor does it require proof beyond a reasonable doubt; step by step, by eroding these constitutional guarantees, the State facilitates its self-appointed task of imposing and ensuring conformity to an official standard of morality.

I adhere to the positions I have taken in *Freedman* v. *Maryland, supra,* at 61 (concurring opinion); *Times Film Corp.* v. *Chicago,* 365 U. S. 43, 78 (1961) (dissenting opinion); *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684, 697 (1959) (concurring opinion); and *Superior Films* v. *Department of Education,* 346 U. S. 587, 588 (1954) (concurring opinion). I would reverse the judgment below.

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

Appellants challenged the constitutionality of the Maryland motion picture censorship statute, Md. Ann. Code, Art. 66A, §§ 1–26 (1970), which requires that films be licensed before exhibition and forbids the licensing of obscene films. Pursuant to § 6 (b) of the statute a film is "obscene" if, "when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess." A three-judge court ruled adversely to appellant, and this Court vacated the judgment and remanded the case for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 905. The three-judge court again upheld the statute.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit

the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting).

It is clear that, tested by that constitutional standard, the Maryland motion picture censorship statute, as it defines "obscene" in § 6 (b), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, and because the judgment of the three-judge court was rendered after *Miller,* I would therefore reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Appeals Dismissed

No. 73–6968. ENGLEFIELD *v.* ENGLEFIELD. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–37. TOWN OF EAST HAVEN ET AL. *v.* UNITED STATES ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 496 F. 2d 452.

No. 74–5145. BUXTON *v.* BOARD OF DIRECTORS ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Affirmed for Absence of Quorum

No. 73–6732. SLOAN *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 2d Cir. Four Members of

the Court have disqualified themselves in this case. Because of this absence of a quorum, 28 U. S. C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of Court, the judgment is affirmed under 28 U. S. C. § 2109, which provides that under these circumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." Reported below: 493 F. 2d 1398.

Certiorari Granted—Vacated and Remanded

No. 74–5060. LaRuffa *v.* New York. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Blackledge* v. *Perry,* 417 U. S. 21 (1974), and *Tollett* v. *Henderson,* 411 U. S. 258 (1973). Reported below: 34 N. Y. 2d 242, 313 N. E. 2d 332.

Miscellaneous Orders

No. —. Ellis *v.* Hawaii; and

No. —. Ellis *v.* Powers et ux. Sup. Ct. Hawaii. Motion to consolidate cases to permit filing of a single petition for writ of certiorari denied.

No. A–177 (74–269). Brian, Secretary, Human Relations Agency, et al. *v.* California Welfare Rights Organization et al. Sup. Ct. Cal. Application for stay presented to Mr. Justice Blackmun, and by him referred to the Court, denied. Reported below: 11 Cal. 3d 237, 520 P. 2d 970.

No. A–190 (74–244). Booze et al. *v.* Florida. Application for stays of mandates of the District Court of Appeal of Florida, Second District, presented to Mr. Jus-

TICE DOUGLAS, and by him referred to the Court, denied. Reported below: 291 So. 2d 262, and 293 So. 2d 107.

No. A–202 (74–312). SWOAP, DIRECTOR, DEPARTMENT OF BENEFIT PAYMENTS, ET AL. *v.* WAITS ET AL. Sup. Ct. Cal. Application to stay enforcement of injunction of Superior Court of California, County of Sacramento, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. Reported below: 11 Cal. 3d 887, 524 P. 2d 117.

No. A–255. ALERS *v.* TOLEDO ET AL. C. A. 1st Cir. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–256 (74–456). HILL, ATTORNEY GENERAL OF TEXAS, ET AL. *v.* PRINTING INDUSTRIES OF THE GULF COAST ET AL. Appeal from D. C. S. D. Tex. Motion of appellees to vacate stay entered by this Court on October 11, 1974 [*ante,* p. 805], denied.

No. A–274. ECONOMIC CONSULTANTS, INC., DBA E–C TAPE SERVICE, INC., ET AL. *v.* MERCURY RECORD PRODUCTIONS, INC., ET AL. Application for stay of mandate of Supreme Court of Wisconsin, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. Reported below: 64 Wis. 2d 163, 218 N. W. 2d 705.

No. A–284 (74–409). ROSE, WARDEN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION, ET AL. Application to stay orders of Judge Robert M. McRae, entered August 22, 1974, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. A–334. HURST ET AL. *v.* UNITED STATES. C. A. 6th Cir. Application for order to have court-appointed counsel relieved and other relief, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. 50, Orig. VERMONT *v.* NEW YORK ET AL. It is ordered by this Court that the Honorable R. Ammi Cutter be, and he is hereby, awarded the sum of $50,000 as compensation for his services as Special Master in this case, and that his disbursements totaling $5,150 be allowed. It is further ordered that the fee and disbursements be paid by the parties in the following amounts: $20,000 by the State of Vermont and $35,150 by the International Paper Co. It is further ordered that the Special Master is hereby discharged. [See 417 U. S. 270.]

No. 73–689. MANESS *v.* MEYERS, JUDGE. 169th Jud. Dist. Ct. Tex., Bell County. [Certiorari granted, 416 U. S. 934.] Motion of Texas Criminal Defense Lawyers Assn. for leave to file a brief as *amicus curiae* denied.

No. 73–820. UNITED STATES *v.* GUANA-SANCHEZ. C. A. 7th Cir. [Certiorari granted, 417 U. S. 967.] Motion for appointment of counsel granted. It is ordered that Joseph Beeler, Esquire, of Miami, Fla., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 73–822. FRY ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. [Certiorari granted, 415 U. S. 912.] Motions of the State of California and California State Employees' Assn. for leave to participate in oral argument as *amici curiae* denied.

No. 73–1012. GULF OIL CORP. ET AL. *v.* COPP PAVING CO., INC., ET AL. C. A. 9th Cir. [Certiorari granted, 415 U. S. 988.] Motion of American Building Maintenance Industries for leave to file a brief as *amicus curiae* denied.

No. 73–1018. UNITED STATES *v.* MAZURIE ET AL. C. A. 10th Cir. [Certiorari granted, 415 U. S. 947.] Motion

of respondents to dismiss writ of certiorari denied. Motion of the State of Wyoming for leave to participate in oral argument as *amicus curiae* granted.

No. 73–1256. CONNELL CONSTRUCTION CO., INC. *v.* PLUMBERS & STEAMFITTERS LOCAL UNION NO. 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO. C. A. 5th Cir. [Certiorari granted, 416 U. S. 981.] Motion of Associated General Contractors of America et al. for leave to participate in oral argument as *amici curiae* denied.

No. 73–1279. WILLIAMS & WILKINS CO. *v.* UNITED STATES. Ct. Cl. [Certiorari granted, 417 U. S. 907.] Motion of National Education Assn. for leave to participate in oral argument as *amicus curiae* denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 73–1380. CHEMEHUEVI TRIBE OF INDIANS ET AL. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 73–1666. ARIZONA PUBLIC SERVICE CO. ET AL. *v.* CHEMEHUEVI TRIBE OF INDIANS ET AL.; and

No. 73–1667. FEDERAL POWER COMMISSION *v.* CHEMEHUEVI TRIBE OF INDIANS ET AL. C. A. D. C. Cir. [Certiorari granted, 417 U. S. 944.] Motion of Arizona Public Service Co. et al. for divided argument granted; however, no additional time for oral argument is allowed.

No. 73–1573. WITHROW ET AL. *v.* LARKIN. Appeal from D. C. E. D. Wis. [Probable jurisdiction noted, 417 U. S. 943.] Consideration of appellee's suggestion of mootness deferred to oral argument.

No. 74–125. ALAMO LAND & CATTLE CO., INC. *v.* ARIZONA. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Probable Jurisdiction Noted or Postponed

No. 73–1820. PHILBROOK, COMMISSIONER, DEPARTMENT OF SOCIAL WELFARE *v.* GLODGETT ET AL.; and

No. 74–132. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* GLODGETT ET AL. Appeals from D. C. Vt. Motion of appellees for leave to proceed *in forma pauperis* granted. In No. 73–1820, probable jurisdiction noted. In No. 74–132, further consideration of question of jurisdiction postponed to hearing of case on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 368 F. Supp. 211.

Certiorari Granted

No. 73–7031. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 285 N. C. 90, 203 S. E. 2d 803.

No. 74–70. GOLDFARB ET UX. *v.* VIRGINIA STATE BAR ET AL. C. A. 4th Cir. Motion of Clark C. Havighurst for leave to file a brief as *amicus curiae* granted. Certiorari granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion and petition. Reported below: 497 F. 2d 1.

Certiorari Denied. (See also Nos. 73–6968, 74–37, and 74–5145, *supra.*)

No. 73–1830. SZEKULA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 926.

No. 73–1903. ZLOTNICK ET AL. *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 161 U. S. App. D. C. 238, 494 F. 2d 1157.

No. 73–1906. HERMAN INVESTMENT CO. ET AL. *v.* LOEFFLER, TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 793.

No. 73–1984. NEW YORK SHIPPING ASSN., INC. *v.* FEDERAL MARITIME COMMISSION ET AL.; and

No. 73–1990. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 1215.

No. 73–2018. IN RE ROSEN. Ct. App. D. C. Certiorari denied. Reported below: 315 A. 2d 151.

No. 73–2022. ROLLINS TELECASTING, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 494 F. 2d 80.

No. 73–2048. MATLOCK TRUCK BODY & TRAILER CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 671.

No. 73–2061. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 496 F. 2d 185.

No. 73–6800. BAXTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1404.

No. 73–6895. SOMERSET *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 73–6907. HOLMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 1375.

No. 73–6908. PETERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 20, 495 F. 2d 1076.

No. 73–6920. MOODY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1405.

No. 73–6921. VALLEJO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 496 F. 2d 960.

No. 73–6940. BROWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 495 F. 2d 593.

No. 73–6942. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1405.

No. 73–6945. SHABAZZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6947. DUCKETT ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 432, 308 N. E. 2d 590.

No. 73–6956. JONES ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 20, 495 F. 2d 1076.

No. 73–6963. KOHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 763.

No. 73–6971. COMBS *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1241.

No. 73–6978. OWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1100.

No. 73–6981. RICKETSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 367.

No. 73–6990. KEARNS *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied.

No. 73–6993. RUCKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 496 F. 2d 1241.

No. 73–6994. MIRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 783.

No. 73–7007. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–7010. BUSTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–7017. VALENTI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–7033. WASHINGTON *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 73–7036. NOLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 529.

No. 73–7071. MCCRAVY *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 924.

No. 73–7103. PFISTER *v.* PHOENIX OF HARTFORD INSURANCE CO. ET AL. Sup. Ct. La. Certiorari denied. Reported below: 293 So. 2d 187.

No. 73–7104. MURRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 922.

No. 73–7105. BROWN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 214 Va. 755, 204 S. E. 2d 429.

No. 73–7106. PEICHEV *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 917.

No. 73–7109. BURKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 373.

No. 73–7110. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–7113. DiJohn *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 73–7114. Duhart *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 496 F. 2d 941.

No. 74–41. Nalls *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 520 P. 2d 611.

No. 74–44. Fahrig et al. *v.* Ledford, Executor. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 74–135. Yakima Tribe of Indians of the Yakima Reservation *v.* Confederated Tribes of the Colville Reservation. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 868.

No. 74–137. Wiest et al. *v.* Mt. Lebanon School District. Sup. Ct. Pa. Certiorari denied. Reported below: 457 Pa. 166, 320 A. 2d 362.

No. 74–140. Ronwin *v.* Committee on Examinations and Admissions of the Supreme Court of Arizona. Sup. Ct. Ariz. Certiorari denied.

No. 74–149. Allied Sheet Metal Fabricators, Inc. *v.* Peoples National Bank of Washington. Ct. App. Wash. Certiorari denied. Reported below: 10 Wash. App. 530, 518 P. 2d 734.

No. 74–151. Zenith Vinyl Fabrics Corp. *v.* Ford Motor Co. C. A. 6th Cir. Certiorari denied.

No. 74–162. Dillinger *v.* Mazza. Ct. App. Ohio, Hancock County. Certiorari denied.

No. 74–163. Bruenn *v.* Bruenn. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–164. OHIO HOIST MANUFACTURING CO. *v.* LIROCCHI, DBA CABLE CLIMBER CO. C. A. 9th Cir. Certiorari denied.

No. 74–173. BLACKSHEAR *v.* BLACKSHEAR. Sup. Ct. Ga. Certiorari denied. Reported below: 232 Ga. 312, 206 S. E. 2d 429.

No. 74–177. PRUITT *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 16 Ill. App. 3d 930, 307 N. E. 2d 142.

No. 74–178. NASSAU COUNTY ASSOCIATION OF INSURANCE AGENTS, INC., ET AL. *v.* AETNA LIFE & CASUALTY CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 1151.

No. 74–179. JEFFERSON CHEMICAL CO., INC. *v.* GENERAL TIRE & RUBBER CO. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 1283.

No. 74–182. GOODBODY & CO. ET AL. *v.* PALOMAR FINANCIAL CORP. Sup. Ct. Cal. Certiorari denied.

No. 74–186. GLINSEY ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 565.

No. 74–5008. PLUMMER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 74–5010. CUSHNIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 81.

No. 74–5013. LISI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 498 F. 2d 1396.

No. 74–5033. LEBRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 502 F. 2d 1160.

No. 74–5035. HAWKINS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 319 A. 2d 328.

No. 74–5036. LEFLORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 925.

No. 74–5057. VESSELS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 1295.

No. 74–5142. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–1583. MARCELLO *v.* SAXBE, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 161 U. S. App. D. C. 345, 495 F. 2d 171.

No. 73–1967. LEE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6670. ROSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6902. MARTINEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 507 S. W. 2d 223.

No. 73–6983. CARTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–9. MAURO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 501 F. 2d 45.

No. 74–5012. SHOLARS *v.* MATTER ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 279.

No. 74–5166. HARRIS *v.* PROCUNIER, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 498 F. 2d 576.

No. 73–1679. LINDA POLLIN MEMORIAL HOUSING CORP. ET AL. *v.* MARSHALL ET AL.; and

No. 73–1680. TENANTS' COUNCIL OF TIBER ISLAND-CARROLLSBURG SQUARE ET AL. *v.* LYNN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. D. C. Cir. Motion of respondents Marshall et al. for leave to proceed *in forma pauperis* in No. 73–1679 granted. Certiorari denied. Reported below: No. 73–1679, 162 U. S. App. D. C. 56, 497 F. 2d 643; No. 73–1680, 162 U. S. App. D. C. 61, 497 F. 2d 648.

No. 73–1724. MILLER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 638.

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

On August 25, 1972, a federal grand jury in the Southern District of Florida returned a 12-count indictment against the petitioners. In eight of the 12 counts petitioners were charged with income tax fraud, in violation of § 7206 (1) of the Internal Revenue Code of 1954, 26 U. S. C. § 7206 (1).[1] The indictment alleged that the

[1] "§ 7206. Fraud and False statements.

"Any person who—

"(1) Declaration under penalties of perjury.

"Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that

acts that were the subject of four of the fraud counts (counts II–V, inclusive) were committed on July 18 and 21, 1966, respectively.

Section 6531 of the Code, 26 U. S. C. § 6531,[2] provides a 6-year period of limitations for offenses under § 7206 (1). The indictment, obviously, was returned after the expiration of the 6-year period and, without more, would be subject to dismissal as out of time. See *Benes* v. *United States*, 276 F. 2d 99, 107–109 (CA6 1960).

Section 6531, however, has as its penultimate sentence the following:

> "Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States."

With respect to the alleged offenses of July 18 and 21, 1966, a complaint was filed by the Government with a commissioner of the United States on July 17, 1972, just within the 6-year period. The record contains an

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it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter

. . . . .

"shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

[2] "§ 6531. Periods of limitation on criminal prosecutions.

"No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

. . . . .

"(5) for offenses described in sections 7206 (1) and 7207 (relating to false statements and fraudulent documents)."

acknowledgment, and discloses, that the Government's case had been prepared a week or 10 days before the expiration of the 6-year period; that there was time for the prosecution to have presented the case to a grand jury within that period; that a grand jury had been empaneled in the district; that, in fact, a grand jury of the district had sat in July 1972, including, specifically, the 13th and 20th days of that month; and that the situation was not one where a grand jury of the district was not in session during the closing days of the limitation period.

A defense motion to dismiss the four counts was granted by the District Court. The Court of Appeals reversed. 491 F. 2d 638, 644–646 (CA5 1974).

In *Jaben* v. *United States,* 381 U. S. 214 (1965), § 6531 was construed to apply to a situation where the Government had developed its case within the time period prescribed by the statute of limitations, but was unable to obtain an indictment because a grand jury was not in session. Mr. Justice Harlan, in speaking for the Court, observed:

> "More basically, the evident statutory purpose of the nine-month extension provision is to afford the Government an opportunity to indict criminal tax offenders in the event that a grand jury is not in session at the end of the normal limitation period. This is confirmed by the immediate precursor of the present section which provided for an extension 'until the discharge of the grand jury at its next session within the district.' I. R. C. 1939, § 3748 (a). Clearly the statute was not meant to grant the Government greater time in which to make its case (a result which could have been accomplished simply by making the normal period of limitation six years and nine months), but rather was intended to deal

> with the situation in which the Government has its case made within the normal limitation period but cannot obtain an indictment because of the grand jury schedule." *Id.*, at 219–220. (Footnote omitted.)

Mr. Justice Goldberg, in a separate opinion, concurring in part and dissenting in part, and joined by Mr. Chief Justice Warren and MR. JUSTICE DOUGLAS, echoed this conclusion:

> "I agree with the Court that the purpose of the tolling provision in the statute of limitations before us, as evidenced by its language and its legislative history, is to avoid penalizing the Government when a criminal defendant cannot be indicted merely because no grand jury is sitting at the time the limitation period expires. In keeping with this purpose, the Government ought to be allowed to present a case prepared before the expiration of the limitation period to the grand jury when it next convenes, but it ought not to be allowed to take advantage of a nine-month extension to prepare a case which was not ready for submission before the end of the statutory period." *Id.*, at 226.

This analysis of the purpose of the significant sentence of § 6531, although not determinative of the issues in *Jaben*, remains as this Court's primary interpretation of the statute.

The Government's position, however, as expressed in its memorandum in opposition to the petition for certiorari,[3] is essentially that the 6-year limitation period for

[3] "The statute simply permits the filing of a complaint prior to the end of the limitations period as a means of extending the time for the issuance of an indictment. . . . The purpose of the complaint procedure is to allow the government additional time to present the matter to the grand jury once its case is made." Memorandum for the United States in Opposition 3.

an offense under § 7206 (1) is automatically extended and converted into a 6-year-and-9-month period, at the Government's option, by its mere filing of an appropriate complaint with a commissioner of the United States before the expiration of the 6-year period.

The Government, possibly, is right, but its position, under the circumstances of this case, appears to me to be not entirely consistent with what was said in the respective opinions in *Jaben* by Justices Harlan and Goldberg. I therefore would grant the petition for certiorari and test the Government's position only upon full briefing and argument.

No. 73–1780. DITLOW ET AL. *v.* BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Motion to defer consideration and certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 161 U. S. App. D. C. 154, 494 F. 2d 1073.

No. 73–1811. BRYANT ET AL. *v.* NORTH CAROLINA; and No. 73–1818. HORN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508 (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: No. 73–1811, 285 N. C. 27, 203 S. E. 2d 27; No. 73–1818, 285 N. C. 82, 203 N. E. 2d 36.

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

Petitioners Bryant and Floyd were convicted in the Superior Court of Mecklenburg County of exhibiting allegedly obscene motion pictures in violation of North

Carolina Gen. Stat. § 14–190.1 (Cum. Supp. 1971). Petitioner Horn was convicted in the Superior Court of New Hanover County of selling allegedly obscene magazines in violation of the same statute. Section 14–190.1 provided in pertinent part at the times of the alleged offenses as follows:

> "(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity in any public place. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:
>
> "(1) Sells . . . any obscene writing, picture, record or other representation or embodiment of the obscene; or
>
> . . . . . .
>
> "(4) Exhibits . . . any obscene still or motion picture, film, filmstrip, . . . or any matter or material . . . which is a representation, embodiment, performance, or publication of the obscene.
>
> "(b) For purposes of this Article any material is obscene if:
>
> "(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and,
>
> "(2) The material is patently offensive because it affronts contemporary national community standards relating to the description or representation of sexual matters; and,
>
> "(3) The material is utterly without redeeming social value."

Petitioners Bryant and Floyd appealed their convictions to the Court of Appeals of North Carolina, which affirmed. The Supreme Court of North Carolina dismissed an appeal and denied a petition for writ of certiorari. This Court then granted certiorari, vacated the

judgment of the Court of Appeals, and remanded for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 913. On remand, the Court of Appeals and the Supreme Court of North Carolina both again affirmed the convictions.

Petitioner Horn's conviction was affirmed by the North Carolina Court of Appeals. The Supreme Court of North Carolina also affirmed, in an opinion rendered after *Miller* was decided.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 14–190.1 was constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari and, since the judgments of the Supreme Court of North Carolina were rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Further, it does not appear from the petition and response that the obscenity of the disputed materials in these cases was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent

*Although four of us would grant certiorari and reverse the judgments, the Justices who join this opinion do not insist that the cases be decided on the merits.

with the Due Process Clause, petitioners must be given an opportunity to have their cases decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgments below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–1992. HALL, CORRECTION COMMISSIONER *v.* INMATES OF THE SUFFOLK COUNTY JAIL ET AL. C. A. 1st Cir. Motion of respondents Lopez et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 494 F. 2d 1196.

No. 73–6443. GREENE ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 160 U. S. App. D. C. 21, 489 F. 2d 1145.

No. 73–6629. PRYOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 160 U. S. App. D. C. 404, 492 F. 2d 670.

No. 73–6936. HELMS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 284 N. C. 508, 201 S. E. 2d 850.

No. 73–6809. FALKNER *v.* BLANTON, JUDGE. C. A. 5th Cir. Motion to strike respondent's brief in opposi-

tion and certiorari denied. Reported below: 488 F. 2d 551.

MR. JUSTICE DOUGLAS, dissenting.

The petitioner brought this lawsuit under 42 U. S. C. § 1983, for damages, an injunction, and declaratory relief against a Florida probate judge, alleging that the latter had refused to award property clearly due the petitioner under a will. The District Court dismissed the complaint *sua sponte* on the ground that the judge was immune from suit. The Court of Appeals affirmed without opinion.

By its language, § 1983 applies to "every person" acting under color of state authority. In *Pierson* v. *Ray,* 386 U. S. 547 (1967), the Court placed a judicial gloss on that language when it held that Congress did not thereby create liability of judges for damages. *Pierson* should not control here, for equitable relief as well as damages were sought. I assume that subjecting judges to damage liability would discourage vigor and independence of the bench, yet there need be no fear that subjecting judges to equitable relief in § 1983 cases will inhibit desirable judicial behavior. Two Courts of Appeals have concluded that the reasons for immunity in damage actions are inapplicable when injunctions or declaratory judgments are sought and accordingly have distinguished *Pierson.* See *Littleton* v. *Berbling,* 468 F. 2d 389 (CA7 1972), rev'd on other grounds *sub nom. O'Shea* v. *Littleton,* 414 U. S. 488 (1974); *Koen* v. *Long,* 302 F. Supp. 1383 (ED Mo. 1969), aff'd *per curiam,* 428 F. 2d 876 (CA8 1970). See also *Erdmann* v. *Stevens,* 458 F. 2d 1205 (CA2 1972); *Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 299 F. Supp. 117 (SDNY 1969) (three-judge court) (Friendly, J.), aff'd on other grounds, 401 U. S. 154 (1971).

Nothing in our cases compels the result below. *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973), held that

municipalities could not be sued under § 1983 even for equitable relief, but the holding was based on the inability to read "municipality" within the meaning of "person" as used in the statute. To read "every person" as including judges places no strain on the words; on the contrary, it is the judicial gloss *Pierson* v. *Ray* placed upon the plain language that causes mischief. Judicial narrowing of this broad remedial statute should proceed no further. I would grant certiorari and reverse the judgment below.

No. 73–6810. GENTILE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1404.

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

Petitioner was questioned by Texas police officers in connection with the burglary of a store. After receiving *Miranda* warnings, petitioner admitted participation in the robbery and disclosed that certain stolen articles could be found in his apartment. The police decided to search the apartment for the stolen goods. Instead of obtaining a warrant, however, the police officers presented petitioner with a "consent form," which he signed. By signing the form he authorized the police "to take from my premises and property, any letters, papers, materials or any other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation."

The police then went to petitioner's apartment in search of four boxes of gum and a small radio, goods known to have been taken in the store burglary. In the course of searching for these items, one of the searching officers found a check lying on a bureau. The check was partly obscured by an article of clothing, but the officer testified that a protruding stub allowed him to determine that the payee was a person other than petitioner. The officers

seized the check, and subsequent investigation revealed that it had been stolen. The officer's discovery formed the basis for petitioner's prosecution in the District Court for mail theft, 18 U. S. C. § 1708. Prior to trial, petitioner unsuccessfully moved to suppress the stolen check as evidence, asserting that the seizure of it violated the Fourth Amendment. Petitioner's conviction followed and the denial of the motion to suppress was held proper on the ground that petitioner had consented to the search of his apartment.

Since there is no contention that the police could otherwise have searched petitioner's apartment without first obtaining a warrant, the lawfulness of their search turns on whether petitioner's signing of the consent form relieved the police of this obligation. If this consent form has any validity, seizure of the stolen check from petitioner's residence is outside its scope. The form signified consent to seizure of property "as evidence . . . in the case or cases under investigation." At the time petitioner signed the form he had been questioned and charged with the burglary of a particular store. Thus his reasonable expectations, which must govern construction of the document, were that he was authorizing the police to search his residence for evidence in connection with the only crime for which he was then a suspect.[1]

[1] The Government argues that the seizure can nevertheless be justified under the "plain view" doctrine. But under our decisions, the "plain view" doctrine permits a seizure only where officers already searching under lawful authority make an unanticipated discovery of an object whose incriminating character is immediately apparent. See *Coolidge* v. *New Hampshire,* 403 U. S. 443, 464–471 (1971). These requirements are not met in this case. When the police entered petitioner's house they had no reason to believe that a piece of paper on his bureau, only partially in view, was the fruit of another crime. There was nothing incriminating about a slip of paper protruding from a piece of clothing on petitioner's bureau. The carefully confined "plain view" exception discussed in *Coolidge,* if extended to cover this case, would likewise validate the seizure

Wholly apart from the question of the scope of consent, I would grant certiorari to consider whether the record adequately demonstrates that petitioner gave an informed consent to search. Although petitioner had received *Miranda* warnings, the record is silent as to whether petitioner knew, prior to signing the consent form, that he had a right to refuse and require the police to obtain a warrant. Since in my view waiver of Fourth Amendment protections requires an "intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938), I would require an affirmative showing in the record that petitioner knew he had a right to refuse. While I need not here decide whether a warning would be required in every case, I note that the surest method of demonstrating that the accused had waived a *known* right is a showing that the officers advised him of it by a statement patterned on the warning mandated by *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

In *Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973), the Court held that the absence of a warning did not vitiate consent to a search in a noncustodial setting, specificially reserving the question of the significance of custodial conditions, *id.,* at 247 n. 36. The Court believed that warning the subject of his right to refuse would be "impractical" under the "informal and unstructured conditions" of a roadside search. *Id.,* at 231–232. Yet the circumstances under which an arrestee in police custody meets with his captors are hardly "unstructured." When a suspect is in custody the situation is in control of the police. The pace of events will not somehow deny them an opportunity to give a warning, as the Court apparently feared would happen in noncustodial settings. Moreover, the custodial setting will permit easy docu-

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of a book, not covered by the warrant, but later determined to be obscene.

mentation of both the giving of a warning and the arrestee's response.

The giving of a warning does not, of course, rule out the possibility that coercive tactics may be used to secure consent. But an affirmative communication that a right to refuse consent will be respected may serve to fortify the accused against the coercion inherent in the custodial setting. See *Miranda* v. *Arizona, supra,* at 468. These considerations are especially compelling where, as here, the police procurement of consent is an outgrowth of custodial interrogation. Before signing the consent form the petitioner had been in custody seven hours, and subjected to interrogation that eventually resulted in a confession.

By proceeding on the basis of a "consent" form the police circumvent three important protections of the warrant procedure. First, they avoid submitting to a magistrate's independent assessment of probable cause. Second, they are spared the necessity of making a record, in the form of an affidavit sworn to prior to the search, that guards against the possibility that an *ex post facto* justification will be based upon what the search turns up. Finally, to the extent the police use, as they did here, a boilerplate consent form, they are relieved of the particularity requirement of the warrant.[2]

Efforts by the police to proceed outside the warrant procedure by procuring consent from persons in police custody should be viewed carefully and critically. I would grant certiorari.

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[2] The Fourth Amendment provides in part that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In contrast to the requirement of particularity is the wording of the "consent" form in this case, authorizing seizure of "any letters, papers, material or any other property or things which [the police] desire as evidence for criminal prosecution in the case or cases under investigation."

No. 73–6874. SPADY ET VIR *v.* MOUNT VERNON HOUSING AUTHORITY. Ct. App. N. Y. Certiorari denied. Reported below: 34 N. Y. 2d 573, 310 N. E. 2d 542.

MR. JUSTICE DOUGLAS, dissenting.

Petitioners Linda and Vincent Spady applied for public housing in Mount Vernon, N. Y., in early 1971. Their application was accepted, and in early July they were told that they were eligible for low-income public housing accommodations. On July 9, 1971, petitioners signed a lease, paid one month's rent plus a security deposit, and were assigned to a specific apartment which would be available to them on July 15, 1971. On or before that date, however, the respondent Housing Authority learned from other tenants that Vincent Spady had previously used the name of Vincent Bentley,[1] and that he had compiled a criminal record under that name. Investigation disclosed that Vincent had been arrested once on burglary charges, which were dismissed when the complaining witnesses failed to appear before the grand jury, and had been arrested again on robbery charges, which were dismissed when he was certified for treatment as a narcotics addict. Since those arrests, he had undergone treatment for his narcotics addiction, had been released as rehabilitated, and was enrolled in a methadone maintenance program.

Upon learning these details, the Housing Authority revoked petitioners' eligibility and removed them from its housing list, on the grounds that their application had been "untruthful" and had failed to reveal Vincent's prior arrests and certification as a narcotics addict.[2] Pe-

[1] His full name at birth was Vincent Spady, but he took the name of Bentley for several years when his mother remarried under that name.

[2] It is undisputed that the application form used by the Authority did not expressly request any information concerning aliases, prior

titioners requested an evidentiary hearing to contest the revocation, but the Housing Authority declined to grant a hearing. Petitioners then brought suit in the New York Supreme Court, which ordered the Authority to hold an evidentiary hearing to determine whether petitioners met applicable desirability standards for public housing eligibility. A divided Appellate Division reversed, holding that petitioners were not entitled to a hearing because they were not tenants in possession, and that the Authority's revocation of petitioners' eligibility had a rational basis. The New York Court of Appeals affirmed on the memorandum of the Appellate Division.

Petitioners contend that they were entitled to an evidentiary hearing before they could be deprived of their eligibility for public housing; they further contend that the reasons advanced by the Authority in support of that revocation are so arbitrary and so lacking in any rational basis as to constitute a denial of due process of law and of the equal protection of the laws.[3]

Our decisions in recent years have identified a wide range of important interests which the State may not trample upon without a prior hearing. Thus we have required hearings prior to termination of welfare benefits, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); revo-

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arrests, or drug addiction. The claim of untruthfulness in the application is, therefore, simply untenable.

[3] Petitioners argue that prior arrests, standing alone, have virtually no probative value in establishing actual misconduct or criminal propensities. They further argue that it is wholly irrational to discriminate against a rehabilitated addict on the basis of his prior addiction or on the basis of criminal acts committed during the period of such addiction, and that such discrimination is fundamentally inconsistent with the nature and purposes of narcotics rehabilitation programs. In the absence of a more specific evidentiary record concerning the circumstances of Vincent's prior arrests and the extent of his rehabilitation, it is impossible to evaluate these arguments as applied to him.

cation of a driver's license, *Bell* v. *Burson,* 402 U. S. 535 (1971); revocation of parole, *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), or probation, *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973); and, under certain circumstances, termination of a teaching position at a state college or university, *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), and *Perry* v. *Sindermann,* 408 U. S. 593 (1972).

Eligibility for public housing, under the circumstances presented here, arguably merits comparable protection. The long waiting lists maintained for low-income housing projects are ample proof of the pressing demand. An applicant who has been certified as eligible and has spent many months on a waiting list has a substantial interest in maintaining that place and a substantial expectancy of obtaining housing. Summary removal from an eligibility list just prior to occupancy can work serious injury, since the applicant may be relegated to the end of another growing line.

Today's mounting bureaucracy, both at the state and federal levels, promises to be suffocating and repressive unless it is put into the harness of procedural due process. One who need not explain the reasons for his actions can operate beyond the law. One who need not even hear a complaint from the citizen can turn sheer power into an arbitrary force.[4] Bureaucrats who can, without hearings, ride herd on the people they are supposed to serve, are able to dispense with the concept of equal protection and make their *ipse dixit* the law. Of course not every agency action should be put down for a hearing lest the work of

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[4] As stated by Mr. Justice Frankfurter in *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 170 (1951):

"The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." (Concurring opinion.)

government be paralyzed. Yet one who has no interest that can be called an entitlement may still have an expectancy on which plans are built and living arrangements made. If, as in Spady's case, he is suddenly cast into the outer darkness and placed on the State's blacklist for housing, he may suffer greatly. The unexamined inferences of this agency and the whispered rumors of Spady's former employer may make him and his family pariahs, so far as housing is concerned.

What the decision on the merits should be is arguable. But I would grant the petition for certiorari and set the case for argument.

No. 74–21. MID-FLORIDA TELEVISION CORP. *v.* TV 9, INC., ET AL.; and

No. 74–31. FEDERAL COMMUNICATIONS COMMISSION *v.* TV 9, INC., ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 161 U. S. App. D. C. 349, 495 F. 2d 929.

No. 74–28. O'BRYAN *v.* CHANDLER, U. S. DISTRICT JUDGE. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 496 F. 2d 403.

No. 74–77. ANDREWS *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Motion to dispense with printing petition and certiorari denied.

No. 74–141. SMITH, CORRECTIONAL SUPERINTENDENT *v.* CHENNAULT. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 495 F. 2d 1367.

