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UNITED STATES REPORTS

VOLUME 451

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1980

APRIL 20 THROUGH MAY 26, 1981

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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ERRATUM

440 U. S. 935, No. 78–868: In lieu of "217 Va. 548" substitute "219 Va. 252".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief 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.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, 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, JOHN PAUL STEVENS, Associate Justice.

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

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

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

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1980

PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.

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

No. 79–1404. Argued December 8, 1980—Decided April 20, 1981*

The Developmentally Disabled Assistance and Bill of Rights Act (Act) established a federal-state grant program whereby the Federal Government provides financial assistance to participating States to aid them in creating programs to care for and treat the developmentally disabled. The Act is voluntary, and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. The "bill of rights" provision of the Act, 42 U. S. C. §§ 6010 (1) and (2), states that mentally retarded persons "have a right to appropriate treatment, services, and habilitation" in "the setting that is least restrictive of . . . personal liberty." Pennsylvania, a participating State, owns and operates Pennhurst State School and Hospital, a facility for the care and treatment of the mentally retarded. Respondent

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*Together with No. 79–1408, *Mayor of Philadelphia et al.* v. *Halderman et al.;* No. 79–1414, *Pennsylvania Association for Retarded Citizens et al.* v. *Pennhurst State School and Hospital et al.;* No. 79–1415, *Commissioners and Mental Health/Mental Retardation Administrator for Bucks County et al.* v. *Halderman et al.;* and No 79–1489, *Pennhurst Parents-Staff Assn.* v. *Halderman et al.,* also on certiorari to the same court.

Halderman, a retarded resident of Pennhurst, brought a class action in Federal District Court on behalf of herself and all other Pennhurst residents against Pennhurst and various officials responsible for its operation. It was alleged, *inter alia,* that conditions at Pennhurst were unsanitary, inhumane, and dangerous, and that such conditions denied the class members various specified constitutional and statutory rights, including rights under the Act, and, in addition to seeking injunctive and monetary relief, it was urged that Pennhurst be closed and that "community living arrangements" be established for its residents. The District Court found that certain of the claimed rights were violated, and granted the relief sought. The Court of Appeals substantially affirmed, but avoided the constitutional claims and instead held that § 6010 created substantive rights in favor of the mentally retarded, that mentally retarded persons have an implied cause of action to enforce those rights, and that the conditions at Pennhurst violated those rights. The court further found that Congress enacted the Act pursuant to both § 5 of the Fourteenth Amendment and the spending power.

Held: Section 6010 does not create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment. Pp. 11–32.

(a) The case for inferring congressional intent to create, pursuant to Congress' enacting power under § 5 of the Fourteenth Amendment, enforceable rights and obligations is at its weakest where, as here, the rights asserted imposed *affirmative* obligations on the States to fund certain services, since it may be assumed that Congress will not implicitly attempt to impose massive financial obligations on the States. Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract," but if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. Pp. 15–18.

(b) Applying the above principles to these cases, this Court finds nothing in the Act or its legislative history to suggest that Congress intended to require the States to assume the high cost of providing "appropriate treatment" in the "least restrictive" environment to their mentally retarded citizens. There is virtually no support for the Court of Appeals' conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose, but to the contrary the

1 Syllabus

Act's language and structure demonstrate that it is a mere federal-state funding statute. Section 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. Far from requiring the States to fund newly declared individual rights, the Act has a systematic focus, seeking to improve care to individuals by encouraging better state planning, coordination, and demonstration projects. Pp. 18–22.

(c) There is no merit to the contention that Congress, acting pursuant to its spending power, conditioned the grant of federal funds on the State's agreeing to underwrite the obligations the Court of Appeals read into § 6010. As noted, the "findings" of § 6010, when viewed in the context of the more specific provisions of the Act, represent general statements of federal policy, not newly created legal duties. Moreover, the "plain language" of § 6010, as well as the administrative interpretation of the provision, also refutes such contention. Section 6010, in contrast to other provisions of the Act that clearly impose conditions, in no way suggests that the grant of federal funds is "conditioned" on a State's funding the rights described therein. Pp. 22–24.

(d) The rule of statutory construction that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds, applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate. The crucial inquiry here is not whether a State would knowingly undertake the obligation to provide "appropriate treatment" in the "least restrictive" setting, but whether Congress spoke so clearly that it can fairly be said that the State could make an informed choice. In this case, Congress fell well short of providing clear notice to the States that by accepting funds under the Act they would be obligated to comply with § 6010. Pp. 24–25.

(e) A comparison of the general language of § 6010 with the conditions Congress explicitly imposed on the States under the Act demonstrates that Congress did not intend to place either absolute or conditional obligations on the States under § 6010. Pp. 25–27.

(f) Questions not addressed by the Court of Appeals—as to whether individual mentally retarded persons may bring suit to compel compliance with those conditions that *are* contained in the Act, the federal constitutional claims, and claims under another federal statute—and issues as to whether state law imposed an obligation on Pennsylvania to provide treatment, are remanded for consideration or reconsideration, respectively, in light of the instant decision. Pp. 27–31.

612 F. 2d 84, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 32. WHITE, J., filed an opinion dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 33.

Allen C. Warshaw, argued the cause for petitioners in No. 79–1404. *Thomas Kittredge* argued the cause for petitioners in Nos. 79–1408 and 79–1415. *Joel I. Klein* argued the cause for petitioner in No. 79–1489. With them on the briefs were *Harvey Bartle III, Robert B. Hoffman, Norman J. Watkins, Alan J. Davis, Carl E. Singley,* and *H. Bartow Farr III.*

David Ferleger argued the cause and filed a brief for respondents Halderman et al. *Thomas K. Gilhool* argued the cause for the Pennsylvania Association for Retarded Citizens et al., petitioners in No. 79–1414 and respondents in Nos. 79–1404, 79–1408, 79–1415, and 79–1489. With him on the brief were *Frank J. Laski* and *Michael Churchill. Assistant Attorney General Days* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Harriet S. Shapiro, Brian K. Landsberg, Frank D. Allen, Jr.,* and *Joan Magagna.*†

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†Briefs of *amici curiae* urging reversal were filed by *Carl R. Ajello,* Attorney General, and *Hugh Barber* and *Francis J. MacGregor,* Assistant Attorneys General, for the State of Connecticut; and by *Michael H. Gottesman* and *Robert M. Weinberg* for Congress of Advocates for the Retarded, Inc., et al.

Briefs of *amici curiae* urging affirmance were filed by *Wm. Reece Smith, Jr.,* for the American Bar Association; by *Margaret F. Ewing* and *Paul R. Friedman* for the American Orthopsychiatric Association et al.; by *Clifford D. Stromberg* for the American Psychiatric Association; by *David S. Tatel* for the International League of Societies for the Mentally Handicapped et al.; by *Robert L. Burgdorf, Jr.,* for the National Association of Protection and Advocacy Systems et al.; by *James D. Crawford* for the National Association for Retarded Citizens et al.; by *Ronald M. Soskin* for the National Center for Law and the Handicapped et al.; by *Deborah Kaplan* and *Steven M. Fleisher* for People First International, Inc., et al.; by *David C. Shaw* for the Connecticut Association for Re-

JUSTICE REHNQUIST delivered the opinion of the Court.

At issue in these cases is the scope and meaning of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, as amended, 42 U. S. C. § 6000 *et seq.* (1976 ed. and Supp. III). The Court of Appeals for the Third Circuit held that the Act created substantive rights in favor of the mentally retarded, that those rights were judicially enforceable, and that conditions at the Pennhurst State School and Hospital (Pennhurst), a facility for the care and treatment of the mentally retarded, violated those rights. For the reasons stated below, we reverse the decision of the Court of Appeals and remand the cases for further proceedings.

I

The Commonwealth of Pennsylvania owns and operates Pennhurst. Pennhurst is a large institution, housing approximately 1,200 residents. Seventy-five percent of the residents are either "severely" or "profoundly" retarded—that is, with an IQ of less than 35—and a number of the residents

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tarded Citizens, Inc., et al.; and by *Steven J. Schwartz* and *Robert D. Fleischner* for Plaintiffs in Brewster *v.* Dukakis (D. Mass.), et al.

A brief for the State of Illinois et al. as *amici curiae* was filed by *Alan E. Grischke* and *Christine A. Bremer,* Special Assistant Attorneys General of Illinois; *Gregorey H. Smith,* Acting Attorney General of New Hampshire, and *Wilbur A. Glahn III* and *Anne R. Clarke,* Assistant Attorneys General; *William J. Guste, Jr.,* Attorney General of Louisiana, and *Carmack M. Blackmon,* Assistant Attorney General; *William J. Brown,* Attorney General of Ohio, and *George Striker,* Assistant Attorney General; *Mark V. Meierhenry,* Attorney General of South Dakota, and *Janice Godtland,* Assistant Attorney General; *Slade Gorton,* Attorney General of Washington, and *David R. Minikel,* Assistant Attorney General; *Chauncey H. Browning,* Attorney General of West Virginia, and *David R. Brisell,* Assistant Attorney General; *Paul L. Douglas,* Attorney General of Nebraska; *John J. Degnan,* Attorney General of New Jersey, and *Steven Wallach,* Deputy Attorney General; *William M. Leech, Jr.,* Attorney General of Tennessee, and *Lee Breckenridge,* Assistant Attorney General; and *Warren A. Spannaus,* Attorney General of Minnesota, and *Alan A. Held,* Special Assistant Attorney General.

are also physically handicapped. About half of its residents were committed there by court order and half by a parent or other guardian.

In 1974, respondent Terri Lee Halderman, a minor retarded resident of Pennhurst, filed suit in the District Court for the Eastern District of Pennsylvania on behalf of herself and all other Pennhurst residents against Pennhurst, its superintendent, and various officials of the Commonwealth of Pennsylvania responsible for the operation of Pennhurst (hereafter petitioners). The additional respondents (hereinafter, with respondent Halderman, referred to as respondents) in these cases—other mentally retarded persons, the United States, and the Pennsylvania Association for Retarded Citizens (PARC)—subsequently intervened as plaintiffs. PARC added several surrounding counties as defendants, alleging that they were responsible for the commitment of persons to Pennhurst.

As amended in 1975, the complaint alleged, *inter alia*, that conditions at Pennhurst were unsanitary, inhumane, and dangerous. Specifically, the complaint averred that these conditions denied the class members due process and equal protection of the law in violation of the Fourteenth Amendment, inflicted on them cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, and denied them certain rights conferred by the Rehabilitation Act of 1973, 87 Stat. 355, as amended, 29 U. S. C. § 701 *et seq.* (1976 ed. and Supp. III), the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. §§ 6001 *et seq.* (1976 ed. and Supp. III), and the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Tit. 50, §§ 4101–4704 (Purdon 1969). In addition to seeking injunctive and monetary relief, the complaint urged that Pennhurst be closed and that "community living arrangements" [1] be established for its residents.

[1] "Community living arrangements" are smaller, less isolated residences

The District Court certified a class consisting of all persons who have been or may become residents of Pennhurst. After a 32-day trial, it issued an opinion, reported at 446 F. Supp. 1295 (1977), making findings of fact and conclusions of law with respect to the conditions at Pennhurst. Its findings of fact are undisputed: Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the "habilitation" of the retarded.[2] Indeed, the court found that the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst. *Id.*, at 1308–1310.

The District Court went on to hold that the mentally retarded have a federal constitutional right to be provided with "minimally adequate habilitation" in the "least restrictive environment," regardless of whether they were voluntarily or involuntarily committed. *Id.*, at 1314–1320. The court also held that there existed a constitutional right to "be free from harm" under the Eighth Amendment, and to be provided with "nondiscriminatory habilitation" under the Equal Protection Clause. *Id.*, at 1320–1322. In addition, it found that § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, and § 201 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Tit. 50, § 4201 (Purdon 1969), provided a right to minimally adequate habilitation in the least restrictive environment.