No. 74–169. DRAKE-HENNE, INC., ET AL. *v.* CITY OF WAHPETON. Sup. Ct. N. D. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 215 N. W. 2d 897.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit during the week of January 13, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a) is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

NOVEMBER 6, 1974

Dismissal Under Rule 60

No. 74–101. FALLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 497 F. 2d 919.

NOVEMBER 7, 1974

Dismissal Under Rule 60

No. 74–268. HOUSEHOLD GOODS CARRIERS' BUREAU *v.* TERRELL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 494 F. 2d 16.

NOVEMBER 11, 1974

Affirmed on Appeal

No. 73–1929. MCDONALD ET AL. *v.* MCLUCAS, ACTING SECRETARY OF THE AIR FORCE, ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 371 F. Supp. 831.

No. 73–7089. WRIGHT ET AL. *v.* MALLOY, COMMISSIONER, DEPARTMENT OF MOTOR VEHICLES. Affirmed on appeal from D. C. Vt. Reported below: 373 F. Supp. 1011.

Appeals Dismissed

No. 73–1890. THOMPSON ET UX. *v.* CLARK, TREASURER OF DUPAGE COUNTY, ET AL. 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.

No. 74–5187. SMITH *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Alameda, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–6884. HUNTER *v.* GENERAL MOTORS CORP., BUICK MOTOR DIVISION. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 487 F. 2d 1402.

No. 73–6899. STOKES *v.* BUCHIGNANI ET AL. Appeal from D. C. E. D. Ky. dismissed for want of jurisdiction.

No. 74–200. BARNETT *v.* GORDON. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 38 Ohio St. 2d 90, 310 N. E. 2d 251.

No. 74–224. BEACON ENTERPRISES, INC. *v.* CITY OF COLUMBUS. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question.

No. 74–315. HOOGASIAN *v.* REGIONAL TRANSPORTATION AUTHORITY ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 58 Ill. 2d 117, 317 N. E. 2d 534.

Vacated and Remanded on Appeal

No. 73–1882. BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* HEIN. Appeal from D. C. S. D. Iowa. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of the revision of regulations of the Department of Agriculture. (See 7 CFR § 271.3 (c)(1)(iii)(f), 39 Fed. Reg. 26002.) Reported below: 371 F. Supp. 1091.

Certiorari Granted—Vacated and Remanded. (See also No. 73–6969, *ante*, p. 18.)

No. 74–5021. GRIER *v.* UNITED STATES. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment of the Court of Appeals for the Fourth Circuit and the sentence imposed by the United States District Court for the Western District of North Carolina (but not the judgment of conviction) are vacated and case remanded to the District Court for reconsideration in light of *Dorszynski* v. *United States*, 418 U. S. 424 (1974). Reported below: 498 F. 2d 1398.

Miscellaneous Orders

No. A–290 (74–5492). SNIDER *v.* UNITED STATES. Application for stay of execution and enforcement of judgment of the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 499 F. 2d 424.

No. A–348 (74–5496). BARTLETT *v.* TOLEDO BAR ASSN. Application for stay of execution and enforcement of judgment of the Supreme Court of Ohio, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 39 Ohio St. 2d 100, 313 N. E. 2d 834.

No. A–361. BAYLOR *v.* HESS, JUDGE. Application for writ of mandamus, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE). Joint motion for additional time for oral argument granted and a total of two hours allotted for that purpose. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 73–820. UNITED STATES *v.* GUANA-SANCHEZ. C. A. 7th Cir. [Certiorari granted, 417 U. S. 967.] Motion of respondent to dismiss writ on account of mootness denied.

No. 73–848. FUSARI, COMMISSIONER OF LABOR *v.* STEINBERG ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 415 U. S. 912.] Motion for appointment of counsel granted. It is ordered that John M. Creane, Esquire, of Milford, Conn., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for appellees in this case.

No. 73–1106. COUSINS ET AL. *v.* WIGODA ET AL. App. Ct. Ill., 1st Dist. [Certiorari granted, 415 U. S. 956.] Motion of petitioners for divided argument denied.

No. 73–1346. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL. *v.* DECHAMPLAIN. Appeal from D. C. D. C. [Probable jurisdiction postponed, 418 U. S. 904.] Motion of appellee for leave to proceed *in forma pauperis* granted. Motion of appellees for additional time for oral argument denied.

No. 73–1377. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CITY OF NEW YORK ET AL. C. A. D. C. Cir.; and

No. 73–1378. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CAMPAIGN CLEAN WATER, INC. C. A. 4th Cir. [Certiorari granted, 416 U. S. 969.]

Motion of petitioner for additional time for oral argument denied.

No. 73–1446. ROE ET AL. *v.* DOE. Ct. App. N. Y. [Certiorari granted, 417 U. S. 907.] Motion of Authors League of America for leave to file a brief as *amicus curiae* denied. Motion of American Psychiatric Assn. et al. for leave to participate in oral argument as *amici curiae* denied.

No. 73–1462. WHITE, SECRETARY OF STATE OF TEXAS, ET AL. *v.* REGESTER ET AL. Appeal from D. C. W. D. Tex. [Probable jurisdiction noted, 417 U. S. 906.] Motion of appellees for additional time for oral argument denied.

No. 73–1471. UNITED STATES ET AL. *v.* NEW JERSEY STATE LOTTERY COMMISSION. C. A. 3d Cir. [Certiorari granted, 417 U. S. 907.] Motion of petitioners to defer oral argument denied.

No. 74–8. O'CONNOR *v.* DONALDSON. C. A. 5th Cir. [Certiorari granted, *ante,* p. 894.] Motion of Daniel S. Dearing, Esquire, to permit Raymond W. Gearey, Esquire, to present oral argument *pro hac vice* on behalf of petitioner granted.

No. 74–70. GOLDFARB ET UX. *v.* VIRGINIA STATE BAR ET AL. C. A. 4th Cir. [Certiorari granted, *ante,* p. 963.] Motion of Virginia State Bar to be dismissed as a party respondent denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 73–6721. TYLER ET AL. *v.* REGAN, U. S. DISTRICT JUDGE; and

No. 74–318. SCARRELLA ET AL. *v.* SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. A–199 (74–170). ANDRINO *v.* UNITED STATES. C. A. 9th Cir. Application for bail, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 74–518. LEVY *v.* PARKER, WARDEN, ET AL. C. A. 3d Cir. Application [A–362] for stay of execution and enforcement of mandate, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant stay pending decision of this Court in No. 73–1346, *McLucas* v. *DeChamplain*. Motions to expedite and consolidate with No. 73–1346 for oral argument denied.

Probable Jurisdiction Noted

No. 74–214. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* SALFI ET AL. Appeal from D. C. N. D. Cal. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 373 F. Supp. 961.

Certiorari Granted

No. 73–1908. CORT ET AL. *v.* ASH. C. A. 3d Cir. Certiorari granted. Reported below: 496 F. 2d 416.

No. 74–124. BLUE CHIP STAMPS ET AL. *v.* MANOR DRUG STORES. C. A. 9th Cir. Certiorari granted. Reported below: 492 F. 2d 136.

No. 74–215. UNITED STATES *v.* PARK. C. A. 4th Cir. Certiorari granted. Reported below: 499 F. 2d 839.

No. 73–1924. MUNIZ ET AL. *v.* HOFFMAN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari granted limited to Questions 3 and 4 presented by the petition which read as follows:

"3. Whether petitioners, charged with criminal contempt for an alleged violation of an injunction issued under the National Labor Relations Act, are entitled to a trial by jury under 18 U. S. C. § 3692, which provides that alleged contemnors are entitled to a jury trial in all contempt cases 'arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute.'

"4. Whether Article III, Section 2 and the Sixth Amendment to the Constitution mandate a jury trial where a penalty of $25,000.00 is assessed against a labor organization in a criminal contempt proceeding."
Reported below: 492 F. 2d 929.

No. 73–2000. UNITED STATES *v.* PELTIER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Case set for oral argument with No. 73–2050, *United States* v. *Ortiz, ante,* p. 824; No. 73–6848, *Bowen* v. *United States, ante,* p. 824; and No. 74–114, *United States* v. *Brignoni-Ponce, ante,* p. 824. Reported below: 500 F. 2d 985.

Certiorari Denied. (See also Nos. 73–1890, 74–5187, and 73–6884, *supra.*)

No. 73–1683. MOORING ET AL. *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS. Sup. Ct. La. Certiorari denied. Reported below: 288 So. 2d 355.

No. 73–1813. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL NO. 10 *v.* HOFFMAN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 929.

No. 73–1919. WILLIS *v.* UNITED STATES; and
No. 73–6934. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 494 F. 2d 1273.

No. 73–1931. NATIONAL DYNAMICS CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 1333.

No. 73–1979. SULLIVAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 498 F. 2d 146.

No. 73–1985. NEWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 926.

No. 73–2004. WASHINGTON ET AL. *v.* FLORIDA. Dist.

Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 294 So. 2d 407.

No. 73–2011. RAMSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 457.

No. 73–2040. MANSON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 494 F. 2d 804.

No. 73–2043. LEWIS, DBA AIRCO ENGINEERS *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 73–2053. RIDLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 920.

No. 73–2068. BARTEMIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 927.

No. 73–6042. HIGHT *v.* BELGRADE STATE BANK ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 162 Mont. 546, 514 P. 2d 766.

No. 73–6759. VALENZUELA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6828. STRADER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 969.

No. 73–6835. FORD *v.* UNITED STATES; and
No. 73–7075. FORD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 1295.

No. 73–6861. HANDY *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 73–6896. PERKINS *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–6917. FITZGERALD ET AL. *v.* BOSLOW, INSTITUTION DIRECTOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 492 F. 2d 1240.

No. 73–6992. PENNYWELL *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 73–6997. WALKER *v.* HUNT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1241.

No. 73–7039. GLORIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 477.

No. 73–7045. ROMERO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1356.

No. 73–7049. REYES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–7050. HOLLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 876.

No. 73–7061. REED *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 292 So. 2d 7.

No. 73–7069. BROWN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–7084. KIBERT *v.* SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 73–7099. GODIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 560.

No. 73–7101. JOYNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 501.

No. 73–7108. CARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 927.

No. 73–7118. HILL *v.* PACE, SHERIFF. Sup. Ct. Va. Certiorari denied.

No. 74–3. ANDERSON ET AL. *v.* TRIMBLE, DISTRICT ATTORNEY OF CLEVELAND COUNTY, ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 519 P. 2d 1352.

No. 74–11. FREEMAN *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 926.

No. 74–15. REICIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 563.

No. 74–17. BIBLER, ADMINISTRATRIX, ET AL. *v.* YOUNG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1351.

No. 74–71. KING'S GARDEN, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 100, 498 F. 2d 51.

No. 74–76. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 1403.

No. 74–88. PHILLIPS ET AL. *v.* KLASSEN, POSTMASTER GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 163 U. S. App. D. C. 360, 502 F. 2d 362.

No. 74–122. PACKERLAND PACKING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 494 F. 2d 293.

No. 74–136. RUSHTON & MERCIER WOODWORKING CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. Reported below: 502 F. 2d 1160.

No. 74–160. WILES ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 499 F. 2d 255.

No. 74–197. STUDER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 74–198. YATES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 509 S. W. 2d 600.

No. 74–207. Akron Presform Mold Co. *v.* McNeil Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 496 F. 2d 230.

No. 74–208. Great Lakes Steel Division, National Steel Corp., et al. *v.* Michie et al. C. A. 6th Cir. Certiorari denied. Reported below: 495 F. 2d 213.

No. 74–212. Hanzimanolis *v.* Murphy, Police Commissioner, City of New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 74–221. Gooch et al. *v.* Skelly Oil Co. et al. C. A. 10th Cir. Certiorari denied. Reported below: 493 F. 2d 366.

No. 74–227. Lecci et al. *v.* Levitt, Comptroller of New York. Ct. App. N. Y. Certiorari denied. Reported below: 34 N. Y. 2d 797, 316 N. E. 2d 327.

No. 74–230. Rafter *v.* Fairfield County Trust Co. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 919.

No. 74–231. Adamszewski et al. *v.* Local Lodge 1487, International Association of Machinists & Aerospace Workers, AFL–CIO, et al. C. A. 7th Cir. Certiorari denied. Reported below: 496 F. 2d 777.

No. 74–236. Haldeman *v.* Sirica, U. S. District Judge. C. A. D. C. Cir. Certiorari denied.

No. 74–237. Teamsters Local Union 377 *v.* Scott. C. A. 6th Cir. Certiorari denied. Reported below: 496 F. 2d 276.

No. 74–239. Tucker *v.* Maher et al. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 1309.

No. 74–244. Booze et al. *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 291 So. 2d 262 and 293 So. 2d 107.

No. 74–248. UNITED STATES GYPSUM CO. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 713 and 498 F. 2d 334.

No. 74–249. PERINI, CORRECTIONAL SUPERINTENDENT *v.* BROOKS. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 923.

No. 74–257. PYNE ET AL. *v.* GREEN. Super. Ct. Pa. Certiorari denied. Reported below: 311 A. 2d 675.

No. 74–259. GARDNER *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 16 Ore. App. 464, 518 P. 2d 1341.

No. 74–263. LIBBEY-OWENS-FORD CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 495 F. 2d 1195.

No. 74–264. BANCO DO BRASIL *v.* VENORE TRANSPORTATION CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 498 F. 2d 469.

No. 74–282. GENERES *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SHASTA ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 74–290. SIEGFERTH, GUARDIAN, ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 6th Cir. Certiorari denied. Reported below: 498 F. 2d 392.

No. 74–291. AANESTAD, ADMINISTRATRIX *v.* BEECH AIRCRAFT CORP. C. A. 9th Cir. Certiorari denied.

No. 74–292. EMPIRE FIRE & MARINE INSURANCE CO. ET AL. *v.* MEYERHOFER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 1190.

No. 74–297. BUTCHER ET UX. *v.* BURTON ABSTRACT & TITLE CO. Ct. App. Mich. Certiorari denied. Reported below: 52 Mich. App. 98, 216 N. W. 2d 434.

No. 73–303. KINEE ET AL. *v.* ABRAHAM LINCOLN FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 3d Cir. Certiorari denied.

No. 74–306. PASSAIC VALLEY WATER COMMISSION *v.* NEW JERSEY EX REL. DEPARTMENT OF HEALTH ET AL. Super. Ct. N. J. Certiorari denied. Reported below: 127 N. J. Super. 251, 317 A. 2d 86.

No. 74–308. RILEY ET AL. *v.* HOWELL ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 43 App. Div. 2d 843, 351 N. Y. S. 2d 647.

No. 74–309. TREASURE VALLEY POTATO BARGAINING ASSN. ET AL. *v.* ORE-IDA FOODS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 497 F. 2d 203.

No. 74–5026. TYLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 74–5028. HEDDEN *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 74–5039. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 921 and 922.

No. 74–5040. MEYER *v.* BOYLE, JUDGE. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 926.

No. 74–5041. CALDWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 74–5042. HALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1405.

No. 74–5044. HAMMONDS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 39 Cal. App. 3d 150, 113 Cal. Rptr. 896.

No. 74–5046. KRYDER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 74–5047. BREWER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1398.

No. 74–5048. ROGERS *v.* LEA COUNTY, NEW MEXICO, PROSECUTORS ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–5050. YEDOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5051. JONES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 457 Pa. 563, 319 A. 2d 142.

No. 74–5053. ROUNDTREE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 45 App. Div. 2d 731, 356 N. Y. S. 2d 357.

No. 74–5055. WRIGHT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5059. BERARDELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 504 F. 2d 126.

No. 74–5061. FALK *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 74–5064. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 919.

No. 74–5065. SHORT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 1170 and 500 F. 2d 676.

No. 74–5066. BURTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 44 App. Div. 2d 910, 356 N. Y. S. 2d 234.

No. 74–5068. PARKER *v.* WALTERS. C. A. 3d Cir. Certiorari denied. Reported below: 495 F. 2d 1369.

No. 74–5069. LOVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 1370.

No. 74–5070. SOMMER *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–5071. BRUNO *v.* DAGGETT ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–5075. DULLES *v.* SECRETARY OF THE TREASURY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 18, 495 F. 2d 1074.

No. 74–5077. BROWN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 293 So. 2d 425.

No. 74–5079. BENANTI *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–5082. WILLIAMS *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 74–5083. BRUNO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5087. CANTON, AKA COMBES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 919.

No. 74–5090. TATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 925.

No. 74–5093. FLETCHER ET AL. *v.* RHODE ISLAND HOSPITAL TRUST NATIONAL BANK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 496 F. 2d 927.

No. 74–5094. CHANEY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1404.

No. 74–5095. ROSARIO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 43 App. Div. 2d 908, 352 N. Y. S. 2d 427.

No. 74–5098. STEIGLER *v.* ANDERSON, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 496 F. 2d 793.

No. 74–5104. SAMUELS, AKA LEBLANC *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5105. PROFFITT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 498 F. 2d 1124.

No. 74–5112. STAPLETON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 494 F. 2d 1269.

No. 74–5115. JOHNSON *v.* CAMDEN COUNTY PROSECUTOR. C. A. 3d Cir. Certiorari denied.

No. 74–5124. JOINER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1314.

No. 74–5125. RAINEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5126. BARNES *v.* GRAY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 923.

No. 74–5129. STARKS *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–5130. CRANE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 499 F. 2d 1385.

No. 74–5132. YOUNG *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 74–5141. WOODY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 215 Kan. 353, 524 P. 2d 1150.

No. 74–5143. BEY, AKA WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 499 F. 2d 194.

No. 74–5150. BOWEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 41.

No. 74–5153. LEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 500 F. 2d 586.

No. 74–5171. LANDIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–5173. ROBINSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1401.

No. 74–5179. THERIAULT ET AL. *v.* CARLSON, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 390.

No. 74–5184. FLOWERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 927.

No. 74–5186. KOBLEIN, AKA BUTTONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 911.

No. 74–5193. HAYMES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 34 N. Y. 2d 639, 311 N. E. 2d 509.

No. 74–5195. PARLE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 110 Ariz. 517, 521 P. 2d 604.

No. 74–5203. JONES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 110 Ariz. 546, 521 P. 2d 978.

No. 74–5205. GARCIA, AKA GARCIA-QUESADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 910.

No. 74–5222. COLEMAN *v.* UNITED STATES; and
No. 74–5226. SIMMONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1403.

No. 74–5232. CHESNEY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 74–5251. SCAGLIOLA *v.* SCAGLIOLA. Sup. Ct. Conn. Certiorari denied. Reported below: —— Conn. ——, 319 A. 2d 414.

No. 74–5252. GREEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 820.

No. 74–5257. MCDONALD *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied. Reported below: 501 F. 2d 385.

No. 74–5263. ROSSILLI *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 920.

No. 74–5313. MILLER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 110 Ariz. 597, 522 P. 2d 23.

No. 73–1823. VAN GUNDY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15,

42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 490 F. 2d 76.

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

Petitioners were convicted in the United States District Court for the Eastern District of Louisiana of receiving allegedly obscene material which had been shipped by common carrier in interstate commerce in violation of 18 U. S. C. § 1462, which provides in pertinent part:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce [of]—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or
>
> . . . . .
>
> "Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Fifth Circuit affirmed, 490 F. 2d 76 (1974).

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the

reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgments below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–1842. ADAMS ET AL. *v.* SOUTHERN CALIFORNIA FIRST NATIONAL BANK ET AL. C. A. 9th Cir. Motion of Ford Motor Credit Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 324.

No. 73–1897. NOWLIN ET UX. *v.* PROFESSIONAL AUTO SALES, INC., ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 496 F. 2d 16.

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*Although four of us would grant certiorari and reverse the judgments, the Justices who join this opinion do not insist that the case be decided on the merits.

No. 73–1824. New Orleans Book Mart, Inc., et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508 (1957) (Douglas, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (Douglas, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (Douglas, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 490 F. 2d 73.

Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting.

Petitioners were convicted in the United States District Court for the Eastern District of Louisiana of transporting allegedly obscene materials in interstate commerce for the purpose of sale in violation of 18 U. S. C. § 1465, which provides in pertinent part:

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The Court of Appeals for the Fifth Circuit affirmed, 490 F. 2d 73 (1974).

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1465, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly

obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–1855. SISCA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 503 F. 2d 1337.

No. 73–2023. COUNTY OF SAN DIEGO ET AL. *v.* RINCON BAND OF MISSION INDIANS. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 495 F. 2d 1.

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

No. 73–2039. PETTY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–2042. FICORELLI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 218.

No. 73–7074. ROLLINS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 299 So. 2d 586.

No. 74–85. OAKLAND RAIDERS *v.* OFFICE OF EMERGENCY PREPAREDNESS ET AL. Temp. Emerg. Ct. App. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–123. IZAAK WALTON LEAGUE OF AMERICA ET AL. *v.* ST. CLAIR ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 849.

No. 74–265. DE LORAINE *v.* MEBA PENSION TRUST ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 499 F. 2d 49.

No. 74–286. BATES *v.* PRUDENTIAL-GRACE LINES, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 900.

No. 74–5045. MASON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 1241.

No. 74–5091. SHIRLEY *v.* STATE NATIONAL BANK OF CONNECTICUT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 F. 2d 739.

No. 74–5096. BRIDGES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 499 F. 2d 179.

No. 74–5159. CROWDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 1367.

No. 74–5190. CASTILLO-BURGOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 501 F. 2d 217.

No. 74–5207. MABE ET AL. *v.* CLINCHFIELD COAL CO. ET AL. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5220. FELL *v.* BUREAU OF MOTOR VEHICLES ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5304. CHRISTIAN *v.* NEW YORK. County Court N. Y., Monroe County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1932. GRONER, DBA LUCKY DISTRIBUTORS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 494 F. 2d 499.

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

Petitioner was convicted in the United States District Court for the Northern District of Texas of using a com-

mon carrier in interstate commerce for carriage of allegedly obscene matter in violation of 18 U. S. C. § 1462, which provides in pertinent part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce [of]—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character
>
> . . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Fifth Circuit affirmed the conviction, 479 F. 2d 577 (1973) (en banc), and this Court vacated the judgment of that court and remanded the case for reconsideration in light of *Miller* v. *California,* 413 U. S. 15 (1973), and companion cases. 414 U. S. 969. On remand, the Fifth Circuit again affirmed the conviction. 494 F. 2d 499 (1974).

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari, and since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–2027. BREWER, WARDEN, ET AL. *v.* REMMERS ET AL.; and

No. 73–7066. REMMERS ET AL. *v.* BREWER, WARDEN, ET AL. C. A. 8th Cir. Motion of respondents in No. 73–2027 for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari in No. 73–7066. Reported below: 494 F. 2d 1277.

No. 73–7067. FANNON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 491 F. 2d 129.

No. 74–14. GISSEL, EXECUTRIX, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion of Association of Ship's Brokers & Agents (USA), Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 493 F. 2d 27.

No. 74–95. NEW YORK *v.* GOGGINS; and

No. 74–5137. BROWN *v.* NEW YORK. Ct. App. N. Y. Motion of respondent in No. 74–95 for leave to proceed

in forma pauperis granted. Certiorari denied. Reported below: 34 N. Y. 2d 163, 313 N. E. 2d 41.

No. 74–99. AMATO *v.* UNITED STATES. C. A. 5th Cir. Motion of Donald Lambert to join in petition and certiorari denied. Reported below: 495 F. 2d 545.

No. 74–119. WASHINGTON *v.* ODOM. Sup. Ct. Wash. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 83 Wash. 2d 541, 520 P. 2d 152.

No. 74–161. CHESAPEAKE & OHIO RAILWAY CO. *v.* HEATER. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 497 F. 2d 1243.

No. 74–240. SIMON *v.* DIXON ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 493 F. 2d 1404.

No. 74–5015. DARROW *v.* UNITED STATES. C. A. 7th Cir. Motion of Cecil Dale Pierce to join in petition and certiorari denied. Reported below: 499 F. 2d 64.

No. 74–5078. FORROW *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied as untimely filed. Reported below: 492 F. 2d 1241.

No. 74–5110. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied as untimely filed. Reported below: 491 F. 2d 1406.

No. 74–5262. MORGAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied as untimely filed. Reported below: 34 N. Y. 2d 709, 313 N. E. 2d 340.

No. 74–5302. MORGAN *v.* CLARK, SHERIFF. C. A. 6th Cir. Certiorari denied as untimely filed. Reported below: 497 F. 2d 924.

Rehearing Denied

No. 73–831. WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO, 417 U. S. 653. Petition for rehearing denied.

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Appeals Dismissed

No. 74–155. DENNIS *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of substantial federal question.

No. 74–341. WHEELER ET AL. *v.* MONROE ET AL. Appeal from Sup. Ct. N. M. dismissed for want of substantial federal question. Reported below: 86 N. M. 296, 523 P. 2d 540.

No. 74–5327. ROBINOWITZ *v.* SARGENT, GOVERNOR OF MASSACHUSETTS, ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–5372. THALASINOS *v.* DOLCINO ET AL. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 114 N. H. 353, 321 A. 2d 107.

Vacated and Remanded on Appeal

No. 74–218. DIVINE, SHERIFF *v.* AMATO. Appeal from C. A. 7th Cir. Judgment vacated and case remanded for further consideration in light of *Hamling* v. *United States,* 418 U. S. 87 (1974), and the decision of the Supreme Court of Wisconsin in *State ex rel. Chobot* v. *Circuit Court,* 61 Wis. 2d 354, 212 N. W. 2d 690 (1973). MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S.

476, 508–514 (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (DOUGLAS, J., dissenting), and that the Constitution prohibits retroactive application of judicially improvised obscenity standards, *Miller* v. *California, supra,* at 37–42, would affirm the judgment below. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would affirm the judgment. Reported below: 496 F. 2d 441.

Certiorari Granted—Vacated and Remanded

No. 74–108. REGAN, CHAIRMAN, NEW YORK STATE BOARD OF PAROLE, ET AL. *v.* JOHNSON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the Eastern District of New York with directions to dismiss cause as moot. Reported below: 500 F. 2d 925.

Miscellaneous Orders

No. A–340. CALLEY *v.* CALLAWAY, SECRETARY OF THE ARMY, ET AL. Application to vacate stay entered by the United States Court of Appeals for the Fifth Circuit on September 26, 1974, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied as moot.

No. A–386. REPUBLIC OF VIETNAM *v.* PFIZER, INC., ET AL. C. A. 8th Cir. Application for injunction, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–392. REAMER *v.* BEALL, U. S. ATTORNEY, ET AL. Application for stay of judgment of the United States District Court for the District of Maryland, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending further order of the Court.

No. D–24. In re Disbarment of Nitsberg. It is ordered that Michael B. Nitsberg, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–27. In re Disbarment of McDermott. It is ordered that Francis X. McDermott, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–28. In re Disbarment of Buttles. It is ordered that Robert S. Buttles, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–29. In re Disbarment of Osborne. It is ordered that George R. Osborne, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–30. In re Disbarment of Tarr. It is ordered that Leonard N. Tarr, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 73–689. Maness *v.* Meyers, Judge. 169th Jud. Dist. Ct. Tex., Bell County. [Certiorari granted, 416

U. S. 934.] Motion of respondent for leave to file supplemental brief after argument granted.

No. 73–1309. BIGELOW *v.* VIRGINIA. Appeal from Sup. Ct. Va. [Probable jurisdiction noted, 418 U. S. 909.] Motion for divided argument on behalf of appellant granted.

No. 73–2050. UNITED STATES *v.* ORTIZ. C. A. 9th Cir. [Certiorari granted, *ante,* p. 824.] Motions to dispense with printing appendix and for appointment of counsel granted. It is ordered that John J. Cleary, Esquire, of San Diego, Cal., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 73–6848. BOWEN *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante,* p. 824.] Motion of petitioner for appointment of counsel granted. It is ordered that Michael D. Nasatir, Esquire, of Beverly Hills, Cal., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 74–13. MULLANEY, WARDEN, ET AL. *v.* WILBUR. C. A. 1st Cir. [Certiorari granted, *ante,* p. 823.] Motions of respondent for leave to proceed *in forma pauperis* and for appointment of counsel granted. It is ordered that Peter J. Rubin, Esquire, of Portland, Me., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 74–114. UNITED STATES *v.* BRIGNONI-PONCE. C. A. 9th Cir. [Certiorari granted, *ante,* p. 824.] Motion of respondent for appointment of counsel granted. It is ordered that John J. Cleary, Esquire, of San Diego, Cal., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 74–175. MIDDENDORF, SECRETARY OF THE NAVY, ET AL. *v.* HENRY ET AL.; and

No. 74–5176. HENRY ET AL. *v.* MIDDENDORF, SECRETARY OF THE NAVY, ET AL. [Certiorari granted, *ante,* p. 895.] Motion to dispense with printing appendix and to proceed on original record granted.

No. 74–5216. REEDER, AKA BLACKROSE *v.* SUPREME COURT OF WYOMING ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 74–5081. MYERS *v.* MYERS ET AL.; and

No. 74–5247. REEDER *v.* CHIEF JUSTICE, SUPREME COURT OF WYOMING, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 74–5287. WILLIAMS *v.* ALBERT ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Postponed

No. 74–156. HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY, ET AL. *v.* MIRANDA, DBA WALNUT PROPERTIES, ET AL. Appeal from D. C. C. D. Cal. Further consideration of question of jurisdiction postponed to hearing of case on merits. Reported below: 388 F. Supp. 350.

Certiorari Granted

No. 73–1734. GURLEY, DBA GURLEY OIL CO. *v.* RHODEN, CHAIRMAN, TAX COMMISSION OF MISSISSIPPI. Sup. Ct. Miss. Certiorari granted. Reported below: 288 So. 2d 868.

No. 74–304. GORDON *v.* NEW YORK STOCK EXCHANGE, INC., ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 498 F. 2d 1303.

No. 74–363. UNITED STATES *v.* RELIABLE TRANSFER CO., INC. C. A. 2d Cir. Certiorari granted. Reported below: 497 F. 2d 1036.

No. 74–80. KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* HELFANT; and

No. 74–277. HELFANT *v.* KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Motion to strike certain portions of petition in No. 74–80 and answer to the cross-petition in No. 74–277 denied. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion and these petitions. Reported below: 500 F. 2d 1188.

Certiorari Denied. (See also Nos. 74–5327 and 74–5372, *supra.*)

No. 73–1575. CALLAHAN ET AL. *v.* KIMBALL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 564.

No. 73–1802. PENNINGTON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 19 Md. App. 253, 310 A. 2d 817.

No. 73–1946. SCATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 1100.

No. 73–1997. HARRISON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–1999. POOLE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 291 So. 2d 723.

No. 73–2051. BOMBACINO *v.* BENSINGER. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 875.

No. 73–6847. COUSINO *v.* COUSINO. Sup. Ct. Mich. Certiorari denied.

No. 73–6894. SHEPPARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–6959. PRATT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6996. KELE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 495 F. 2d 1369.

No. 73–7026. ROSENBERG *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 1367.

No. 73–7037. MARKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 921.

No. 73–7040. OLIVARES-VEGA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 827.

No. 73–7051. MCWHIRT *v.* FEARNOW ET AL. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 301 N. E. 2d 810.

No. 73–7059. CLEMENTS *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 73–7107. COOK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1399.

No. 73–7115. RICHARDSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 498 F. 2d 9.

No. 74–25. UNITED STATES *v.* AMERICAN RENAISSANCE LINES, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 161 U. S. App. D. C. 140, 494 F. 2d 1059.

No. 74–26. MCNEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 490 F. 2d 206.

No. 74–40. JACKSON ET AL. *v.* UNITED STATES; and No. 73–6891. TANTILLO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 161 U. S. App. D. C. 88, 494 F. 2d 1007.

No. 74–63. MATTHEWS CO. ET AL. *v.* WILLIAMS. C. A. 8th Cir. Certiorari denied. Reported below: 499 F. 2d 819.

No. 74–92. MILES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 498 F. 2d 394.

No. 74–150. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1403.

No. 74–171. LOUISIANA *v.* SAWHILL, ADMINISTRATOR, FEDERAL ENERGY OFFICE, ET AL.; and

No. 74–181. CALIFORNIA, BY AND THROUGH THE STATE LANDS COMMISSION *v.* SAWHILL, ADMINISTRATOR, FEDERAL ENERGY OFFICE, ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 504 F. 2d 430.

No. 74–172. GROENDYKE TRANSPORT, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 17.

No. 74–174. GOLDMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 382.

No. 74–195. SUN SHIPBUILDING & DRY DOCK CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 74–199. BARTON *v.* MORTON, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 498 F. 2d 288.

No. 74–209. GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 137, 494 F. 2d 1386.

No. 74–217. SUTTON, EXECUTOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied.

No. 74–246. MONARCH INSURANCE COMPANY OF OHIO *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 74–262. Ricci *v.* County of Riverside et al. C. A. 9th Cir. Certiorari denied. Reported below: 495 F. 2d 1.

No. 74–269. Brian, Secretary, Human Relations Agency, et al. *v.* California Welfare Rights Organization et al. Sup. Ct. Cal. Certiorari denied. Reported below: 11 Cal. 3d 237, 520 P. 2d 970.

No. 74–270. Kelley, Director of Department of Conservation of Alabama, et al. *v.* Mobil Oil Corp. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 784.

No. 74–288. Local 1426, International Longshoremen's Assn., AFL–CIO *v.* Wilmington Shipping Co. et al. C. A. 4th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 74–295. Fur Information & Fashion Council, Inc., et al. *v.* E. F. Timme & Son, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 501 F. 2d 1048.

No. 74–302. Tjaden *v.* Tjaden. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 294 So. 2d 846.

No. 74–305. Coniglio *v.* Highwood Services, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 495 F. 2d 1286.

No. 74–311. Swoap, Director, Department of Social Welfare, et al. *v.* Cooper et al. Sup. Ct. Cal. Certiorari denied. Reported below: 11 Cal. 3d 856, 524 P. 2d 97.

No. 74–312. Swoap, Director, Department of Social Welfare, et al. *v.* Waits et al. Sup. Ct. Cal. Certiorari denied. Reported below: 11 Cal. 3d 887, 524 P. 2d 117.

No. 74–319. MARSHALL ET AL. *v.* CITY OF SEATTLE. Sup. Ct. Wash. Certiorari denied. Reported below: 83 Wash. 2d 665, 521 P. 2d 693.

No. 74–329. PAT RYAN & ASSOCIATES, INC. *v.* OCCIDENTAL LIFE INSURANCE COMPANY OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 496 F. 2d 1255.

No. 74–330. TUCKER *v.* THRELKELD. C. A. 9th Cir. Certiorari denied. Reported below: 496 F. 2d 1101.