Each of these rights was found to have been violated by the conditions existing at Pennhurst. Indeed, the court held that a large institution such as Pennhurst could not provide adequate habilitation. 446 F. Supp., at 1318. It thus or-

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where retarded persons are treated as much as possible like nonretarded persons.

[2] There is a technical difference between "treatment," which applies to curable mental illness, and "habilitation," which consists of education and training for those, such as the mentally retarded, who are not ill. This opinion, like the opinions of the courts below, will use the terms interchangeably.

dered that Pennhurst eventually be closed, that suitable "community living arrangements" be provided for all Pennhurst residents, that plans for the removal of residents from Pennhurst be submitted to the court, that individual treatment plans be developed for each resident with the participation of his or her family, and that conditions at Pennhurst be improved in the interim. The court appointed a Special Master to supervise the implementation of this order. *Id.*, at 1326–1329.

The Court of Appeals for the Third Circuit substantially affirmed the District Court's remedial order. 612 F. 2d 84 (1979) (en banc). Unlike the District Court, however, the Court of Appeals sought to avoid the constitutional claims raised by respondents and instead rested its order on a construction of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6000 *et seq.* (1976 ed. and Supp. III).[3] It found that §§ 111 (1) and (2) of the Act, 89 Stat. 502, 42 U. S. C. §§ 6010 (1) and (2), the "bill of rights" provision, grant to mentally retarded persons a right to "appropriate treatment, services, and habilitation" in "the setting that is least restrictive of . . . personal liberty." The

[3] As originally enacted in 1975, the definition of "developmentally disabled" included mental retardation. § 6001 (7)(A)(i). As amended in 1978, however, a mentally retarded individual is considered developmentally disabled only if he satisfies various criteria set forth in the Act.

It is perhaps suggestive of the novelty of the Court of Appeals' decision that none of the respondents briefed the Act before the District Court, nor raised it in the Court of Appeals. Rather, the court itself suggested the applicability of the Act and requested supplemental briefs on the issue for the purpose of rehearing en banc. Even then the United States, which raised only constitutional claims before the District Court, contended merely that the "most significant implication of the Developmentally Disabled Act is the important light which it sheds upon congressional intent about the nature of the rights of institutionalized mentally retarded persons, and the guidance which it may give in discerning a violation of Section 504 [of the Rehabilitation Act]." Supplemental Brief for United States in No. 78–1490 (CA3), p. 2.

court further held that under the test articulated in *Cort* v. *Ash,* 422 U. S. 66, 78 (1975), mentally retarded persons have an implied cause of action to enforce that right. 612 F. 2d, at 97. Because the court found that Congress enacted the statute pursuant to both § 5 of the Fourteenth Amendment [4] and the spending power,[5] it declined to consider whether a statute enacted pursuant to the spending power alone "could ever provide the predicate for private substantive rights." *Id.,* at 98. As an alternative ground, the court affirmed the District Court's holding that Pennhurst residents have a state statutory right to adequate "habilitation."

The court concluded that the conditions at Pennhurst violated these federal and state statutory rights. As to relief, it affirmed the order of the District Court except insofar as it ordered Pennhurst to be closed. Although the court concluded that "deinstitutionalization is the favored approach to habilitation" in the least restrictive environment, it did not construe the Act to require the closing of large institutions like Pennhurst. *Id.,* at 115. The court thus remanded the case to the District Court for "individual determinations by the court, or by the Special Master, as to the appropriateness of an improved Pennhurst for each such patient" and instructed the District Court or the Master to "engage in a presumption in favor of placing individuals in [community living arrangements]." *Id.,* at 114–115.[6]

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[4] Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[5] The spending power is encompassed in Art. I, § 8, cl. 1, of the Constitution, which states that the "Congress shall have the Power To . . . provide for the . . . general Welfare of the United States."

[6] The decisions below are somewhat unclear concerning to whom petitioners owe this right of treatment. The District Court certified a class of all persons who *may* become residents of Pennhurst, and the Court of Appeals directed relief for all *plaintiffs* in the case, including those on Pennhurst's waiting list. Thus, the decisions arguably entitle even those mentally

Three judges dissented. Although they assumed that the majority was correct in holding that Pennhurst residents have a right to treatment under the Act and an implied cause of action under the Act to enforce that right, they disagreed that the Act imposed a duty on the defendants to provide the "least restrictive treatment" possible. The dissent stated that "the language and structure of the Act, the relevant regulations, and the legislative history all indicate that the States may consider their own resources in providing less restrictive treatment." *Id.*, at 119. It did not believe that the general findings and declarations contained in a funding statute designed to encourage a course of conduct could be used by the federal courts to create absolute obligations on the States.[7]

We granted certiorari to consider petitioners' several challenges to the decision below. 447 U. S. 904. Petitioners first contend that 42 U. S. C. § 6010 does not create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment. Assuming that Congress did intend to create such a right, petitioners question the authority of Congress to impose these affirmative obligations on the States under either its spending power or § 5 of the Fourteenth Amendment. Petitioners next assert that any rights created by the Act are enforceable in federal court only by the Federal Government, not by private parties.

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retarded citizens who are not institutionalized or currently receiving services to a "right to treatment."

[7] The dissent went on to conclude that neither the Federal Constitution, § 504 of the Rehabilitation Act of 1973, nor state law required a State to provide treatment in the "least restrictive setting." The dissent would have thus reversed those portions of the District Court's order that contemplated a court order closing Pennhurst and the creation of new less restrictive facilities. It would also have remanded the case to the District Court for it to decide "how best to bring Pennhurst in compliance with statutory and constitutional requirements" and left open "the possibility that certain individuals in the future may be able to show that their particular mode of treatment is not rationally related to the State's purpose in confining them." 612 F. 2d, at 131.

Finally, petitioners argue that the court below read the scope of any rights created by the Act too broadly and far exceeded its remedial powers in requiring the Commonwealth to move its residents to less restrictive environments and create individual habilitation plans for the mentally retarded. Because we agree with petitioners' first contention—that § 6010 simply does not create substantive rights—we find it unnecessary to address the remaining issues.

II

We turn first to a brief review of the general structure of the Act. It is a federal-state grant program whereby the Federal Government provides financial assistance to participating States to aid them in creating programs to care for and treat the developmentally disabled. Like other federal-state cooperative programs, the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. See generally *King* v. *Smith,* 392 U. S. 309 (1968); *Rosado* v. *Wyman,* 397 U. S. 397 (1970); *Harris* v. *McRae,* 448 U. S. 297 (1980). The Commonwealth of Pennsylvania has elected to participate in the program. The Secretary of the Department of Health and Human Services (HHS), the agency responsible for administering the Act, has approved Pennsylvania's state plan and in 1976 disbursed to Pennsylvania approximately $1.6 million. Pennhurst itself receives no federal funds from Pennsylvania's allotment under the Act, though it does receive approximately $6 million per year in Medicaid funds.

The Act begins with an exhaustive statement of purposes. 42 U. S. C. § 6000 (b)(1) (1976 ed., Supp. III). The "overall purpose" of the Act, as amended in 1978, is:

> "[*T*]*o assist* [the] states to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their

> maximum potential through a system which coordinates, monitors, plans, and evaluates those services and which ensures the protection of the legal and human rights of persons with developmental disabilities." (Emphasis supplied.)

As set forth in the margin, the "specific purposes" of the Act are to "assist" and financially "support" various activities necessary to the provision of comprehensive services to the developmentally disabled. § 6000 (b)(2) (1976 ed., Supp. III).[8]

The Act next lists a variety of conditions for the receipt of federal funds. Under § 6005, for example, the Secretary "as a condition of providing assistance" shall require that "each recipient of such assistance take affirmative action" to hire qualified handicapped individuals. Each State, in turn, shall "as a condition" of receiving assistance submit to the Secretary a plan to evaluate the services provided under the Act. § 6009. Each State shall also "as a condition" of receiving assistance "provide the Secretary satisfactory assur-

[8] Section 6000 (b)(2) provides:

"The specific purposes of this chapter are—

"(A) to assist in the provision of comprehensive services to persons with developmental disabilities, with priority to those persons whose needs cannot be covered or otherwise met under the Education for All Handicapped Children Act, the Rehabilitation Act of 1973 . . . , or other health, education, or welfare programs;

"(B) to assist States in appropriate planning activities;

"(C) to make grants to States and public and private, nonprofit agencies to establish model programs, to demonstrate innovative habilitation techniques, and to train professional and paraprofessional personnel with respect to providing services to persons with developmental disabilities;

"(D) to make grants to university affiliated facilities to assist them in administering and operating demonstration facilities for the provision of services to persons with developmental disabilities, and interdisciplinary training programs for personnel needed to provide specialized services for these persons; and

"(E) to make grants to support a system in each State to protect the legal and human rights of all persons with developmental disabilities."

ances that each program . . . which receives funds from the State's allotment . . . has in effect for each developmentally disabled person who receives services from or under the program a habilitation plan." § 6011 (a) (1976 ed., Supp. III). And § 6012 (a) (1976 ed., Supp. III) conditions aid on a State's promise to "have in effect a system to protect and advocate the rights of persons with developmental disabilities."

At issue here, of course, is § 6010, the "bill of rights" provision. It states in relevant part:

> "Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> "(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> "(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.
>
> "(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutio[n] . . . that—(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such person; or (B) does not meet the following minimum standards . . . ."

Noticeably absent from § 6010 is any language suggesting that § 6010 is a "condition" for the receipt of federal funding under the Act. Section 6010 thus stands in sharp contrast to §§ 6005, 6009, 6011, and 6012.

The enabling parts of the Act are the funding sections. 42 U. S. C. §§ 6061–6063 (1976 ed. and Supp. III).[9] Those sections describe how funds are to be allotted to the States, re-

[9] Sections 6031–6043 authorize separate funding to university-affiliated facilities for the operation of demonstration and training programs and are not pertinent here.

quire that any State desiring financial assistance submit an overall plan satisfactory to the Secretary of HHS, and require that funds disbursed under the Act be used in accordance with the approved state plan. To be approved by the Secretary, the state plan must comply with several specific conditions set forth in § 6063. It, *inter alia,* must provide for the establishment of a State Planning Council, § 6063 (b)(1), and set out specific objectives to be achieved under the plan, § 6063 (b)(2)(A) (1976 ed., Supp. III). Services furnished under the plan must be consistent with standards prescribed by the Secretary, § 6063 (b)(5)(A)(i) (1976 ed., Supp. III), and be provided in an individual manner consistent with § 6011, § 6063 (b)(5)(B) (1976 ed., Supp. III). The plan must also be supported by assurances that any program receiving assistance is protecting the human rights of the disabled consistent with § 6010, § 6063 (b)(5)(C) (1976 ed., Supp. III).[10] Each State must also require its State Planning Council to serve as an advocate of persons with developmental disabilities. § 6067 (1976 ed. and Supp. III).

The Act further provides procedures and sanctions to ensure state compliance with its requirements. The Secretary may, of course, disapprove a state plan, § 6063 (c). If a State fails to satisfy the requirements of § 6063, the Secretary may terminate or reduce the federal grant. § 6065 (1976 ed., Supp. III). Any State dissatisfied with the Secretary's disapproval of the plan, or his decision to terminate funding, may appeal to the federal courts of appeals. § 6068. No other cause of action is recognized in the Act.

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[10] The provisions of § 6063 were reworded and recodified in 1978. Section 6063 (b)(5)(C) (1976 ed., Supp. III) replaced § 133 (b)(24) of the Act, as added and renumbered, 89 Stat. 491, 506, 42 U. S. C. § 6063 (b)(24), which required a somewhat similar "assurance." The only significant difference between the two provisions is that § 6063 (b)(5)(C) contains a specific reference to § 6010.