No. 74–331. TUCKER *v.* CRIKELAIR. C. A. 9th Cir. Certiorari denied.

No. 74–334. YORTY *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT (CITY COUNCIL OF LOS ANGELES, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari denied.

No. 74–349. HUSMAN EXPRESS CO. *v.* BRYAN TRUCK LINE, INC. Sup. Ct. Ohio. Certiorari denied. Reported below: 38 Ohio St. 2d 103, 310 N. E. 2d 587.

No. 74–356. BROOKLYN HEIGHTS PRESBYTERIAN CHURCH ET AL. *v.* UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–359. THIBODEAU ET AL. *v.* MINNESOTA STATE BAR ASSN. Sup. Ct. Minn. Certiorari denied. Reported below: 300 Minn. 323, 219 N. W. 2d 920.

No. 74–367. CHISHOLM BROTHERS FARM EQUIPMENT CO. *v.* INTERNATIONAL HARVESTER CO. C. A. 9th Cir. Certiorari denied. Reported below: 498 F. 2d 1137.

No. 74–381. NAPPER ET UX. *v.* ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD ET AL. Sup. Ct. Ark. Certiorari denied.

No. 74–5011. HAMLIN, AKA DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1398.

No. 74–5037. FERRI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 495 F. 2d 1369.

No. 74–5088. GREGORIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 F. 2d 1253.

No. 74–5100. QUIROZ-SANTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 499 F. 2d 36.

No. 74—5111. MILLER *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 74–5147. SMITH *v.* CENTRAL LOS ANGELES HEALTH PROJECT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5151. JEFFERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5152. SMITH *v.* KELLER, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 74–5156. HURD *v.* MARSHAL OF RIVERSIDE COUNTY ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–5158. MONROE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 74–5165. STEINBERG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–5168. WILLIAMS *v.* DANA CORP. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 1407.

No. 74–5169. WARREN *v.* AARON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 74–5170. BASALYGA *v.* ASCH. Sup. Ct. Pa. Certiorari denied.

No. 74–5175. SALADIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 1404.

No. 74–5181. HANDY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5192. ROONEY *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 16 Ill. App. 3d 901, 307 N. E. 2d 216.

No. 74–5199. WEDRA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 34 N. Y. 2d 199, 313 N. E. 2d 61.

No. 74–5204. WALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 500 F. 2d 38.

No. 74–5208. MORROW ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1398.

No. 74–5215. BALLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 876.

No. 74–5227. WASHINGTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 922.

No. 74–5236. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1401.

No. 74–5259. ETHRIDGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 494 F. 2d 351.

No. 74–5309. MULCAHY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 44 App. Div. 2d 911, 356 N. Y. S. 2d 237.

No. 74–5323. Flint *v.* Mullen, Warden. C. A. 1st Cir. Certiorari denied. Reported below: 499 F. 2d 100.

No. 74–5353. Sander *v.* Ohio. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1403.

No. 73–5354. Collier *v.* Cowan, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 923.

No. 73–2025. Junior Chamber of Commerce of Rochester, Inc., et al. *v.* United States Jaycees et al.; and

No. 73–2028. Junior Chamber of Commerce of Philadelphia et al. *v.* United States Jaycees et al. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 495 F. 2d 883.

No. 74–187. First American Bank & Trust Co. et al. *v.* Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions, et al. Sup. Ct. N. D. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 221 N. W. 2d 509.

No. 74–5049. Daniels *v.* Alabama. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 74–5056. Trudeau *v.* Michigan. Ct. App. Mich. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 74–5149. New *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 74–5167. Williams *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 57 Ill. 2d 239, 311 N. E. 2d 681.

No. 74–5183. SANNEY *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 500 F. 2d 411.

No. 74–5277. VALLE-ROJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–7003. ARNOLD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari on the wiretap issue.

No. 74–296. WILLIAMS *v.* MATTHEWS CO. ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 499 F. 2d 819.

No. 74–320. DADE COUNTY ET AL. *v.* MARINE EXHIBITION CORP. Dist. Ct. App. Fla., 3d Dist. Motion to defer consideration and certiorari denied. Reported below: 296 So. 2d 652.

No. 74–383. RIVER FARMS, INC. *v.* FOUNTAIN ET AL. Ct. App. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 21 Ariz. App. 504, 520 P. 2d 1181.

Rehearing Denied

No. 73–6425. CHAMBERS *v.* DELANEY ET AL., *ante,* p. 876;

No. 73–6467. GOODWIN *v.* IOWA, *ante,* p. 846;

No. 73–6873. BONNER ET AL. *v.* MARKS ET AL., *ante,* p. 863;

No. 73–6988. SANTANA *v.* NEW YORK ET AL., *ante,* p. 866; and

No. 74–68. CLARION CORP. *v.* AMERICAN HOME PRODUCTS CORP. ET AL., *ante,* p. 870. Petitions for rehearing denied.

No. 74–5018. RANDO *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante*, p. 820; and

No. 74–5139. DILLINGHAM *v.* FLORIDA, *ante*, p. 871. Petitions for rehearing denied.

No. 1863, Misc., October Term, 1968. MIKE *v.* NEW YORK, 395 U. S. 948; and

No. 73–1524. HALLMARK INDUSTRY *v.* REYNOLDS METALS CO. ET AL., 417 U. S. 932. Motions for leave to file petitions for rehearing denied.

NOVEMBER 25, 1974

Affirmed on Appeal

No. 73–1626. WEAVER, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* RANDLE ET AL. Appeal from D. C. N. D. Ill. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed.

Appeal Dismissed

No. 74–5349. SKUFCA *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 457 Pa. 124, 321 A. 2d 889.

Certiorari Granted—Vacated and Remanded

No. 73–1982. UNITED THEATRES OF FLORIDA, INC., DBA UNITED MINI-ADULT THEATRE, ET AL. *v.* GERSTEIN;

No. 73–2056. UNITED THEATRES OF FLORIDA, INC., DBA UNITED MINI-ADULT THEATRE, ET AL. *v.* GERSTEIN; and

No. 73–2057. UNITED THEATRES OF FLORIDA, INC., DBA UNITED MINI-ADULT THEATRE, ET AL. *v.* GERSTEIN. Dist. Ct. App. Fla., 3d Dist. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Little Beaver Theatre, Inc.* v. *Tobin*, 258 So. 2d 30 (Fla. App. 1972). Reported below: No. 73–

1982, 259 So. 2d 215; Nos. 73–2056 and 73–2057, 259 So. 2d 210.

No. 74–5189. YEAGER *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his brief for the United States filed November 1, 1974, judgment vacated and case remanded to the United States District Court for the Northern District of Oklahoma directing that court to hold a hearing and make appropriate findings of fact.

Miscellaneous Orders

No. ————. GRAVES ET AL. *v.* LYNN, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 8th Cir. Motion to dispense with printing petition denied.

No. ————. DELLINGER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Motion to dispense with printing portions of appendix to petition granted.

No. A–360 (74–439). LEWIS *v.* UNITED STATES. C. A. 9th Cir. Order entered by MR. JUSTICE DOUGLAS on November 2, 1974, releasing applicant from custody upon his own recognizance, continued pending final disposition of petition for writ of certiorari.

No. A–385. KAPLAN *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. D. C. Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–392. REAMER *v.* BEALL, U. S. ATTORNEY, ET AL. Order entered by the Court on November 18, 1974 [*ante*, p. 1015], staying judgment of the United States District Court for the District of Maryland is continued conditioned upon the filing of a petition for writ of certiorari on or before December 24, 1974. Should such a peti-

tion be so filed on or before December 24, 1974, this order is to continue pending this Court's action on the petition. If the petition for writ of certiorari is denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to remain in effect pending the sending down of the judgment of this Court.

No. A–414. ROEMER ET AL. *v.* BOARD OF PUBLIC WORKS OF MARYLAND ET AL. D. C. Md. Application for an injunction pending appeal presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant the injunction. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Reported below: 387 F. Supp. 1282.

No. 73–1256. CONNELL CONSTRUCTION CO., INC. *v.* PLUMBERS & STEAMFITTERS LOCAL UNION NO. 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO. C. A. 5th Cir. [Certiorari granted, 416 U. S. 981.] Motion of the Chamber of Commerce of the United States for leave to file a reply brief as *amicus curiae* denied.

No. 73–1543. JOHNSON *v.* RAILWAY EXPRESS AGENCY, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 417 U. S. 929.] Motion of respondents for divided argument granted.

No. 73–6642. CROSBY ET AL. *v.* MIDDENDORF, SECRETARY OF THE NAVY. C. A. 9th Cir. Motion to consolidate this case with Nos. 74–175 and 74–5176 [*Middendorf* v. *Henry* and *Henry* v. *Middendorf*, certiorari granted, *ante*, p. 895] denied.

No. 73–7031. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Certiorari granted, *ante*, p. 963.] Motion of

Richard A. Heim for leave to file a brief as *amicus curiae* granted.

No. A–325 (74–5567). ALERS *v.* MUNICIPALITY OF SAN JUAN. Appeal from C. A. 1st Cir. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 74–5107. WILLIAMS *v.* COMSTOCK, MEN'S COLONY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied.

No. 74–5043. FONTAINE *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT;

No. 74–5237. MYERS *v.* CARRICO ET AL.; and

No. 74–5239. BEGUN *v.* JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Denied

No. 73–1894. FLAXMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 344.

No. 73–1947. JOYCE *v.* UNITED STATES; and

No. 73–1980. WALLACE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 499 F. 2d 9.

No. 73–1983. WILCOX COUNTY BOARD OF EDUCATION ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 575.

No. 73–2007. QUICK SHOP MARKETS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 492 F. 2d 1248.

No. 73–2030. HEDDEN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 287 So. 2d 179.

No. 73–2063. LUE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 498 F. 2d 531.

No. 73–2064. DiBella *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 499 F. 2d 1175.

No. 73–7054 Rawls *v.* Daughters of Charity of Saint Vincent DePaul, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 141.

No. 74–4. Washington *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 496 F. 2d 620.

No. 74–7. McRae *v.* United States. Ct. App. D. C. Certiorari denied.

No. 74–23. Pomares et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 499 F. 2d 1220.

No. 74–115. Powell *v.* Rogers, Deputy Commissioner, Bureau of Employees' Compensation, U. S. Department of Labor, et al. C. A. 9th Cir. Certiorari denied. Reported below: 496 F. 2d 1248.

No. 74–152. Rice *v.* United States. C. C. P. A. Certiorari denied. Reported below: 496 F. 2d 880.

No. 74–203. Rosenblatt *v.* United States. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 910, 497 F. 2d 928.

No. 74–252. Bieski et al. *v.* Eastern Automobile Forwarding Co., Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 921.

No. 74–275. Jones et ux. *v.* Jones et ux. Sup. Ct. Kan. Certiorari denied. Reported below: 215 Kan. 102, 523 P. 2d 743.

No. 74–278. McCain et al. *v.* Lybrand et al. C. A. 4th Cir. Certiorari denied. Reported below: 509 F. 2d 1049.

No. 74–299. Premier Industrial Corp. *v.* Marlow et al. Sup. Ct. Ala. Certiorari denied. Reported below: 292 Ala. 407, 295 So. 2d 396.

No. 74–347. Bierman, Administratrix *v.* Progressive Finance Co. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 74–351. Savannah Sugar Refining Corp. *v.* Baxter. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 437.

No. 74–357. Sanders Brine Shrimp Co. *v.* Southern Pacific Transportation Co. C. A. 10th Cir. Certiorari denied. Reported below: 501 F. 2d 1156.

No. 74–358. Jno. McCall Coal Co., Inc., et al. *v.* Culbertson, Executrix. C. A. 4th Cir. Certiorari denied. Reported below: 495 F. 2d 1403.

No. 74–361. Scott *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 74–366. Fisher et al. *v.* Copeland Refrigeration Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 923.

No. 74–369. Weidinger Chevrolet, Inc. *v.* Universal C. I. T. Credit Corp. C. A. 8th Cir. Certiorari denied. Reported below: 501 F. 2d 459.

No. 74–371. Cordle *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 53 Ala. App. 148, 298 So. 2d 77.

No. 74–376. Susquehanna Valley Teachers' Assn. et al. *v.* Central School District No. 1 of Town of Conklin et al. App. Div., Sup. Ct. N. Y., 3d Jud.

Dept. Certiorari denied. Reported below: 43 App. Div. 2d 198, 350 N. Y. S. 2d 805.

No. 74–379. Ohio *v.* Arthur Andersen & Co. et al. C. A. 10th Cir. Certiorari denied. Reported below: 502 F. 2d 834.

No. 74–393. Brantley et al. *v.* Union Bank & Trust Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 365.

No. 74–397. Forgy *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 74–398. Plan for Arcadia, Inc. *v.* Anita Associates et al. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 390.

No. 74–400. Ballas *v.* McKiernan et al. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 14, 315 N. E. 2d 758.

No. 74–401. Vulcan Forging Co. *v.* Dahlberg, Simon, Jayne, Woolfenden & Gawne. Ct. App. Mich. Certiorari denied.

No. 73–462. Cappadona *v.* New Jersey. Super. Ct. N. J. Certiorari denied. Reported below: 127 N. J. Super. 555, 318 A. 2d 425.

No. 74–5004. Crawley *v.* United States; and

No. 74–5038. Jones *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1398.

No. 74–5006. Proffitt *v.* Becker, Chief Judge, U. S. District Court, et al. C. A. 8th Cir. Certiorari denied.

No. 74–5022. RUARK, AKA THATCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 925.

No. 74–5025. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 925.

No. 74–5089. KENNEDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1185.

No. 74–5097. BENSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 475.

No. 74–5101. BLACKSHEAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1400.

No. 74–5102. SOBOLESKI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 74–5127. CURRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 99.

No. 74–5133. KREUTZ *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 293 So. 2d 451.

No. 74–5135. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 160.

No. 74–5161. GASKINS *v.* TITEFLEX EMPLOYEES COLLECTIVE BARGAINING ASSN. C. A. 1st Cir. Certiorari denied. Reported below: 502 F. 2d 1160.

No. 74–5162. FLAMMIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 921.

No. 74–5180. ELLIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 74–5200. HOLSEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 74–5206. FOSTER ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 272 Md. 273, 323 A. 2d 419.

No. 74–5212. YOUNG *v.* TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 74–5217. IN RE KUNKLE. Sup. Ct. S. D. Certiorari denied. Reported below: — S. D. —, 218 N. W. 2d 521.

No. 74–5219. BARCENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 1110.

No. 74–5221. WHISNANT *v.* DAVIS. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1403.

No. 74–5224. WELLS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1401.

No. 74–5228. VANDYGRIFT *v.* PATTON, JUDGE. Sup. Ct. Fla. Certiorari denied.

No. 74–5234. O'BRIEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5242. LONQUEST *v.* MEACHAM, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 74–5244. FEASTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 871.

No. 74–5254. WHITLOW *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1371.

No. 74–5255. LOMBARDI *v.* FOLLETTE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–5256. BENEVIDES *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5260. JONES *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5264. ERWIN *v.* LEEKE, CORRECTIONS DIRECTOR, ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–5269. QADIR *v.* COUNTY OF SANTA CLARA ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–5270. PERKINS *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 74–5271. GRAHAM *v.* HALES ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–5278. PITTMAN *v.* LEWIS, PRISON SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 74–5286. LOMBARDI *v.* CASSCLES, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–5288. MYERS, DBA ROMYCO STEREO *v.* AMPEX, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 1092.

No. 74–5293. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1403.

No. 74–5296. CLARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 502 F. 2d 1163.

No. 74–5305. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 1050.

No. 74–5332. RADEMAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 2d 1404.

No. 74–5364. VERVILLE, ADMINISTRATOR *v.* BOTSFORD GENERAL HOSPITAL ET AL. Sup. Ct. Mich. Certiorari denied.

No. 74–5382. SKIDMORE *v.* NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 498 F. 2d 1396.

No. 73–7090. WEIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART would grant certiorari. Reported below: 495 F. 2d 879.

No. 74–45. PESIKOFF ET AL. *v.* SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 163 U. S. App. D. C. 197, 501 F. 2d 757.

No. 74–62. GENOVESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 921.

No. 74–131. NOCAR ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 719.

No. 74–5229. TAYLOR, AKA MILLER *v.* BRATTON, U. S. DISTRICT JUDGE. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5276. MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5316. MURRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 160.

No. 74–5322. LOVELY *v.* LALIBERTE ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 498 F. 2d 1261.

No. 74–5340. GIBBS ET AL. *v.* GARVER, DIRECTOR, BUREAU OF MOTOR VEHICLES, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 502 F. 2d 1107.

No. 74–51. IZZI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 1403.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner was convicted by a municipal court of illegal possession of a firearm. Subsequently the Federal Government became interested in the matter, and petitioner was convicted of receiving or possessing a firearm in commerce or affecting commerce. Petitioner is a previously convicted felon, which is an element of the federal offense.

I would grant certiorari in this case limited to the double jeopardy issue which is raised by petitioner's two prosecutions for the same offense. The Solicitor General argues that, because of the interstate-commerce and previously-convicted-felon elements of the federal offense, the two prosecutions did not involve the "same evidence." I am unpersuaded by this approach to the problem, since I believe that a "same transaction" standard is appropriate. See *Ashe* v. *Swenson,* 397 U. S. 436, 448–460 (1970) (BRENNAN, J., concurring). The Solicitor General also argues that the two prosecutions were permissible because they were carried out by separate sovereigns, but I do not agree with this reasoning either. See *Bartkus* v. *Illinois,* 359 U. S. 121, 150–170 (1959) (Black and BRENNAN, JJ., dissenting); *Abbate* v. *United States,* 359 U. S. 187, 196–204 (1959) (Black and BRENNAN, JJ., dissenting).

The Court of Appeals reached the merits of the double jeopardy claim here, but it did so only after noting that the claim appeared not to have been raised below. I do not believe that petitioner's failure to plead double jeopardy at trial, if indeed there was such a failure, should block consideration of that issue. Cf. *LaRuffa* v. *New*

York, ante, p. 959; *Blackledge* v. *Perry,* 417 U. S. 21 (1974); *Robinson* v. *Neil,* 409 U. S. 505 (1973).

Because I believe that petitioner has an arguably meritorious claim on the double jeopardy issue I think we should grant certiorari on that question and set this case for argument.

No. 74–116. PLACE *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE WHITE would grant certiorari. Reported below: 497 F. 2d 412.

No. 74–117. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL NO. 1581, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 489 F. 2d 635.

No. 74–176. JOHNSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 495 F. 2d 1079.

No. 74–251. LEVINSON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would grant certiorari. Reported below: 496 F. 2d 651.

No. 74–298. PROCESS EQUIPMENT ENGINEERING CO., INC. *v.* TENNESSEE EASTMAN CO., A DIVISION OF EASTMAN KODAK CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 498 F. 2d 921.

No. 74–390. LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES *v.* BOINES BY GAINES. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari

denied. Reported below: 44 App. Div. 2d 765, 354 N. Y. S. 2d 252.

No. 74–391. COWAN, PENITENTIARY SUPERINTENDENT *v.* CAUDILL. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 500 F. 2d 1402.

Rehearing Denied

No. 73–1553. GREEN ET AL. *v.* UNITED STATES, *ante,* p. 827;

No. 73–1753. IN RE ESTATE OF CASSIDY ET AL., *ante,* p. 882;

No. 73–1889. WHITLOCK, EXECUTRIX *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 839;

No. 73–1972. CANNON, WARDEN, ET AL. *v.* THOMAS ET AL., *ante,* p. 813;

No. 73–6443. GREENE ET AL. *v.* UNITED STATES, *ante,* p. 977;

No. 73–6616. ANGEL *v.* COINER, WARDEN, *ante,* p. 850;

No. 73–6701. CAMPBELL *v.* CALIFORNIA ET AL., *ante,* p. 853;

No. 73–6768. KOPAS ET AL. *v.* UNITED STATES ET AL., *ante,* p. 857; and

No. 73–6775. KOPAS ET AL. *v.* UNITED STATES TAX COURT ET AL., *ante,* p. 857. Petitions for rehearing denied.

No. 73–1179. ENVIRONMENTAL DEFENSE FUND, INC., ET AL. *v.* STAMM, COMMISSIONER, BUREAU OF RECLAMATION, ET AL., 416 U. S. 974. Motion for leave to file petition for rehearing denied.

No. 73–6827. KREAGER *v.* GENERAL ELECTRIC CO. ET AL., *ante,* p. 861. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

DECEMBER 9, 1974

Affirmed on Appeal

No. 74–256. AMERICAN INSTITUTE FOR SHIPPERS' ASSNS., INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. R. I. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would note probable jurisdiction and set case for oral argument.

No. 74–285. GEORGE TRANSFER & RIGGING CO., INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Md. Reported below: 380 F. Supp. 179.

No. 74–360. LONG ISLAND RAIL ROAD CO. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. E. D. N. Y.

No. 74–471. CASSIDY ET AL. *v.* WILLIS, ELECTION COMMISSIONER OF DELAWARE, ET AL. Affirmed on appeal from Sup. Ct. Del. Reported below: —— Del. ——, 323 A. 2d 598.

No. 74–426. JOINER ET AL. *v.* CITY OF DALLAS ET AL. Affirmed on appeal from D. C. N. D. Tex. MR. JUSTICE WHITE and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 380 F. Supp. 754.

Appeals Dismissed

No. 74–307. B & L MOTOR FREIGHT, INC., ET AL. *v.* HEYMANN, DIRECTOR, DIVISION OF MOTOR VEHICLES, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument.

No. 74–326. MASON, SECRETARY, DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, ET AL. *v.* FRANCIS ET AL. Appeal from D. C. Md. Motion of appellee Francis for

leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari before judgment, certiorari denied.

No. 74–336. SMITH, DBA HOLIDAY HEALTH CLUB, ET AL. *v.* KEATOR, ET AL. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 285 N. C. 530, 206 S. E. 2d 203.

No. 74–344. MCCOLLOUGH *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 57 Ill. 2d 440, 313 N. E. 2d 462.

No. 74–5029. IVORY *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 285 So. 2d 633.

Miscellaneous Orders

No. ———. MARK TRAIL CAMP GROUNDS, INC. *v.* FIELD ENTERPRISES, INC., DBA PUBLISHERS-HALL SYNDICATE. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied.

No. 71–6356. DOE ET AL. *v.* MCMILLAN ET AL., 412 U. S. 306. Motion of petitioners for clarification of opinion of this Court denied.

No. 73–662. SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* COUNCILMAN. C. A. 10th Cir. [Certiorari granted, 414 U. S. 1111.] Motion of respondent for divided argument granted.

No. 73–717. ANTOINE ET UX. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. [Probable jurisdiction noted, 417 U. S. 966.] Motion of appellee to strike brief of the United States as *amicus curiae* denied.

No. 73–1016. LASCARIS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF ONONDAGA COUNTY *v.* SHIRLEY ET AL.; and

No. 73–1095. LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* SHIRLEY ET AL. Appeals from D. C. N. D. N. Y. [Probable jurisdiction noted, 417 U. S. 943.] Motion of Isadore Greenberg, Esquire, to permit Douglas A. Eldridge, Esquire, to present oral argument *pro hac vice* on behalf of appellee Stuck granted. Motion of the State of Iowa for leave to participate in oral argument as *amicus curiae* denied.

No. 73–1462. WHITE, SECRETARY OF STATE OF TEXAS, ET AL. *v.* REGESTER ET AL. Appeal from D. C. W. D. Tex. [Probable jurisdiction noted, 417 U. S. 906.] Motion of appellees for divided argument granted.

No. 73–1500. ERICKSON, WARDEN *v.* UNITED STATES EX REL. FEATHER ET AL. C. A. 8th Cir. [Certiorari granted, 417 U. S. 929.] Motion of respondents for divided argument granted.

No. 73–1631. OSTRER *v.* UNITED STATES, *ante,* p. 829. Motion to modify denial of certiorari denied.

No. 73–2000. UNITED STATES *v.* PELTIER. C. A. 9th Cir. [Certiorari granted, *ante,* p. 993.] Motion for appointment of counsel granted. It is ordered that Sandor W. Shapery, Esquire, of LaJolla, Cal., be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 73–6923. RICE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of Gloria Mae Gilmore et al. to join in petition granted.

No. 74–520. MONTANYE, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* HAYMES. C. A. 2d Cir. Motion to expedite denied.

No. 74–5140. CASSIUS *v.* ARIZONA. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 824.] Motion of petitioner to permit Frederick S. Klein, Esquire, to present oral argument *pro hac vice* granted.

No. 74–5373. ANDERSON *v.* REED, PENITENTIARY SUPERINTENDENT; and

No. 74–5437. LEWIS *v.* ENGLISH, FACILITY SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 74–464. CUPP *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 74–5368. KENNEDY ET AL. *v.* WYOMING ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted

No. 74–453. VAN LARE, ACTING COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* HURLEY ET AL. Appeal from D. C. S. D. N. Y. and D. C. E. D. N. Y. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case set for oral argument with No. 74–5054 [*Taylor* v. *Lavine*, certiorari granted, *infra*]. Reported below: 380 F. Supp. 167.

Certiorari Granted

No. 73–1888. UNITED STATES *v.* ALASKA. C. A. 9th Cir. Certiorari granted. Reported below: 497 F. 2d 1155.

No. 74–364. UNITED STATES *v.* HALE. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma*

pauperis and certiorari granted. Reported below: 162 U. S. App. D. C. 305, 498 F. 2d 1038.

No. 74–5054. TAYLOR ET AL. *v.* LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Case set for oral argument with No. 74–453 [*Van Lare* v. *Hurley*, probable jurisdiction noted, *supra*]. Reported below: 497 F. 2d 1208.

Certiorari Denied. (See also Nos. 74–326 and 74–5029, *supra.*)

No. 73–6830. JUAREZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6890. ELLINGBURG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 73–6938. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–6991. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–6999. PITTMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–7055. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–7080. BONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 876.

No. 73–7081. POWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 922.

No. 73–7102. SWANSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 1376.

No. 74–19. BREWER *v.* UNITED STATES; and
No. 73–6931. MACKAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 491 F. 2d 616.

No. 74–65. CLINGON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 293 So. 2d 823.

No. 74–93. BROWN ET AL. *v.* UNITED STATES; and
No. 74–138. PRADER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 499 F. 2d 829.

No. 74–98. DONNER *v.* UNITED STATES;
No. 74–5106. MCNAMARA *v.* UNITED STATES;
No. 74–5119. MACK *v.* UNITED STATES;
No. 74–5120. MCNAMARA *v.* UNITED STATES;
No. 74–5121. WILLIAMS *v.* UNITED STATES; and
No. 74–5138. KENNEDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 184.

No. 74–109. RACHAL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 910.

No. 74–110. PFOTZER ET AL., DBA E. & E. J. PFOTZER *v.* WARHOLIC ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 919.

No. 74–111. PFOTZER ET AL. *v.* CITY OF NORWALK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 919.

No. 74–133. CALDERON *v.* BOARD OF EDUCATION OF THE EL MONTE SCHOOL DISTRICT OF LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–144. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 F. 2d 348.

No. 74–146. CATENA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1319.

No. 74–170. ANDRINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 497 F. 2d 1103.

No. 74–180. SIEGEL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–184. ROSS *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied.

No. 74–189. IM ET AL., MINORS, BY IM *v.* SAXBE, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1399.

No. 74–210. SHEPARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1403.

No. 74–228. TAYLOR *v.* UNITED STATES; and
No. 74–5285. HEARN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 496 F. 2d 236.

No. 74–233. DEPARTMENT OF TRANSPORTATION OF MARYLAND ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL.; and
No. 74–234. VIRGINIA *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 129.

No. 74–243. PACENTE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 490 F. 2d 661.

No. 74–247. SIMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 177.

No. 74–266. TUCKER *v.* WIGGINS ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–271. FRESTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1399.

No. 74–273. AFFILIATED FUND, INC., ET AL. *v.* PAPILSKY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 554.

No. 74–317. CAMERON ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 44 App. Div. 2d 355, 355 N. Y. S. 2d 19.

No. 74–327. HART *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 925, 498 F. 2d 1405.

No. 74–328. PATCH *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 924, 498 F. 2d 1405.

No. 74–346. FEDERAL PRESCRIPTION SERVICE, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 496 F. 2d 813.

No. 74–355. MCCORMICK, EXECUTOR, ET AL. *v.* FINNERMAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 499 F. 2d 212.

No. 74–385. YORK INTERNATIONAL BUILDING, INC., ET AL. *v.* CHANEY, TRUSTEE. C. A. 9th Cir. Certiorari denied.

No. 74–417. HEIRS OF BURAT (BURAS) *v.* BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT OF LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1336.

No. 74–419. AUTOMOTIVE CHAUFFEURS, PARTS & GARAGE EMPLOYEES, LOCAL UNION 926, ET AL. *v.* NAPA PITTSBURGH, INC. C. A. 3d Cir. Certiorari denied. Reported below: 502 F. 2d 321.

No. 74–422. DUNBAR *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 290 So. 2d 582.

No. 74–435. WARD *v.* PHILADELPHIA ELECTRIC CO. Super. Ct. Pa. Certiorari denied.

No. 74–424. Bowman Transportation, Inc. *v.* Franks et al. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 398.

No. 74–425. International Union of Operating Engineers, Local No. 18, AFL–CIO *v.* Dayton Power & Light Co. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 766.

No. 74–430. Modern Air Transport, Inc. *v.* International Association of Machinists & Aerospace Workers, District No. 145. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1241.

No. 74–433. Christman *v.* Hanrahan et al. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 2d 65.

No. 74–448. Marth, Trustee in Bankruptcy *v.* Dannerbeck et al. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 2d 686.

No. 74–451. United States *v.* Griffin et al. C. A. 6th Cir. Certiorari denied. Reported below: 502 F. 2d 959.

No. 74–455. Response of Carolina, Inc., et al. *v.* Leasco Response, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 314.

No. 74–457. Crane *v.* Industrial Commission of Illinois et al. Sup. Ct. Ill. Certiorari denied. Reported below: 57 Ill. 2d 158, 311 N. E. 2d 156.

No. 74–480. Deering *v.* City of Seattle et al. Ct. App. Wash. Certiorari denied. Reported below: 10 Wash. App. 832, 520 P. 2d 638.

No. 74–482. Cissna *v.* McQuaid, Trustee in Bankruptcy. C. A. 9th Cir. Certiorari denied.

No. 74–486. New Jersey *v.* Sheffield et al. Super. Ct. N. J. Certiorari denied.

No. 74–5003. Wilbanks et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 99, 497 F. 2d 686.

No. 74–5014. Martinez, aka Gonzales, et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 664.

No. 74–5067. Perry *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 1403.

No. 74–5113. Wiemer *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1399.

No. 74–5117. Felts *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 80.

No. 74–5177. Brawer et al. *v.* United States; and No. 74–5300. Kreshik *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 496 F. 2d 703.

No. 74–5191. Qualls *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 500 F. 2d 1238.

No. 74–5197. Bryant *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 72–5211. Rockwell *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 1403.

No. 74–5213. Skelley *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 501 F. 2d 447.

No. 74–5223. Pennick *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 500 F. 2d 184.

No. 74–5231. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 771.

No. 74–5238. MACKIN, AKA NELSON, ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 163 U. S. App. D. C. 427, 502 F. 2d 429.

No. 74–5243. JORDAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 74–5249. ELLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5253. POSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 1296.

No. 74–5258. WAGONER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 313 A. 2d 719 and 321 A. 2d 211.

No. 74–5261. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 1401.

No. 74–5265. DOUGLAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5273. HILL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1245.

No. 74–5275. VASQUEZ-CASILLAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5282. SANGUANDIKUL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 500 F. 2d 1398.

No. 74–5284. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5290. BRIERLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 501 F. 2d 1024.

No. 74–5291. LACOUTURE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1237.

No. 74–5292. WEAVER *v.* CANNON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 74–5298. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 500 F. 2d 1085.

No. 74–5299. MAGID *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 502 F. 2d 1164.

No. 74–5303. RESNICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 1401.

No. 74–5308. MILLER *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5311. SANTANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 710.

No. 74–5312. KING *v.* MOORE. C. A. 7th Cir. Certiorari denied.

No. 74–5317. RUIZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–5319. LONG *v.* PORELLE, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 74–5324. ROGERS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 83 Wash. 2d 553, 520 P. 2d 159.

No. 74–5326. LEE *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 499 F. 2d 456.

No. 74–5335. MCCOY *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 498 F. 2d 1396.

No. 74–5336. Esser *v.* Tripodi et al. C. A. 3d Cir. Certiorari denied.

No. 74–5338. McCants *v.* Alabama. C. A. 5th Cir. Certiorari denied.

No. 74–5339. Hartmann *v.* New York et al. C. A. 10th Cir. Certiorari denied.

No. 74–5342. Castaphney *v.* United States;
No. 74–5344. Brown *v.* United States; and
No. 74–5345. Goshay *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1399 and 1400.

No. 74–5346. Kessler *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 57 Ill. 2d 493, 315 N. E. 2d 29.

No. 74–5355. Harris *v.* New York. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 74–5356. Paul *v.* New Mexico. C. A. 10th Cir. Certiorari denied.

No. 74–5358. D'Amico et al. *v.* Liberty Corp. et al. Sup. Ct. Pa. Certiorari denied. Reported below: 457 Pa. 181, 329 A. 2d 222.

No. 74–5361. Cross *v.* Church, County Clerk-Recorder. C. A. 9th Cir. Certiorari denied.

No. 74–5362. Friedman *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 1352.

No. 74–5377. Farries *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 74–5380. Yopp *v.* Michigan. Sup. Ct. Mich. Certiorari denied. Reported below: 392 Mich. 793.

No. 74–5386. ALLEN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–5387. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5388. DAVIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1182.

No. 74–5389. PEACOCK *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1405.

No. 74–5392. TRIGG *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 1404.

No. 74–5393. HILL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 74–5396. GRAY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 74–5404. JACKSON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 522 P. 2d 1356.

No. 74–5415. MENDOZA *v.* CAMPBELL, SUPERINTENDENT, MOTOR VEHICLE DIVISION, HIGHWAY DEPARTMENT OF ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 111 Ariz. 71, 523 P. 2d 502.

No. 74–5416. BARBOSA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 74–5417. STEVENS *v.* ASCH. C. A. 3d Cir. Certiorari denied.

No. 74–5421. GORE *v.* SIELAFF, CORRECTIONS DIRECTOR. C. A. 7th Cir. Certiorari denied.

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No. 74–5428. WATERS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1406.