III

As support for its broad remedial order, the Court of Appeals found that 42 U. S. C. § 6010 created substantive rights in favor of the disabled and imposed an obligation on the States to provide, at their own expense, certain kinds of treatment. The initial question before us, then, is one of statutory construction: Did Congress intend in § 6010 to create enforceable rights and obligations?

A

In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate, namely, Congress' power to enforce the Fourteenth Amendment and its power under the Spending Clause to place conditions on the grant of federal funds. Although the court below held that Congress acted under both powers, the respondents themselves disagree on this point. The Halderman respondents argue that § 6010 was enacted pursuant to § 5 of the Fourteenth Amendment. Accordingly, they assert that § 6010 is mandatory on the States, regardless of their receipt of federal funds. The Solicitor General, in contrast, concedes that Congress acted pursuant to its spending power alone. Tr. of Oral Arg. 54. Thus, in his view, § 6010 only applies to those States which accept federal funds.[11]

Although this Court has previously addressed issues going to Congress' power to secure the guarantees of the Fourteenth Amendment, *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966); *Oregon* v. *Mitchell*, 400 U. S. 112 (1970); *Fitzpatrick*

[11] The PARC respondents take a somewhat different view. Although they argue that Congress enacted § 6010 under both § 5 and the spending power, they suggest that § 6010 applies only to programs which receive federal money. The PARC respondents are also cross-petitioners in this litigation, arguing that the Act requires Pennhurst to be closed. In their view, the individual placement decisions required by the court below are not authorized by the Act and, in any event, are an improper exercise of judicial authority.

v. *Bitzer*, 427 U. S. 445 (1975),[12] we have had little occasion to consider the appropriate test for determining when Congress intends to enforce those guarantees. Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment. Our previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to § 5. See *Katzenbach* v. *Morgan*, *supra* (intent expressly stated in the Voting Rights Act of 1965); *Oregon* v. *Mitchell*, *supra* (intent expressly stated in the Voting Rights Act Amendments of 1970); *Fitzpatrick* v. *Bitzer*, *supra* (intent expressly stated in both the House and Senate Reports of the 1972 Amendments to the Civil Rights Act of 1964); cf. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966) (intent to enforce the Fifteenth Amendment expressly stated in the Voting Rights Act of 1965). Those cases, moreover, involved statutes which simply prohibited certain kinds of state conduct. The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain

[12] There is of course a question whether Congress would have the power to create the rights and obligations found by the court below. Although the court below held that "section 6010 does not go beyond what has been judicially declared to be the limits of the [F]ourteenth [A]mendment," 612 F. 2d, at 98, this Court has never found that the involuntarily committed have a constitutional "right to treatment," much less the voluntarily committed. See *Sanchez* v. *New Mexico*, 396 U. S. 276 (1970), dismissing for want of substantial federal question, 80 N. M. 438, 457 P. 2d 370 (1968); *O'Connor* v. *Donaldson*, 422 U. S. 563, 587–589 (1975) (BURGER, C. J., concurring). Thus, the Pennhurst petitioners and several *amici* argue that legislation which purports to create against the States not only a right to treatment, but one in the least restrictive setting, is not "appropriate" legislation within the meaning of § 5. Because we conclude that § 6010 creates no rights whatsoever, we find it unnecessary to consider that question.

services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.

Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. See, *e. g., Oklahoma* v. *CSC,* 330 U. S. 127 (1947); *King* v. *Smith,* 392 U. S. 309 (1968); *Rosado* v. *Wyman,* 397 U. S. 397 (1970). Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." See *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585–598 (1937); *Harris* v. *McRae,* 448 U. S. 297 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.[13] Cf. *Employees* v. *Department of Public Health and Welfare,* 411 U. S. 279, 285 (1973); *Edelman* v. *Jordan,* 415 U. S. 651 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Indeed, in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving

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[13] There are limits on the power of Congress to impose conditions on the States pursuant to its spending power, *Steward Machine Co.* v. *Davis,* 301 U. S., at 585; *Lau* v. *Nichols,* 414 U. S. 563, 569 (1974); *Fullilove* v. *Klutznick,* 448 U. S. 448 (1980) (BURGER, C. J.); see *National League of Cities* v. *Usery,* 426 U. S. 833 (1976). Even the Halderman respondents, like the court below, recognize the "constitutional difficulties" with imposing affirmative obligations on the States pursuant to the spending power, Tr. of Oral Arg. 45. That issue, however, is not now before us.

federal funds, it has proved capable of saying so explicitly. See, *e. g., King* v. *Smith, supra,* at 333 (Social Security Act creates a "federally imposed obligation [on the States] to furnish 'aid to families with dependent children . . . with reasonable promptness to all eligible individuals,' " quoting the Act). We must carefully inquire, then, whether Congress in § 6010 imposed an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys under the Act or whether it spoke merely in precatory terms.

B

Applying those principles to these cases, we find nothing in the Act or its legislative history to suggest that Congress intended to require the States to assume the high cost of providing "appropriate treatment" in the "least restrictive environment" to their mentally retarded citizens.

There is virtually no support for the lower court's conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose. Quite the contrary, the Act's language and structure demonstrate that it is a mere federal-state funding statute. The explicit purposes of the Act are simply "to assist" the States through the use of federal grants to improve the care and treatment of the mentally retarded. § 6000 (b) (1976 ed., Supp. III). Nothing in either the "overall" or "specific" purposes of the Act reveals an intent to require the States to fund new, substantive rights. Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States.

Respondents nonetheless insist that the fact that § 6010 speaks in terms of "rights" supports their view. Their reliance is misplaced. " 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Philbrook* v. *Glodgett,* 421 U. S. 707, 713 (1975),

quoting *United States* v. *Heirs of Boisdoré,* 8 How. 113, 122 (1849). See *District of Columbia* v. *Carter,* 409 U. S. 418, 420 (1973). Contrary to respondents' assertion, the specific language and the legislative history of § 6010 are ambiguous. We are persuaded that § 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. It is simply a general statement of "findings" and, as such, is too thin a reed to support the rights and obligations read into it by the court below. The closest one can come in giving § 6010 meaning is that it justifies and supports Congress' appropriation of money under the Act and guides the Secretary in his review of state applications for federal funds. See *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 (1938).[14] As this Court recognized in *Rosado* v. *Wyman, supra,* at 413, "Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goal, serve as a nudge in the preferred directions." This is such a case.

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[14] Respondents also contend that the title of the Act as passed, rather than as codified, reveals an intent to create rights in favor of the disabled. Pub. L. 94–103, 89 Stat. 486. As passed, the Act contained three Titles. Title I provided for services and facilities to the developmentally disabled and Title II, entitled "The Establishment and Protection of the Rights of Persons with Developmental Disabilities," contained § 6010. Respondents' reliance on this title is misplaced. It has long been established that the title of an Act "cannot enlarge or confer powers." *United States* v. *Oregon & California R. Co.,* 164 U. S. 526, 541 (1896); *Cornell* v. *Coyne,* 192 U. S. 418, 430 (1904). See *United States* v. *Fisher,* 2 Cranch 358, 386 (1805); *Yazoo & Mississippi Valley R. Co.* v. *Thomas,* 132 U. S. 174, 188 (1889). In addition, the location of § 6010 in the Act as passed confirms § 6010's limited meaning. Section 6010 was the preamble of Title II followed by provisions later codified as §§ 6009, 6011, 6012. The congressional findings in § 6010 thus seem to have been designed simply to serve as the rationale for the conditions imposed in the remaining sections of Title II.

The legislative history buttresses our conclusion that Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled. The House Committee believed the purpose of the Act was simply to continue an existing federal grant program, designed to promote "effective planning by the states of their programs, initiation of new, needed programs, and filling of gaps among existing efforts." H. R. Rep. No. 94–58, pp. 6, 8–9 (1975). Indeed, as passed by the House, the Act contained no "bill of rights" provision whatsoever. The Committee instead merely "applauded" the efforts of others to secure rights for the developmentally disabled. *Id.*, at 7.

Respondents, however, argue vigorously that the legislative history of the bill as passed by the Senate evinces Congress' intent to impose absolute obligations on the States to fund certain levels of treatment. Respondents rely most heavily on Title II of the Senate bill which adopted a "Bill of Rights" for the mentally retarded and contained over 400 pages of detailed standards "designed to assist in the protection of the human rights guaranteed under the Constitution." S. Rep. No. 94–160, p. 34 (1975). The Report also noted that the "Federal Government has a responsibility to provide equal protection under the law to all citizens." *Id.*, at 32. And Senator Stafford stated on the Senate floor that "Title II was added to the bill to assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization." 121 Cong. Rec. 16516 (1975).

Respondents read too much into these scattered bits of legislative history. In the first place, it is by no means clear that even the Senate bill created new substantive rights in favor of the disabled.[15] Despite the general discussion of

[15] As originally passed by the Senate, for example, the bill provided that a State which failed to comply with the detailed standards of care enumerated in Title II would lose all federal funding, including that provided

equal protection guarantees in the Senate Report, the Committee's view of the Act was quite modest. It explained that the purpose of Title II was simply "to stimulate the States to develop alternative programs of care for mentally retarded." S. Rep. No. 94–160, *supra,* at 1. It viewed Title II as satisfying the "need for a clear exposition of the purposes for which support should be provided under the authorities of the Act." *Id.,* at 3. Nor are the remarks of various Senators to the contrary. Senator Stafford spoke merely in terms of "assisting" the States. Senator Randolph, in introducing the bill on the floor of the Senate, confirmed the Senate's limited purpose. He said:

> "[W]e have developed a bill whose thrust, like the 1970 act, is *to assist* States in developing a comprehensive plan to bring together available resources in a coordinated way so developmentally disabled individuals are appropriately served. Our goal is more thorough and careful planning and more effective evaluation." 121 Cong. Rec. 16514 (1975) (emphasis supplied).

Even Senator Javits, the principal proponent of Title II, did not read the Act as establishing new substantive rights to enforce those guaranteed by the Constitution. He explained that Title II "represents a *reaffirmation* of the basic human and civil rights of all citizens. It offers the *direction* to provide a valid and realistic *framework* for improving the overall situation of this country's mentally retarded and other developmentally disabled individuals." *Id.,* at 16519 (emphasis supplied).

In any event, whatever the Senate's view of its bill, Congress declined to adopt it. The Conference Committee rejected the explicit standards of Title II and instead com-

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under such programs as Medicaid. S. 462, Tit. II, § 206. See S. Rep. No. 94–160, p. 35 (1975). The fact that the Senate would include a *funding* sanction is, of course, wholly inconsistent with respondents' argument that Congress was acting pursuant to § 5 of the Fourteenth Amendment.

promised on the more general statement of "findings" in what later became § 6010. H. R. Conf. Rep. No. 94–473, pp. 41, 43 (1975). As Senator Javits noted with respect to the compromise, "Title II of the Conference agreement establishes a *clear Federal policy* that the mentally retarded have a right to appropriate treatment, services, and habilitation." 121 Cong. Rec. 29820 (1975) (emphasis supplied).

In sum, nothing suggests that Congress intended the Act to be something other than a typical funding statute.[16] Far from requiring the States to fund newly declared individual rights, the Act has a systematic focus, seeking to improve care to individuals by encouraging better state planning, coordination, and demonstration projects. Much like the Medicaid statute considered in *Harris* v. *McRae,* 448 U. S. 297 (1980), the Act at issue here "was designed as a cooperative program of shared responsibilit[ies], not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund." *Id.,* at 309.

There remains the contention of the Solicitor General that Congress, acting pursuant to its spending power, conditioned the grant of federal money on the State's agreeing to underwrite the obligations the Court of Appeals read into § 6010. We find that contention wholly without merit. As amply demonstrated above, the "findings" in § 6010, when viewed

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[16] Nor is the contrary proved by a 1978 amendment to § 6010 which provides:

"The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons." 92 Stat. 3007.

This provision, adopted in Conference Committee without any legislative history, merely expresses Congress' view that persons with developmental disabilities have rights in addition to those generally available to "all persons." The section recognizes that Congress only "described" rights, not created them. Nothing in the language supports an inference of substantive duties from a statement of congressional policy.

in the context of the more specific provisions of the Act, represent general statements of federal policy, not newly created legal duties.

The "plain language" of § 6010 also refutes the Solicitor General's contention. When Congress intended to impose conditions on the grant of federal funds, as in §§ 6005, 6009, 6011, 6012, 6063, and 6067, it proved capable of doing so in clear terms. Section 6010, in marked contrast, in no way suggests that the grant of federal funds is "conditioned" on a State's funding the rights described therein. The existence of explicit conditions throughout the Act, and the absence of conditional language in § 6010, manifest the limited meaning of § 6010.

Equally telling is the fact that the Secretary has specifically rejected the position of the Solicitor General. The purpose of the Act, according to the Secretary, is merely "to improve and coordinate the provision of services to persons with developmental disabilities." 45 CFR § 1385.1 (1979). The Secretary acknowledges that "[n]o authority was included in [the 1975] Act to allow the Department to withhold funds from States on the basis of failure to meet the findings [of § 6010]." 45 Fed. Reg. 31006 (1980). If funds cannot be terminated for a State's failure to comply with § 6010, § 6010 can hardly be considered a "condition" of the grant of federal funds.[17] The Secretary's interpretation of § 6010, moreover, is well supported by the legislative history. In reaching

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[17] To be sure, the Secretary has read the 1978 recodification of § 6063 (b)(5)(C) (1976 ed., Supp. III) to require a participating State to assure the Secretary that services in funded programs are being provided consistent with § 6010. 45 Fed. Reg. 31006 (1980). But, as will be discussed *infra*, even if the Secretary's interpretation of the 1978 recodification is correct, a participating State's obligations under § 6063 (b)(5)(C) are far more modest than the obligations read into § 6010 by the court below and urged by the Solicitor General here. It is also important to note that the Secretary, despite his apparent authority to do so, has not terminated funds to Pennsylvania for noncompliance with § 6063 (b)(5)(C).

the compromise on § 6010, the Conference Committee rejected the Senate's proposal to terminate federal funding of States which failed to comply with the standards enumerated in Title II of the Senate's bill, see n. 15, *supra*. By eliminating that sanction, Congress made clear that the provisions of § 6010 were intended to be hortatory, not mandatory.[18]

The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting § 6010. When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. *Harris* v. *McRae, supra*. It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation on participating States.

Our conclusion is also buttressed by the rule of statutory construction established above, that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds. That canon applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate. It is difficult to know what

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[18] The Solicitor General also relies heavily on § 6010 (3), quoted *supra*, at 13. He apparently contends that Congress in § 6010 (3) conditioned the grant of all federal funds, including Medicaid, on the participating State's agreement to provide adequate treatment to individuals. Although § 6010 (3), unlike §§ 6010 (1) and (2), at least speaks in terms of "obligations," we find the Solicitor General's argument ultimately without merit. First, like the other "findings" in § 6010, § 6010 (3) is merely an expression of federal *policy*. As even the Secretary concedes, Congress did not give the Secretary authority to withdraw federal funds on the basis of a State's failure to comply with § 6010 (3). Second, by its terms, § 6010 (3) states that both the Federal Government and the States should not spend public money for substandard *institutions*. Nothing reveals an intent to condition the grant of federal funds under the Act on the State's promise to provide appropriate habilitation to *individuals*.

is meant by providing "appropriate treatment" in the "least restrictive" setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment. The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010. Not only does § 6010 lack conditional language, but it strains credulity to argue that participating States should have known of their "obligations" under § 6010 when the Secretary of HHS, the governmental agency responsible for the administration of the Act and the agency with which the participating States have the most contact, has never understood § 6010 to impose conditions on participating States. Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or "retroactive" conditions.

Finally, a brief comparison of the general language of § 6010 with the conditions Congress explicitly imposed on the States demonstrates that Congress did not intend to place either absolute or conditional obligations on the States. The Court of Appeals, for example, read § 6010 to impose an obligation to provide habilitation plans for all developmentally disabled persons. But Congress required habilitation plans under § 6011 "only when the Federal assistance under the Act contributes a portion of the cost of the habilitation services to the developmentally disabled person." H. R. Conf. Rep. No. 94–473, p. 43 (1975). If the Court of Appeals were correct, of course, there would be no purpose for Congress to have required habilitation plans at all, or to have limited the requirement to certain programs, since such plans automatically would have been mandated in all programs by the more inclusive requirements of § 6010.

Second, the specific condition imposed in § 6063 (b)(5)(C) (1976 ed., Supp. III) requires each state plan to

> "contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities . . . who are receiving treatment, services, or habilitation, under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to rights of the developmentally disabled)."

Once again, these limitations—both as to programs assisted under the Act and as to affording protection in a manner that is "consistent with § 6010"—would be unnecessary if, as the court below ruled, all state programs were required to fund the rights described in § 6010.

And third, the court below held that § 6010 mandated deinstitutionalization for most, if not all, mentally retarded persons. As originally enacted in 1975, however, the Act required only that each State use not less than 30 percent of its allotment "for the purpose of assisting it in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities." § 6062 (a)(4).[19] Three years later, Congress relieved the States of even that modest duty. Instead of requiring the States to use a certain portion of their allotment to support deinstitutionalization, Congress required the States to concentrate their efforts in at least one of four areas, only one of which was "community living arrangements." § 6063 (b)(4)(A)(ii) (1976 ed., Supp. III). Had § 6010 created a right to deinstitutionalization, the policy choices con-

[19] The House Report, for example, explained that States were required only to plan "for as much deinstitutionalization as is feasible," recognizing that this requirement would "prompt some movement of patients from State institutions back into their communities." H. R. Rep. No. 94–58, p. 10 (1975).

templated by both the 1975 and 1978 provisions would be meaningless.

In sum, the court below failed to recognize the well-settled distinction between congressional "encouragement" of state programs and the imposition of binding obligations on the States. *Harris* v. *McRae,* 448 U. S. 297 (1980). Relying on that distinction, this Court in *Southeastern Community College* v. *Davis,* 442 U. S. 397 (1979), rejected a claim that § 504 of the Rehabilitation Act of 1973, which bars discrimination against handicapped persons in federally funded programs, obligates schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that "state agencies such as Southeastern are only 'encourage[d] . . . to adopt and implement such policies and procedures,'" *id.,* at 410 (quoting the Act), we stressed that "Congress understood [that] accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.,* at 411. Likewise in this case, Congress was aware of the need of developmentally disabled persons and plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it.

IV

Respondents also suggest that they may bring suit to compel compliance with those conditions which *are* contained in the Act. Of particular relevance to these cases are § 6011 (a) (1976 ed., Supp. III) and § 6063 (b)(5)(C) (1976 ed., Supp. III), which are quoted *supra,* at 12–13, 26.[20]

That claim raises several issues. First, it must be determined whether respondents have a private cause of action

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[20] The Court of Appeals was apparently aware of these conditions since it referred expressly to § 6063 (b)(5)(C) in concluding that § 6010 creates a right to treatment. Its error was in bypassing these specific conditions and resting its decision on the more general language of § 6010.

to compel state compliance with those conditions.[21] In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State. See § 6065 (1976 ed., Supp. III). Just last Term, however, in *Maine* v. *Thiboutot,* 448 U. S. 1 (1980), we held that 42 U. S. C. § 1983 provides a cause of action for state deprivations of "rights secured" by "the laws" of the United States. See 448 U. S., at 4. Whether *Thiboutot* controls these cases depends on two factors. First, respondents here, unlike the plaintiffs in *Thiboutot,* who alleged that state law prevented them from receiving federal funds to which they were entitled, can only claim that the state plan has not provided adequate "assurances" to the Secretary. It is at least an open question whether an individual's interest in having a State provide those "assurances" is a "right secured" by the laws of the United States within the meaning of § 1983. Second, JUSTICE POWELL in dissent in *Thiboutot* suggested that § 1983 would not be available where the "governing statute provides an exclusive remedy for violations of its terms." *Id.,* at 22, n. 11. It is unclear whether the express remedy contained in this Act is exclusive.

Second, it is not at all clear that the Pennhurst petitioners have violated § 6011 and § 6063 (b)(5)(C) (1976 ed. and Supp. III). Those sections, by their terms, only refer to "programs assisted" under the Act. Because Pennhurst does not receive federal funds under the Act, it is arguably not a "program assisted." Thus, there may be no obligation on the State under § 6011 to assure the Secretary that each resident of Pennhurst have a habilitation plan, or assure the Secretary

[21] Because we conclude that § 6010 confers no substantive rights, we need not reach the question whether there is a private cause of action under that section or under 42 U. S. C. § 1983 to enforce those rights. See *Southeastern Community College* v. *Davis,* 442 U. S. 397, 404, n. 5 (1979).

under § 6063 (b)(5)(C) that Pennhurst residents are being provided services consistent with § 6010.[22]

Third, there is the question of remedy. Respondents' relief may well be limited to enjoining the Federal Government from providing funds to the Commonwealth. As we stated in *Rosado* v. *Wyman,* 397 U. S., at 420, welfare claimants were "entitled to declaratory relief and an appropriate injunction by the District Court against the payment of *federal* monies . . . should the State not develop a conforming plan within a reasonable period of time." (Emphasis in original.) There, we rejected the suggestion that the courts could require the State to pay the additional sums demanded by compliance with federal standards. Relying on *King* v. *Smith,* 392 U. S. 309 (1968), we explained that "the State had alternative choices of assuming the additional cost" of complying with the federal standard "or not using federal funds." 397 U. S., at 420–421. Accordingly, we remanded the case so that the State could exercise that choice.

In other instances, however, we have implicitly departed from that rule and have affirmed lower court decisions enjoining a State from enforcing any provisions which conflict with federal law in violation of the Supremacy Clause, *e. g., Carleson* v. *Remillard,* 406 U. S. 598 (1972). In still other cases, we have struck down state laws without addressing the form of relief, *e. g., Townsend* v. *Swank,* 404 U. S. 282 (1971). In no case, however, have we required a State to provide money to plaintiffs, much less required a State to take on such open-ended and potentially burdensome obligations as providing "appropriate" treatment in the "least restrictive" environment. And because this is a suit in federal court, anything

[22] JUSTICE WHITE concedes that Pennsylvania may not have violated § 6011, since Pennhurst may not be a "program assisted" under the Act. *Post,* at 41–42, n. 7. Curiously, however, he simultaneously assumes that § 6063 (b)(5)(C) applies to Pennhurst. *Post,* at 41. Because both § 6011 and § 6063 (b)(5)(C) apply only to "programs assisted," I do not understand why § 6063 (b)(5)(C), but not § 6011, is applicable.

but prospective relief would pose serious questions under the Eleventh Amendment. *Edelman* v. *Jordan,* 415 U. S. 651 (1974).[23]

These are all difficult questions. Because the Court of Appeals has not addressed these issues, however, we remand the issues for consideration in light of our decision here.

V

After finding that federal law imposed an obligation on the States to provide treatment, the court below examined state law and found that it too imposed such a requirement. 612 F. 2d, at 100–103. The court looked to § 4201 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, which provides in pertinent part:

> "The department of [Public Welfare] shall have power, and its duty shall be:
>
> "(1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race, color, national origin, settlement, residence, or economic or social status." Pa. Stat. Ann., Tit. 50, § 4201 (Purdon 1969).