No. 74–5440. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–1832. CIRILLO ET AL. *v.* UNITED STATES;
No. 73–1837. LILIENTHAL *v.* UNITED STATES;
No. 73–1859. SORRENTINO ET AL. *v.* UNITED STATES; and
No. 73–1987. VENETUCCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 499 F. 2d 872.

No. 74–104. IN RE PORTER. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 268 Ore. 417, 521 P. 2d 345.

No. 74–118. BISHOP, ADMINISTRATOR *v.* HENDRICKS. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 495 F. 2d 289.

No. 74–139. KITCHENS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 293 So. 2d 815.

No. 74–154. MARTINEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 498 F. 2d 464.

No. 74–219. TOLIVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 500 F. 2d 1403.

No. 74–232. VIGORITO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 499 F. 2d 1351.

No. 74–387. KARLAN *v.* CITY OF CINCINNATI. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS

would grant certiorari. Reported below: 39 Ohio St. 2d 107, 314 N. E. 2d 162.

No. 74–408. PIETRUNTI *v.* BOARD OF EDUCATION OF BRICK TOWNSHIP. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 128 N. J. Super. 149, 319 A. 2d 262.

No. 74–421. CLEVELAND BROWNS, INC. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–447. SAUQUOIT FIBERS CO., INC. *v.* LEESONA CORP. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 498 F. 2d 271.

No. 74–467. BUILDING OWNERS & MANAGERS ASSOCIATION OF METROPOLITAN DETROIT ET AL. *v.* DETROIT EDISON CO. ET AL. Cir. Ct., Ingham County, Mich. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5032. MONTGOMERY ET AL. *v.* CALIFORNIA. Super. Ct. Cal., County of Sacramento. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5128. BETTS *v.* COUNTY COURT FOR LACROSSE COUNTY, BRANCH II, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 496 F. 2d 1156.

No. 74–5160. MCNEIL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 162 U. S. App. D. C. 99, 497 F. 2d 686.

No. 74–5225. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5375. SNYDER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 164 U. S. App. D. C. 370, 505 F. 2d 477.

No. 74–5385. ELI *v.* BRITT, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 498 F. 2d 1340.

No. 74–5447. HAYES *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 500 F. 2d 1212.

No. 74–78. PREISER, CORRECTIONAL COMMISSIONER OF NEW YORK, ET AL. *v.* WILLIAMS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 497 F. 2d 337.

No. 74–350. TROOPERS LODGE NO. 41, FRATERNAL ORDER OF POLICE, ET AL. *v.* WALKER, GOVERNOR OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would grant certiorari. Reported below: 57 Ill. 2d 512, 315 N. E. 2d 9.

MR. JUSTICE DOUGLAS.

The petitioners are members of the Illinois State Police who, joined by their fraternal organization, challenge an Illinois regulatory program that requires disclosure of financial transactions and associations by state employees. The program was created by an executive order of the Governor of Illinois. The order established a State Board of Ethics, empowered to require designated state employees to file an annual statement of economic interest, which discloses assets and liabilities, each source of income and the amount received therefrom, and each "close economic association," which is defined as a "busi-

ness or professional entity with which the person is associated as an officer, employee, director or partner or in which he has a substantial interest." The foregoing disclosures must be made not only by the employee himself, but also by members of his immediate family sharing his household. Information so reported is open to "reasonable public inspection." Failure to make the required disclosures subjects the employee to disciplinary action, including discharge.

The executive order applies by its terms only to members of the executive branch. Were this the only element of the Illinois scheme to discourage conflict of interests among those who hold public office, I believe a substantial equal protection question would be presented. The State has an undeniably strong interest in placing beyond question the integrity of its public service. But this is an interest that applies to all branches of the government, and where a State singles out a target group of employees, it is arguably compelled by the Equal Protection Clause to justify the differential treatment. The Illinois program, however, is greater than the executive order, and I add this word because it is not discussed in the briefs nor in the opinion in this case. The Illinois Governmental Ethics Act, passed in 1972, in addition to prescribing a "code of conduct" for legislators, requires the disclosure of "economic interest" by members of the legislature and independent agencies, Ill. Rev. Stat., c. 127, § 601–101 *et seq.* (1973).[1] Criminal penalties are provided for the filing of false statements, and failure to disclose at all subjects the officer to forfeiture of his office, § 604A–107. The statute provides for public examination of statements "at all reasonable times," § 604A–106. Judges have similar reporting obligations under a rule of

[1] See also, Note, The Illinois Governmental Ethics Act—A Step Ahead Toward Better Government, 22 De Paul L. Rev. 302 (1972).

the Illinois Supreme Court, Ill. Rev. Stat., c. 110A, § 68 (1973).[2] Since it appears that Illinois has offered even-handed treatment, I accordingly join in the denial of certiorari.

Rehearing Denied

No. 73–1387. FITHIAN *v.* FITHIAN, *ante,* p. 825;

No. 73–1559. FAIRVIEW NURSING HOME *v.* NATIONAL LABOR RELATIONS BOARD, *ante,* p. 827;

No. 73–1624. ANDREA DUMON, INC., ET AL. *v.* CLAIROL, INC., *ante,* p. 873;

No. 73–1657. ESTATE OF MEADE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 882;

No. 73–1709. SNEIDERS *v.* HENRY, *ante,* p. 832;

No. 73–1713. SMYZER *v.* KENTUCKY, *ante,* p. 832;

No. 73–1741. PERSICO ET AL. *v.* UNITED STATES, *ante,* p. 924;

No. 73–1756. BIDDLE, ADMINISTRATRIX *v.* BOWSER, *ante,* p. 834;

No. 73–1826. PETTITT ET UX. *v.* CITY OF FRESNO ET AL., *ante,* p. 810;

No. 73–1935. PAYNE, A MINOR, BY PAYNE *v.* CITY OF FORT LAUDERDALE ET AL., *ante,* p. 875;

No. 73–1953. CANNON *v.* OVIATT, *ante,* p. 810;

No. 73–2061. SMITH *v.* UNITED STATES, *ante,* p. 964;

No. 73–6625. COULTER *v.* UNITED STATES, *ante,* p. 850;

No. 73–6629. PRYOR *v.* UNITED STATES, *ante,* p. 977; and

No. 73–6710. ZAUN ET UX. *v.* FANN, SHERIFF, ET AL., *ante,* p. 854. Petitions for rehearing denied.

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[2] Statements filed by judges are not automatically open to public inspection, but litigants in a particular case may ascertain, through an administrative procedure, whether a judge has had an economic interest in the outcome. Ill. Rev. Stat., c. 110A, §§ 66–68 (1973).

No. 73–6774. EPHRAIM *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante,* p. 897;

No. 73–6806. SOTELO ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE, *ante,* p. 859;

No. 73–6912. LEE *v.* ALABAMA, *ante,* p. 864;

No. 73–6964. OLENZ *v.* TELETYPE CORP. ET AL., *ante,* p. 865;

No. 73–6968. ENGLEFIELD *v.* ENGLEFIELD, *ante,* p. 958;

No. 73–7019. BAILEY *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante,* p. 953;

No. 74–1. CARDIN *v.* KENTUCKY, *ante,* p. 868;

No. 74–90. KELLER, SECRETARY, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA, ET AL. *v.* MIXON, A MINOR, BY CARTER, ET AL., *ante,* p. 880; and

No. 74–194. WALL ET AL. *v.* HARDWICK ET AL., *ante,* p. 888. Petitions for rehearing denied.

No. 73–1744. FOSTER *v.* AMERICAN MACHINE & FOUNDRY CO. ET AL., *ante,* p. 833;

No. 73–6805. GEARIN *v.* WEYERHAEUSER LINE, *ante,* p. 884; and

No. 74–86. LEONARD *v.* STRAUSS, *ante,* p. 901. Motions for leave to file 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 Eighth Circuit during the week of March 10, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

DECEMBER 16, 1974

Appeals Dismissed

No. 74–225. MARSHALL ET AL. *v.* OHIO; and

No. 74–226. KENSINGER *v.* OHIO. Appeals from Ct. App. Ohio, Hamilton County. Stays (Nos. A–1282 and A–1283) heretofore granted on July 9, 1974, by MR. JUSTICE STEWART are vacated. Appeals dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508–514 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would note probable jurisdiction and summarily reverse the judgments.

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

Appellants were convicted in the Court of Common Pleas of Hamilton County, Ohio, of possession of allegedly obscene materials with intent to distribute the materials in violation of Ohio Rev. Code Ann. § 2905.35 (Supp. 1973), which provided in pertinent part at the time of the alleged offense as follows:

> "No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance;

or possess or have in his control any obscene material with intent to violate this section . . . ."

As used in § 2905.35,

"(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." § 2905.34.

On appeal, the Court of Appeals of Hamilton County affirmed the convictions. The Supreme Court of Ohio dismissed the appeals.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents."

Paris Adult Theatre I v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 2905.35, as it incorporated the definition of "obscene" of § 2905.34, was constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore note probable jurisdiction and, since the judgment of the Court of Appeals of Hamilton County was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented in addition to those already treated merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1974) (BRENNAN, J., dissenting).

Further, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, each appellant must be given an opportunity to have his case decided upon, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgments below and remand for a determination whether appellants should be afforded new trials under local community standards.

No. 74–474. CONKLIN *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 12 Cal. 3d 259, 522 P. 2d 1049.

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*Although four of us would note probable jurisdiction and reverse the judgments, the Justices who join this opinion do not insist that the case be decided on the merits.

No. 74–284. DISTRICT OF COLUMBIA *v.* WALTERS ET AL. Appeal from Ct. App. D. C. dismissed for want of properly presented federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 319 A. 2d 332.

No. 74–478. GARIS *v.* COMPANIA MARITIMA SAN BASILIO, S. A., ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 44 App. Div. 2d 655, 353 N. Y. S. 2d 711.

No. 74–5376. GARGALLO *v.* GARGALLO. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–5403. MARTINOLICH *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: 456 Pa. 136, 318 A. 2d 680.

Vacated and Remanded on Appeal

No. 74–499. FITZGERALD ET AL. *v.* DIGRAZIA ET AL. Appeal from D. C. E. D. Mo. Judgment vacated and case remanded for entry of a fresh judgment or decree from which a timely appeal may be taken to the United States Court of Appeals. *Gonzalez* v. *Automatic Employees Credit Union, ante,* p. 90. Reported below: 383 F. Supp. 668.

Certiorari Dismissed

No. 73–1739. SANDQUIST *v.* CALIFORNIA. App. Dept., Super Ct. Cal., County of Los Angeles;

No. 74–158. KUHNS ET AL. *v.* CALIFORNIA; and

No. 74–159. KUHNS ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Cruz. Petitioners did not seek to have the Appellate Department certify their cases to the Court of Appeal pursuant to California Penal Code § 1471 and California Rules of Court 62 and 63. Accordingly, the decisions of the Appellate Department are not "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had . . . ," 28 U. S. C. § 1257, and the petitions for writs of certiorari to their respective courts are dismissed for want of jurisdiction. See *Banks* v. *California,* 395 U. S. 708 (1969).

Miscellaneous Orders

No. A–430. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Application for reduction of bail pending appeal, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. 73–1256. CONNELL CONSTRUCTION CO., INC. *v.* PLUMBERS & STEAMFITTERS LOCAL NO. 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO. C. A. 5th Cir. [Certiorari granted, 416 U. S. 981.] Motion of petitioner for leave to file a brief after argument granted.

No. 73–6739. COSTARELLI *v.* MASSACHUSETTS. Appeal from Municipal Ct. of Boston. [Probable jurisdiction postponed, *ante,* p. 893.] Motion of appellant for appointment of counsel granted. It is ordered that Robert W. Hagopian, Esquire, of Wrentham, Mass., be, and he is hereby, appointed to serve as counsel for appellant in this case.

No. 74–157. United Housing Foundation, Inc., et al. *v.* Forman et al. C. A. 2d Cir. Motion to defer consideration of petition for writ of certiorari granted.

No. 74–5522. Dolphus *v.* Wainwright, Corrections Director. Motion for leave to file petition for writ of habeas corpus denied.

No. 74–5374. Monteer *v.* Chief Judge, United States Court of Appeals for the Eighth Circuit; and

No. 74–5481. Dollar *v.* California et al. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 74–201. City of Richmond, Virginia *v.* United States et al. Appeal from D. C. D. C. Motion of appellee Holt for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Mr. Justice Powell took no part in the consideration or decision of this matter. Reported below: 376 F. Supp. 1344.

Certiorari Granted

No. 74–22. Ivan Allen Co. *v.* United States. C. A. 5th Cir. Certiorari granted. Reported below: 493 F. 2d 426.

No. 74–415. Rondeau *v.* Mosinee Paper Corp. C. A. 7th Cir. Certiorari granted. Reported below: 500 F. 2d 1011.

No. 74–450. Butterfield, Administrator, Federal Aviation Administration, et al. *v.* Robertson et al. C. A. D. C. Cir. Certiorari granted. Reported below: 162 U. S. App. D. C. 298, 498 F. 2d 1031.

No. 74–452. Twentieth Century Music Corp. et al. *v.* Aiken. C. A. 3d Cir. Certiorari granted. Reported below: 500 F. 2d 127.

No. 74–466. BRENNAN, SECRETARY OF LABOR *v.* BACHOWSKI ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 502 F. 2d 79.

No. 74–121. PHELPS, RECEIVER IN BANKRUPTCY *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition which read as follows:

1. "Whether the Court of Appeals incorrectly granted to the United States a priority based upon the Internal Revenue Code of 1954 for taxes in violation of and contrary to the priorities for payment of claims established by the Bankruptcy Act?"

2. "Whether the Court of Appeals incorrectly held that service of a Notice of Levy upon an assignee for the benefit of creditors subsequent to the assignment reduced the bankrupt's property then held by the assignee to the constructive possession of the United States?"

3. "Whether the Court of Appeals incorrectly determined that the Bankruptcy Court lacked summary jurisdiction to adjudicate the controversy before it without the consent of the United States?"

Reported below: 495 F. 2d 1283.

No. 74–389. ALBEMARLE PAPER CO. ET AL. *v.* MOODY ET AL.; and

No. 74–428. HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS & PAPERWORKERS, AFL–CIO *v.* MOODY ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 474 F. 2d 134.

Certiorari Denied. (See also Nos. 74–284, 74–478, 74–5376, and 74–5403, *supra.*)

No. 73–7058. THOMAS *v.* UNITED STATES BOARD OF PAROLE ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–7093. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 496 F. 2d 982.

No. 73–7094. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 497 F. 2d 602.

No. 74–127. MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION ET AL. *v.* SIMON, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 19, 495 F. 2d 1075.

No. 74–145. BRAINERD *v.* BEAL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 901.

No. 74–191. MARKHAM ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 498 F. 2d 178.

No. 74–223. HASTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 876.

No. 74–258. YOUNG ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 498 F. 2d 1164.

No. 74–279. MIRELEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 915.

No. 74–280. BRAMBLE *v.* SAXBE, ATTORNEY GENERAL, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 498 F. 2d 968.

No. 74–281. VOWTERAS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 500 F. 2d 1210.

No. 74–340. MALONE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 899, 497 F. 2d 928.

No. 74–345. R. J. Reynolds Tobacco Co. et al. *v.* American President Lines, Ltd., et al. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 66, 503 F. 2d 157.

No. 74–368. Roberts et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 498 F. 2d 520.

No. 74–429. Sigma Systems Corp. et al. *v.* Electronic Data Systems Corp. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 241.

No. 74–468. Webster *v.* Kentucky. Ct. App. Ky. Certiorari denied. Reported below: 508 S. W. 2d 33.

No. 74–473. Steamship Mutual Underwriting Assn., Ltd. *v.* Westchester Fire Insurance Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 1352.

No. 74–475. Universal Builders, Inc., et al. *v.* Clark et al. C. A. 7th Cir. Certiorari denied. Reported below: 501 F. 2d 324.

No. 74–488. Hartley et al. *v.* City of Chattanooga et al.; and

No. 74–490. Hudson et al. *v.* City of Chattanooga et al. Sup. Ct. Tenn. Certiorari denied. Reported below: 512 S. W. 2d 555.

No. 74–500. Remsco Associates, Inc. *v.* Beaver Falls Municipal Authority. Super. Ct. Pa. Certiorari denied.

No. 74–507. Gonzalez et al. *v.* International Longshoremen's Association, Local No. 1581, AFL–CIO. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 330.

No. 74–509. MONTY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 45 App. Div. 2d 1038, 358 N. Y. S. 2d 181.

No. 74–529. JOHNSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 74–5024. DORAN *v.* OHIO. Ct. App. Ohio, Wayne County. Certiorari denied.

No. 74–5030. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1398.

No. 74–5076. ALLISON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 62 Wis. 2d 14, 214 N. W. 2d 437.

No. 74–5108. FELTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 499 F. 2d 845.

No. 74–5235. FIELDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 69.

No. 74–5267. MUNDT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5306. STURGEON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 501 F. 2d 1270.

No. 74–5331. DILWORTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 74–5333. PIETRAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 501 F. 2d 182.

No. 74–5341. RESNICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 575.

No. 74–5351. DURAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5359. FONSECA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 1384.

No. 74–5360. PECINA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 501 F. 2d 536.

No. 74–5365. WENTZ ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 74–5370. GONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5406. CALLAHAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 45 App. Div. 2d 819, 356 N. Y. S. 2d 549.

No. 74–5442. MOYNIER *v.* VALUCH ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5456. CONNER *v.* DERAMUS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 74–5457. AGUR *v.* WILSON, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 498 F. 2d 961.

No. 74–5462. GIBSON *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–5463. MILLER *v.* MARYLAND. Crim. Ct. Baltimore City, Md. Certiorari denied.

No. 74–5464. BENNETT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 52 Mich. App. 742, 218 N. W. 2d 407.

No. 74–5467. RAYMOND *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 74–5471. SEDILLO, AKA BAYLORS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 74–5474. ARNOLD *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–5476. WILSON *v.* CLANON, PRISON SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 74–5477. PAQUETTE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 920.

No. 74–5480. GUTIERREZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 74–5484. ALEXANDER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1405.

No. 74–5494. NEVAREZ *v.* ARIZONA. Super. Ct. Ariz., Pima County. Certiorari denied.

No. 74–5496. BARTLETT *v.* TOLEDO BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 39 Ohio St. 2d 100, 313 N. E. 2d 834.

No. 74–5498. CARTER *v.* HARDY. C. A. 5th Cir. Certiorari denied.

No. 74–5526. KENNEDY ET AL. *v.* MEACHAM, WARDEN, ET AL. Sup. Ct. Wyo. Certiorari denied.

No. 74–5559. SANTANA *v.* UNITED STATES DISTRICT COURT. C. A. 2d Cir. Certiorari denied.

No. 73–2008. AYRE *v.* MARYLAND. Crim. Ct. Baltimore City, Md. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508–514 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult*

Theatre I v. *Slaton,* 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment.

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

Petitioner was convicted in the Criminal Court of Baltimore City of possession of obscene materials with intent to sell in violation of Md. Ann. Code, Art. 27, § 418 (1971). Section 418 provides in pertinent part as follows: "Every person who . . . has in his possession with intent to distribute . . . any obscene matter is guilty of a misdemeanor." The Maryland courts have defined the term "obscene" by adopting the test set forth in *Miller* v. *California,* 413 U. S. 15 (1973). See *Ebert* v. *Maryland State Bd. of Censors,* 19 Md. App. 300, 313 A. 2d 536 (1973). The Maryland Court of Special Appeals and the Maryland Court of Appeals denied certiorari.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 418 of the Maryland Code is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari, and, since the judgment of the Maryland Court of Appeals was rendered after *Miller,* reverse.* In that circumstance, I

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–6535. WELLS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 504 S. W. 2d 96.

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

On April 28, 1967, petitioner and two companions allegedly robbed the Liberty Loan Corporation office in St. Louis of $200. During the robbery, one of petitioner's confederates fired a shot which killed a bank employee. Petitioner was charged in separate indictments with first-degree murder and first-degree robbery by means of a dangerous and deadly weapon. At the time, the death penalty was available under Missouri law for each of these crimes, with the decision whether it should be imposed committed to jury discretion. Mo. Rev. Stat. §§ 559.030, 560.135 (1959).

Under then-applicable Missouri criminal procedure rules, it was not permissible to join in one indictment or at one trial robbery and murder charges. See Mo. Sup. Ct. Rule 24.04; Mo. Rev. Stat. §§ 545.120, 545.130 (1959). Petitioner was tried first on the murder charge. Missouri punishes as first-degree murder "every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem." Mo. Rev. Stat. § 559.010 (1969). While the murder indictment alleged that petitioner murdered the victim "feloniously, willfully, and premeditately, deliberately, on purpose and of . . . malice aforethought," petitioner claims, and the Supreme Court of Missouri, as we read its opinion, found, that the murder case was tried to the jury on a felony-murder theory, with proof of the elements of

the robbery supplying the requisite *mens rea* for murder. Missouri permits trial on a felony-murder theory even though the indictment does not allege the felony but alleges directly the *mens rea* for first-degree murder. *State* v. *Conway,* 351 Mo. 126, 171 S. W. 2d 677 (1943).

Petitioner was found guilty of first-degree murder by the jury, which assessed his punishment as life imprisonment. At the sentencing hearing before the trial judge, petitioner waived his right to appeal the murder conviction and was sentenced to life imprisonment for murder. At the same hearing, he withdrew his not-guilty plea to the robbery charge and entered a guilty plea. The prosecuting attorney then recommended a concurrent life sentence on the robbery conviction, and the judge imposed the recommended sentence.

In 1970, petitioner sought state post-conviction remedies to vacate both the waiver of appeal from the murder conviction and the guilty plea to the robbery charge. After hearing, the trial judge held that, although both the waiver of appeal and the guilty plea were motivated by fear that the death penalty might be imposed if petitioner stood trial for robbery, the waiver and plea were voluntary. The Supreme Court of Missouri affirmed. 504 S. W. 2d 96 (1974).

The Supreme Court of Missouri also rejected petitioner's contention that the prosecution for robbery after conviction for murder on a felony-murder theory violated the constitutional protection from double jeopardy. *Id.,* at 97, relying on *State* v. *Moore,* 326 Mo. 1199, 33 S. W. 2d 905 (1930). In my view this holding was in error.

I

The two charges leveled against petitioner clearly arose out of the same criminal transaction or episode, yet they were tried separately. In that circumstance, we should grant the petition for certiorari and reverse the robbery

conviction. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the joinder at one trial, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Tijerina* v. *New Mexico,* 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States,* 416 U. S. 995 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson,* 417 U. S. 957 (1974) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida,* 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White,* 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown,* 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana,* 452 Pa. 233, 304 A. 2d 432 (1973), vacated and remanded, 414 U. S. 808 (1973), on remand, 455 Pa. 622, 314 A. 2d 854 (1974).

Guilty pleas can be vacated on collateral attack on double jeopardy grounds, even when the double jeopardy claim was not raised before conviction. *Blackledge* v. *Perry,* 417 U. S. 21, 31 (1974). Further, there is no significance in the fact that Missouri law would not have permitted joinder of the two offenses here. If it is state law rather than prosecutorial abuse which results in two trials for the same offense, the "remedy lies in changing [Missouri's] criminal procedure, not in denying petitioner the constitutional protection to which he is entitled.* Petitioner was tried twice for the same offense,

*In fact, Missouri's joinder rules have been changed since petitioner was tried. They now permit joinder of "[a]ll offenses which are based . . . on two or more acts or transactions which constitute

and his conviction should be reversed." *Duncan* v. *Tennessee,* 405 U. S. 127, 133 (1972) (BRENNAN, J., dissenting). Cf. *Turner* v. *Arkansas,* 407 U. S. 366 (1972).

II

Even on the "same evidence" theory, never adopted by this Court, see *Ashe* v. *Swenson, supra,* at 452–453; *Abbate* v. *United States,* 359 U. S. 187, 197–198 (1959) (separate opinion), it is my view that the robbery conviction here violated the double jeopardy protection. The State claims that, since conviction for robbery would require proof that another was deprived of property against his will, it would involve evidence not pertinent to the murder conviction. Yet, it appears from those portions of the record now available to us that the murder conviction was premised upon proof of the completed robbery. We have indicated that a person cannot be tried for a greater offense which includes all the elements already established by evidence in a trial on a lesser offense. *Waller* v. *Florida, supra.* There is also some indication that the same-evidence rule operates in the other direction, to preclude retrial on a lesser offense when all of its elements have been established by evidence in a trial on a greater offense. See *In re Nielsen,* 131 U. S. 176, 187–190 (1889); *Grafton* v. *United States,* 206 U. S. 333, 352 (1907). This case illustrates graphically why this should be so. The prosecution threatened to retry essentially the same case in pursuit of a greater sentence, and it used the leverage of that threatened prosecution to induce the waiver of the right to appeal the murder conviction.

No. 74–55. CLAY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

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parts of a common scheme or plan." Mo. Sup. Ct. Rule 24.04, as amended Dec. 7, 1970.

No. 74–213. VON CLEMM ET AL. *v.* BANUELOS, TREASURER OF THE UNITED STATES, ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 498 F. 2d 163.

No. 74–260. TRAMUNTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 500 F. 2d 1334.

No. 74–267. CHARBONIER ET AL. *v.* UNITED STATES; and

No. 74–5268. BURKE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 495 F. 2d 1226.

No. 74–5178. CASTLEBERRY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 522 P. 2d 257.

No. 74–5240. BRYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 775.

No. 74–5272. HAWKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 501 F. 2d 1029.

No. 74–324. CITY OF DALLAS ET AL. *v.* SOUTHWEST AIRLINES CO. ET AL. C. A. 5th Cir. Motion of Air Transport Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 494 F. 2d 773.

No. 74–332. SATTERWHITE *v.* UNITED PARCEL SERVICE, INC. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 496 F. 2d 448.

No. 74–352. MEACHUM, CORRECTIONAL SUPERINTENDENT *v.* LAFRANCE; and

No. 74–5458. LAFRANCE *v.* MEACHUM, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Motion of respondent in No. 74–352 for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 499 F. 2d 29.

No. 74–458. NEW JERSEY *v.* GENERAL MOTORS CORP. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 500 F. 2d 1404.

No. 74–463. DANN, COMMISSIONER OF PATENTS *v.* HONEYWELL, INC. C. C. P. A. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 497 F. 2d 1344.

No. 74–485. MICHIGAN *v.* DAVIS ET AL. Sup. Ct. Mich. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: See 53 Mich. App. 94, 218 N. W. 2d 787.

No. 74–5027. ALLEN *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. *Molinaro* v. *New Jersey,* 396 U. S. 365 (1970). Reported below: 495 F. 2d 1373.

Rehearing Denied

No. 73–6800. BAXTER *v.* UNITED STATES, *ante,* p. 964; and

No. 73–6809. FALKNER *v.* BLANTON, JUDGE, *ante,* p. 977. Petitions for rehearing denied.

No. 73–6605. FOLKS *v.* UNITED STATES, *ante,* p. 849. Motion for leave to file petition for rehearing denied.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit on December 13, 1974, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

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 during the week of May 26, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

DECEMBER 23, 1974

Affirmed on Appeal

No. 74–517. MERCER ET AL. *v.* MICHIGAN STATE BOARD OF EDUCATION ET AL. Affirmed on appeal from D. C. E. D. Mich. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 379 F. Supp. 580.

Appeals Dismissed

No. 73–7014. JONES *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of properly presented federal question. Reported below: 293 So. 2d 33.

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

The Court dismisses this appeal for want of a properly presented federal question. That disposition is utterly indefensible on the record of this case.

Appellant was arrested for violating Fla. Stat. § 847.05 (Supp. 1974–1975), which provides:

> "Any person who shall publicly use or utter any indecent or obscene language shall be guilty of a misdemeanor of the second degree . . . ."

After the arrest, appellant was searched and marihuana was found in his possession. Appellant was then charged with using indecent or obscene language, resisting arrest, and possession of marihuana. Prior to trial, he moved to dismiss the information on the ground that on its face Fla. Stat. § 847.05 violates the First and Fourteenth Amendments and therefore the arrest pursuant to § 847.05 was unlawful and the ensuing search and seizure of the marihuana invalid. The motion was denied. At trial by jury, the marihuana was admitted in evidence and appellant was convicted solely on the charge of possession of marihuana. The conviction was appealed to the Florida Supreme Court pursuant to Art. 5, § 3 (b)(1), of the Florida Constitution, which directs the Florida Supreme Court to "hear appeals . . . from orders of trial courts . . . passing on the validity of a state statute . . . ." The Florida Supreme Court upheld the constitutionality of § 847.05, finding that the statutory language itself was "sufficient to convey to a person of common understanding its prohibition." 293 So. 2d 33, 34 (1974). In view of that holding, the Florida Supreme Court found it unnecessary to decide whether the marihuana conviction could stand if § 847.05 were unconstitutional and the initial arrest therefore unlawful.

Section 847.05 punishes only spoken words and, as construed by the Florida Supreme Court, is facially unconstitutional because it is not limited in application "to punish only unprotected speech" but is "susceptible of application to protected expression." *Gooding* v. *Wilson,*

405 U. S. 518, 522 (1972). See also *Lewis* v. *City of New Orleans,* 415 U. S. 130, 134 (1974); *Cohen* v. *California,* 403 U. S. 15, 20 (1971). In that circumstance, it is irrelevant that the statute might constitutionally reach appellant's conduct, for " '[a]lthough a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is 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. The statute, in effect, is stricken down on its face. . . .' " *Gooding* v. *Wilson, supra,* at 521.

Gooding obviously compels reversal of the judgment of the Florida Supreme Court. The Court, however, dismisses this appeal for want of a properly presented federal question. But a dismissal on that ground would be appropriate only if the federal claim had not been raised in a proper and timely manner in the state courts. See, *e. g., Bailey* v. *Anderson,* 326 U. S. 203, 206–207 (1945); *Street* v. *New York,* 394 U. S. 576, 581–585 (1969). That cannot possibly be said of this case. The unconstitutionality of § 847.05 was the basic claim asserted by appellant and he urged it at every level in the state proceedings. And even were there doubt of this, and there can be none on this record, our jurisdiction still obtains since the Florida Supreme Court's sole ground of decision was based upon resolution of the federal question. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio,* 360 U. S. 423, 436 (1959).

Certainly it cannot be said that there is lack of a properly presented federal question because appellant was con-

victed not for violating § 847.05 but on the marihuana charge. His claim is that the marihuana seized from him and admitted in evidence against him was "fruit of the poisonous tree" because his initial arrest was pursuant to the unconstitutional § 847.05. It may be that on remand his "fruits" claim will be rejected and the marihuana conviction reinstated. But the Florida Supreme Court did not speak to that question in light of its determination, based on holding § 847.05 constitutional, that the initial arrest was valid. Appellant has properly presented the federal question decided by the Florida Supreme Court and our plain duty is to reverse that court and remand for further proceedings not inconsistent with this opinion.

No. 74–69. PADILLA *v.* LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 34 N. Y. 2d 36, 312 N. E. 2d 149.

No. 74–434. COLORADO CIVIL RIGHTS COMMISSION EX REL. MCALLISTER *v.* COLORADO ET AL. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 185 Colo. 42, 521 P. 2d 908.

No. 74–5486. BRIMM *v.* WORKMEN'S COMPENSATION APPEALS BOARD ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 74–235. SEIDENFADEN ET AL. *v.* CITY OF LOUISVILLE ET AL. Appeal from Ct. App. Ky. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would postpone further consideration of question of jurisdiction to hear-

ing of case on the merits. Reported below: 508 S. W. 2d 42.

Vacated and Remanded on Appeal

No. 73–711. CRYAN, SHERIFF, ET AL. *v.* HAMAR THEATRES, INC., ET AL. Appeal from D. C. N. J. [Probable jurisdiction noted, 416 U. S. 954.] Judgment vacated and case remanded to determine whether the cause is moot in light of *State* v. *DeSantis,* 65 N. J. 462, 323 A. 2d 489 (1974).

No. 74–67. DICKSON *v.* FORD, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from D. C. W. D. Tex. This is an appeal, assertedly brought under 28 U. S. C. § 1253, from a three-judge court order dismissing a complaint which sought to enjoin a federal statute upon the ground of its unconstitutionality, 28 U. S. C. § 2282. The court found the case "non-justiciable" because the appellant lacked standing to sue and because the case involved a "political question." Where a three-judge court dismisses a complaint as being nonjusticiable, appeal does not lie to this Court under 28 U. S. C. § 1253. *Gonzalez* v. *Automatic Employees Credit Union, ante,* p. 90. Accordingly, the order is vacated and case remanded so that a fresh order may be entered from which a timely appeal may be taken to the United States Court of Appeals. 28 U. S. C. § 1291. Reported below: 379 F. Supp. 1345.

No. 74–437. NORTH *v.* RUSSELL ET AL. Appeal from Ct. App. Ky. Upon representation of the Attorney General of Kentucky set forth in his motion to dismiss or affirm filed in this Court on November 29, 1974, judgment is vacated and case remanded for further consideration in light of the position presently asserted by the Commonwealth. Reported below: 516 S. W. 2d 103.

Miscellaneous Orders

No. A–446 (74–759). MOORE *v.* UNITED STATES. Ct. App. D. C. Application for release pending disposition of petition for writ of certiorari, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–467 (74–668). SELIKOFF *v.* NEW YORK. Ct. App. N. Y. Application for stay of incarceration, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 35 N. Y. 2d 227, 318 N. E. 2d 784.

No. A–498. GABRIEL *v.* UNITED STATES ET AL. D. C. N. J. Application for stay, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–506. GIBBS ET AL. *v.* HOWELL ET AL. Ct. App. N. Y. Application for stay of execution of judgment upon remittitur, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A–514. BOYD *v.* PENNSYLVANIA STATE BOARD OF OSTEOPATHIC EXAMINERS. Pa. Commw. Ct. Application for stay of suspension of license to practice pending timely filing and disposition of a petition for writ of certiorari, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 12 Pa. Commw. 620, 317 A. 2d 307.

No. 74–5588. TUCKER *v.* BOWERS, UNITED STATES ATTORNEY, ET AL.; and

No. 74–5621. CRANE *v.* STONE, CORRECTIONAL SUPERINTENDENT, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 73–6650. BROWN *v.* ILLINOIS. Sup. Ct. Ill. [Certiorari granted, *ante,* p. 894.] Motion of John Thomas Moran, Jr., Esquire, to permit Robert P. Isaac-

son, Esquire, to present oral argument *pro hac vice* on behalf of petitioner granted.