Respondents contend that, even if we conclude that relief is unavailable under federal law, state law adequately supports the relief ordered by the Court of Appeals. There are,

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[23] We do not significantly differ with our Brother WHITE on the remedy for failure to comply with federally imposed conditions. Relying on *Rosado* v. *Wyman,* he argues that Pennsylvania should be given the option of rejecting federal funds under the Act or complying with § 6010. If we agreed that § 6010 was a condition on the grant of federal funds, we would have little difficulty subscribing to that view. We differ only in that he believes that § 6010 imposes conditions on participating States while we believe that the relevant conditions to these cases are §§ 6011 and 6063 (b)(5)(C). If the court on remand determines that there has been a violation of those conditions, it may well be appropriate to apply the principles announced in *Rosado,* as JUSTICE WHITE suggests.

however, two difficulties with that argument. First, the lower court's finding that state law provides a right to treatment may well have been colored by its holding with respect to § 6010. Second, the court held only that there is a right to "treatment," not that there is a state right to treatment in the "least restrictive" environment. As such, it is unclear whether state law provides an independent and adequate ground which can support the court's remedial order. Accordingly, we remand the state-law issue for reconsideration in light of our decision here.[24]

For similar reasons, we also remand to the Court of Appeals those issues it did not address, namely, respondents' federal constitutional claims and their claims under § 504 of the Rehabilitation Act.

VI

Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded.[25] The Developmentally Disabled Assistance and Bill of Rights Act is one such law. It establishes a national policy to provide better care and treatment to the retarded and creates funding incentives to induce the States to do so. But the Act does no more than that. We would be attribut-

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[24] Respondents have submitted to the Court 10 photocopies of a recent decision of the Pennsylvania Supreme Court which they characterize as holding that Pennsylvania state law provides a right to "state-funded individualized habilitation services." *In re Schmidt*, 494 Pa. 86, 429 A. 2d 631 (1981). The late submission not only fails to comply with Supreme Court Rule 35.5, it does not affect our decision here. On remand following our reversal, the Court of Appeals will be in a position to consider the state-law issues in light of the Pennsylvania's Supreme Court's recent decision.

[25] *E. g.*, The Rehabilitation Act of 1973, as amended in 1974 and 1978, 29 U. S. C. § 701 *et seq.* (1976 ed. and Supp. III); The Education for All Handicapped Children Act of 1975, 20 U. S. C. §§ 1401–1420; Social Security Amendments of 1974, 42 U. S. C. §§ 1396d (d) and 1397; Community Mental Health Centers Act, 42 U. S. C. § 2689 *et seq.*

ing far too much to Congress if we held that it required the States, at their own expense, to provide certain kinds of treatment. Accordingly, we reverse the principal holding of the Court of Appeals and remand for further proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

Although I agree that the judgment of the Court of Appeals must be reversed, and although I am in accord with much of what the Court says about the meaning of this confused and confusing legislation, see *ante,* at 11–27, I do not join the Court's advisory discussion in Part IV of its opinion. In that Part, the Court properly and correctly notes, *ante,* at 30, that it leaves open for consideration on remand whether, and in what form, §§ 6011 and 6063 create rights that are enforceable by private parties like those that make up these plaintiff classes. The Court, however, seems to me strongly to intimate that it will not view kindly any future positive holding in that direction. I agree that this specific question was not presented and is not today decided, but I decline to join what appears to be a negative attitude on the part of the Court to what is a possible construction of the Act.

It seems plain to me that Congress, in enacting § 6010, intended to do more than merely set out politically self-serving but essentially meaningless language about what the developmentally disabled deserve at the hands of state and federal authorities. A perfectly reasonable judicial interpretation of § 6010, which would avoid the odd and perhaps dangerous precedent of ascribing no meaning to a congressional enactment, would observe and give effect to the linkage between § 6010 and § 6063. As the Court points out, *ante,* at 12, a State that accepts funds under the Act becomes legally obligated to submit a state plan containing "assur-

ances satisfactory to the Secretary that the human rights of all persons with developmental disabilities . . . who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 . . . ." 42 U. S. C. § 6063 (b)(5)(C) (1976 ed., Supp. III).

That private parties, the intended beneficiaries of the Act, should have the power to enforce the modest legal content of § 6063 would not be an unusual application of our precedents, even for a legislative scheme that involves federal regulatory supervision of state operations See, *e. g., Cannon* v. *University of Chicago,* 441 U. S. 677 (1979); *Rosado* v. *Wyman,* 397 U. S. 397 (1970). See also *Maine* v. *Thiboutot,* 448 U. S. 1 (1980).

Finally, I have difficulty with the Court's suggestion, *ante,* at 28–29, that Pennhurst should be free of the Act's requirements because it does not directly receive funds under the Act. The Commonwealth's program for the institutionalized developmentally disabled is unified in one administration. To restrict the definition of "program assisted" in § 6063 to specific institutions within a unified program would allow a State to insulate substandard institutions from federal requirements merely by allocating federal funds to acceptable premises and state funds to substandard ones.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting in part.

Pennhurst is a residential institution for the retarded operated by the Commonwealth of Pennsylvania and serving a five-county area. Roughly half of its 1,200 residents were admitted upon application of their parents or guardians while the remainder were committed pursuant to court order. After extensive discovery and a lengthy trial, the District Court held that the conditions of confinement at Pennhurst violated the rights of its residents under the Eighth and Fourteenth Amendments of the United States Constitution, state

law,[1] and the Rehabilitation Act of 1973, 29 U. S. C. § 794, and entered a detailed remedial order requiring the eventual closing of Pennhurst in favor of community living arrangements for Pennhurst's displaced residents. 446 F. Supp. 1295 (ED Pa. 1978). On appeal, the Court of Appeals for the Third Circuit determined that the result reached by the District Court was proper under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6000 *et seq.* (1976 ed. and Supp. III) (Act), although relief under that statute had not initially been raised in that court. 612 F. 2d 84 (1979) (en banc). The Court of Appeals determined that the Act created judicially cognizable rights to treatment and to receipt of care in the least restrictive environment, and that the right to treatment was also supported by state law. The court essentially affirmed the remedial order entered by the District Court with one significant exception.[2] Finding that the legislative history did not require the abandonment of large institutional facilities, the Court of Appeals held that the District Court erred in ordering Pennhurst to be closed. Rather, the Court of Appeals required that each resident of Pennhurst be afforded an individual hearing before a Special Master to determine the appropriate level of institutionalization with a presumption established that community-based living arrangements were proper.

In essence, the Court concludes that the so-called "Bill of Rights" section of the Act, 42 U. S. C. § 6010, merely serves to establish guidelines which States should endeavor to fulfill, but which have no real effect except to the extent that the Secretary of Health and Human Services chooses to use the criteria established by § 6010 in determining funding under the Act. In my view, this reading misconceives the impor-

[1] See Pa. Stat. Ann., Tit. 50, § 4201 *et seq.* (Purdon 1969).

[2] The Court of Appeals also overturned the District Court's decision to require the State to find suitable alternative employment for those Pennhurst employees displaced by the order. This order is not an issue before this Court.

tant purposes Congress intended § 6010 to serve. That section, as confirmed by its legislative history, was intended by Congress to establish requirements which participating States had to meet in providing care to the developmentally disabled. The fact that Congress spoke in generalized terms rather than the language of regulatory minutia cannot make nugatory actions so carefully undertaken.

I

As an initial matter, I agree that § 6010 was enacted pursuant to Congress' spending power, and not pursuant to its power under § 5 of the Fourteenth Amendment. Accordingly, I agree that the Act was not intended to place duties on States independent of their participation in the program established by the Act. The Court of Appeals, in the section of its opinion concerning the exercise of a private cause of action, determined that § 6010 was passed pursuant to § 5, reasoning that since the Fourteenth Amendment included a right " 'to be free from, and to obtain judicial relief for, unjustified intrusions on personal security,' " 612 F. 2d, at 98, quoting *Ingraham* v. *Wright,* 430 U. S. 651, 673 (1977), congressional passage of § 6010 indicated its desire to enforce this interest.[3] Congressional action under the Enforcement Clause of the Fourteenth Amendment, however, has very significant consequences, see *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976), and given these ramifications, it should not be lightly assumed that Congress acted pursuant to its power under § 5 in passing the Act.

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[3] Respondents Halderman and PARC suggest a number of other Fourteenth Amendment "interests" allegedly served by § 6010. See, *e. g., San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1 (1973) (right to receive something more than no education); *Jackson* v. *Indiana,* 406 U. S. 715 (1972) (right to be institutionalized only when the nature and duration of such treatment bears a reasonable relation to its purpose); *O'Connor* v. *Donaldson,* 422 U. S. 563 (1975) (right of nondangerous persons capable of living without institutionalization to be free).

Here, there is no conclusive basis for determining that Congress acted pursuant to § 5. Nothing in the statutory language refers to the Fourteenth Amendment. Section 6010 was but one part of a bill whose underlying purpose was to extend and modify an existing federal-state grant program. The initial program was unquestionably passed pursuant to Congress' spending power. Moreover, § 6010 (3) is by its express terms a limitation on federal and state spending. The rights articulated in § 6010 are also cross-referenced in § 6063 (1976 ed. and Supp. III), which details the operation of the grant program.[4] Thus, all objective considerations connected with § 6010 and its operation suggest that Congress enacted it pursuant to its Spending Clause powers.

Of course, resolution of the § 5 issue does not determine the issue whether § 6010 was intended by Congress to have substantive consequences as part of a statute enacted under Art. I, § 8, cl. 1, and in my view, the majority makes far too much of the fact that § 6010 was not passed pursuant to the Fourteenth Amendment. While this conclusion has significant ramifications for the appropriate remedy for violations of the Act, it does not follow that § 6010 was to have no impact or effect besides the mere "encouragement" of state action and created no obligations on participating States and no rights in those being served by programs maintained by a State in cooperation with the Federal Government.

II

The language and scheme of the Act make it plain enough to me that Congress intended § 6010, although couched in

[4] The Act as passed in 1975 required that the state plan "contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities . . . be protected." § 6063 (b)(24). This measure was amended in 1978 to make it explicit that a State's plan must provide assurances of its compliance with § 6010. See text, *infra*.

terms of rights, to serve as requirements that the participating States must observe in receiving federal funds under the provisions of the Act. That Congress was deadly serious in stating that the developmentally disabled had entitlements which a State must respect if it were to participate in a program can hardly be doubted.

Federal involvement in state provision of health care to those persons with developmental disabilities began in 1963 with the passage of the Mental Retardation Facilities Construction Act, Pub. L. 88–164, 77 Stat. 282. That statute provided funds for the construction of health care facilities and specifically encouraged the development of community-based programs.[5] The Developmentally Disabled Act, technically an amendment to the Mental Retardation Facilities Construction Act, was passed in light of Congress' continued concern about the quality of health care being provided to the developmentally disabled and that federal support for improved care should be increased. A central expression of this concern was § 6010, which declares by way of four congressional "findings" that:

1. Persons with developmental disabilities have a "right to appropriate treatment, services, and habilitation."

2. Treatment should be designed to maximize an individual's potential and should be provided "in the setting that is least restrictive of the person's personal liberty."

3. The State and Federal Governments have an obligation to assure that public funds are not provided to institutions or programs that do not provide "appropriate treatment,

[5] An amendment was passed in 1967 which added a program to train professionals in community programs, as well as providing funds to support institutions, Pub. L. 90–170, 81 Stat. 527. In 1970, Congress passed a second amendment adopting a formula grant system essentially similar to the present system. The 1970 amendment also broadened the number of potential beneficiaries to include persons afflicted with various disabilities not previously covered. Pub. L. 91–517, 84 Stat. 1316.

services and habilitation" or do not meet minimum standards of care in six specific respects such as diet, dental care, and the use of force or chemical restraints.

4. Rehabilitative programs should meet standards designed to assure the most favorable possible outcome for patients, and these standards should be appropriate to the needs of those being served, depending on the type of institution involved.[6]

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[6] The pertinent text of § 6010 provides:

"Congress makes the following findings respecting the rights of persons with developmental disabilities:

"(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

"(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

"(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

"(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

"(B) does not meet the following minimum standards:

"(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

"(ii) Provision to such persons of appropriate and sufficient medical and dental services.

"(iii) Prohibition of the use of physicial restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

"(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

"(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

"(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

"(4) All programs for persons with developmental disabilities should

As clearly as words can, § 6010 (1) declares that the developmentally disabled have the right to appropriate treatment, services, and habilitation. The ensuing parts of § 6010 implement this basic declaration. Section 6010 (3), for example, *obligates* the Federal and State Governments not to spend the public funds on programs that do not carry out the basic requirement of § 6010 (1) and, more specifically, do not meet minimum standards with respect to certain aspects of treatment and custody. Sections 6010 (2) and (4) are phrased in less mandatory terms, but the former unmistakably states a preference for treatment in the least restrictive environment and the latter for establishing standards for assuring the appropriate care of the developmentally disabled in relation to the type of institution involved. Both sections, by delineating in some respects the meaning of "appropriate"

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meet standards which are designed to assure the most favorable possible outcome for those served, and—

"(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary . . . as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;

"(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

"(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs."

Section 6010 was amended in 1978 to add the following concluding paragraph:

"The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons." Pub. L. 95–602, § 507, 92 Stat. 3007.

treatment, services, and habilitation, implement the basic rights that the developmentally disabled must be afforded for the purpose of the programs envisioned by the Act. Hence, neither section could be ignored by the Secretary in carrying out his duties under the statute.

Standing on its own bottom, therefore, § 6010 cannot be treated as only wishful thinking on the part of Congress or as playing some fanciful role in the implementation of the Act. The section clearly states rights which the developmentally disabled are to be provided as against a participating State. But § 6010 does not stand in isolation. Other provisions of the Act confirm the view that participating States must take account of § 6010 and that the section is an integral part of an Act cast in the pattern of extending aid conditioned on state compliance with specified conditions. Section 6063 (a) requires that for a State to take advantage of the Act, it must have a "plan submitted to and approved by the Secretary. . . ." Section 6063 (b) (1976 ed., Supp. III), which is entitled "Conditions for Approval," states that "[i]n order to be approved by the Secretary under this section, a State plan for the provision of services and facilities for persons with developmental disabilities must" be filed; and in its original form, § 6063 required the plan to satisfy the conditions stated in some 30 numbered paragraphs. The 24th specification was that the plan must "contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities . . . who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected." Any doubts that the human rights referred to in § 6063 (b)(24) corresponded to those specified in § 6010 were removed in 1978 when § 6063 (b) was amended to restate the conditions which a plan must satisfy. Section 6063 (b)(5)(C) (1976 ed., Supp. III) now provides:

> "The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of

> all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to the rights of the developmentally disabled)."

Pennsylvania has submitted a plan under § 6063, that is, a plan providing services for the developmentally disabled in Pennsylvania. The Court states that the plan has been approved and that funds have been allocated to the State. These funds will necessarily be supporting Pennsylvania's "programs" for providing treatment, services, or habilitation within the meaning of § 6063 (b)(5)(C); and under the express terms of that section, Pennsylvania is required to respect the § 6010 rights of the developmentally disabled in its state institutions, including Pennhurst, and to give the Secretary adequate assurances in this respect. This is true whether or not Pennhurst itself directly receives any share of the State's allocation. It should also be noted that § 6063 (b)(3)(A) (1976 ed., Supp. III) provides that "the funds paid to the state under § 6062 of this title will be used to make a significant contribution toward strengthening services for persons with developmental disabilities through agencies in the various political subdivisions of the State." Thus, funds received under the Act were intended to result in the improvement of care at institutions like Pennhurst.[7]

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[7] There is nothing "curious" as the Court suggests about coming to a different conclusion about the applicability of § 6011 to Pennhurst. Section 6063 (b)(5)(B) requires that the plan must provide that services are provided in an individualized manner consistent with the requirements of § 6011 relating to habilitation plans. Section 6011 requires that when any specific program in a State, including any program of an agency, facility or project, receives funds from the State's allotment, it will have in effect individualized plans for habilitation of each individual receiving services under that program. The section goes on to specify in detail how such individualized plans shall be formulated and how they are to be car-

III

The legislative history of § 6010 confirms the view that Congress intended § 6010 to have substantive significance. Both the initial House of Representatives and Senate versions of the Act contained provisions indicating congressional concern with the character and quality of care for the developmentally disabled. The House bill, H. R. 4005, 94th Cong., 1st Sess. (1975), did not have a bill of rights section akin to § 6010. It did, however, have a provision that required States to spend at least 10% of their respective allotments "for the purpose of assisting . . . in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities." § 5 (b)(4). Debate in the House of Representatives indicated that the spending restriction was designed to promote community-based facilities to counteract the unfortunate practice of widespread institutionalization of developmentally disabled persons.[8]

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ried out and monitored. The Court asserts that Pennhurst has not been receiving federal funds under the Act, which means, I take it, that Pennhurst has not received funds from the State's allocation under the Act. In that event, I would not think that § 6011 would apply to Pennhurst residents. But Pennhurst is part of the State's overall program, and the State has presented a plan and received federal funds to support its developmentally disabled program throughout the State. It must, therefore, observe the § 6010 rights of the developmentally disabled in state institutions, including Pennhurst.

[8] See, *e. g.*, 121 Cong. Rec. 9976 (1975) (remarks of Cong. Rogers) (percentage requirement would assist in overcoming misuse of facilities caused by tendency of States to resort to institutionalization); *ibid.* (remarks of Cong. Carter) (treatment "should be conducted in that person's community without unnecessarily institutionalizing him").

It is clear that the House was concerned with many of the same factors which informed the Senate's detailed provision which ultimately lead to the genesis of § 6010. The Court's narrow reading of the House bill is not convincing. To the extent that the House bill did not have an analogue to § 6010, comments on the bill are necessarily irrelevant to the question of the intended effect of § 6010.

The Senate version of the Act, S. 462, 94th Cong., 1st Sess. (1975), contained a separate Title II, called the "Bill of Rights for Mentally Retarded and Other Persons with Developmental Disabilities," setting forth in extensive detail specific standards which state programs and facilities were required to meet. The impetus behind the Senate's "Bill of Rights" was the recognition by several Senators of the tragic conditions of confinement faced by many residents of large institutions.[9] An often repeated purpose of the Bill of Rights was to foster the development of community-based facilities as well as to encourage overall better care and treatment for the mentally disabled.[10] At the same time, there was the realiza-

[9] See, *e. g.*, 121 Cong. Rec. 16518 (1975) (remarks of Sen. Javits) ("The shocking conditions at Willowbrook in New York, and many other institutions for the mentally retarded throughout the Nation which inspired the bill of rights have not ended"); *id.*, at 16521 (remarks of Sen. Schweiker) ("The last 5 years have seen a dramatic increase in public awareness of the needs of institutionalized mentally retarded and developmentally disabled persons. This has been highlighted by scandals in many institutions, by court cases, and by the efforts of the communications media"); *id.*, at 16516 (remarks of Sen. Williams) ("Over the past few years, the horrifying conditions which exist in most of the public residential institutions for the mentally retarded . . . have provided shocking testimony to the inhuman way we care for such persons. The conditions at . . . [the] institutions have shown beyond a shadow of a doubt that the treatment of these individuals is worse then [*sic*] all of us would like to admit").

[10] For example, Senator Javits stated that the Bill of Rights section, an integral part of the legislation, would "establish minimum standards for residential and community facilities and agencies for the protection of the rights of those individuals needing services, while at the same time, encouraging deinstitutionalization and normalization." *Id.*, at 16518. In conclusion, Senator Javits identified a number of concerns shared by many of the legislators speaking on the Senate bill:

"Progress toward recognition of the basic human and civil rights of the mentally retarded and other developmentally disabled persons has been slow. The Federal Government has largely abrogated its responsibility in this regard and recently the greatest initiatives have come from our courts. . . .

"Congress should reaffirm its belief in equal rights for all citizens—

tion that institutions still had a significant role to play in the treatment of the mentally disabled.[11]

The Senate's version of Title II provided two methods for the States to comply with the requirements of the Act. First, a State wishing to participate could opt to follow guidelines to be established by the Secretary under Part B of Title II. § 210 (a). Alternatively, a State could decide to meet the extensive standards specified in Parts C and D relating to residential and community facilities respectively. Under the Senate bill, it was clear that the standards encompassed by the alternative procedures were not merely hortatory. That bill provided that within one year after the enactment, a State desiring funding must provide assurances to the Secretary that "each such facility or agency has established a plan for achieving compliance no later than 5 years after the date of enactment . . . ." § 203 (a). After the 5-

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including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive Federal support of facilities providing inhumane care and treatment of the mentally retarded. The bill of rights of S. 462 represents this new direction, and begins this reaffirmation." *Id.*, at 16519.

See *id.*, at 16520 (remarks of Sen. Cranston) (Senate bill enunciated basic goal of moving away from "long-term institutionalization of individuals with developmental disabilities to the development of community-based programs utilizing all community resources related to treatment or habilitation of such individuals to provide comprehensive services in the home community").

[11] See, *e. g.*, *id.*, at 16522 (remarks of Sen. Schweiker) ("It is now time to provide alternatives to locking persons up in institutions"); *id.*, at 16520 (remarks of Sen. Cranston) ("[I]n encouraging the movement to community-based programs, I recognize that the need for some long-term residential programs will remain. The bill specifically provides that where institutional programs are appropriate, adequate support should be planned for them so that necessary treatment and habilitation programs can be given residential patients to develop their full potential"); *id.*, at 16516 (remarks of Sen. Stafford) (the Bill of Rights will "assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization . . .").

year period, "no residential facility or program of community care for individuals with developmental disabilities shall be eligible to receive payments either directly or indirectly under any Federal law, unless such residential facility meets the standards promulgated under parts C or D of this title or has demonstrated to the Secretary for a reasonable period of time that it has actively implemented the requirements of part B." § 206 (a).

Following Senate and House passage, the different bills came to a Conference Committee. The resulting compromise kept the House 10% spending restriction which the Conference Report noted was "designed to eliminate inappropriate placement in institutions of persons with developmental disabilities . . . ." H. R. Conf. Rep. No. 94–473, p. 33 (1975). The Senate's detailed Bill of Rights was replaced by § 6010, a comparatively brief statement of the developmentally disabled's rights expressed in general terms. The specific mechanism of alternative compliance standards was omitted. The Conference Report set forth the following as the statement of purpose of the Conference version of the Senate's Title II.

> "The conference substitute contains a compromise which enumerates Congressional findings respecting the rights of persons with developmental disabilities. These include findings that the developmentally disabled have a right to appropriate treatment, services and habilitation; that such treatment, services and habilitation should be designed to maximize the developmental potential of the person and be provided in the setting that is least restrictive to his personal liberty; that the Federal government and the States have an obligation to assure that public funds are not provided in programs which do not provide appropriate treatment, services and habilitation or do not meet minimum standards respecting diet, medical and dental services, use of restraints, visiting hours and compliance with fire and safety codes;

> and that programs for the developmentally disabled should meet appropriate standards including standards adjusted for the size of the institutions . . . .
>
> "These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts." H. R. Conf. Rep. No. 94–473, *supra,* at 41–42.