No. A–511. MILLER *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange. Application for bail pending appeal, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion of Special Committee on Tidelands of National Association of Attorneys General for leave to file a brief as *amicus curiae* granted.

No. 73–1708. BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* ALCALA ET AL. C. A. 8th Cir. [Certiorari granted, *ante,* p. 823.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 73–1765. MEEK ET AL. *v.* PITTENGER, SECRETARY OF EDUCATION, ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, *ante,* p. 822.] Joint motion for additional time for oral argument granted, and a total of one and one-half hours allotted for oral argument.

No. 73–1808. LAING *v.* UNITED STATES ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 824]; and

No. 74–75. UNITED STATES ET AL. *v.* HALL. C. A. 6th Cir. [Certiorari granted, *ante,* p. 824.] Motion to consolidate for oral argument granted.

No. 73–1933. UNITED STATES *v.* CITIZENS & SOUTHERN NATIONAL BANK ET AL. Appeal from D. C. N. D. Ga. [Probable jurisdiction noted, *ante,* p. 893.] Motion of Independent Bankers Association of Georgia, Inc., for leave to file a brief as *amicus curiae* granted.

Probable Jurisdiction Noted

No. 74–456. HILL, ATTORNEY GENERAL OF TEXAS, ET AL. *v.* PRINTING INDUSTRIES OF THE GULF COAST ET AL. Appeal from D. C. S. D. Tex. Probable jurisdiction noted. Reported below: 382 F. Supp. 801.

Certiorari Granted

No. 74–5116. MURPHY *v.* FLORIDA. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 495 F. 2d 553.

Certiorari Denied. (See also No. 74–235, *supra.*)

No. 73–1978. MITZNER ET AL. *v.* UNITED STATES;
No. 74–5063. HECK *v.* UNITED STATES;
No. 74–5073. MOTHS *v.* UNITED STATES; and
No. 74–5086. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 499 F. 2d 778.

No. 73–7076. OLSON *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1056.

No. 74–202. DIMATTINA, AKA ZAMPITELLA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 497 F. 2d 921.

No. 74–211. TOLLETT *v.* LAMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 497 F. 2d 1231.

No. 74–229. POMMERENING ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 500 F. 2d 92.

No. 74–348. ODLAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 148.

No. 74–354. VERIVE *v.* UNITED STATES; and
No. 74–5109. SCHULMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 2d 1404.

No. 74–373. KONIECKI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 2d 1405.

No. 74–382. UNITED STATES *v.* FINLEY COAL CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 285.

No. 74–386. IDAHO TAX COMMISSION *v.* MAHONEY. Sup. Ct. Idaho. Certiorari denied. Reported below: 96 Idaho 59, 524 P. 2d 187.

No. 74–399. MAYSE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 925.

No. 74–405. WARREN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 205 Ct. Cl. 823, 503 F. 2d 1406.

No. 74–410. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 502 F. 2d 1150.

No. 74–432. COMMUNITY BANK ET AL. *v.* FEDERAL RESERVE BANK OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 282.

No. 74–443. LIBERTY LOAN CORP. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 498 F. 2d 225.

No. 74–449. GREENBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–460. HIGHWAY & LOCAL MOTOR FREIGHT DRIVERS LOCAL NO. 701, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* SUBURBAN TRANSIT CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 499 F. 2d 78.

No. 74–483. O'Callaghan et al. *v.* Sheldon et al.; and

No. 74–541. Sheldon et al. *v.* O'Callaghan et al. C. A. 2d Cir. Certiorari denied. Reported below: 497 F. 2d 1276.

No. 74–502. Smart *v.* Jones et al. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 663.

No. 74–505. Baldwin et al. *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 297 So. 2d 157.

No. 74–527. Children's Rehabilitation Center, Inc. *v.* Service Employees International Union, Local No. 227, AFL–CIO. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1077.

No. 74–531. Patton et al., Trustees *v.* Railway Labor Executives' Assn. et al. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 34.

No. 74–553. Goodyear *v.* Gates Rubber Co. C. A. 10th Cir. Certiorari denied.

No. 74–5052. McManus *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: See 516 P. 2d 277.

No. 74–5118. Hill *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 297 So. 2d 660.

No. 74–5123. Nunez-Villalobos *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 1023.

No. 74–5157. Meyers *v.* Venable et al. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 1215.

No. 74–343. AGNEW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1400.

No. 74–5131. APODACA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–5134. FICO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5185. DOE *v.* MIDDENDORF, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied.

No. 74–5202. RUSH ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 2d 1405.

No. 74–5241. GILLIKIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1398.

No. 74–5279. KLEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 488 F. 2d 481.

No. 74–5325. VAN DRUNEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 501 F. 2d 1393.

No. 74–5407. MASSENGALE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 99, 497 F. 2d 686.

No. 74–5509. AIKEN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 574.

No. 74–5513. RICH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 510 S. W. 2d 596.

No. 74–5514. CLOUSTON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5520. BRYANT *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5525. GAITO *v.* MATSON. Super. Ct. Pa. Certiorari denied. Reported below: 233 Ga. 393, 211 S. E. 2d 771.

No. 74–5540. BUSH *v.* CRAIG ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 233 Ga. 393, 211 S. E. 2d 771.

No. 74–5549. HAWKINS *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 728.

No. 73–1702. LOWDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 492 F. 2d 953.

No. 73–2058. PENNSYLVANIA *v.* O'SHEA. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 456 Pa. 288, 318 A. 2d 713.

No. 74–241. HENNIGAN ET UX. *v.* PLACID OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 496 F. 2d 876.

No. 74–370. GOODRICH *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: — S. D. —, 216 N. W. 2d 557.

No. 74–523. FRASIER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: — Ind. —, 312 N. E. 2d 77.

No. 74–5017. SEDILLO *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–524. THISTLETHWAITE *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 339.

No. 74–580. GOODEN, A MINOR, BY GOODEN, ET AL. *v.* MISSISSIPPI STATE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 499 F. 2d 441.

No. 74–5016. AYERS *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 16 Ore. App. 300, 518 P. 2d 190.

No. 74–5074. ESTRADA *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 63 Wis. 2d 476, 217 N. W. 2d 359.

No. 74–5427. WERTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 502 F. 2d 784.

No. 74–5506. CARTER *v.* COOK. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 502 F. 2d 1165.

No. 74–313. BUCKLEY ET AL. *v.* AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS. C. A. 2d Cir.; and

No. 74–314. LEWIS *v.* AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS. Ct. App. N. Y. Certiorari denied. Reported below: No. 74–313, 496 F. 2d 305, and No. 74–314, 34 N. Y. 2d 265, 313 N. E. 2d 735.

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

These cases, as I view them, present the issue of whether a person suffers an infringement of his First Amend-

ment rights when he is compelled to pay union dues (or their equivalent) as a precondition to expressing his ideas through a public broadcasting medium.[1]

In *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225 (1956), a union-shop agreement authorized under the Railway Labor Act was challenged under the First and Fifth Amendments. While holding on the merits that a union-shop requirement does not violate those Amendments, we held that the Railway Labor Act provision governing union-shop agreements constituted sufficient governmental action to require consideration of the constitutional issues: "[T]he federal statute is the source of the power and authority by which any private rights are lost or sacrificed." 351 U. S., at 232. We left open the possibility that a membership or dues requirement might, in some circumstances, be imposed in contravention of the First Amendment, though no such problem was presented on the record in that case.

In *Hanson,* governmental action was based on the Railway Labor Act, which provided that state "right to work" laws were superseded and that a union-shop agreement was permissible notwithstanding such laws. 351 U. S., at 231–232. Thus that federal Act placed "the imprimatur of the federal law" upon union-shop agreements. The Taft-Hartley Act (in contrast) authorizes union-shop agreements only in the absence of contrary state law. 61 Stat. 151, 29 U. S. C. § 164 (b). Yet there still is a substantial argument in favor of a holding that a union-shop agreement under the NLRA bears the imprimatur of federal law.

The fact that § 8 (a)(3) [2] is phrased in permissive rather than mandatory terms would not, in and of itself,

[1] I agree with the respective Courts of Appeals that issues concerning union disciplinary sanctions (or threats of such sanctions) are not properly before us.

[2] 49 Stat. 452, as amended, 29 U. S. C. § 158 (a)(3).

prevent a finding of governmental action. The Federal Government has undertaken extensive regulation of the field of labor-management relations, and by its approval and enforcement of union-shop agreements, may be said to "encourage" and foster such agreements. *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14 (CA1 1971); cf. *Reitman* v. *Mulkey*, 387 U. S. 369 (1967).

It is significant that congressional permissiveness toward union-shop agreements is coupled with the NLRA's "exclusivity" principle, whereby a majority vote of the employees in a particular category is sufficient to designate an exclusive bargaining representative whose actions bind majority and minority alike. When Congress authorizes an employer and a union to enter into union-shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it had imposed them by statute.

There is a substantial question whether the union-dues requirement imposed upon these petitioners should be characterized as a prior restraint or inhibition upon their free-speech rights. In some respects, the requirement to pay dues under compulsion can be viewed as the functional equivalent of a "license" to speak. In several related decisions, we have left open the possibility that First Amendment associational freedoms would be infringed by a requirement that a union member subject to a union-shop agreement pay dues to support union political activities with which he disagrees. *Machinists* v. *Street*, 367 U. S. 740 (1961); *Railway Employes' Dept* v. *Hanson*, *supra*. Cf. *Lathrop* v. *Donohue*, 367 U. S. 820 (1961). We held in *Street* that the Railway Labor Act should be construed to deny unions the power to compel a union member to pay dues in support of union political causes of which he disapproves; we indicated that some

suitable formula of apportionment could be worked out, so that the union member would bear his share of the cost of collective-bargaining activities from which he benefited, but would not be forced to contribute to political activities if he did not wish to do so. Whether a similar accommodation could be worked out in the present case, I do not know. Our cases dealing with flat license fees or registration requirements, such as *Thomas* v. *Collins,* 323 U. S. 516 (1945), and *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943), tend to suggest that even a minimal payment designed solely to cover administrative costs may be impermissible in a First Amendment context. There remains a question of whether an accommodation respecting dues could be worked out in the present case. Whatever the outcome, I believe that the issues are sufficiently substantial to call for plenary consideration.

No. 74–498. RESEARCH CORP. *v.* NASCO INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 501 F. 2d 358.

No. 74–501. WYETH LABORATORIES, A DIVISION OF AMERICAN HOME PRODUCTS CORP. *v.* REYES. C. A. 5th Cir. Motions of American Academy of Pediatrics and Conference of State and Territorial Epidemiologists for leave to file briefs as *amici curiae* granted. Motion of American Medical Assn. for leave to file a brief as *amicus curiae* denied. Certiorari denied. Reported below: 498 F. 2d 1264.

No. 74–546. DITTER, U. S. DISTRICT JUDGE *v.* PHILADELPHIA NEWSPAPERS, INC., ET AL. C. A. 3d Cir. Motion of American Newspaper Publishers Assn. for leave to file a brief as *amicus curiae* and certiorari denied. Reported below: 504 F. 2d 1.

No. 74–5527. BRIDGES *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1402.

No. 74–5532. BOLDEN *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 73–528. GENERES *v.* STICH ET AL. Ct. App. Cal., 3d App. Dist. Certiorari and other relief denied.

Rehearing Denied

No. 73–1890. THOMPSON ET UX. *v.* CLARK, TREASURER OF DUPAGE COUNTY, ET AL., *ante*, p. 988;

No. 74–97. DIAMOND ET AL. *v.* BLAND, SHERIFF, ET AL., *ante*, p. 885;

No. 74–248. UNITED STATES GYPSUM CO. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, *ante*, p. 998; and

No. 74–5187. SMITH *v.* CALIFORNIA, *ante*, p. 988. Petitions for rehearing denied.

No. 73–6732. SLOAN *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 958. Petition for rehearing denied. See this Court's Rule 58.

DECEMBER 30, 1974

Dismissal Under Rule 60

No. 74–5565. ESTEVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 60.

JANUARY 9, 1975

Dismissal Under Rule 60

No. 73–1943. TRANSWESTERN PIPELINE CO. *v.* KERR-MCGEE CORP. ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 492 F. 2d 878.

JANUARY 13, 1975*

Affirmed on Appeal

No. 74–380. LOUISIANA STATE BOARD OF MEDICAL EXAMINERS ET AL. *v.* ROSEN. Affirmed on appeal from D. C. E. D. La. Reported below: 380 F. Supp. 875.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, concurring.

Under the compulsion of *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), which in my view were erroneously decided, I join the affirmance.

No. 74–402. RASTETTER ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Affirmed on appeal from D. C. Ariz. Reported below: 379 F. Supp. 170.

No. 74–5136. YOUNG ET AL. *v.* COBB, CHIEF, BUREAU OF FINANCIAL RESPONSIBILITY, ET AL. Affirmed on appeal from D. C. S. D. Fla.

Appeals Dismissed

No. 73–2045. AMERICAN PLANT FOOD CORP. *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 508 S. W. 2d 598.

No. 74–253. SOBOTTKA *v.* BROWN, REGISTRAR OF VOTERS. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 74–413. CEREZO *v.* BUSO ET AL. Appeal from Sup. Ct. P. R. dismissed for want of substantial federal question. Reported below: —— P. R. R. ——.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

No. 74–5425. RUDERER *v.* WOOD ET AL. Appeal from D. C. S. D. Ill. dismissed for want of jurisdiction.

No. 74–5571. RAY ET AL. *v.* HEDGEWALD ET AL. Appeal from D. C. W. D. Ky. dismissed for want of jurisdiction.

No. 74–5567. ALERS *v.* MUNICIPALITY OF SAN JUAN. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–5577. HURD *v.* HURD. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–5583. TURNER *v.* CALIFORNIA. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 74–83. PELLICCIONI *v.* SCHUYLER PACKING CO. ET AL. Super. Ct. N. J. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kelley* v. *Southern Pacific Co., ante,* p. 318. Reported below: See 65 N. J. 290, 321 A. 2d 251.

No. 74–5352. ACKERSON *v.* UNITED STATES. C. A. 8th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his brief for the United States filed December 19, 1974, judgment vacated and case remanded to the United States District Court for the Eastern District of Missouri to permit the Government to dismiss the charges against petitioner. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST dissent. Reported below: 502 F. 2d 300.

Miscellaneous Orders

No. A–285. WOHLGEMUTH *v.* PLANNED PARENTHOOD ASSOCIATION OF SOUTHEASTERN PENNSYLVANIA, INC., ET AL. C. A. 3d Cir. Application to vacate preliminary injunction, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A–445. PARKER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Application for continuance of bail pending timely filing of petition for writ of certiorari, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–501. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Application for bail pending appeal, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–518. MCINTOSH *v.* WOODWARD, ACTING DIRECTOR, UNITED STATES BOARD OF PAROLE, ET AL. C. A. 5th Cir. Application for bail pending appeal, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–547 (74–5678). LIDDY *v.* UNITED STATES. C. A. D. C. Cir. Application for bail, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Reported below: 166 U. S. App. D. C. 95, 509 F. 2d 428.

No. A–553. NATIONAL LEAGUE OF CITIES, INC., ET AL. *v.* BRENNAN, SECRETARY OF LABOR; and

No. A–566. CALIFORNIA ET AL. *v.* BRENNAN, SECRETARY OF LABOR. D. C. D. C. Stay order heretofore granted by THE CHIEF JUSTICE on December 31, 1974, is hereby continued on condition that appellants file their jurisdictional statements on or before January 17, 1975. Appellee may file a reply to the jurisdictional statements on or before 12 p. m., January 23, 1975. Neither the

jurisdictional statements nor the replies need be initially printed. Reported below: 406 F. Supp. 826.

No. A–563. HUNTSVILLE BOARD OF EDUCATION ET AL. *v.* HEREFORD ET AL. Application for recall and stay of mandate of the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. D–25. IN RE DISBARMENT OF LEACH. It is ordered that Arthur Dale Leach, of Silver Spring, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–26. IN RE DISBARMENT OF KETCHAM. It is ordered that Frank S. Ketcham, of Potomac, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–28. IN RE DISBARMENT OF BUTTLES. It having been reported to this Court that Robert S. Buttles, of New York, N. Y., has been suspended from the practice of law in all of the courts of the State of New York, and this Court by order of November 18, 1974 [*ante,* p. 1016], having suspended the said Robert S. Buttles from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon respondent, and that a response has been filed;

It is ordered that the said Robert S. Buttles be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of

attorneys admitted to practice before the Bar of this Court.

No. D–31. In re Disbarment of Ross. It is ordered that John A. Ross, Jr., of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–32. In re Disbarment of Germaise. It is ordered that Irwin L. Germaise, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 35, Orig. United States *v.* Maine et al. Motion of Associated Gas Distributors for leave to file a brief as *amicus curiae* granted. [For earlier orders herein, see, *e. g., ante,* p. 1087.]

No. 73–1708. Burns, Commissioner, Department of Social Services of Iowa, et al. *v.* Alcala et al. C. A. 8th Cir. [Certiorari granted, *ante,* p. 823.] Motion of American Association for Maternal & Child Health et al. for leave to file a brief as *amici curiae* granted. Motion of the Attorney General of Florida for leave to participate in oral argument as *amicus curiae* denied.

No. 73–1908. Cort et al. *v.* Ash. C. A. 3d Cir. [Certiorari granted, *ante,* p. 992.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 73–2047. Buck et al. *v.* Impeach Nixon Committee et al., *ante,* p. 891. Motion of respondents to retax costs denied.

No. 73–1765. MEEK ET AL. *v.* PITTENGER, SECRETARY OF EDUCATION, ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, *ante,* p. 822.] Motion of National Audio-Visual Assn., Inc., for leave to file a brief as *amicus curiae* granted.

No. 73–1923. EASTLAND ET AL. *v.* UNITED STATES SERVICEMEN'S FUND ET AL. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 823.] Motion of respondents for divided argument granted.

No. 73–2060. AUSTIN ET AL. *v.* NEW HAMPSHIRE ET AL. Appeal from Sup. Ct. N. H. [Probable jurisdiction noted, *ante,* p. 822.] Motion of appellees to permit Charles G. Cleaveland, Esquire, to present oral argument *pro hac vice* granted. Motions of Attorney General of Vermont and Attorney General of New Jersey for leave to participate in oral argument as *amici curiae* denied.

No. 74–70. GOLDFARB ET UX. *v.* VIRGINIA STATE BAR ET AL. C. A. 4th Cir. [Certiorari granted, *ante,* p. 963.] Motions of the Bar of the City of New York and the District of Columbia Bar for leave to file briefs as *amici curiae* denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 74–5595. RATCLIFF *v.* TEXAS ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 74–453. VAN LARE, ACTING COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* HURLEY ET AL. Appeal from D. C. S. D. N. Y. and D. C. E. D. N. Y. [Probable jurisdiction noted, *ante,* p. 1045]; and

No. 74–5054. TAYLOR ET AL. *v.* LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 1046.] Motion to consolidate for oral argument granted.

No. 74–304. GORDON *v.* NEW YORK STOCK EXCHANGE, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1018.] Motion of Retirement Board of the Teachers' Retirement System of the City of New York for leave to file a brief as *amicus curiae* denied.

No. 74–5295. PARMLEY *v.* ALABAMA ET AL.;

No. 74–5502. FARRIES *v.* UNITED STATES DISTRICT COURT; and

No. 74–5531. DRAUGHON *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

No. 74–5451. MAGEE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA. Motion for leave to file petition for writ of mandamus and/or prohibition, and/or certiorari denied.

Probable Jurisdiction Noted

No. 73–1689. UNITED STATES *v.* AMERICAN BUILDING MAINTENANCE INDUSTRIES. Appeal from D. C. C. D. Cal. Probable jurisdiction noted. Reported below: 401 F. Supp. 1005.

No. 74–548. UNITED STATES *v.* TAX COMMISSION OF MISSISSIPPI ET AL. Appeal from D. C. S. D. Miss. Probable jurisdiction noted. Reported below: 378 F. Supp. 558.

Certiorari Granted

No. 74–204. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* ELDRIDGE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 493 F. 2d 1230.

Certiorari Denied. (See also Nos. 74–5567, 74–5577, and 74–5583, *supra.*)

No. 73–1433. HURT *v.* BRITTON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 73–7112. VALDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–49. CARLSON ET AL. *v.* CARLSON. Sup. Ct. Cal. Certiorari denied. Reported below: 11 Cal. 3d 474, 521 P. 2d 1114.

No. 74–57. DYKMAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 294 So. 2d 633.

No. 74–94. SCRANTON CONSTRUCTION CO., INC., ET AL. *v.* LITTON INDUSTRIES LEASING CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 778.

No. 74–105. GOLDEN EAGLE, AKA AUSTINE *v.* JOHNSON, DEPUTY SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 1179.

No. 74–128. ADOLPH COORS CO. *v.* FEDERAL TRADE COMMISSION; and

No. 74–609. FEDERAL TRADE COMMISSION *v.* ADOLPH COORS CO. C. A. 10th Cir. Certiorari denied. Reported below: 497 F. 2d 1178.

No. 74–274. PARNESS ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 430.

No. 74–276. NATIONAL ROOFING CONTRACTORS ASSN. ET AL. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied. Reported below: 495 F. 2d 1294.

No. 74–287. GABLES BY THE SEA, INC. *v.* LEE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 1340.

No. 74–300. ROSEN *v.* LAWRENCE. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 910.

No. 74–301. WASHBURN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 575.

No. 74–310. STANDARD FORGE & AXLE CO., INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1392.

No. 74–316. KERN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 74–321. DUNN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 499 F. 2d 856.

No. 74–325. ROVNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1400.

No. 74–372. SCHENKER, AKA SHENKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 1367.

No. 74–378. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 500 F. 2d 854.

No. 74–396. MATHIS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 292 Ala. 732, 296 So. 2d 764.

No. 74–392. ORRIN *v.* SIMON, SECRETARY OF THE TREASURY. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 97, 497 F. 2d 684.

No. 74–394. PATERNO ET AL. *v.* UNITED STATES; and No. 74–406. DENTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied: Reported below: 498 F. 2d 1396.

No. 74–388. CASEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–407. INFELICE *v.* UNITED STATES; and
No. 74–5397. GARELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: No. 74–407, 500 F. 2d 1405; No. 74–5397, 500 F. 2d 1406.

No. 74–414. DE VESTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–423. PROVIDENT LIFE INSURANCE CO. ET AL. *v.* RESERVE LIFE INSURANCE CO. ET AL.; and
No. 74–617. RESERVE LIFE INSURANCE CO. ET AL. *v.* PROVIDENT LIFE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 499 F. 2d 715.

No. 74–427. WILLIAMS *v.* GAGLIARDI, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. Reported below: 500 F. 2d 403.

No. 74–436. MEDENICA *v.* CALLAWAY, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 574.

No. 74–442. ESSEX, ADMINISTRATRIX *v.* VINAL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 499 F. 2d 226.

No. 74–445. HASWELL *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 205 Ct. Cl. 421, 500 F. 2d 1133.

No. 74–461. ALEXANDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 500 F. 2d 1.

No. 74–477. LIPPMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 314.

No. 74–484. PRINCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1289.

No. 74–493. Ohio Civil Rights Commission *v.* Lysyj, dba Kent Trailer Park. Sup. Ct. Ohio. Certiorari denied. Reported below: 38 Ohio St. 2d 217, 313 N. E. 2d 3.

No. 74–494. Krause et ux. *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 1109.

No. 74–516. Stewart *v.* Kyros et al. C. A. 1st Cir. Certiorari denied. Reported below: 502 F. 2d 1161.

No. 74–539. Nichols *v.* Woodward & Lothrop, Inc. Ct. App. D. C. Certiorari denied. Reported below: 322 A. 2d 283.

No. 74–550. Philadelphia Anti-Poverty Action Commission (PAAC) et al. *v.* Rizzo, Mayor of Philadelphia, et al. C. A. 3d Cir. Certiorari denied. Reported below: 502 F. 2d 306.

No. 74–554. Parrigan *v.* Paderick, Penitentiary Superintendent. Sup. Ct. Va. Certiorari denied.

No. 74–555. Ishler *v.* Toledo Bar Assn. Sup. Ct. Ohio. Certiorari denied. Reported below: 39 Ohio St. 2d 33, 313 N. E. 2d 818.

No. 74–559. Johnson *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 291 So. 2d 67.

No. 74–562. Mahaley et al. *v.* Cuyahoga Metropolitan Housing Authority et al. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1087.

No. 74–564. Vassallo *v.* LaTorr, Warden. C. A. 2d Cir. Certiorari denied.

No. 74–566. Reed *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–568. Estep, a minor, by Stanley *v.* Janler Plastic Mold Corp. Sup. Ct. Ill. Certiorari denied. Reported below: 57 Ill. 2d 395, 312 N. E. 2d 618.

No. 74–569. Ellis *v.* Hawaii. Sup. Ct. Hawaii. Certiorari denied. Reported below: 55 Haw. 458, 522 P. 2d 460.

No. 74–570. Dean *v.* Ford Motor Co. C. A. 9th Cir. Certiorari denied.

No. 74–581. California Moving & Storage Assn. et al. *v.* Public Utilities Commission of California. Sup. Ct. Cal. Certiorari denied.

No. 74–582. Picard *v.* Rhode Island. Sup. Ct. R. I. Certiorari denied. Reported below: 113 R. I. 649, 324 A. 2d 631.

No. 74–585. Stanjim Co. et al. *v.* Board of Revision of Mahoning County et al. Sup. Ct. Ohio. Certiorari denied. Reported below: 38 Ohio St. 2d 233, 313 N. E. 2d 14.

No. 74–589. Brown *v.* Baylor University Medical Center at Dallas, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 783.

No. 74–590. Kastner, t/a Liberty Bell Discount, et al. *v.* Pennsylvania Department of Transportation. Pa. Commw. Ct. Certiorari denied. Reported below: 13 Pa. Commw. Ct. 525, 320 A. 2d 146.

No. 74–598. Education/Instruccion, Inc., et al. *v.* Moore, Chairman, Capitol Regional Planning Agency of Connecticut, et al. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 1187.

No. 74–600. LaTurner et al. *v.* Burlington Northern, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 593.

No. 74–608. CAREY ET AL. *v.* O'DONNELL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 46, 506 F. 2d 107.

No. 74–610. NORTHEAST MASTER EXECUTIVE COUNCIL *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 36, 506 F. 2d 97.

No. 74–612. PINNELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 256 Ark. 738, 512 S. W. 2d 13.

No. 74–616. PETERS ET AL. *v.* CLARK ET AL. Petition for certiorari before judgment to C. A. 5th Cir. Certiorari denied.

No. 74–625. CALVERT *v.* STATE ADMINISTRATIVE BOARD OF ELECTION LAWS ET AL. Ct. App. Md. Certiorari denied. Reported below: 272 Md. 659, 327 A. 2d 290.

No. 74–627. NELSON *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: —— S. D. ——, 220 N. W. 2d 2.

No. 74–628. LIBERTY NATIONAL LIFE INSURANCE CO. ET AL. *v.* BATTLE, DBA EDGAR H. BATTLE FUNERAL HOME, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 39.

No. 74–629. PLACID OIL CO. ET AL. *v.* LOUISIANA ET AL.; and

No. 74–638. TEXACO INC. *v.* LOUISIANA ET AL. Sup. Ct. La. Certiorari denied. Reported below: 300 So. 2d 154.

No. 74–639. CONNECTICUT ET AL. *v.* KLARMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 29.

No. 74–646. REYNOLDS ET AL. *v.* PASTER ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 512 S. W. 2d 97.

No. 74–665. CIACCIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–5020. CARRINGTON *v.* VIRGINIA STATE PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 493 F. 2d 1355.

No. 74–5072. STEWART *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 3d 902, 519 P. 2d 568.

No. 74–5122. WHITE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, ——, and ——, 311 N. E. 2d 543, 547 and 550.

No. 74–5144. O'BRIEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 74–5146. SURLES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5194. CHAVERS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 294 So. 2d 489.

No. 74–5201. OWENS *v.* CANNON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 927.

No. 74–5209. MORROW *v.* ILLINOIS; and

No. 74–5210. MACKINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 17 Ill. App. 3d 24, 308 N. E. 2d 92.

No. 74–5218. CRUMP *v.* BRANTLEY, WARDEN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 17 Ill. App. 3d 318, 307 N. E. 2d 651.

No. 74–5233. JONES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 494 F. 2d 1184.

No. 74–5250. HUDSPETH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 74–5266. LOCKETT *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 910.

No. 74–5283. RODRIGUEZ-PRECIADO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 74–5289. KRAPPATSCH, ADMINISTRATOR *v.* CAPPS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 910.

No. 74–5301. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 1400.

No. 74–5310. MARSHALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 499 F. 2d 76.

No. 74–5314. LAWRENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 1065.

No. 74–5315. MANJARRES-ARCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 2d 426.

No. 73–5320. BAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1402.

No. 74–5321. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5328. HALLAWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5329. SCOTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1401.

No. 74–5334. GARVEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5337. MARTIN-MENDOZA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 499 F. 2d 918.

No. 74–5343. GEARIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 691.

No. 74–5366. WHITAKER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1400.

No. 74–5371. WILLIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 1401.

No. 74–5378. NORTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 504 F. 2d 342.

No. 74–5383. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1401.

No. 74–5391. JONES ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 500 F. 2d 1403.

No. 74–5400. GRAHAM *v.* DEWINTER, UNITED STATES MARSHAL. C. A. 1st Cir. Certiorari denied.

No. 74–5409. COWLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 67.

No. 74–5410. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 598.

No. 74–5412. DANIELS *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 74–5418. DENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5420. HUBBARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 501 F. 2d 1254.

No. 74–5432. HAYGOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 166.

No. 74–5434. VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1183.

No. 74–5438. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 505 F. 2d 736.

No. 74–5441. MANDUJANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 499 F. 2d 370.

No. 74–5443. VILKAITIS *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 74–5465. LAUGHLIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 74–5468. MAGEE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–5518. PEMBERTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 784.

No. 74–5495. FUNCHES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 53 Ala. App. 330, 299 So. 2d 771.

No. 74–5492. SNIDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 499 F. 2d 424.

No. 74–5529. MCHAR *v.* MCHALE. C. A. D. C. Cir. Certiorari denied.

No. 74–5542. COOK *v.* ADMINISTRATOR, VETERANS' ADMINISTRATION. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1371.

No. 74–5545. STONE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5546. NORMAN *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 74–5547. CARPENTER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 74–5550. MORENO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 511 S. W. 2d 273.

No. 74–5555. MCALISTER ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, ——, and ——, 313 N. E. 2d 113, 869, and 872.

No. 74–5557. DODSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 74–5558. MYERS, DBA ROMYCO STEREO *v.* AMPEX, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 74–5561. CARTER *v.* MONEY TREE CO. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 783.

No. 74–5569. JONES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 232 Ga. 771, 208 S. E. 2d 825.

No. 74–5578. MAGEE *v.* BRITT, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 74–5582. CARROL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5590. VESTER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 22 N. C. App. 16, 205 S. E. 2d 556.

No. 74–5592. COSCO *v.* MEACHAM, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–5596. SHINE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5601. DUARTE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5606. RAMIREZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 40 Cal. App. 3d 347, 114 Cal. Rptr. 916.

No. 74–441. MEIER *v.* BOLDT, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. See *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970).

No. 74–551. LEE ET AL. *v.* ARROWOOD, CO-EXECUTOR, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 500 F. 2d 138.

No. 74–586. WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL. *v.* MEANS. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 299 So. 2d 577.

Rehearing Denied

No. 73–1823. VAN GUNDY ET AL. *v.* UNITED STATES, *ante*, p. 1004; and

No. 73–1824. NEW ORLEANS BOOK MART, INC., ET AL. *v.* UNITED STATES, *ante*, p. 1007. Petitions for rehearing denied.

No. 73–6847. COUSINO *v.* COUSINO, *ante,* p. 1019;

No. 74–187. FIRST AMERICAN BANK & TRUST CO. ET AL. *v.* ELLWEIN, STATE EXAMINER AND COMMISSIONER, DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS, ET AL., *ante,* p. 1026;

No. 74–419. AUTOMOTIVE CHAUFFEURS, PARTS & GARAGE EMPLOYEES, LOCAL UNION 926, ET AL. *v.* NAPA PITTSBURGH, INC., *ante,* p. 1049;

No. 74–5032. MONTGOMERY ET AL. *v.* CALIFORNIA, *ante,* p. 1057;

No. 74–5161. GASKINS *v.* TITEFLEX EMPLOYEES COLLECTIVE BARGAINING ASSN., *ante,* p. 1035;

No. 74–5168. WILLIAMS *v.* DANA CORP., *ante,* p. 1024;

No. 74–5240. BRYAN *v.* UNITED STATES, *ante,* p. 1079;

No. 74–5254. WHITLOW *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante,* p. 1036; and

No. 74–5269. QADIR *v.* COUNTY OF SANTA CLARA ET AL., *ante,* p. 1037. 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 Fourth Circuit during the month of January 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JANUARY 20, 1975 *

Appeals Dismissed

No. 74–5433. KOVACH *v.* SCHUBERT, HOSPITAL SUPERINTENDENT. Appeal from Sup. Ct. Wis. dismissed for

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of No. 74–335, *Pryba* v. *United States, infra,* p. 1127.

want of substantial federal question. Reported below: 64 Wis. 2d 612, 219 N. W. 2d 341.

No. 74–5710. SMITH *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Kern, dismissed for want of substantial federal question.

No. 74–5617. NICKENS *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. D–33. IN RE DISBARMENT OF MCDONALD. It is ordered that Ronald F. McDonald, Jr., of Rockville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–34. IN RE DISBARMENT OF KERR. It is ordered the Elaine Worley Kerr, of Bailey's Crossroads, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–35. IN RE DISBARMENT OF RAIMONDI. It is ordered that Thomas Paul Raimondi, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–36. IN RE DISBARMENT OF BOMSTEIN. It is ordered that Stanley J. Bomstein, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–37. In re Disbarment of Hankinson. It is ordered that Christopher Ker Hankinson, of Vienna, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 73–1933. United States *v.* Citizens & Southern National Bank et al. Appeal from D. C. N. D. Ga. [Probable jurisdiction noted, *ante,* p. 893.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument.

No. 74–8. O'Connor *v.* Donaldson. C. A. 5th Cir. [Certiorari granted, *ante,* p. 894.] Motion of Texas et al. for leave to file a brief as *amici curiae* denied.

No. 74–5574. Williams *v.* United States District Court for the Northern District of New York. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 74–337. Doran *v.* Salem Inn, Inc., et al. Appeal from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 501 F. 2d 18.