Following the Conference Report, the Act was passed with minimal debate.[12]

The Senate's version of the Bill of Rights was hundreds of pages long and constituted an attempt to define the standards and conditions of state participation with precision and in great detail. The Conference Report makes clear that the detailed version was rejected, not to substitute a merely advisory section for an extended statement of conditions, but

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[12] Prior to final passage, Congressman Rogers stated that the revised Title II included a "brief statement of the rights of the developmentally disabled to appropriate treatment and care," which constituted "modest *requirements*." *Id.,* at 29309 (emphasis added). Senator Javits was more dramatic in announcing the purpose of Title II as creating a clear federal policy in favor of a right to treatment. "This 'Bill of Rights' explicitly recognizes that the Federal Government and the States have an obligation to assure that public funds are not provided to institutions or other residential programs" that do not provide adequate treatment. *Id.,* at 29820. See also *id.,* at 29818 (remarks of Sen. Randolph) (compromise reorganized Title II of the Senate bill "in order to reflect the essential elements which are necessary for continued improvement in the quality of care and habilitation of developmentally disabled persons in residential and community facilities"); *id.,* at 29821 (remarks of Sen. Williams) (the compromise establishes for the first time in federal law a "basic statement" of the rights of the developmentally disabled and the Act "will assure that funds under the act will be used by the States to assist them in the deinstitutionalization process").

rather to substitute a generalized statement of entitlements that a participating State must respect and that would adequately meet congressional concerns without encountering the inflexibility of legislatively prescribed conditions of treatment and care. There is no basis for considering the shortened statement as intended to play a qualitatively lesser role in the scheme of the Act. Rather, the compromise is best understood as a rejection of either the need or the ability of Congress to specify the required standards in a manner resembling administrative regulations.[13]

IV

As previously stated, § 6010 should be understood to require a State receiving funds under the Act to observe the rights established by the provision. None of the concerns expressed by the Court present sufficient reason to avoid or overcome the statutory mandate.

It is true that the terms "treatment, services and habilitation" to which § 6010 declares an entitlement are not self-defining. But it does not follow that the participating States are free to ignore them. Under § 6010 (3)(A), as already indicated, the State has an "obligation" not to spend public funds on any institutional or other residential facility that "does not provide treatment, services and habilitation which is appropriate to the needs of such persons." If federal

[13] The Act also required the Secretary to review and evaluate the quality standards under various statutes and to report to the Congress on any proposed changes. See Pub. L. 94–103, § 204, 89 Stat. 504. When the Secretary's recommendations were presented, the House took no steps to enact them into law, again demonstrating legislative unwillingness to adopt detailed uniform standards. See Developmental Disabilities Act Amendments of 1978: Hearings on H. R. 11764 before the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., 471–475 (1978). Congress did determine, however, to amend § 6063 to expressly require a State to provide assurance to the Secretary of its plan to comply with § 6010. See 42 U. S. C. § 6063 (b)(5)(C) (1976 ed., Supp. III).

funds are to be used to support a program, the program must (1) provide for the § 6010 rights to appropriate treatment, services, and habilitation; (2) observe the direction in § 6010 (2) that treatment, services, and habilitation be furnished in the least restrictive setting; (3) satisfy the minimum standards referred to in § 6010 (3)(B); and (4) follow the provisions of § 6010 (4), which offers further guidance for the participating State in furnishing the treatment, services, and habilitation to which the developmentally disabled are entitled.

Furthermore, before approving a state plan, the Secretary must assure himself that the rights identified under § 6010 will be adequately protected by the participating State. Why the language of an express "condition," which § 6010 lacks, should be the only touchstone for identifying a State's obligation is difficult to fathom.[14] Indeed, identifying "rights" and requiring the participating State to observe them seems a far stronger indicia of congressional intent than a mere statement of "conditions."

To argue that Congress could not have intended to obligate the States under § 6010 because those obligations would

[14] None of the cases cited by the Court suggest, much less hold, that Congress is required to condition its grant of funds with contract-like exactitude. In *Harris* v. *McRae,* 448 U. S. 297 (1980), the Court held that there was no evidence in the statute or in *the legislative history,* that Congress intended the States to assume the full costs of funding abortions once the federal funds were withheld under the Hyde Amendment. Here, there is explicit recognition in the statute and in the legislative history that Congress intended the States to provide the developmentally disabled with adequate treatment in the least restrictive environment consistent with their medical needs. The other cases cited by the Court involved situations where the Court held that Congress must indicate that it intended the States to have waived fundamental constitutional rights merely by participating in a federal program. See *Edelman* v. *Jordan,* 415 U. S. 651 (1974) (Eleventh Amendment sovereign immunity); *Employees* v. *Department of Public Health,* 411 U. S. 279, 285 (1973) (same). The Eleventh Amendment concerns are not implicated in these cases, and the citation of *Edelman* and *Employees* is thus unpersuasive.

be large and for the most part unknown is also unpersuasive. Section 6010 calls for appropriate treatment, services, and habilitation; and, as already detailed, the remaining sections spell out, some in more detail than others, the scope of that requirement. Beyond this, however, the content and reach of the federal requirements will, as a practical matter, emerge from the process of preparing a state plan and securing its approval by the Secretary. The state plan must undertake to provide services and facilities pursuant to "standards" prescribed by the Secretary; and, as will become evident, the State's option to terminate its statutory duties must be respected by the courts. In any event, there is no indication in the record before us that the cost of compliance with § 6010 would be "massive." The District Court found that noninstitutional facilities located in the communities would be significantly less expensive to operate than facilities like Pennhurst. 446 F. Supp., at 1312. At best, the cost of compliance with § 6010 is indeterminate.

It is apparently suggested that § 6010 is reduced to a mere statement of hope by the absence of an express provision requiring the Secretary to cut off funds in the event he determines that a State is not observing the rights set out in § 6010. But it is clear that the Secretary may not approve a plan in the first place without being assured that those rights will be protected, and it is difficult to believe that the Secretary must continue to fund a program that is failing to live up to the assurances that the State has given the Secretary.

It is also a matter of substantial moment that § 6012 (1976 ed., Supp. III) expressly conditions the approval of a plan on the State's providing "a system to protect and advocate the rights of persons with developmental disabilities," and that the system must "have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of rights of such persons." § 6012 (a)(2)(A). Section 6012 goes on to provide federal aid in establishing such sys-

tems, and it seems rather plain that the Act contemplates not only ongoing oversight by the Secretary but also enforcement of the rights of persons receiving treatment through judicial action or otherwise.

It is thus not of determinative significance that the Secretary was once of the view that noncompliance with § 6010 did not provide sufficient reason to cut off funds under the Act. As the Court recognizes, the 1978 amendments have convinced him that § 6010 rights must be respected; [15] but if the Secretary's original view was correct, and I do not think it was, this would not foreclose judicial remedies sought by or on behalf of developmentally disabled persons injured by the State's failure to observe § 6010 rights. Moreover, the Solicitor General, who is the legal representative of the United States, is of the view that the Act does create enforceable rights. In any event, this Court, as it is permitted to do, has disagreed on occasion with the administrative determination of the Secretary. See, *e. g., Philbrook* v. *Glodgett,* 421

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[15] The Secretary has recently announced the Department's view that the rights enunciated by § 6010 must now be addressed by participating state plans as a result of the 1978 amendments. The explanation of the proposed rulemaking provided as follows:

"No authority was included in that Act to allow the Department to withhold funds from States on the basis of failure to meet the findings.

"The 1978 amendments, however, added a requirement to the basic State grant program that the State assure the Secretary that the rights of developmentally disabled people are to be protected consistent with [§ 6010]. The Department has decided to require that all programs authorized under the Act, except for the protection and advocacy systems, comply with [§ 6010] of the Act. The protection and advocacy systems are exempted because they are an extension of the 'Rights' provisions and the systems do not provide services, treatment or habilitation. The Department believes that applying this policy to the other programs is within the intent of Congress. Recipients of funds under the Act are to assure the State and the Commissioner that they will provide services which comply with the requirements of [§ 6010]. Failure to comply with the assurance may result in the loss of Federal funds." 45 Fed. Reg. 31006 (1980).

U. S. 707, 715, and n. 11 (1975); *Carleson* v. *Remillard,* 406 U. S. 598, 602 (1972); *Townsend* v. *Swank,* 404 U. S. 282, 286, and n. 3 (1971). See also *General Electric Co.* v. *Gilbert,* 429 U. S. 125, 140–146 (1976).

V

Given my view that Congress intended § 6010 to do more than suggest that the States act in a particular manner, I find it necessary to reach the question whether these rights can be enforced in federal courts in a suit brought by the developmentally disabled. This action was brought under 42 U. S. C. § 1983, and directly under the Developmentally Disabled Act. The Court of Appeals determined that under the factors enunciated in *Cort* v. *Ash,* 422 U. S. 66 (1975), an implied private cause of action existed under the Act. Subsequently, however, we held that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Maine* v. *Thiboutot,* 448 U. S. 1, 4 (1980). It is acknowledged by all parties that it is appropriate to consider the cause-of-action question in light of the intervening decision in *Thiboutot.*

We have often found federal-court jurisdiction to enforce statutory safeguards in grant programs in suits brought by injured recipients. See, *e. g., Rosado* v. *Wyman,* 397 U. S. 397 (1970); *Shea* v. *Vialpando,* 416 U. S. 251 (1974); *Carleson* v. *Remillard, supra.* In essence, *Thiboutot* creates a presumption that a federal statute creating federal rights may be enforced in a § 1983 action. To be sure, Congress may explicitly direct otherwise, such as if the "governing statute provides an exclusive remedy for violations of its terms." *Thiboutot, supra,* at 22, n. 11 (POWELL, J., dissenting). See generally *Chapman* v. *Houston Welfare Rights Organization,* 441 U. S. 600, 672 (1979) (§ 1983 protections apply to all rights secured by federal statutes "unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is

inconsistent with congressional intention") (WHITE, J., concurring in judgment). Thus, in *Preiser* v. *Rodriguez,* 411 U. S. 475 (1973), we held that § 1983 did not provide a basis for relief since federal habeas corpus proceedings constituted the sole remedy for challenging the fact or duration of confinement. See *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 150, n. 5 (1970). Attempting to fit within the exception, the Pennhurst petitioners suggest that Congress intended the sole remedy for violations of the terms of the Act to be the power of the Secretary to disapprove a State's plan. See 42 U. S. C. § 6063 (c). According to these petitioners, imposition of a private remedy would be incompatible with the overall scheme of the Act, especially given the amorphous quality of the asserted rights.

As a general matter, it is clear that the fact that a federal administrative agency has the power to oversee a cooperative state-federal venture does not mean that Congress intended such oversight to be the exclusive remedy for enforcing statutory rights. This Court is "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program[s]" even if the agency has the statutory power to cut off federal funds for noncompliance. *Rosado* v. *Wyman, supra,* at 420. In part, this reluctance is founded on the perception that a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act. Cf. *Cannon* v. *University of Chicago,* 441 U. S. 677, 708, n. 42 (1979). In this litigation, there is no indication that Congress intended the funds cutoff, which, as the Court notes, the Secretary believed was not within the power of the agency, to be the sole remedy for correcting violations of § 6010. Indeed, § 6012 and the legislative history of the Act reveal that Congress intended judicial enforcement of § 6010. See *supra,* at 46; H. R. Conf. Rep. No. 94–473, p. 42 (1975) (the statutory rights established by § 6010 "should be protected and assured by the Congress and the courts"). Ac-

cordingly, I would hold that jurisdiction under § 1983 was properly invoked in these cases under *Thiboutot*.