Certiorari Granted

No. 74–362. Intercounty Construction Corp. et al. *v.* Walter, Deputy Commissioner, Bureau of Employees' Compensation, U. S. Department of Labor, et al. C. A. D. C. Cir. Certiorari granted. Reported below: 163 U. S. App. D. C. 147, 500 F. 2d 815.

No. 74–653. Michigan *v.* Mosley. Ct. App. Mich. Certiorari granted. Reported below: 51 Mich. App. 105, 214 N. W. 2d 564.

No. 74–157. UNITED HOUSING FOUNDATION, INC., ET AL. *v.* FORMAN ET AL.; and

No. 74–647. NEW YORK ET AL. *v.* FORMAN ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 500 F. 2d 1246.

No. 74–634. UNITED STATES *v.* NOBLES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 501 F. 2d 146.

Certiorari Denied. (See also No. 74–5617, *supra.*)

No. 73–2006. COLORADO MAGNETICS, INC., DBA SOUND VALUES, INC., ET AL. *v.* EDWARD B. MARKS MUSIC CORP. C. A. 10th Cir. Certiorari denied. Reported below: 497 F. 2d 285.

No. 74–81. COCHRAN *v.* UNITED STATES; and

No. 74–522. HORNSBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1072.

No. 74–250. COLE *v.* SCHLESINGER, SECRETARY OF DEFENSE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 494 F. 2d 141.

No. 74–261. C. R. FEDRICK, INC. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 38 Cal. App. 3d 385, 120 Cal. Rptr. 434.

No. 74–283. EMPRISE CORP. *v.* UNITED STATES;

No. 74–322. POLIZZI ET AL. *v.* UNITED STATES; and

No. 74–323. GIORDANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 856.

No. 74–365. WHITTED *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 21 N. C. App. 649, 205 S. E. 2d 611.

No. 74–446. Local 300, Laborers' International Union of North America, et al. *v.* Magallanes et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 40 Cal. App. 3d 809, 115 Cal. Rptr. 428.

No. 74–491. Schneider *v.* United States; and
No. 74–5608. Dace *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 502 F. 2d 897.

No. 74–526. Stollings *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–530. Lawhon *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 499 F. 2d 352.

No. 74–560. Rendon et al. *v.* District of Columbia Board of Elections. Ct. App. D. C. Certiorari denied.

No. 74–565. Breier et al. *v.* Bence et al. C. A. 7th Cir. Certiorari denied. Reported below: 501 F. 2d 1185.

No. 74–618. Morse *v.* Wilson, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 500 F. 2d 1264.

No. 74–624. Fenner *v.* Strickland. Sup. Ct. Neb. Certiorari denied. Reported below: 192 Neb. 114, 219 N. W. 2d 229.

No. 74–626. Continental Illinois National Bank & Trust Company of Chicago *v.* O'Brien et al. C. A. 7th Cir. Certiorari denied.

No. 74–631. Eddie Dassin, Inc. *v.* Eastern Airlines, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 74.

No. 74–644. Association of Motion Picture & Television Producers, Inc., et al. *v.* Knopf et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 40 Cal. App. 3d 233, 114 Cal Rptr. 782.

No. 74–636. PELLICCI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 504 F. 2d 1106.

No. 74–640. ECONOMIC RESEARCH ANALYSTS, INC., ET AL. *v.* O'CONNELL; and

No. 74–642. ECONOMIC RESEARCH ANALYSTS, INC., ET AL. *v.* HUDAK. C. A. 5th Cir. Certiorari denied. Reported below: No. 74–640, 499 F. 2d 994; No. 74–642, 499 F. 2d 996.

No. 74–651. BRENNAN, SECRETARY OF LABOR *v.* GREYHOUND LINES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 499 F. 2d 859.

No. 74–654. O'DELL ET AL. *v.* CITY OF CHATTANOOGA ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 513 S. W. 2d 780.

No. 74–668. SELIKOFF *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 227, 318 N. E. 2d 784.

No. 74–672. CITY OF LOS ANGELES *v.* AARON ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 40 Cal. App. 3d 471, 115 Cal. Rptr. 162.

No. 74–686. LOESER *v.* LOESER. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 311 N. E. 2d 636.

No. 74–695. DESKINS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 512 S. W. 2d 520.

No. 74–697. MAHONEY ET AL. *v.* PHILADELPHIA HOUSING AUTHORITY. Pa. Commw. Ct. Certiorari denied. Reported below: 13 Pa. Commw. 243, 320 A. 2d 459.

No. 74–5005. ALEXANDER ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 74–5103. BAKER *v.* ATKINS, ACTING WARDEN. C. A. 10th Cir. Certiorari denied.

No. 74–5245. PORTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 1006.

No. 74–5274. HURST ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 923.

No. 74–5297. WOODS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 74–5350. VARFIS *v.* RICHEY, U. S. DISTRICT JUDGE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 74–5379. MILNE, AKA GORDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 329.

No. 74–5384. CROOK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 502 F. 2d 1378.

No. 74–5394. SCALES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 214 Va. 728, 204 S. E. 2d 273.

No. 74–5395. HOWES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5398. STYPMANN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–5401. CORUM *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–5402. COOLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 1249.

No. 74–5408. RAVEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 728.

No. 74–5411. MALONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 2d 554.

No. 74–5430. BANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 74–5448. BEAMON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 298 So. 2d 376.

No. 74–5450. TERAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5452. KOCHEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 74–5461. KEMPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 503 F. 2d 327.

No. 74–5470. COCHRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 499 F. 2d 380.

No. 74–5485. MAYFIELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5490. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 1037.

No. 74–5501. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 1397.

No. 74–5503. TUBBS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 1397.

No. 74–5508. LINCOLN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5521. ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5528. RODOVICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 499 F. 2d 358.

No. 74–5533. TALLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied: Reported below: 505 F. 2d 731.

No. 74–5537. TASBY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 504 F. 2d 332.

No. 74–5541. DEMONTIJO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5605. MARTIN *v.* FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1182.

No. 74–5610. PILLIS *v.* RUSSO, JUDGE, ET AL. Sup. Ct. Va. Certiorari denied.

No. 74–5614. HARSANY *v.* WORKMEN'S COMPENSATION APPEALS BOARD ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–5618. CHERRY *v.* INDIANA. C. A. 7th Cir. Certiorari denied.

No. 74–5622. ENGLISH *v.* DAVIS, CORRECTIONS DIRECTOR. Sup. Ct. Va. Certiorari denied.

No. 75–5626. BESSER *v.* DUNN, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–5630. WILLIAMS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1183.

No. 74–5631. HENDERSON *v.* ATKINS, ACTING WARDEN. C. A. 10th Cir. Certiorari denied.

No. 74–5640. ADKINS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 295 So. 2d 120.

No. 74–5649. CATANZARITE *v.* MAZURKIEWICZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1400.

No. 74–5650. BREDY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 74–5652. TALLENT, AKA OSTERHOUT, ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 44 App. Div. 2d 911, 356 N. Y. S. 2d 238.

No. 74–29. SYKES *v.* MARYLAND; and

No. 74–30. FORNARO *v.* MARYLAND. Crim. Ct. Baltimore City. Certiorari denied.

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

Petitioners were convicted in Baltimore City District Court of showing unlicensed films in violation of the Maryland motion picture censorship statute, Md. Ann. Code, Art. 66A, §§ 1–26 (1970 and Supp. 1974), which requires that films be licensed before exhibition and forbids the licensing of obscene films. Pursuant to § 6 (b) of the statute a film is "obscene" if, "when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess." The Criminal Court of Baltimore City affirmed both convictions, and the Maryland Court of Special Appeals and the Maryland Court of Appeals denied certiorari.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult*

Theatre I v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting).

It is clear that, tested by that constitutional standard, the Maryland motion picture censorship statute, as it defines "obscene" in § 6 (b), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), and because the judgments below were rendered after *Miller,* I would therefore reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 74–222. ALLRED ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 21 N. C. App. 229, 204 S. E. 2d 214.

No. 74–335. PRYBA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 163 U. S. App. D. C. 389, 502 F. 2d 391.

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

Petitioner was convicted in the United States District Court for the District of Columbia of transporting obscene films in interstate commerce in violation of 18 U. S. C. § 1462 and of possessing such films with intent to distribute in violation of D. C. Code Ann. § 22–2001 (1973). The Court of Appeals for the District of Columbia Circuit affirmed. 163 U. S. App. D. C. 389, 502 F. 2d 391 (1974). Title 18 U. S. C. § 1462 provides in pertinent part:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other

common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

. . . . . .

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

"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."

District of Columbia Code Ann. § 22–2001 (1973) provides in pertinent part:

"(a)(1) It shall be unlawful in the District of Columbia for a person knowingly—

"(A) to sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

. . . . . .

"(E) to create, buy, procure, or possess any matter described in the preceding subparagraphs of this paragraph with intent to disseminate such matter in violation of this subsection.

. . . . . .

"(e) A person convicted of violating subsection (a) or (b) of this section shall for the first offense be fined not more than $3,000 or imprisoned not more than one year, or both. A person convicted of a second or subsequent offense under subsection (a) or (b) of this section shall be fined not less than

$1,000 nor more than $5,000 or imprisoned not less than six months or more than three years, or both."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting).

It is clear that, tested by that constitutional standard, 18 U. S. C. § 1462 and D. C. Code Ann. § 22–2001 (1973) are constitutionally overbroad and therefore facially invalid. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the District of Columbia Court of Appeals was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

remand for a determination whether petitioner should be afforded a new trial under local community standards.

MR. JUSTICE DOUGLAS, dissenting.

It is occasionally suggested that the First Amendment, applied to the States through the Fourteenth, *Stromberg* v. *California,* 283 U. S. 359 (1931), has a more restricted meaning than when applied to the Federal Government. See *Roth* v. *United States,* 354 U. S. 476, 500–503 (1957) (Harlan, J., concurring in judgment in *Alberts* v. *California,* 354 U. S. 476 (1957)). That view has never prevailed and is not at issue in this case as the prohibition of the First Amendment against abridgment of speech and press precisely fits this federal prosecution and, in my view, should bar it. That is the view I expressed in *Roth, supra,* at 508–514 (dissenting), a position from which I have not retreated.

No. 74–353. SCHUBERT, HOSPITAL SUPERINTENDENT *v.* KOVACH. Sup. Ct. Wis. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 64 Wis. 2d 612, 219 N. W. 2d 341.

No. 74–384. SPRINKLE, ACTING WARDEN, ET AL. *v.* MASON. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 74–536. BALLEW *v.* ALABAMA; and

No. 74–537. PIERCE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 74–536, 292 Ala. 1460, 296 So. 2d 206; No. 74–537, 292 Ala. 473, 296 So. 2d 218.

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

Petitioners were convicted of distributing or exhibiting allegedly obscene publications in violation of Ala. Code,

Tit. 14, § 374 (4)(1) (Supp. 1973), which provides as follows:

> "Every person who, with knowledge of its contents, . . . sells, exhibits or commercially distributes, . . . any obscene printed or written matter or material, other than mailable matter . . . shall be guilty of a misdemeanor . . . ."

As used in § 374 (4), "obscene" means:

> "lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest." § 374 (3).

On appeal, the Alabama Court of Criminal Appeals affirmed the convictions. The Supreme Court of Alabama granted certiorari in both cases and affirmed.

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 374 (4), as it incorporates the definition of "obscene" of § 374 (3), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari and, since the judgments of the Supreme Court of Alabama were rendered after *Miller*, reverse the convictions. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Further, it does not appear from the petition or response in No. 74–536 that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner Ballew must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate this judgment and remand for a determination whether petitioner Ballew should be afforded a new trial under local community standards.

No. 74–645. NATIONAL RIGHT TO WORK LEGAL DEFENSE & EDUCATION FOUNDATION, INC., ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. D. C. Cir. Motion to defer consideration and certiorari denied. Reported below: See 376 F. Supp. 1060.

Rehearing Denied

No. 73–1902. NATIONAL INDEPENDENT COAL OPERATORS ASSN. *v.* BRENNAN, SECRETARY OF LABOR, *ante,* p. 955;

No. 73–6856. ROBINSON *v.* JEFFERSON COUNTY BOARD OF EDUCATION ET AL., *ante,* p. 862;

No. 73–6991. WILLIAMS *v.* CALIFORNIA, *ante,* p. 1046;

No. 74–426. JOINER ET AL. *v.* CITY OF DALLAS ET AL., *ante,* p. 1042;

No. 74–5132. YOUNG *v.* UNITED STATES, *ante,* p. 1002; and

No. 74–5527. BRIDGES *v.* TENNESSEE, *ante,* p. 1097. Petitions for rehearing denied.

No. 74–44. FAHRIG ET AL. *v.* LEDFORD, EXECUTOR, *ante,* p. 967. Motion for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF CIVIL AND CRIMINAL PROCEDURE [1]

EFFECTIVE JULY 1, 1975

Section 3 of the Act of Jan. 2, 1975, Pub. L. 93–595, 88 Stat. 1926, enacting the Federal Rules of Evidence and related amendments to the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, provides as follows:

> "SEC. 3. The Congress expressly approves the amendments to the Federal Rules of Civil Procedure, and the amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972,[2] and December 18, 1972,[3]

[1] See Reporter's Note, 409 U. S. 1132. The full text of the Federal Rules of Evidence as prescribed by the Court, is set forth in H. R. Doc. No. 93–46, pp. 1–43 (1973), together with THE CHIEF JUSTICE's letter of submittal, *id.*, at III.

[2] The order of November 20, 1972, reads in pertinent part as set forth below. The full text of that order is printed in H. R. Doc. No. 93–46, *supra*, at v.

"ORDERED:

"3. That subdivision (c) of Rule 30 and [Rule] 44.1 of the Federal Rules of Civil Procedure be, and they hereby are, amended . . . to read [as set forth, *infra*, at 1134, 1136].

"4. That subdivision (c) of Rule 32 of the Federal Rules of Civil Procedure be, and it hereby is, abrogated . . . .

"5. That Rules 26, 26.1, and 28 of the Federal Rules of Criminal Procedure be, and they hereby are, amended . . . to read [as set forth, *infra*, at 1136].

"6. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the foregoing new rules and amendments to and abrogation of existing rules to the Congress at the beginning of its next regular

[*Footnote 3 is on p. 1134*]

and such amendments shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act."

The amendments to the Federal Rules of Civil Procedure [4] read as follows:

Rule 30. Depositions upon oral examination

(*c*) *Examination and cross-examination; record of examination; oath; objections.*—Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

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session, in accordance with the provisions of Title 18 U. S. C. § 3771 and Title 28 U. S. C. §§ 2072 and 2075."

[3] The order of December 18, 1972, reads in pertinent part as set forth below. The full text of that order is printed in H. R. Doc. No. 93–46, *supra,* at VIII.

"ORDERED:

"1. That Rule 43 of the Federal Rules of Civil Procedure, as amended by Order of this Court entered November 20, 1972, be, and it hereby is, further amended . . . to read [as set forth, *infra,* at 1135].

"2. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the foregoing amendment of Rule 43 of the Federal Rules of Civil Procedure to the Congress at the beginning of its next regular session in accordance with the provisions of Title 28, U. S. C. § 2072."

[4] For earlier publication of the Federal Rules of Civil Procedure and the amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, and 401 U. S. 1017.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

Rule 32. Use of depositions in court proceedings

[Subdivision (c) is abrogated.]

Rule 43. Taking of testimony

(*a*) *Form.*—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

[(*b*) *Scope of examination and cross-examination*] (Abrogated)

[(*c*) *Record of excluded evidence*] (Abrogated)

(*d*) *Affirmation in lieu of oath.*—Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(*e*) *Evidence on motions.*—When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

(*f*) *Interpreters.*—The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Rule 44.1. Determination of foreign law

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

The amendments to the Federal Rules of Criminal Procedure [5] read as follows:

Rule 26. Taking of testimony

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

Rule 26.1. Determination of foreign law

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Rule 28. Interpreters

The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.

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[5] For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, and 416 U. S. 1001.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1136 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS FROM JULY 29 THROUGH DECEMBER 31, 1974

TIMES-PICAYUNE PUBLISHING CORP. *v.* SCHULINGKAMP

ON APPLICATION FOR STAY

No. A–1305. Decided July 29, 1974

Application for stay of Louisiana trial court's order restricting media coverage of trials of defendants accused of committing highly publicized rape and murder is granted pending the timely filing and disposition of a petition for certiorari in this Court, where the order imposed pervasive restraints of uncertain duration, and where alternative means for protecting the defendants' rights to a fair trial appear to have been available to the trial court.

MR. JUSTICE POWELL, Circuit Justice.

This is an application for stay of an order of the Louisiana Criminal District Court for the Parish of Orleans restricting media coverage of the trials of two defendants accused of committing a highly publicized rape and murder in the city of New Orleans. The applicant, a Louisiana corporation that owns and publishes two of the city's daily newspapers, has asked that I stay that order pending filing and disposition of a petition for a writ of certiorari in this Court. Respondent, the Honorable Oliver P. Schulingkamp, has at my request filed a memorandum in opposition to the application. The record before me indicates a substantial possibility that the state court's order is inconsistent with this Court's decisions governing prior restraint of the news media and that continuance of the order pending consideration of a petition for a writ

of certiorari would inflict irreparable harm. I therefore have granted the requested stay.

In April 1973, a young white nursing student was raped and murdered following her visit to an elderly patient living in one of the city's public housing projects. Shortly thereafter, two Negro suspects were arrested and charged with the crime. The case immediately became the focal point in the media for a number of more generalized concerns. The state university program that prompted the student's unescorted visit to the housing project was called into sharp question, as was the sufficiency of law enforcement efforts in high-crime areas of New Orleans. The case also occasioned criticism of the criminal and juvenile justice systems.

Much of the initial publicity was directed toward one defendant, a 17-year-old with an apparently extensive history of juvenile offenses. Newspaper stories recounted in some detail the circumstances leading to his arrest and his subsequent alleged disclosure of the location where the victim's body was recovered. Additionally, stories dwelt on his prior juvenile offenses. Almost all of the many newspaper references characterized him as a youth with a history of 43 juvenile arrests, the accuracy of which has since been disputed. Some newspaper accounts referred to his previous arrest on charges of murder and armed robbery without simultaneously revealing that those charges had been dropped for insufficient evidence. Others reported a psychiatric diagnosis of this defendant made several years earlier and apparently contained in the records of the juvenile probation officer.

Within a few days reports concerning the crime, the accused, and other related concerns ceased to be of banner importance. Stories became shorter and began to move from the first page to less prominent positions in the papers. Newspaper coverage appears to have ceased

within some 10 days of the arrest and the papers apparently published no stories about the defendants from the latter part of April until late January of the following year, when one subdued story announced the anticipated initiation of pretrial motions in the case.[1]

Some of the newspaper reporting that occurred in April can hardly be characterized as responsible journalism. Like many States, Louisiana maintains the confidentiality of the records of juvenile offenders. La. Rev. Stat. Ann. § 13:1586.3 (Supp. 1974). The record does not indicate how reporters came into possession of some of their information. Additionally, there appear to be inaccuracies or partial truths in matters that are of obvious importance.

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[1] Stories from the applicant's newspapers were included in the defendant's motion to restrict media coverage and have been made part of this application. They reveal that the crime obtained immediate first-page banner coverage. On April 10, 1973, stories appeared that reported discovery of the victim's body and the arrest of a juvenile in connection with the crime. By the next day, this defendant had been identified and front-page stories began to portray his history of juvenile arrests. The arrest of the second defendant received banner coverage on April 12, as did a report that allegedly linked property stolen from the victim to the possession of the first defendant. The following day first-page banner stories appeared purportedly detailing the first defendant's juvenile record and his psychiatric diagnosis. One newspaper also ran a picture of him being escorted to arraignment with his hands cuffed behind his back. During that same period other stories dealt with more general topics, and many mentioned this defendant and his juvenile record.

Publicity began to subside around April 15 and ended a few days thereafter. The record does not disclose any subsequent newspaper accounts mentioning the defendants until the appearance on January 12, 1974, of a story reporting the expected initiation of routine pretrial motions in the case.

The record does not specifically reveal the nature and extent of radio and television reporting. I assume that its timing and intensity more or less paralleled that of the newspaper reporting.

In March 1974, some 11 months after the crime and attendant extensive publicity, counsel for the defendant who had received the most journalistic attention moved that the Criminal District Court for the Parish of Orleans impose restrictions on reporting of the case. The court granted the motion on June 17, 1974. The court's order imposes a total ban on reporting of testimony given in hearings on pretrial motions until after the selection of a jury and also places other selective restrictions on reporting before and during trial.

At the time the order was issued, the court apparently contemplated only one trial. By its terms the order was to remain in effect until termination of *the* trial. The court later severed the defendants' cases and ordered separate trials of the rape and murder charges against each. It made no modification of its media coverage order to reflect this changed circumstance. The applicant has represented that the court stated that the order would remain in effect until the termination of the last trial. Respondent has not contradicted this representation, and I assume it to be correct.

The applicant sought relief from both the lower federal courts and the state court system prior to addressing this application to me. After failing to obtain immediate injunctive relief from the federal courts,[2] the applicant asked the state court to vacate its order. That request was denied, as was a request that the court stay its order pending submission of application for

[2] The United States District Court conducted a hearing at which it heard argument of counsel and the testimony of the respondent herein. Thereafter, the court determined that it should abstain from interfering with the state proceedings at that stage. The applicant noted an appeal from that decision and requested that the United States Court of Appeals for the Fifth Circuit stay the state court order pending appeal. A panel of the Fifth Circuit denied the request for a stay. Neither of these decisions is before me today.

supervisory and remedial writs in the Louisiana Supreme Court. On July 9, 1974, the applicant sought writs of certiorari, review, prohibition, and mandamus, and a stay of the state trial court's order in the Louisiana Supreme Court. That same day the Louisiana Supreme Court denied relief by a vote of four to three, stating that the "[s]howing made does not justify the relief demanded." Following one more unsuccessful attempt to obtain an injunction in the United States District Court, the applicant has requested that I, as Circuit Justice for the Fifth Circuit, stay the state court's order pending this Court's consideration of a petition for a writ of certiorari.

I have previously expressed my reluctance, in considering in-chambers stay applications, to substitute my view for that of other courts that are closer to the relevant factual considerations that so often are critical to the proper resolution of these questions. *Graves* v. *Barnes,* 405 U. S. 1201, 1203 (1972). In my in-chambers opinion in that case, I articulated the general standards governing the grant of a stay application: there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. *Ibid.*

The question of the possibility of irreparable harm is particularly troublesome in this case. It presents a fundamental confrontation between the competing values of free press and fair trial, with significant public and private interests balanced on both sides. If the order is not stayed, the press is subjected to substantial prior restraint with respect to a case of widespread concern in the community. If, on the other hand, the order is stayed and

the press fails to act with scrupulous responsibility, the defendants' constitutional right to a fair trial may be seriously endangered.

The challenged portions of the order of the Criminal District Court for the Parish of Orleans impose a total prohibition on publication of testimony adduced in pretrial hearings until after selection of a jury. Noting that extensive testimony would be required in considering the many pretrial motions, including motions to suppress an alleged confession and other evidence, the court specifically ordered "that the reporting of such testimony be deferred until after the jury has been selected in order to preclude the possibility of such testimony influencing, in any way, prospective jurors yet to be selected, and rendering more difficult the task of selecting said jurors." In addition, the state court order imposes other selective restrictions on what may be published both before and during trial. These restrictions are aimed at the content of news reporting. The order requires that the media avoid publication of interviews with subpoenaed witnesses. It also prohibits publication of any of the defendants' criminal records or discreditable acts or of any possible confessions or inculpatory statements unless made part of the evidence in the court record. The order forbids publication of any testimony stricken by the court unless identified as having been stricken and bars publication of any leaks, statements, or conclusions of guilt or innocence that might be expressed or implied by statements of the police, prosecuting attorneys, or defense counsel. Finally, the order prohibits any editorial comment preceding or during trial "which tends to influence the Court, jury, or witnesses." By its terms, the order remains in effect "until the conclusion of the trial." The court's decision to continue the order during pendency of all of the trials ensures that it will

extend over an indefinite and possibly lengthy period of time.

The court's order imposes significant prior restraints on media publication. As such, it would come to this Court " 'bearing a heavy presumption against its constitutional validity.' " *New York Times Co.* v. *United States,* 403 U. S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931). Decisions of this Court repeatedly have recognized that trials are public events. See, *e. g., Sheppard* v. *Maxwell,* 384 U. S. 333, 349–350 (1966); *Estes* v. *Texas,* 381 U. S. 532, 541 (1965); *Craig* v. *Harney,* 331 U. S. 367, 374 (1947). And "reporters . . . are plainly free to report whatever occurs in open court through their respective media." *Estes* v. *Texas, supra,* at 541–542.

This Court also has shown a special solicitude for preserving fairness in a criminal trial. "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California,* 314 U. S. 252, 271 (1941). See also *Rideau* v. *Louisiana,* 373 U. S. 723, 726 (1963); *Irvin* v. *Dowd,* 366 U. S. 717 (1961). The task of reconciling First Amendment rights with the defendant's right to a fair trial before an impartial jury is not an easy one. This Court has observed in dictum that newsmen might be prohibited from publishing information about trials if such restrictions were necessary to assure a defendant a fair trial. *Branzburg* v. *Hayes,* 408 U. S. 665, 685 (1972). There was no indication in that opinion, however, that the standards for determining the propriety of resort to such action would materially differ from those applied in other decisions involving prior restraints of speech and publication.

I need only consider this question in the limited context of an application for a stay. On the record before me, and certainly in the absence of any showing of an imminent threat to fair trial, I cannot say that the order of the state court would withstand the limitations that this Court has applied in determining the propriety of prior restraints on publication. Cf. *United States* v. *Dickinson*, 465 F. 2d 496 (CA5 1972). The state court was properly concerned that the type of news coverage described above might be resumed and might threaten the defendants' rights to a fair trial. But the restraints it has imposed are both pervasive and of uncertain duration. They include limitations on the timing as well as the content of media publication, cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). Moreover, the court has available alternative means for protecting the defendants' rights to a fair trial.[3]

[3] The court has already invoked several of these procedures. For example, portions of the court's order prohibit members of the bar and other persons under the court's supervision and control from making extrajudicial statements prior to the termination of trial. These prohibitions are not challenged here. Additionally, respondent has indicated his intention to sequester the juries. This will protect against many of the hazards that the selective restrictions on reporting during trial are designed to prevent.

Some other options may yet be used to protect the defendants' rights. The defendant who sought the order apparently did not request that the pretrial hearings be closed to the public and press, and the court does not seem to have contemplated that possibility. As an initial matter, the court's power to take such action is a question governed by state law. Unlike some States, Louisiana does not appear to have a specific provision authorizing such action. Cf. Cal. Penal Code § 868 (1970); Iowa Code § 761.13 (1973); Mont. Rev. Codes Ann. § 95–1202 (c) (1969). This Court has not been called upon to determine whether these provisions are constitutional, and I express no view on that question. Of course, the court must conduct *voir dire* of the prospective jurors in these cases with particular care. Finally, the court retains the power to hold

The issues underlying this case are important and difficult. Without anticipating my views on the merits, I have concluded that this application satisfies the standards for the grant of a stay. Accordingly, I have decided to stay that portion of the order of the Louisiana Criminal District Court that imposes direct limitations on media reporting pending the timely filing and disposition of a petition for a writ of certiorari in this Court.[4]

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persons, including members of the media, in contempt in particular limited circumstances. See *Craig* v. *Harney,* 331 U. S. 367 (1947); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Bridges* v. *California,* 314 U. S. 252 (1941).

[4] The applicant has not questioned the portions of the court's order that relate to the conduct of other persons, and this stay order does not affect them. My order is limited to the portion of the respondent's order directed specifically to the news media. It does not, however, stay the portion of the court's order prohibiting the use of electronic or mechanical equipment within the court during the trial or related proceedings.

The Reporters Committee for Freedom of the Press and the Vieux Carre Courier Publishing Co., as *amici curiae,* have requested additionally that I enjoin any court proceeding about which the press is prohibited from reporting pending final disposition of this case on the merits. I find that action to be unwarranted and unwise.

EHRLICHMAN *v.* SIRICA ET AL.

ON APPLICATION FOR STAY

No. A–93. Decided August 28, 1974

Application for stay of District Court's order setting applicant's criminal trial date, on alleged grounds that pretrial publicity precluded applicant's receiving a fair trial in the venue at the time set and that he lacks sufficient time to prepare his defense, is denied. The responsibility for passing on a claim for a change of venue or delay in a trial because of prejudicial pretrial publicity calls for the exercise of the highest order of sound judicial discretion by the District Court, and doubts about the correctness of the order, particularly after the Court of Appeals has reviewed it and denied mandamus, do not constitute sufficient basis for contrary action by an individual Circuit Justice absent the most extraordinary circumstances. Denial of the application here indicates no view on the issues presented, and any errors in the exercise of discretion in resolving those issues are subject to appellate review.

MR. CHIEF JUSTICE BURGER, Circuit Justice.

This application comes before me as Circuit Justice for a stay of the District Judge's order setting trial for September 30, 1974, of *United States* v. *Mitchell,* D. C. Crim. No. 74–110. Defendant Ehrlichman seeks this stay alleging that past and continuing prejudicial publicity has made it impossible for him to receive a fair trial in this venue at the time now set, and that he will not have sufficient time to prepare his defense.

The trial had been set for September 9, 1974. When both the prosecution and defense asked for more time to prepare for trial the District Court denied the requests, and applicant, *inter alia,* petitioned for a writ of mandamus from the United States Court of Appeals for the District of Columbia Circuit to delay the trial. That court, sitting en banc, did not rule directly on the petition,

but instead remanded and recommended that the District Judge consider delaying the trial three or four weeks so all parties would have more time to prepare; one judge based his concurrence on prejudicial publicity as well. The District Judge then ordered the trial to be deferred for three weeks from September 9, 1974.

The present application is presented to me, as Circuit Justice for the District of Columbia Circuit, to delay the start of the trial until January 1975. The application puts forth the same reasons as were before the Court of Appeals. The United States has filed a response opposing any further delay.

The function of a Circuit Justice in these circumstances is limited. It does not ordinarily encompass overseeing pretrial orders in pending criminal prosecutions. Such matters are essentially within the sound judicial discretion of the trial judge who must be presumed to be intimately aware of the case at hand and other factors which bear upon the relief sought. *Frohwerk* v. *United States,* 249 U. S. 204 (1919); *Goldsby* v. *United States,* 160 U. S. 70 (1895); *Isaacs* v. *United States,* 159 U. S. 487 (1895).

The limited power of a court of appeals, whether by way of mandamus or in its supervisory function over trial courts, must be looked to as the primary source of relief since such courts are in closer touch with the facts and factors presented in the workings of the regular activities of the district courts within a circuit.

Here the Court of Appeals has denied mandamus relief, but exercised something in the nature of a *de facto* supervisory function by remanding the issue to the District Court with intimations that some delay would be appropriate. It is only a coincidence that the location of this trial is in the same city as the seat of this Court, giving Members of this Court essentially the same ex-

posure as that of the trial judge and the Court of Appeals to the pretrial publicity which forms a partial basis for the relief requested. Except for cases coming from the District of Columbia Circuit, a Justice of this Court is ordinarily far removed from the setting of the trial. General principles about the function of a Circuit Justice in a situation of this kind are not to be formed from such a unique setting. An individual Circuit Justice does not possess the supervisory powers of a court of appeals concerning the activities of the district courts within its circuit.

One course open in this setting and in light of the gravity of the claim of prejudicial pretrial publicity would be to refer this application to the full Court for action at the opening of the October 1974 Term on October 7. However, this in itself would defer starting of the trial to at least sometime in the latter half of October since neither party would be expected to go to trial immediately following this Court's action. To follow this course would have the operative effect of an additional stay of three or four weeks, assuming denial of the relief requested.

The responsibility for passing on a claim for change of venue or delay in a trial because of prejudicial pretrial publicity calls for the exercise of the highest order of sound judicial discretion by the District Court. Doubts about the correctness of a district court decision fixing a trial date in these circumstances, particularly after the Court of Appeals has reviewed the matter and denied an application for mandamus, are not sufficient to form a basis for contrary action by an individual Circuit Justice. The District Court bears responsibility commensurate with its authority in such matters, and only in the most extraordinary circumstances should an individual Circuit Justice intervene.

The application for a stay is therefore denied, but this action is not to be taken as intimating any view whatever on the issues presented by the order of the District Court or the action of the Court of Appeals. The resolution of these issues should they arise after verdict must await the normal appellate processes. *Sheppard* v. *Maxwell,* 384 U. S. 333, 362 (1966).

Application denied.

SOCIALIST WORKERS PARTY *v.* ATTORNEY GENERAL

ON APPLICATION FOR STAY

No. A–534. Decided December 27, 1974

Applicants, the Socialist Workers Party, its youth organization (YSA), and various individuals, brought an action against various Government officials for alleged interference in their political activities and sought an injunction, which the District Court granted, barring FBI agents and informants from attending or otherwise monitoring the YSA national convention. Except for upholding a bar against the FBI's transmitting to the Civil Service Commission (CSC) the names of persons attending the convention, the Court of Appeals vacated the injunction, noting that the convention was open to anyone under age 29 and that the only investigative method would be the use of informants who would attend meetings as the public would and that any "chilling effect" on applicants' rights was not sufficient to outweigh prejudice to the Government that compromising its informants would entail. Applicants apply for a stay of the Court of Appeals' order and reinstatement of the District Court's injunction. *Held:* Although, unlike the situation in *Laird* v. *Tatum,* 408 U. S. 1, applicants' allegations of a "chilling effect" are sufficiently specific to satisfy Art. III's jurisdictional requirements, nevertheless a stay would be improper, since the FBI has represented that it plans no disruptive activity at the convention and will not transmit information to nongovernmental entities, and since interim relief against disclosure of delegates' names to the CSC has been granted.

MR. JUSTICE MARSHALL, Circuit Justice.

This case is before me on an application to stay an order entered by a panel of the Court of Appeals for the Second Circuit, vacating in part an order of the District Court for the Southern District of New York. The District Court had granted a preliminary injunction against the Director of the Federal Bureau of Investigation and

others, barring Government agents and informants from attending or otherwise monitoring the national convention of the Young Socialist Alliance (YSA), to be held in St. Louis, Mo., between December 28, 1974, and January 1, 1975. Applicants also seek to have the injunction of the District Court reinstated in full.

Applicants, the Socialist Workers Party, the YSA—the party's youth organization—and several individuals, originally brought this action against various Government officials, seeking injunctive and monetary relief for alleged governmental interference in the political activities of the two organizations. In the course of preparing for trial on the merits, the applicants apparently learned that the FBI planned to monitor the YSA national convention and to use confidential informants to gain information about convention activities. They sought to enjoin the FBI, its agents, and its informants from "attending, surveilling [*sic*], listening to, watching, or otherwise monitoring," the convention. After several hearings, the District Court granted the injunction in the form requested by the plaintiffs. On an expedited appeal,[1] the Court of Appeals vacated the District Court's injunction in all respects except one: it barred the FBI from transmitting the names of persons attending the convention to the Civil Service Commission pending final determination of the action. For the reasons stated below, I have concluded that on the facts of this case, the extraordinary relief of a stay is not warranted.

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[1] Applicants object to the Court of Appeals' treatment of the case as an appeal, after initially setting it as a motion for a stay. When the time is as short as it was in this case, of course, the difference between the two is very slight. The court's determination that the District Court abused its discretion in ordering the injunction would appear to meet the standard of review for either a stay or the reversal of a preliminary injunction.

I

The applicants argue that a stay is necessary to protect the First Amendment speech and association rights of those planning to attend the YSA convention. Surveillance and other forms of monitoring, they claim, will chill free participation and debate, and may even discourage some from attending the convention altogether. Beyond this, the applicants allege that the FBI has admitted that its agents or informants "intend to participate in the convention debate posing as *bona fide* YSA members." [2] This "double agent" activity, the applicants claim, will result in "corruption of the democratic process" and consequent irreparable harm to the applicants and others who would participate in the convention.

The applicants further assert that granting the relief requested here will not result in injury to the FBI. The fact that the FBI has a duty to keep itself informed concerning the possible commission of crimes, applicants say, does not justify its permitting informants and agents to participate in the convention, since the YSA has not been shown to have engaged in illegal activities. They further claim that the risk that FBI informants will become identifiable by their nonattendance at the convention is not sufficient to support the Court of Appeals'

[2] Applicants argue that this admission, made after the District Court's decision, significantly alters the balance of the equities in this case. However, the Government has represented that no FBI agents will attend the convention and that the informants who are members of the YSA will participate in the convention only in a manner consistent with their previous roles in the organization. The Government assured both the Court of Appeals and me that the FBI has authorized no disruptive activity at the YSA convention. To require informants who may be active members of the organization to remain silent throughout the convention would render them as readily identifiable in some cases as an order excluding them.

order. While the applicants' allegations evoke an unsavory picture of deceit and political sabotage, the facts as characterized by the Court of Appeals suggest a less sinister view of the Government's planned activities at the convention. The court noted that the convention would be open to anyone under the age of 29; that anyone could register; that even the "delegated" sessions would be open to anyone registered at the convention; that the Government planned no electronic surveillance or disruptive activity; and that the only investigative method would be the use of informants who would attend the meetings just as any member of the public would be permitted to do.

The Court of Appeals held that on the facts of this case, the chilling effect on attendance and participation at the convention was not sufficient to outweigh the serious prejudice to the Government of permanently compromising some or all of its informants. The 11th-hour grant or denial of injunctive relief would not be likely to have a significant effect on attendance at the convention, the court stated, and since the convention is to be open to the public and the press, the use of informants to gather information would not appear to increase appreciably the "chill" on free debate at the convention. In weighing the nature of the planned investigative activity, the justification for that activity, and the claimed First Amendment infringement in this case, the Court of Appeals determined that the balance of the equities tipped in favor of the Government and that a preliminary injunction was therefore improper.

II

This case presents a difficult threshold question—whether the applicants have raised a justiciable controversy under this Court's decision in *Laird* v. *Tatum,* 408

U. S. 1 (1972). In *Laird,* the plaintiffs protested surveillance activities by the Army that were in many ways similar to those planned by the FBI in this case. The Court held, however, that the plaintiffs' claim that the Army's surveillance activities had a general chilling effect on them was not sufficient to establish a case or controversy under Art. III of the Constitution.

The Government has contended that under *Laird,* a "chilling effect" will not give rise to a justiciable controversy unless the challenged exercise of governmental power is "regulatory, proscriptive, or compulsory in nature," and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging. *Id.,* at 11. In my view, the Government reads *Laird* too broadly. In the passage relied upon by the Government, the Court was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not. More apposite is the Court's observation in *Laird* that the respondents' claim was

> "that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights." *Id.,* at 13.

Because the "chilling effect" alleged by respondents in *Laird* arose from their distaste for the Army's assumption of a role in civilian affairs or from their apprehension that the Army might at some future date "misuse the information in some way that would cause direct harm to [them]," *ibid.,* the Court held the "chilling effect" allegations insufficient to establish a case or controversy.

In this case, the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under *Laird,* to satisfy the requirements of Art. III.

III

Although the applicants have established jurisdiction, they have not, in my view, made out a compelling case on the merits. I cannot agree that the Government's proposed conduct in this case calls for a stay, which, given the short life remaining to this controversy, would amount to an outright reversal of the Court of Appeals.

It is true that governmental surveillance and infiltration cannot in any context be taken lightly. The dangers inherent in undercover investigation are even more pronounced when the investigative activity threatens to dampen the exercise of First Amendment rights. See *DeGregory* v. *New Hamp. Atty. Gen.,* 383 U. S. 825 (1966); *Gibson* v. *Florida Legislative Comm.,* 372 U. S. 539 (1963); *NAACP* v. *Alabama,* 357 U. S. 449 (1958). But our abhorrence for abuses of governmental investigative authority cannot be permitted to lead to an indiscriminate willingness to enjoin undercover investigation of any nature, whenever a countervailing First Amendment claim is raised.

In this case, the Court of Appeals has analyzed the competing interests at some length, and its analysis seems to me to compel denial of relief. As the court

pointed out, the nature of the proposed monitoring is limited, the conduct is entirely legal, and if relief were granted, the potential injury to the FBI's continuing investigative efforts would be apparent. Moreover, as to the threat of disclosure of names to the Civil Service Commission, the Court of Appeals has already granted interim relief. On these facts, I am reluctant to upset the judgment of the Court of Appeals.[3]

As noted above, the Government has stated that it has not authorized any disruptive activity at the convention. In addition, the Government has represented that it has no intention of transmitting any information obtained at the convention to nongovernmental entities such as schools or employers. I shall hold the Government to both representations as a condition of this order. Accordingly, the application to stay the order of the Court of Appeals and to reinstate the injunction entered by the District Court is

Denied.

[3] This is especially true where, as here, the matter before me involves a preliminary injunction granted without a full hearing on the merits. Much of the information before me is in dispute. The denial of the stay in this case in no way affects the outcome of the case on the merits, which was filed in 1973 and is still pending in the District Court.

NATIONAL LEAGUE OF CITIES ET AL. *v.* BRENNAN, SECRETARY OF LABOR

ON APPLICATION FOR STAY

No. A–553. Decided December 31, 1974

Applicant States, municipalities, and others, which have brought suit challenging the constitutionality of the 1974 Amendments to the Fair Labor Standards Act, request, *inter alia*, a stay of provisions that go into effect January 1, 1975, following the District Court's denial of a preliminary injunction and dismissal of the complaint, which the court characterized as involving "a difficult and substantial question of law." In view of various factors, including that court's concern, the pervasive impact of its judgment on all state and municipal governments, and the brevity of time, an order is entered granting the requested relief until the application can be presented to the full Court at the earliest convenient date.

See: 406 F. Supp. 826.

MR. CHIEF JUSTICE BURGER, Circuit Justice.

This matter came to me as an individual Circuit Justice for the District of Columbia Circuit after the close of regular business hours of this Court on Tuesday, December 31, 1974, on a motion of the above-named applicants, States and municipalities, the National League of Cities, and the National Governors' Conference. The application of said parties requests a stay of those parts of the 1974 Amendments to the Fair Labor Standards Act, Pub. L. 93–259, 88 Stat. 55, amending 29 U. S. C. § 201 *et seq.*, which go into effect January 1, 1975, a stay of the regulations promulgated by the Secretary of Labor, 29 CFR Part 553, 39 Fed. Reg. 44142, Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activities, including security personnel in correctional institutions of said States and municipalities, and an injunction against enforcement by

the Secretary of Labor, or by any other person in any federal court, to enforce parts of the said 1974 Amendments to the above-described Act, which went into effect May 1, 1974.

The above-entitled case was filed in the United States District Court for the District of Columbia on December 12, 1974. A three-judge District Court was convened and on Monday, December 30, 1974, heard arguments on plaintiffs' and plaintiff intervenors' (all of whom, except for plaintiff intervenor State of California, are applicants on this application) application for a preliminary injunction. Earlier today an order was entered, denying a preliminary injunction and dismissing the complaint in the above-entitled action.

The three-judge District Court in denying the relief on the day after it heard arguments expressed the view that the complaint raised "a difficult and substantial question of law" but concluded that it was bound by this Court's holding in *Maryland* v. *Wirtz,* 392 U. S. 183 (1968).

In light of the pervasive impact of the judgment of the District Court on every state and municipal government in the United States, the novelty of the legal questions presented, the expressed concern of the District Court as to the substantiality of the constitutional questions raised, the brevity of time available to the District Court and to me as Circuit Justice, and the extent and nature of the injury to the applicants, it is not appropriate to take final action as an individual Justice.

Against this background, and balancing the injury to the contemplated enforcement of the regulations by the Secretary, against the injury to the applicants if they are ultimately successful, and sharing the doubts and concerns articulated by the District Court, I am not prepared—less than five hours before the regulations of the

Secretary become effective—to do more than enter an interim order granting the relief prayed for until the application can be presented to the full Court at the earliest convenient date. At that time the entire matter can be considered with the benefit of a response from the Solicitor General on behalf of the Secretary.

Accordingly, an order will be entered forthwith, granting the relief prayed for until further order of the Court and referring the application to the full Court.

The Solicitor General has been directed to file any response he desires to make on or before Wednesday, January 8, 1975.

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2. *Priority wage claims—Withholding taxes—Necessity for proofs of claim.*—Proofs of claim by United States and New York City with respect to withholding taxes on priority wage claims of employees of bankrupt employer are not required. Since tax liability accrues only when wage is paid, and since wages subject to wage claims here, although earned before bankruptcy, were not paid prior thereto, so that bankrupt employer's tax liability came into being only during bankruptcy, the taxes are not like debts of bankruptcy for which proofs of claim must be filed. Otte v. United States, p. 43.

3. *Priority wage claims—Withholding-tax returns—Burden on estate.*—Requiring trustee in bankruptcy for employer to withhold federal and New York City taxes from payment of priority claims for wages earned by employees prior to employer's bankruptcy, but unpaid at inception of bankruptcy proceedings, and to report and file returns does not unduly burden administration of bankrupt estates so as to contravene spirit of Act, for burden is same as any employer, or receiver, arrangement debtor, or other fiduciary, with a like number of employees must bear; moreover, both Internal Revenue Code and New York City Administrative Code allow trustee to withhold taxes at a flat rate, thus facilitating tax computation. Otte v. United States, p. 43.

4. *Priority wage claims—Withholding-tax returns and reports.*—From obligation of trustee in bankruptcy for employer to withhold taxes from payment of priority claims for wages earned by employees prior to employer's bankruptcy, but unpaid at inception of bankruptcy proceeding, it follows that trustee is also required to prepare and submit to wage claimants and to taxing authorities reports and returns required of employers under §§ 6051 (a), 6001, and 6011 of Internal Revenue Code of 1954 and similar provisions of New York City Administrative Code. Otte v. United States, p. 43.

5. *Withholding taxes—Second priority.*—Federal and city withholding taxes are entitled, as are priority wage claims from which they emerge, to second priority of payment under § 64a (2) of Act. Such taxes are not within fourth priority under § 64a (4), since they did not become due and owing by bankrupt but only after wage claims were paid following bankruptcy. Nor are such taxes entitled to first priority under § 64a (1), since they are not costs or expenses of administration of bankrupt estate, but are part of

BANKRUPTCY ACT—Continued.
wage claims themselves and are carved out of payment of those claims. Otte v. United States, p. 43.

BANKRUPTCY CLAUSE. See **Constitutional Law**, I.

BANKS. See **Procedure**, 1.

BARS. See **Constitutional Law**, II, 2–3; III, 5.

BURDEN OF ASKING FOR UNION ELECTION. See **National Labor Relations Act**, 2.

BUSINESS AND OCCUPATION TAXES. See **Constitutional Law**, II, 4; III, 6.

CALIFORNIA. See **Antitrust Acts.**

CANADA. See **Immigration and Nationality Act.**

CANONS OF CONSTRUCTION. See **Tucker Act**, 2–3.

CARD MAJORITY. See **National Labor Relations Act**, 2.

CARRIERS. See **Appeals**, 1; **Interstate Commerce Commission**; **Judicial Review.**

CASE OR CONTROVERSY. See **Federal Rules of Civil Procedure**; **Justiciability**; **Mootness**; **Stays**, 4.

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY. See **Appeals**, 1; **Interstate Commerce Commission**; **Judicial Review.**

CERTIFICATES OF STATE APPELLATE COURT. See **Jurisdiction.**

CHANGE OF VENUE. See **Stays**, 3.

CHIEF WITNESSES. See **Procedure**, 4.

CHILLING EFFECT. See **Stays**, 4.

CIVIL RIGHTS ACT OF 1871.

State action—Electric utility—Termination of service.—Pennsylvania is not sufficiently connected with respondent utility's challenged termination of petitioner's electric service for nonpayment allegedly without notice, hearing, and an opportunity to pay amounts due, to make respondent's conduct attributable to State for purposes of Fourteenth Amendment in suit under Act, petitioner having shown no more than that respondent was a heavily regulated privately owned public utility with a partial monopoly and that it elected to terminate service in a manner that Pennsylvania Utility Commission found permissible under state law. Jackson v. Metropolitan Edison Co., p. 345.

CLAIMS AGAINST UNITED STATES. See **Justiciability**, 2; **Tucker Act**, 2–3.

CLAIMS FOR TAXES. See **Bankruptcy Act**, 1–3, 5.

CLAIMS FOR WAGES. See **Bankruptcy Act.**

CLASS ACTIONS. See **Federal Rules of Civil Procedure**; **Mootness.**

CLAYTON ACT. See **Antitrust Acts**; **Procedure**, 1.

COLLECTIVE BARGAINING. See **National Labor Relations Act**, 2.

COLUMBUS, OHIO. See **Constitutional Law**, III, 3–4.

COMMERCE. See **Antitrust Acts**; **Federal-State Relations.**

COMMERCE CLAUSE. See **Constitutional Law**, II; III, 5–6; **Jurisdiction.**

COMMERCE WITH INDIAN TRIBES. See **Constitutional Law**, II, 2–3; III, 5.

COMMON LAW OF PARDONS. See **Constitutional Law**, V.

COMMON-LAW STANDARD OF MALICE. See **Procedure**, 5.

COMMUTATION OF SENTENCE. See **Constitutional Law**, V.

COMMUTERS. See **Immigration and Nationality Act.**

COMPETITION. See **Antitrust Acts.**

COMPTROLLER OF THE CURRENCY. See **Procedure**, 1.

CONDEMNATION. See **Justiciability**; **Tucker Act.**

CONDITIONAL COMMUTATION OF SENTENCE. See **Constitutional Law**, V.

CONGRESS. See **Constitutional Law**, II, 2–3.

CONNECTICUT. See **Appeals**, 3.

CONSCIENTIOUS OBJECTORS. See **Internal Revenue Code.**

CONSOLIDATED RAIL CORPORATION (CONRAIL). See **Constitutional Law**, I; **Justiciability**; **Tucker Act.**

CONSTITUTIONAL LAW. See also **Appeals**, 2–3; **Civil Rights Act of 1871**; **Contempt**; **Elections**; **Federal-State Relations**; **Internal Revenue Code**; **Jurisdiction**; **Justiciability**; **Procedure**, 3; **Standing to Object**; **Stays**, 2, 4; **Tucker Act.**

I. Bankruptcy Clause.

Uniformity requirement—Regional Rail Reorganization Act of 1973 (Rail Act).—Rail Act does not contravene uniformity require-

CONSTITUTIONAL LAW—Continued.
ment of Bankruptcy Clause. Regional Rail Reorganization Act Cases, p. 102.

II. Commerce Clause.

1. *"Forward" contract for cotton—Refusal to enforce.*—Mississippi Supreme Court's refusal to enforce "forward" contract between appellant Tennessee cotton merchant and appellee Mississippi farmer on grounds that contract was wholly intrastate and that Mississippi courts could not be used to enforce contract as appellant was doing business in State without requisite certificate, contravened Commerce Clause, since cotton in instant transaction, though to be delivered to appellant at local warehouse, was to be there temporarily for sorting and classification for out-of-state shipment and was thus already in stream of interstate commerce. Allenberg Cotton Co. v. Pittman, p. 20.

2. *Regulation of liquor in Indian country.*—Congress has authority under Art. I, § 8, of Constitution to regulate distribution of alcoholic beverages by establishments such as respondents' bar, which was located on non-Indian land on outskirts of an unincorporated village within an Indian reservation. Such authority is adequate, even though land was held in fee by non-Indians and persons regulated were non-Indians. United States v. Mazurie, p. 544.

3. *Regulation of liquor in Indian country—Delegation of authority.*—Congress could validly delegate to an Indian reservation's tribal council its authority under Art. I, § 8, of Constitution to regulate distribution of alcoholic beverages by establishments such as respondents' bar, which was located on non-Indian land on outskirts of an unincorporated village within a reservation. Independent authority of Indian tribes over matters that affect internal and social relations of tribal life is sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes" under Art. I, § 8. United States v. Mazurie, p. 544.

4. *Washington business and occupation tax.*—Washington's business and occupation tax is not repugnant to Commerce Clause, appellant out-of-state manufacturer, upon whose unapportioned gross receipts from sale of aerospace fasteners to its principal Washington customer tax was imposed, having made no showing of multiple taxation on its interstate business, tax being apportioned to activities taxed, all of which are intrastate. Standard Steel Co. v. Wash. Revenue Dept., p. 560.

CONSTITUTIONAL LAW—Continued.

III. Due Process.

1. *Durational residency requirement—Divorce.*—Iowa durational residency requirement for divorce does not violate Due Process Clause of Fourteenth Amendment on asserted ground that it denies litigant opportunity to make individualized showing of bona fide residence and thus bars access to divorce courts. Even if appellant could make an individualized showing of physical presence plus intent to remain, she would not be entitled to divorce, for Iowa requires not merely "domicile" in that sense, but residence in State for one year. Moreover, no total deprivation of access to divorce courts but only delay in such access is involved here. Sosna v. Iowa, p. 393.

2. *Male naval officers—Mandatory discharge.*—Challenged legislative classification, whereby naval officer with more than nine years of active service, who failed for a second time to be selected for promotion, was subject to a mandatory discharge under 10 U. S. C. § 6382 (a), whereas if he had been a woman officer he would have been entitled under 10 U. S. C. § 6401 to 13 years of commissioned service before a mandatory discharge for want of promotion, is completely rational and does not violate Due Process Clause of Fifth Amendment. Schlesinger v. Ballard, p. 498.

3. *Suspension from school—Property and liberty rights.*—Students facing temporary suspension from a public school have property and liberty interests that qualify for protection under Due Process Clause of Fourteenth Amendment. Goss v. Lopez, p. 565.

4. *Suspension from school—Required procedure.*—Due process requires, in connection with public school student's suspension of 10 days or less, that student be given oral or written notice of charges against him and, if he denies them, an explanation of evidence authorities have and an opportunity to present his version. Generally, notice and hearing should precede student's removal from school, since hearing may almost immediately follow misconduct, but if prior notice and hearing are not feasible, as where student's presence endangers persons or property or threatens disruption of academic process, thus justifying immediate removal from school, necessary notice and hearing should follow as soon as practicable. Goss v. Lopez, p. 565.

5. *Vagueness of criminal statute—Introducing liquor into Indian country.*—Title 18 U. S. C. § 1154, under which respondent bar operators were convicted of introducing spirituous beverages into Indian country, is not unconstitutionally vague. Given nature of

CONSTITUTIONAL LAW—Continued.
bar's location on non-Indian land on outskirts of an unincorporated village within Indian reservation and surrounding largely Indian population, statute was sufficient to advise respondents that their bar was not excepted from tribal regulation by virtue of being located in a non-Indian community. United States v. Mazurie, p. 544.

6. *Washington business and occupation tax.*—Imposition of Washington's business and occupation tax on appellant out-of-state manufacturer's unapportioned gross receipts from its sale of aerospace fasteners to its principal Washington customer, does not violate due process as measure of tax bears a relationship to benefits conferred on appellant by State. Standard Steel Co. v. Wash. Revenue Dept., p. 560.

7. *Writ of garnishment—Lack of hearing.*—Georgia statute permitting a writ of garnishment to be issued in pending suits on an affidavit of plaintiff or his attorney containing only conclusory allegations, prescribing filing of a bond as only method of dissolving garnishment, which deprives defendant of use of property in garnishee's hands pending litigation, and making no provision for an early hearing, violates Due Process Clause of Fourteenth Amendment. North Georgia Finishing, Inc. v. Di-Chem, Inc., p. 601.

IV. Equal Protection of the Laws.

Durational residency requirement—Divorce.—Iowa durational residency requirement for divorce is not unconstitutional on alleged ground that it establishes two classes of persons and discriminates against those who have recently exercised their right to travel to Iowa. Appellant was not irretrievably foreclosed from obtaining some part of what she sought, and such requirement may reasonably be justified on grounds of State's interest in requiring those seeking divorce from its courts to be genuinely attached to State, as well as of State's desire to insulate its divorce decrees from likelihood of successful collateral attack. Sosna v. Iowa, p. 393.

V. Executive Pardoning Power.

Death sentence under Uniform Code of Military Justice—Commutation to life imprisonment.—Conditional commutation to life imprisonment, without possibility of parole, of petitioner's death sentence for murder under Art. 118 of UCMJ, was within President's powers under Art. II, § 2, cl. 1, of Constitution to "grant Reprieves and Pardons for Offenses against the United States." Since pardoning power derives from Constitution alone, it cannot be modified, abridged, or diminished by any statute, including Art.

CONSTITUTIONAL LAW—Continued.

118, and *Furman* v. *Georgia*, 408 U. S. 238, did not affect such conditional commutation of petitioner's sentence. Schick v. Reed, p. 256.

VI. First Amendment.

Freedom of speech—Injunction against picketing.—Alabama courts' action in enjoining picketing of foreign-flag ship by petitioner maritime unions which were protesting, as substandard, wages paid foreign crewmen who manned ship, violated no right conferred upon petitioners by First and Fourteenth Amendments, because that action is well within that "broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." American Radio Assn. v. Mobile S. S. Assn., p. 215.

VII. Sixth Amendment.

Selection of jury—Exclusion of women.—Requirement that petit jury be selected from a representative cross section of community, which is fundamental to jury trial guaranteed by Sixth Amendment, is violated by systematic exclusion of women from jury panels, which in judicial district here involved amount to 53% of citizens eligible for jury service. Taylor v. Louisiana, p. 522.

CONTEMPT.

Lawyer—Advice to client not to produce subpoenaed material—Fifth Amendment.—A lawyer is not subject to penalty of contempt for advising his client, during trial of a civil case, to refuse on Fifth Amendment grounds to produce material demanded by a subpoena *duces tecum* when lawyer believes in good faith that material may tend to incriminate his client. To hold otherwise would deny constitutional privilege against self-incrimination means of its own implementation, since when a witness is so advised advice becomes an integral part of protection accorded witness by Fifth Amendment. Maness v. Meyers, p. 449.

CONTRACTS. See **Constitutional Law**, II, 1; **Jurisdiction.**

CONVENTION DELEGATES. See **Elections**; **Procedure**, 2.

"CONVEYANCE TAKING." See **Justiciability**, 1; **Tucker Act**, 1, 3.

CORPORATIONS. See **Constitutional Law**, II, 1; **Jurisdiction.**

COTTON FARMERS. See Constitutional Law, II, 1; Jurisdiction.

COTTON MERCHANTS. See Constitutional Law, II, 1; Jurisdiction.

COURT OF CLAIMS. See Justiciability, 2; Tucker Act.

COURTS-MARTIAL. See Constitutional Law, V.

COURTS OF APPEALS. See Appeals, 2.

CREDENTIALS CONTESTS. See Elections; Procedure, 2.

CRIMINAL LAW. See Constitutional Law, III, 5; V; VII; Procedure, 3–4; Standing to Object; Stays, 2–3.

CROSS SECTION OF THE COMMUNITY. See Constitutional Law, VII; Standing to Object.

DAILY ALIEN COMMUTERS. See Immigration and Nationality Act.

DAMAGES. See Procedure, 5.

DAMAGE TO REPUTATION. See Constitutional Law, III, 3.

DEATH SENTENCES. See Constitutional Law, V.

DELAY IN TRIAL. See Stays, 3.

DELEGATES. See Elections; Procedure, 2.

DELEGATION OF AUTHORITY. See Constitutional Law, II, 3.

DEMOCRATIC NATIONAL CONVENTION. See Elections; Procedure, 2.

DEMOCRATIC PARTY GUIDELINES. See Elections; Procedure, 2.

DENIAL OF INJUNCTIVE RELIEF. See Appeals, 2.

DEPRIVATION OF LIBERTY. See Constitutional Law, III, 3–4, 7.

DEPRIVATION OF PROPERTY. See Constitutional Law, III, 3–4.

DIRECT APPEALS. See Appeals, 2.

DIRECTED VERDICTS. See Procedure, 5.

DISCLOSURES BY PROSECUTION. See Procedure, 4.

DISCRETION. See Stays, 3.

DISCRIMINATION. See Constitutional Law, III, 2.

DISMISSALS. See Procedure, 1–2, 5.

DISTRIBUTION OF ALCOHOLIC BEVERAGES. See **Constitutional Law**, II, 2–3; III, 5.

DISTRICT COURTS. See **Appeals**; **Judicial Review**, 1; **Stays**, 1.

DIVORCE. See **Constitutional Law**, III, 1; IV; **Federal Rules of Civil Procedure**; **Mootness.**

DOING BUSINESS. See **Constitutional Law**, II, 1; **Jurisdiction.**

DOMESTIC RELATIONS. See **Constitutional Law**, III, 1; IV; **Federal Rules of Civil Procedure**; **Mootness.**

DROPPING OF INDICTMENT COUNTS. See **Procedure**, 4.

DUE PROCESS. See **Appeals**, 3; **Civil Rights Act of 1871**; **Constitutional Law**, III.

DURATIONAL RESIDENCY REQUIREMENTS. See **Constitutional Law**, III, 1; IV; **Federal Rules of Civil Procedure**; **Mootness.**

EARLY HEARINGS. See **Constitutional Law**, III, 7.

"EFFECTS ON COMMERCE" THEORY. See **Antitrust Acts**, 1, 3.

ELECTIONS. See also **Procedure**, 2.

National Party Convention—Selection of delegates—State system as against Party guidelines.—In selection of candidates for national office a National Party Convention serves pervasive national interest, which is paramount to any interest of a State in protecting integrity of its electoral process, and Illinois Circuit Court erred in enjoining petitioners, who had been selected by National Democratic Party Credentials Committee, from acting as Illinois delegates at 1972 National Convention, as against respondent rival delegates, who had been elected in state primary election, since such injunction abridged associational rights of petitioners and their Party and Party's right to determine composition of its National Convention in accordance with Party standards. Cousins v. Wigoda, p. 477.

ELECTRIC UTILITIES. See **Civil Rights Act of 1871.**

ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION. See **Appeals**, 3.

EMINENT DOMAIN. See **Justiciability**, 2; **Tucker Act.**

EMPLOYER AND EMPLOYEES. See **Bankruptcy Act**, 1–4; **Federal Employers' Liability Act**; **National Labor Relations Act**, 2.

ENFORCEMENT OF CONTRACTS. See **Constitutional Law,** II, 1; **Jurisdiction.**

ENGLISH COMMON LAW OF PARDONS. See **Constitutional Law,** V.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** III, 2; IV.

"EROSION TAKING." See **Justiciability,** 2; **Tucker Act,** 2.

EVIDENCE. See also **Antitrust Acts,** 1; **Constitutional Law,** III, 4; **Federal-State Relations; Privacy; Procedure,** 5.

Sufficiency—Question for state courts.—Petitioner maritime unions' contention that record in state action to enjoin petitioners' picketing of foreign-flag ship protesting substandard wages paid foreign crewmen who manned ship, fails to support conclusion that there was a substantial question whether picketing constituted "wrongful interference" with business of respondents, an association representing stevedores, and a shipper, is without merit. Question whether evidence is sufficient to make out a cause of action created by state law and tried in state courts is a matter for decision by those courts. American Radio Assn. v. Mobile S. S. Assn., p. 215.

EXCLUSION OF WOMEN FROM JURIES. See **Constitutional Law,** VII; **Standing to Object.**

EXCLUSIVE-DEALING ARRANGEMENTS. See **Antitrust Acts.**

EXECUTIVE PARDONING POWER. See **Constitutional Law,** V.

EXHAUSTION OF REMEDIES. See **Procedure,** 3.

FAILURE TO BE PROMOTED. See **Constitutional Law,** III, 2.

FAIR CROSS SECTION OF THE COMMUNITY. See **Constitutional Law,** VII; **Standing to Object.**

FAIR LABOR STANDARDS ACT. See **Stays,** 1.

FAIR TRIALS. See **Stays,** 2–3.

"FALSE LIGHT" THEORY. See **Privacy; Procedure,** 5.

FARMWORKERS. See **Immigration and Nationality Act.**

FEDERAL BUREAU OF INVESTIGATION. See **Stays,** 4.

FEDERAL EMPLOYERS' LIABILITY ACT.

1. *"While employed"—Lack of requirements.*—District Court's findings that petitioner employee of trucking company worked most of time on respondent railroad's premises and that respondent's employees were responsible for checking safety conditions on railroad cars showed only that two companies' operations were closely re-

FEDERAL EMPLOYERS' LIABILITY ACT—Continued.
lated, not that respondent's employees supervised operation of unloading automobiles from respondent's railroad car to trucking company's auto trailer, and consequently FELA's "while employed" requirement remains unsatisfied even under proper test. Kelley v. Southern Pacific Co., p. 318.

2. *"While employed"—Lack of requirements.*—"While employed" language of FELA requires not only that FELA plaintiff be an agent of rail carrier but carrier's servant, and here District Court erred in holding that petitioner employee of trucking company (who according to court's findings was neither a borrowed servant of respondent railroad nor a dual servant of respondent and trucking company) came within coverage of FELA, since those findings also did not establish a master-servant relationship between respondent and trucking company that would be necessary to render petitioner a subservant of railroad. Nor was District Court's conclusion that respondent was "responsible" for operation of unloading automobiles from respondent's railroad car to trucking company's auto trailer tantamount to a finding that railroad controlled or had right to control physical conduct of trucking company employees like petitioner in unloading operation. Kelley v. Southern Pacific Co., p. 318.

FEDERAL QUESTIONS. See **Jurisdiction.**

FEDERAL RESERVE BOARD. See **Procedure,** 1.

FEDERAL RULES OF CIVIL PROCEDURE. See also **Mootness.**

Rule 23 (a)—Class action—Named representative—Protection of class.—Test of Rule 23 (a) that named representative in a class action "fairly and adequately protect the interests of the class," is met here in appellant's class action challenging constitutionality of Iowa's durational residency requirement for divorces, even though appellant had long since satisfied such requirement by time case reached this Court, where it is unlikely that segments of class represented would have interests conflicting with appellant's, and interests of class have been competently urged at each level of proceeding. Sosna v. Iowa, p. 393.

FEDERAL-STATE RELATIONS. See also **Antitrust Acts,** 2; **Constitutional Law,** II, 1; VI; **Elections; Evidence; Jurisdiction; Procedure,** 3.

Picketing of foreign ships—National Labor Relations Act—Non-pre-emption of state-court jurisdiction.—Jurisdiction of Alabama courts over action by respondents, an association representing stevedoring companies, and a shipper, seeking injunctive relief

FEDERAL-STATE RELATIONS—Continued.
against picketing of foreign-flag ship by petitioner maritime unions which were protesting, as substandard, wages paid foreign crewmen who manned ship, was not pre-empted by NLRA. American Radio Assn. v. Mobile S. S. Assn., p. 215.

FEMALE JURORS. See **Constitutional Law**, VII.

FEMALE NAVAL OFFICERS. See **Constitutional Law**, III, 2.

FIFTH AMENDMENT. See **Constitutional Law**, III, 2; **Contempt**; **Justiciability**, 2; **Tucker Act.**

FINAL SYSTEM PLAN. See **Constitutional Law**, I; **Justiciability**; **Tucker Act.**

FIREMEN. See **Stays**, 1.

FIRST AMENDMENT. See **Constitutional Law**, VI; **Elections**; **Internal Revenue Code**; **Stays**, 2, 4.

FOREIGN COMMERCE. See **Federal-State Relations.**

FOREIGN CORPORATIONS. See **Constitutional Law**, II, 1; **Jurisdiction.**

FOREIGN-FLAG SHIPS. See **Constitutional Law**, VI; **Evidence**; **Federal-State Relations.**

"FORWARD" CONTRACTS. See **Constitutional Law**, II, 1; **Jurisdiction.**

FOURTEENTH AMENDMENT. See **Appeals**, 3; **Civil Rights Act of 1871**; **Constitutional Law**, III, 1, 3–4, 7; IV; VI; VII; **Elections**; **Standing to Object.**

FREEDOM OF ASSOCIATION. See **Elections**; **Stays**, 4.

FREEDOM OF RELIGION. See **Internal Revenue Code.**

FREEDOM OF SPEECH. See **Constitutional Law**, VI; **Stays**, 4.

FREEDOM OF THE PRESS. See **Stays**, 2.

GARNISHMENT. See **Constitutional Law**, III, 7.

GEORGIA. See **Constitutional Law**, III, 7.

GOOD-FAITH LEGAL ADVICE. See **Contempt.**

GOVERNMENTAL INFILTRATION OR SURVEILLANCE. See **Stays**, 4.

"GREEN CARDS." See **Immigration and Nationality Act.**

GROSS RECEIPTS TAXES. See **Constitutional Law**, II, 4; III, 6.

GUIDELINES. See **Elections; Procedure,** 2.

HABEAS CORPUS. See **Procedure,** 3.

HEARING EXAMINERS. See **Interstate Commerce Commission; Judicial Review.**

HEARINGS. See **Constitutional Law,** III, 3–4, 7.

HIGHWAYS. See **Antitrust Acts,** 1, 3–4.

"HOT PLANTS." See **Antitrust Acts,** 3–4.

ILLINOIS. See **Elections; Procedure,** 2.

ILLINOIS COMMERCIAL CODE. See **Appeals,** 2.

ILLINOIS MOTOR VEHICLE CODE. See **Appeals,** 2.

IMMIGRATION AND NATIONALITY ACT.

Alien commuters—"Special immigrants."—Alien commuters are immigrants who are "lawfully admitted for permanent residence," and are "returning from a temporary visit abroad" when they enter United States, and this "special immigrant" classification is applicable to both daily and seasonal commuters. This has long been administrative construction of statute in context of alien commuters, a factor which must be accorded great weight when, as here, Congress has considered subject and has not seen fit to alter administrative practice. Saxbe v. Bustos, p. 65.

IMPARTIAL JURY TRIALS. See **Constitutional Law,** VII; **Standing to Object.**

INCOME TAXES. See **Bankruptcy Act; Internal Revenue Code.**

"IN COMMERCE." See **Antitrust Acts,** 2, 4.

INDIAN COUNTRY. See **Constitutional Law,** II, 2–3; III, 5.

INDICTMENTS. See **Procedure,** 4.

INFORMANTS. See **Stays,** 4.

INJUNCTIONS. See **Appeals,** 2; **Constitutional Law,** VI; **Federal-State Relations; Internal Revenue Code.**

INSTALLMENT CONTRACTS. See **Appeals,** 2.

INTERIM RELIEF. See **Stays,** 1.

INTERNAL REVENUE CODE. See also **Bankruptcy Act.**

Anti-Injunction Act—Withholding—Conscientious objectors.—Anti-Injunction Act, 26 U. S. C. § 7421 (a), which prohibits suits "for the purpose of restraining the assessment or collection of any tax," bars injunctive relief on First Amendment grounds against withholding income taxes from portion of appellee conscientious

INTERNAL REVENUE CODE—Continued.

objectors' wages deemed allocable to military expenditures; and since appellees concededly cannot show that Government would not prevail in a refund action, they do not qualify for judicial exception from § 7421 (a) under rules prescribed by *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1. United States v. American Friends Service Com., p. 7.

INTERSTATE COMMERCE. See **Antitrust Acts**, 1, 4; **Constitutional Law**, II, 1, 4; III, 6; **Federal-State Relations**; **Jurisdiction.**

INTERSTATE COMMERCE ACT. See **Interstate Commerce Commission**; **Judicial Review.**

INTERSTATE COMMERCE COMMISSION. See also **Appeals**, 1; **Judicial Review.**

Motor carriers—Certificates of public convenience and necessity—ICC's approach—Divergence from hearing examiners.—In granting appellant motor carriers' applications for certificates of public convenience and necessity over opposition of appellee competing carriers, ICC was entitled to take an approach, divergent from that of its hearing examiners, favoring added competition among carriers. Bowman Transp. v. Ark.-Best Freight System, p. 281.

INTERSTATE HIGHWAYS. See **Antitrust Acts**, 1, 3–4.

INTERVENING CHANGES IN LAW. See **Appeals**, 3.

INTERVENING DECISIONS. See **Constitutional Law**, V; **Procedure**, 3.

INTOXICATING LIQUORS. See **Constitutional Law**, II, 2–3; III, 5.

INTRASTATE COMMERCE. See **Constitutional Law**, II, 1, 4; III, 6; **Jurisdiction.**

INTRASTATE SALES. See **Antitrust Acts.**

INVASION OF PRIVACY. See **Privacy**; **Procedure**, 5.

IRREPARABLE INJURIES. See **Constitutional Law**, III, 7; **Internal Revenue Code**; **Stays**, 2.

JUDICIAL DISCRETION. See **Stays**, 3.

JUDICIAL REVIEW. See also **Appeals**, 1; **Interstate Commerce Commission.**

1. *Interstate Commerce Commission order—Motor carriers—Certificates of public convenience and necessity.*—District Court erred in refusing to enforce ICC's order authorizing issuance of

JUDICIAL REVIEW—Continued.

certificates of public convenience and necessity to appellant motor carriers on ground that ICC had acted arbitrarily in refusing to credit certain evidence introduced by appellee competing carriers. Bowman Transp. v. Ark.-Best Freight System, p. 281.

2. *Lapse of time—Evidentiary hearings—Ultimate agency decision—Reopening of record.*—Lapse of time between conclusion of evidentiary hearings on appellant motor carriers' applications for certificates of public convenience and necessity and ultimate agency decision by Interstate Commerce Commission authorizing such certificates, does not justify a reviewing court's requiring that record be reopened. Bowman Transp. v. Ark.-Best Freight System, p. 281.

JURIES. See **Constitutional Law,** VII; **Standing to Object.**

JURISDICTION. See also **Antitrust Acts; Appeals,** 2; **Constitutional Law,** II, 1; **Federal-State Relations.**

Supreme Court—Appeal—Decision below on federal question.—On appeal from Mississippi Supreme Court's dismissal of appellant Tennessee cotton merchant's suit against appellee Mississippi farmer for refusal to deliver cotton under a "forward" contract on grounds that contract was wholly intrastate and that Mississippi courts could not be used to enforce contract as appellant was doing business in State without requisite certificate, certificate executed by Chief Justice of Mississippi Supreme Court makes it clear that federal question was raised and decided by that court on validity of state statute as applied to facts under Commerce Clause of Federal Constitution, and this Court has jurisdiction over appeal. Allenberg Cotton Co. v. Pittman, p. 20.

JURISDICTIONAL DISPUTES. See **National Labor Relations Act,** 1.

JURY SELECTION PROCEDURES. See **Constitutional Law,** VII; **Standing to Object.**

JURY TRIALS. See **Constitutional Law,** VII; **Standing to Object.**

JUST COMPENSATION. See **Justiciability,** 2; **Tucker Act.**

JUSTICIABILITY. See also **Appeals,** 2; **Constitutional Law,** I; **Stays,** 4; **Tucker Act.**

1. *Regional Rail Reorganization Act of 1973 (Rail Act)—"Conveyance taking" issues.*—In action attacking constitutionality of Rail Act, certain basic "conveyance taking" issues are now ripe for adjudication. Regional Rail Reorganization Act Cases, p. 102.

JUSTICIABILITY—Continued.

2. *Regional Rail Reorganization Act of 1973 (Rail Act)—"Erosion taking"—Availability of Tucker Act remedy.*—In action attacking constitutionality of Rail Act, issue of availability of a Tucker Act remedy if Rail Act effects an "erosion taking" is ripe for adjudication in view of distinct possibility that compelled continued rail operations by Penn Central, which in past several years has sustained great losses and is not "reorganizable on an income basis within a reasonable time under § 77" of Bankruptcy Act, would injure plaintiffs below without any assurance before Final System Plan is implemented of their being compensated. Regional Rail Reorganization Act Cases, p. 102.

JUVENILE OFFENDERS. See **Stays**, 2.

KNOWING FALSEHOODS. See **Privacy; Procedure**, 5.

LABOR. See **Constitutional Law**, VI; **Evidence; Federal-State Relations; National Labor Relations Act.**

LABOR REGULATIONS. See **Stays**, 1.

LABOR UNIONS. See **Constitutional Law**, VI; **Evidence; Federal-State Relations; National Labor Relations Act.**

LACK OF HEARING OR NOTICE. See **Constitutional Law**, III, 3–4, 7.

LAWYERS. See **Contempt.**

LESSENING OF COMPETITION. See **Antitrust Acts.**

LIBERTY INTERESTS. See **Constitutional Law**, III, 3–4.

LIFE IMPRISONMENT. See **Constitutional Law**, V.

LIMITATION OF ACTIONS. See **Procedure**, 1.

LIQUID ASPHALT. See **Antitrust Acts**, 1, 3–4.

LIQUOR LICENSES. See **Constitutional Law**, II, 2–3; III, 5.

LOUISIANA. See **Stays**, 2.

MALE NAVAL OFFICERS. See **Constitutional Law**, III, 2.

MALICE. See **Procedure**, 5.

MANDATORY DISCHARGES FOR WANT OF PROMOTION. See **Constitutional Law**, III, 2.

MARITIME OPERATIONS. See **Federal-State Relations.**

MARITIME UNIONS. See **Constitutional Law**, VI; **Evidence; Federal-State Relations.**

MASTER-SERVANT RELATIONSHIP. See **Federal Employers' Liability Act.**

MATERIAL USED IN INTERSTATE HIGHWAYS. See **Antitrust Acts**, 1, 3–4.

MEDIA COVERAGE OF CRIMINAL TRIALS. See **Stays**, 2–3.

MEN NAVAL OFFICERS. See **Constitutional Law**, III, 2.

MERGERS. See **Procedure**, 1.

MEXICO. See **Immigration and Nationality Act.**

MILITARY EXPENDITURES. See **Internal Revenue Code.**

MISCONDUCT OF STUDENTS. See **Constitutional Law**, III, 3–4.

MISSISSIPPI. See **Constitutional Law**, II, 1; **Jurisdiction.**

MONITORING OF NATIONAL CONVENTION. See **Stays**, 4.

MOOTNESS. See also **Federal Rules of Civil Procedure.**

Satisfaction of residency requirement for divorce—Live controversy—Class action.—Fact that appellant had long since satisfied durational residency requirement for divorce in Iowa by time class action challenging constitutionality of such requirement reached this Court does not moot case, since controversy remains very much alive for class of unnamed persons whom she represents and who, upon certification of class action, acquired legal status separate from her asserted interest. Sosna v. Iowa, p. 393.

MOTOR CARRIERS. See **Appeals**, 1; **Interstate Commerce Commission; Judicial Review.**

MOTOR VEHICLES. See **Appeals**, 2.

MULTIPLE TAXATION. See **Constitutional Law**, II, 4; III, 6.

MUNICIPAL EMPLOYEES. See **Stays**, 1.

MURDER. See **Constitutional Law**, V.

NATIONAL CONVENTIONS. See **Stays**, 4.

NATIONAL DEMOCRATIC PARTY. See **Elections; Procedure**, 2.

NATIONAL LABOR RELATIONS ACT. See also **Constitutional Law**, VI; **Federal-State Relations.**

1. *Jurisdictional dispute—Unfair labor practice—§ 10 (k) determination—Applicability of § 5 of Administrative Procedure Act.*—Section 5 of APA, which prohibits commingling prosecutorial and adjudicatory functions in agency proceedings, and generally applies to "every case of adjudication required by statute to be determined

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on the record after opportunity for an agency hearing" (§ 2 (d) of APA defining "adjudication" as "agency process for formulation of an order," and "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making"), does not govern proceedings conducted under § 10 (k) of NLRA. Section 10 (k) determination is not itself a "final disposition" within the meaning of "order" and "adjudication" in § 2 (d) of APA, nor is it "agency process for the formulation of an order" within meaning of § 2 (d). ITT v. Electrical Workers, p. 428.

2. *Union's majority status—Authorization cards—Refusal of recognition—National Labor Relations Board election procedure—Union's burden.*—An employer who has not engaged in an unfair labor practice impairing electoral process does not commit a violation of § 8 (a)(5) of NLRA simply because he refuses to accept evidence of union's majority status other than results of NLRB election. At least in absence of any agreement to permit majority status to be determined by means other than NLRB election, a union that is refused recognition despite authorization cards or other evidence purporting to show that it represents a majority of employees has burden of taking next step and invoking NLRB's election procedure. Linden Lumber Division v. NLRB, p. 301.

NATIONAL LABOR RELATIONS BOARD. See **Federal-State Relations; National Labor Relations Act.**

NATIONAL PARTY CONVENTIONS. See **Elections; Procedure,** 2.

NATIONAL RAIL CRISIS. See **Constitutional Law,** I; **Justiciability; Tucker Act.**

NAVAL OFFICERS. See **Constitutional Law,** III, 2.

NEGLIGENCE. See **Federal Employers' Liability Act.**

NEW ORLEANS. See **Stays,** 2.

NEWSPAPERS. See **Privacy; Procedure,** 5; **Stays,** 2.

NEW YORK CITY ADMINISTRATIVE CODE. See **Bankruptcy Act,** 1–4.

"NEXUS TO COMMERCE" THEORY. See **Antitrust Acts.**

1974 AMENDMENTS TO FAIR LABOR STANDARDS ACT. See **Stays,** 1.

NON-INDIAN COMMUNITIES. See **Constitutional Law,** II, 2–3; III, 5.

NONPAYMENT OF UTILITY BILLS. See **Civil Rights Act of 1871.**

NOTICE. See **Constitutional Law**, III, 3–4, 7.

OHIO. See **Constitutional Law**, III, 3–4.

PARDONS. See **Constitutional Law**, V.

PAROLE. See **Constitutional Law**, V.

PAYMENT OF WAGES. See **Bankruptcy Act.**

PEACEFUL PICKETING. See **Constitutional Law**, VI; **Evidence**; **Federal-State Relations.**

PENNSYLVANIA. See **Civil Rights Act of 1871.**

PERSONAL INJURIES. See **Federal Employers' Liability Act.**

PETIT JURIES. See **Constitutional Law**, VII; **Standing to Object.**

PICKETING. See **Constitutional Law**, VI; **Evidence**; **Federal-State Relations.**

POLICE. See **Stays**, 1.

POLITICAL PARTIES. See **Elections**; **Procedure**, 2; **Stays**, 4.

POWER TO COMMUTE SENTENCE. See **Constitutional Law**, V.

PRE-EMPTION. See **Federal-State Relations.**

PREPARATION FOR TRIAL. See **Stays**, 3.

PRESIDENTIAL COMMUTATION OF SENTENCE. See **Constitutional Law**, V.

PRESIDENTIAL NOMINATING CONVENTIONS. See **Elections**; **Procedure**, 2.

PRESIDENTIAL PARDONS. See **Constitutional Law**, V.

PRETRIAL PUBLICITY. See **Stays**, 2–3.

PRICE DISCRIMINATION. See **Antitrust Acts**, 2.

PRIMARY ELECTIONS. See **Elections.**

PRIOR HEARINGS. See **Constitutional Law**, III, 3–4.

PRIORITY OF TAX OR WAGE CLAIMS. See **Bankruptcy Act**, 5.

PRIOR NOTICE. See **Constitutional Law**, III, 3–4.

PRIOR RESTRAINTS. See **Stays**, 2.

PRISON SECURITY PERSONNEL. See **Stays**, 1.

PRIVACY. See also **Procedure**, 5.

Invasion of privacy—Newspaper story—Sufficiency of evidence—Knowing or reckless falsehoods—Scope of reporter's employment.—In petitioners' diversity action against respondent newspaper publisher and reporter for invasion of privacy based on feature story in newspaper discussing impact upon petitioners' family of father's death in a bridge collapse, evidence was sufficient to support jury finding that respondents had published knowing or reckless falsehoods about petitioners, particularly with respect to "calculated falsehoods" about petitioner mother's being present when story was being prepared, and that respondent reporter's writing of story was within scope of his employment at newspaper so as to render respondent publisher vicariously liable under *respondeat superior* for knowing falsehoods in story. Cantrell v. Forest City Publishing Co., p. 245.

PRIVATE ACTION. See **Civil Rights Act of 1871.**

PRIVATELY OWNED PUBLIC UTILITIES. See **Civil Rights Act of 1871.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Contempt.**

PROCEDURE. See also **Appeals**, 2–3.

1. *Clayton Act suit—Bank acquisition—Stay.*—Where Government's Clayton Act suit to enjoin appellee's acquisition of banks was brought within 30 days after Federal Reserve Board's approval of acquisition as required by Bank Holding Company Act but before Comptroller of Currency had approved it as required by Bank Merger Act, District Court erred in dismissing suit without prejudice and ruling that Government should bring a new suit if and when Comptroller approved acquisition, but should stay suit until Comptroller acts. Such procedure will conserve judicial resources and fully protect both parties, and avoid possible prejudice to Government, which by being required to wait for Comptroller's approval before filing suit would risk having complete relief barred by time limitation of Bank Holding Company Act. United States v. Michigan National Corp., p. 1.

2. *Court of Appeals judgment—Supreme Court stay—Res judicata—Political convention credentials contest.*—This Court's *per curiam*, staying Court of Appeals judgment affirming District Court's dismissal of action by purported Illinois delegate to 1972 Democratic National Convention challenging constitutionality of Democratic Party's guidelines for selecting delegates, and granting Party's counterclaim for injunction against Illinois state-court action

PROCEDURE—Continued.
to enjoin seating of rival delegates, unqualifiedly suspended operative effects of Court of Appeals judgment without resolving merits of controversy; and rival delegates' contention that this Court's action in staying such judgment left it as a res judicata bar to injunction is not open for consideration, not having been pleaded and proved in state court as required by state law. Cousins v. Wigoda, p. 477.

3. *Federal habeas corpus—State courts' opportunity to decide federal constitutional question—No resubmission.*—Since state courts had a full opportunity to determine federal constitutional issue before petitioner resorted to federal forum in habeas corpus action filed after State Supreme Court held unconstitutional criminal statute challenged in federal action, no substantial state interest would be served by requiring petitioner to resubmit his constitutional claim to state courts. Francisco v. Gathright, p. 59.

4. *Indictment—Dropping of counts against witness—Required disclosure.*—Where Assistant United States Attorney prosecuting petitioner denied during trial that two counts of three-count indictment against Government's chief witness involving same events for which petitioner was convicted had been dropped in return for witness' cooperation and testimony, but United States Attorney's records indicated that Assistant had agreed to drop two counts in return for guilty plea to third count, Court of Appeals' judgment affirming petitioner's conviction is vacated and case is remanded to that court so that if on basis of Government's documentation it is unable to decide whether Assistant "failed to make any required disclosure," it can remand case to District Court for further proceedings. Ring v. United States, p. 18.

5. *Setting aside verdict—Error—Privacy action.*—Court of Appeals erred in setting aside jury's verdict for compensatory damages in petitioners' diversity action against respondent newspaper publisher and reporter for invasion of privacy based on a feature story in newspaper discussing impact upon petitioners' family of father's death in a bridge collapse and containing a number of inaccuracies and false statements about family. The record discloses that District Judge when he dismissed punitive damages claim was not referring to "actual malice" standard of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, but to common-law standard of malice that is generally required under state tort law to support punitive damages award and that in a "false light" case would focus on defendant's attitude toward plaintiff's privacy and not on truth or falsity of material published, and thus was not determining that

PROCEDURE—Continued.
petitioners had failed to introduce evidence of knowing falsity or reckless disregard of truth. Cantrell v. Forest City Publishing Co., p. 245.

PROHIBITED PURPOSE OF PICKETING. See **Constitutional Law, VI; Federal-State Relations.**

PROMOTIONS. See **Constitutional Law, III, 2.**

PROOFS OF CLAIM. See **Bankruptcy Act, 2.**

PROPERTY INTERESTS. See **Constitutional Law, III, 3–4.**

PROPERTY RIGHTS. See **Constitutional Law, III, 3, 7.**

PUBLIC CONVENIENCE AND NECESSITY. See **Appeals, 1; Interstate Commerce Commission; Judicial Review.**

PUBLIC POLICY. See **Constitutional Law, VI; Federal-State Relations.**

PUBLIC SCHOOLS. See **Constitutional Law, III, 3–4.**

PUBLIC UTILITIES. See **Civil Rights Act of 1871.**

PUNITIVE DAMAGES. See **Procedure, 5.**

QUALIFICATIONS FOR DOING BUSINESS. See **Constitutional Law, II, 1; Jurisdiction.**

RAIL ACT. See **Constitutional Law, I; Justiciability; Tucker Act.**

RAILROADS. See **Constitutional Law, I; Federal Employers' Liability Act; Justiciability; Tucker Act.**

RATIONAL CLASSIFICATIONS. See **Constitutional Law, III, 2.**

RECKLESS DISREGARD OF TRUTH. See **Privacy; Procedure, 5.**

REFUND ACTIONS. See **Internal Revenue Code.**

REFUSAL TO RECOGNIZE UNION. See **National Labor Relations Act, 2.**

REGIONAL RAIL REORGANIZATION ACT OF 1973. See **Constitutional Law, I; Justiciability; Tucker Act.**

REGULATION OF ALCOHOLIC BEVERAGES. See **Constitutional Law, II, 2–3; III, 5.**

REGULATION OF UTILITIES. See **Civil Rights Act of 1871.**

REGULATIONS OF SECRETARY OF LABOR. See **Stays, 1.**

RELIGIOUS CORPORATIONS. See **Internal Revenue Code.**

REMAND. See **Appeals**, 1; **Procedure**, 4.

REMEDIES. See **Justiciability**, 2; **Tucker Act.**

REOPENING OF AGENCY PROCEEDINGS. See **Judicial Review**, 2.

REORGANIZATIONS. See **Constitutional Law**, I; **Justiciability**; **Tucker Act.**

REPORTERS. See **Privacy**; **Procedure**, 5.

REPOSSESSION. See **Appeals**, 2.

REPRESENTATION ELECTIONS. See **National Labor Relations Act**, 2.

REPRESENTATIVE CROSS SECTION OF THE COMMUNITY. See **Constitutional Law**, VII; **Standing to Object.**

REPUTATION OF STUDENTS. See **Constitutional Law**, III, 3–4.

REQUIRED DISCLOSURES BY PROSECUTION. See **Procedure**, 4.

RESALES. See **Appeals**, 2.

RES JUDICATA. See **Procedure**, 2.

RESPONDEAT SUPERIOR. See **Privacy.**

RETAIL INSTALLMENT CONTRACTS. See **Appeals**, 2.

RETROACTIVITY. See **Constitutional Law**, V.

RIGHTS OF ASSOCIATION. See **Elections**; **Stays**, 4.

RIGHTS TO EDUCATION. See **Constitutional Law**, III, 3.

RIGHTS TO LIBERTY. See **Constitutional Law**, III, 3.

RIGHTS TO PROPERTY. See **Constitutional Law**, III, 3, 7.

RIGHT TO FAIR TRIAL. See **Stays**, 2–3.

RIGHT TO JURY TRIAL. See **Constitutional Law**, VII; **Standing to Object.**

RIGHT TO TRAVEL. See **Constitutional Law**, III, 1; IV.

RIPENESS FOR ADJUDICATION. See **Justiciability.**

ROBINSON-PATMAN ACT. See **Antitrust Acts**, 2–4.

RULES OF CIVIL PROCEDURE. See **Federal Rules of Civil Procedure**; **Mootness.**

SALES. See **Antitrust Acts**, 1, 3–4.

SCHOOLS. See **Constitutional Law**, III, 3–4.

SCOPE OF EMPLOYMENT. See **Privacy.**

SCOPE OF REVIEW. See **Judicial Review**, 1.

SEAMEN. See **Constitutional Law**, VI; **Evidence**; **Federal-State Relations.**

SEASONAL ALIEN COMMUTERS. See **Immigration and Nationality Act.**

"SEATED INTERVIEW" PROCEDURES. See **Appeals**, 3.

SECONDARY BOYCOTTS. See **Constitutional Law**, VI; **Federal-State Relations.**

SECURITY AGREEMENTS. See **Appeals**, 2.

SELECTION FOR PROMOTION. See **Constitutional Law**, III, 2.

SELECTION OF JURIES. See **Constitutional Law**, VII; **Standing to Object.**

SETTING ASIDE VERDICTS. See **Procedure**, 5.

SEX DISCRIMINATION. See **Constitutional Law**, III, 2; VII.

SHERMAN ACT. See **Antitrust Acts.**

SHIPPERS. See **Constitutional Law**, VI; **Evidence**; **Federal-State Relations.**

SIXTH AMENDMENT. See **Constitutional Law**, VII; **Standing to Object.**

SOCIAL SECURITY TAXES. See **Bankruptcy Act.**

SPECIAL COURT. See **Constitutional Law**, I; **Justiciability**; **Tucker Act.**

SPECIAL IMMIGRANTS. See **Immigration and Nationality Act.**

SPIRITUOUS BEVERAGES. See **Constitutional Law**, II, 2–3; III, 5.

STANDARD FOR FELA LIABILITY. See **Federal Employers' Liability Act.**

STANDING TO OBJECT. See also **Constitutional Law**, VII.

Male criminal defendant—Challenge to jury-selection scheme—Exclusion of women.—Appellant, a convicted male criminal defendant, had standing to make claim that state jury-selection scheme whereby women were systematically excluded from jury panels is unconstitutional, there being no rule that such a claim may be asserted only by defendants who are members of group excluded from jury service. Taylor v. Louisiana, p. 522.

STANDING TO SUE. See **Appeals**, 2.

STATE ACTION. See **Civil Rights Act of 1871.**

STATE COURTS. See **Constitutional Law,** II, 1; III, 1; IV; VI; **Evidence; Federal-State Relations; Procedure,** 3.

STATE EMPLOYEES. See **Stays,** 1.

STATE REGULATION OF UTILITIES. See **Civil Rights Act of 1871.**

STATE TAXES. See **Constitutional Law,** II, 4; III, 6.

STATUTE OF LIMITATIONS. See **Procedure,** 1.

STAYS. See also **Procedure,** 1–2.

1. *Fair Labor Standards Act—1974 Amendments.*—In view of various factors, including concern of District Court, which, while dismissing applicants' complaint challenging constitutionality of 1974 Amendments to FLSA, characterized it as involving "a difficult and substantial question of law," pervasive impact of that court's judgment on all state and municipal governments, and brevity of time, an order is entered granting stay of provisions that go into effect January 1, 1975, until application can be presented to full Court at earliest convenient date. National League of Cities v. Brennan (BURGER, C. J., in chambers), p. 1321.

2. *Order restricting media coverage of criminal trials.*—Application for stay of Louisiana trial court's order restricting media coverage of trials of defendants accused of committing highly publicized rape and murder is granted, pending timely filing and disposition of petition for certiorari in this Court, where order imposed pervasive restraints of uncertain duration, and alternative means for protecting defendants' rights to fair trial appear to have been available to trial court. Times-Picayune Pub. Corp. v. Schulingkamp (POWELL, J., in chambers), p. 1301.

3. *Order setting criminal trial date.*—Application for stay of District Court's order setting applicant's criminal trial date, on alleged grounds that pretrial publicity precluded applicant's receiving fair trial in venue at time set and that he lacks sufficient time to prepare his defense, is denied. Responsibility for passing on claim for change of venue or delay in trial because of prejudicial pretrial publicity calls for exercise of highest order of sound judicial discretion by District Court, and doubts about correctness of order, particularly after Court of Appeals has reviewed it and denied mandamus, do not constitute sufficient basis for contrary action by individual Circuit Justice absent most extraordinary circumstances. Ehrlichman v. Sirica (BURGER, C. J., in chambers), p. 1310.

4. *Order vacating injunction against FBI attendance at convention.*—Although applicants' allegations of a "chilling effect" if FBI

STAYS—Continued.

agents and informants were allowed to attend youth organization's national convention are sufficiently specific to satisfy Art. III's jurisdictional requirements, nevertheless a stay of Court of Appeals' order vacating District Court's injunction barring FBI agents and informants from attending or otherwise monitoring such convention would be improper, since FBI has represented that it plans no disruptive activity at convention and will not transmit information to nongovernmental entities, and since interim relief against disclosure of delegates' names to Civil Service Commission has been granted. Socialist Workers Party v. Attorney General (MARSHALL, J., in chambers), p. 1314.

STEVEDORES. See **Constitutional Law,** VI; **Evidence; Federal-State Relations.**

SUBPOENAS DUCES TECUM. See **Contempt.**

SUBSTANDARD WAGES. See **Constitutional Law,** VI; **Evidence; Federal-State Relations.**

SUFFICIENCY OF EVIDENCE. See **Antitrust Acts,** 1; **Evidence; Privacy.**

SUPREME COURT. See also **Appeals,** 2; **Jurisdiction.**

1. Assignments of Mr. Justice Clark (retired) to the United States Court of Appeals for the Seventh Circuit, pp. 954, 987.

2. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Eighth Circuit, p. 1061.

3. Assignments of Mr. Justice Clark (retired) to the United States Court of Appeals for the Second Circuit, p. 1081.

4. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Fourth Circuit, p. 1117.

5. Amendments to Federal Rules of Civil Procedure, p. 1134.

6. Amendments to Federal Rules of Criminal Procedure, p. 1136.

SUSPENSIONS FROM SCHOOL. See **Constitutional Law,** III, 3–4.

SYSTEMATIC EXCLUSION OF WOMEN FROM JURIES. See **Constitutional Law,** VII; **Standing to Object.**

TAKING OF PROPERTY FOR PUBLIC USE. See **Justiciability,** 2; **Tucker Act.**

TAX CLAIMS. See **Bankruptcy Act,** 2, 5.

TAXES. See **Bankruptcy Act; Constitutional Law,** II, 4; III, 6; **Internal Revenue Code.**

TAX REFUND ACTIONS. See **Internal Revenue Code.**

TAX REPORTS OR RETURNS. See **Bankruptcy Act,** 3–4.

TEMPORARY SUSPENSIONS FROM SCHOOL. See **Constitutional Law,** III, 3–4.

TERMINATION OF ELECTRIC SERVICE. See **Civil Rights Act of 1871.**

THREE-JUDGE COURTS. See **Appeals,** 2–3.

TIE-IN SALES. See **Antitrust Acts,** 1, 3–4.

TIME LIMITATIONS. See **Procedure,** 1.

TORTS. See **Privacy; Procedure,** 5.

TRANSPORTATION. See **Appeals,** 1; **Interstate Commerce Commission; Judicial Review.**

TRIAL BY JURY. See **Constitutional Law,** VII; **Standing to Object.**

TRIBAL REGULATION. See **Constitutional Law,** II, 2–3.

TRUCKING COMPANIES. See **Federal Employers' Liability Act.**

TRUSTEES IN BANKRUPTCY. See **Bankruptcy Act.**

TUCKER ACT. See also **Constitutional Law,** I; **Justiciability,** 2.

1. *Adequate remedy—Taking of railroad property—Regional Rail Reorganization Act of 1973 (Rail Act).*—Tucker Act guarantees an adequate remedy at law for any taking of railroad property that might occur as a result of final conveyance provisions of Rail Act. Regional Rail Reorganization Act Cases, p. 102.

2. *Remedy—Continuance of rail operations—"Erosion taking"—Regional Rail Reorganization Act of 1973 (Rail Act).*—Tucker Act remedy is not barred by Rail Act, but is available to provide just compensation for any "erosion taking" effected by Rail Act with respect to compelled continuation of rail operations by Penn Central pending Final System Plan's implementation. Regional Rail Reorganization Act Cases, p. 102.

3. *Remedy—"Conveyance taking"—Regional Rail Reorganization Act of 1973 (Rail Act).*—For same reasons as obtained with respect to "erosion taking" issue, a suit in Court of Claims is available under Tucker Act for a cash award to cover any shortfall between consideration that railroads receive for their rail properties finally conveyed under Rail Act and constitutional minimum. Regional Rail Reorganization Act Cases, p. 102.

UNDERCOVER INVESTIGATIONS. See Stays, 4.

UNEMPLOYMENT COMPENSATION. See Appeals, 3.

UNFAIR LABOR PRACTICES. See Federal-State Relations; National Labor Relations Act.

UNIFORM CODE OF MILITARY JUSTICE. See Constitutional Law, V.

UNIFORMITY REQUIREMENT OF BANKRUPTCY CLAUSE. See Constitutional Law, I.

UNION ELECTIONS. See National Labor Relations Act, 2.

UNIONS. See Constitutional Law, VI; Evidence; Federal-State Relations; National Labor Relations Act.

UNITED STATES NAVY. See Constitutional Law, III, 2.

UNITED STATES RAILWAY ASSOCIATION. See Constitutional Law, I; Justiciability; Tucker Act.

UNLOADING OPERATIONS. See Federal Employers' Liability Act.

UTILITIES. See Civil Rights Act of 1871.

VAGUENESS. See Constitutional Law, III, 5.

VENIRES. See Constitutional Law, VII; Standing to Object.

VENUE. See Stays, 3.

VERDICTS. See Procedure, 5.

VICARIOUS LIABILITY. See Privacy.

WAGE CLAIMS. See Bankruptcy Act.

WAGES. See Constitutional Law, VI; Evidence; Federal-State Relations.

WANT OF PROOF. See Antitrust Acts, 1; Evidence; Federal Employers' Liability Act, 1.

WASHINGTON. See Constitutional Law, II, 4; III, 6.

"WHILE EMPLOYED" REQUIREMENT OF FELA. See Federal Employers' Liability Act.

WITHHOLDING TAXES. See Bankruptcy Act; Internal Revenue Code.

WITNESSES. See Procedure, 4.

WOMEN NAVAL OFFICERS. See Constitutional Law, III, 2.

WORDS AND PHRASES.

1. *"Agency process for the formulation of an order."* § 2 (d), Administrative Procedure Act, 5 U. S. C. § 551 (7). ITT v. Electrical Workers, p. 428.

2. *"Engaged in or affecting commerce."* §§ 2 (6) and (7), National Labor Relations Act, 29 U. S. C. §§ 152 (6) and (7). American Radio Assn. v. Mobile S. S. Assn., p. 215.

3. *"Final disposition."* § 2 (d), Administrative Procedure Act, 5 U. S. C. § 551 (6). ITT v. Electrical Workers, p. 428.

4. *"In commerce."* § 2 (a), Robinson-Patman Act, 15 U. S. C. § 13; §§ 3, 7, Clayton Act, 15 U. S. C. §§ 14, 18. Gulf Oil Corp. v. Copp Paving Co., p. 186.

5. *"Lawfully admitted for permanent residence."* 8 U. S. C. § 1101 (a)(27)(B) (Immigration and Nationality Act). Saxbe v. Bustos, p. 65.

6. *"Payment of wages."* § 3402 (a), Internal Revenue Code of 1954, 26 U. S. C. § 3402 (a). Otte v. United States, p. 43.

7. *"Returning from temporary visit abroad."* 8 U. S. C. § 1101 (a)(27)(B) (Immigration and Nationality Act). Saxbe v. Bustos, p. 65.

8. *"Wages."* § 3102 (a), Internal Revenue Code of 1954, 26 U. S. C. § 3102 (a). Otte v. United States, p. 43.

9. *"While . . . employed."* 45 U. S. C. § 51 (Federal Employers' Liability Act). Kelley v. Southern Pacific Co., p. 318.

WRIT OF GARNISHMENT. See **Constitutional Law**, III, 7.

WRONGFUL INTERFERENCE WITH BUSINESS. See **Constitutional Law**, VI; **Evidence**; **Federal-State Relations.**

YOUTH SOCIALIST ALLIANCE. See **Stays**, 4.