VI

I would vacate the judgment of the Court of Appeals and remand the cases for further proceedings. This litigation does not involve the exercise of congressional power to enforce the Fourteenth Amendment as the Court of Appeals held, but is an exercise of the spending power. What an appropriate remedy might be where state officials fail to observe the limits of their power under the United States Constitution or fail to perform an ongoing statutory duty imposed by a federal statute enacted under the commerce power or the Fourteenth Amendment is not necessarily the measure of a federal court's authority where it is found that a State has failed to perform its obligations undertaken pursuant to a statute enacted under the spending power. The State's duties in the latter situation do not arise until and unless the State chooses to receive federal funds. Furthermore, the State may terminate such statutory obligations, except those already accrued, by withdrawing from the program and terminating its receipt of federal funds. It is settled that administrative oversight and termination of federal funding in the event of a State's failure to perform its statutory duties is not the sole remedy in Spending Clause cases. "It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Rosado* v. *Wyman, supra,* at 422–423. It is equally clear, however, that the courts in such cases must take account of the State's privilege to withdraw and terminate its duties under the federal law. Although the court may enjoin the enforcement of a discrete state statutory provision or regulation or may order state officials prospectively to perform their duties incident to the

receipt of federal funds, the prospective force of such injunctions cannot survive the State's decision to terminate its participation in the program. Furthermore, there are cases in which there is no identifiable statutory provision whose enforcement can be prohibited. *Rosado* v. *Wyman* was such a case, and there, after finding that the State was not complying with the provisions of the Social Security Act, we remanded the case to the District Court to "afford [the State] an opportunity to revise its program in accordance with [federal requirements]" as we had construed them to be, but to retain jurisdiction "to review . . . any revised program adopted by the State, or, should [the State] choose not to submit a revamped program by the determined date, issue its order restraining the further use of federal monies . . . ." 397 U. S., at 421–422. See *Lau* v. *Nichols,* 414 U. S. 563 (1974).

It is my view that the Court of Appeals should have adopted the *Rosado* approach in these cases. It found the State to be in noncompliance with the federal statute in major respects and proceeded to impose a far-reaching remedy, approving the appointment of a Special Master to decide which of the Pennhurst inmates should remain and which should be moved to community-based facilities. More properly, the court should have announced what it thought was necessary to comply with the Act and then permitted an appropriate period for the State to decide whether it preferred to give up federal funds and go its own route. If it did not, it should propose a plan for achieving compliance, in which event, if it satisfied the court, a decree incorporating the plan could be entered and if the plan was unsatisfactory, the further use of federal funds could be enjoined. In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed. As we recently recognized in *Parham* v. *J. R.,* 442 U. S. 584 (1979): "The mode and procedure of medical diagnostic procedures is not the business of judges. What is best for a

child is an individual medical decision that must be left to the judgment of physicians in each case. We do no more than emphasize that the decision should represent an independent judgment of what the child requires and that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted." *Id.*, at 607–608. Cf. *Addington* v. *Texas,* 441 U. S. 418, 429 (1979) (commitment depends "on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists"). In enacting § 6010, Congress eschewed creating any specific guidelines on the proper level of institutionalization, leaving the question to the States to determine in the first instance. A court-appointed Special Master is inconsistent with this approach.

Accordingly, I would vacate the judgment of the Court of Appeals and remand the cases for further proceedings.

UNITED PARCEL SERVICE, INC. *v.* MITCHELL ET AL.

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

No. 80–169. Argued February 24, 1981—Decided April 20, 1981

After respondent employee had been discharged by petitioner employer for alleged dishonest acts, respondent requested his union to file a grievance contesting the discharge. The collective-bargaining agreement provided a grievance and arbitration procedure for the resolution of covered disputes. Respondent was represented by the union at an arbitration hearing which resulted in a decision upholding the discharge. Seventeen months later, respondent filed suit in Federal District Court against the union and petitioner under § 301 (a) of the Labor Management Relations Act, alleging that the union had breached its duty of fair representation and that petitioner discharged him not for the stated reasons, which it knew to be false, but to replace full-time employees with part-time employees. The court granted summary judgment for the defendants on the ground that the action was barred by New York's 90-day statute of limitations for actions to vacate arbitration awards. The Court of Appeals reversed, holding that the District Court should have applied New York's 6-year limitations period for breach-of-contract actions.

Held: Given the choices present here, and the undesirability of the results of the grievance and arbitral process being suspended in limbo for long periods, the District Court properly chose the 90–day period for the bringing of an action to vacate an arbitration award. Cf. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554. Pp. 60–64.

(a) The timeliness of a § 301 suit is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations, and the determination of which limitations period is the most appropriate depends upon the nature of the federal claim and the federal policies involved. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696. Pp. 60–61.

(b) Although not styled as one to vacate the arbitration award, respondent's suit, if successful, would have that direct effect. He raised the same claim that was raised before the arbitrators—that he was discharged in violation of the collective-bargaining agreement. He sought the same relief—reinstatement with full backpay. While his underlying claim against his employer was based on the collective-

bargaining agreement, the indispensable predicate for the § 301 (a) action was not a showing under traditional contract law that the discharge was a breach of the agreement, but instead that the union breached its duty of fair representation. Since the arbitrators' conclusion was, under the collective-bargaining agreement, "binding on all parties," respondent was required to show that the union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim. Thus, the suit is more analogous to an action to vacate an arbitration award than to a straight contract action. Pp. 61–62.

(c) An employee's unfair representation claim against his union, even though his employer may ultimately be called upon to respond in damages if he is successful, is more a creature of "labor law" as it has developed since the enactment of § 301 than it is of general contract law. And one of the leading federal policies in this area is the relatively rapid disposition of labor disputes. The system of industrial self-government, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later. Pp. 63–64.

624 F. 2d 394, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 64. STEWART, J., filed an opinion concurring in the judgment, *post,* p. 65. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post,* p. 71.

Bernard G. Segal argued the cause for petitioner. With him on the briefs was *James D. Crawford. Albert S. Parsonnet* filed a brief for Local 177, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, respondent under this Court's Rule 19.6, in support of petitioner.

David Jaroslawicz argued the cause for respondent Mitchell. With him on the brief was *Ira Leitel.**

*Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Laurence Gold, Michael H. Gottesman,* and *Robert M. Weinberg* for the American Federation of Labor and Congress of Industrial Organizations;

JUSTICE REHNQUIST delivered the opinion of the Court.

We are called upon in this case to determine which state statute of limitations period should be borrowed and applied to an employee's action against his employer under § 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (a), and *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976).

I

Petitioner United Parcel Service, Inc. (UPS), employed respondent Mitchell (respondent) as a car washer at its facility on Staten Island, N. Y. On January 13, 1977, respondent was discharged for dishonest acts, including falsifying his timecards and claiming payment for hours which he did not work. Respondent denied the charges against him and requested his union, Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union No. 177 (the Union), to file a grievance on his behalf contesting the discharge. UPS and the Union were parties to a collective-bargaining agreement which provided a grievance and arbitration procedure for the resolution of disputes covered by the agreement. App. 57–67. Pursuant to the agreement respondent's grievance was submitted to a panel of the Atlantic Area Parcel Grievance Committee, composed of three union and three company representatives (the Joint Panel). Cf. *Hines* v. *Anchor Motor Freight, Inc., supra,* at 557, n. 2. The Joint Panel conducted a hearing, at which respondent was represented by the Union, and on February 16, 1977, it announced its decision that the discharge be upheld. App. 103–104. Under the collective-bargaining agreement this decision was "binding on all parties." *Id.*, at 66; see *id.*, at 103.

Seventeen months later, on July 20, 1978, respondent filed a complaint in the United States District Court for the East-

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and by *David Previant* for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

ern District of New York against the Union and UPS under § 301 (a) of the Labor Management Relations Act, 29 U. S. C. § 185 (a). See *Hines* v. *Anchor Motor Freight, Inc., supra.* He alleged that the Union had breached its duty of fair representation and that UPS discharged him not for the stated reasons, which it knew to be false, but to achieve savings by replacing full-time employees with part-time employees. App. 7–13. Both UPS and the Union moved for summary judgment on the ground that the action was barred by New York's 90-day statute of limitations for actions to vacate arbitration awards. Section 7511 (a) of the N. Y. Civ. Prac. Law (McKinney 1963) provides that "[a]n application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him."

The District Court granted summary judgment in favor of UPS and the Union, ruling that respondent's action was properly characterized as one to vacate the arbitration award entered against him. The court reasoned: "The relief sought was expressly denied in an arbitration award issued as a result of a full-scale arbitration proceeding. The effect of any grant of the relief sought . . . would be to vacate the determination of the arbitrators." App. 129. Respondent appealed and the Court of Appeals for the Second Circuit reversed. 624 F. 2d 394 (1980). That court held that the District Court should have applied New York's 6-year limitations period for actions alleging breach of contract, N. Y. Civ. Prac. Law § 213 (2) (McKinney 1972). It reasoned that respondent's action was analogous to a breach-of-contract action because the issues were whether the collective-bargaining agreement had been breached and whether the Union contributed to that breach by failure to discharge its duty of fair representation. The court further reasoned that a 6-year limitations period "provides for relatively rapid disposition of labor disputes without undermining an employee's ability to vindicate his rights through § 301 actions." 624 F. 2d, at 397–398.

We granted UPS' petition for certiorari. 449 U. S. 898 (1980).[1]

II

Congress has not enacted a statute of limitations governing actions brought pursuant to § 301 of the LMRA. As this Court pointed out in *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 704–705 (1966), "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." [2] Our present task is to determine which limitations period is "the most appropriate one provided by state law." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975). This depends upon an examination of the nature of the fed-

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[1] A direct conflict in the Circuits developed when the Third Circuit, confronted with the present question, borrowed the 3-month period contained in Pennsylvania's arbitration statute, reversing a District Court decision borrowing the State's 6-year period for actions upon a contract. *Liotta* v. *National Forge Co.*, 629 F. 2d 903 (1980), cert. pending, No. 80–890.

[2] *Amicus* the American Federation of Labor and Congress of Industrial Organizations has filed a brief arguing that, in cases such as the present, courts should apply the 6-month limitations period found in § 10 (b) of the National Labor Relations Act, 29 U. S. C. § 160 (b). The AFL–CIO distinguishes the above-quoted language from *Hoosier Cardinal* on the ground that *Hoosier Cardinal* involved a § 301 action by a union against an employer, while actions brought by employees against both their union and employer pursuant to our decisions in *Vaca* v. *Sipes*, 386 U. S. 171 (1967), and *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976), are hybrid § 301 breach-of-duty actions, the union's duty being implied from the NLRA. We decline to consider this argument since it was not raised by either of the parties here or below. See *Bell* v. *Wolfish*, 441 U. S. 520, 532, n. 13 (1979); *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960). Our grant of certiorari was to consider *which* state limitations period should be borrowed, not whether such borrowing was appropriate. See Pet. for Cert. i. The parties have considered the question as being limited to which state limitations period to borrow. See, *e. g.*, Brief for Petitioner 8; Brief for Respondent 11. Since respondent filed his complaint beyond the 6-month period, the same result would obtain in this case were we to adopt the AFL–CIO's position.

eral claim and the federal policies involved. See *Hoosier Cardinal, supra,* at 706–707.

Although respondent did not style his suit as one to vacate the award of the Joint Panel, if he is successful the suit will have that direct effect. Respondent raises in his § 301 action the same claim that was raised before the Joint Panel—that he was discharged in violation of the collective-bargaining agreement. He seeks the same relief he sought before the Joint Panel—reinstatement with full backpay. In sum, "it is clear that [he] was dissatisfied with and simply seeks to upset the arbitrator's decision that the company did not wrongfully discharge him." *Liotta* v. *National Forge Co.,* 629 F. 2d 903, 905–906 (CA3 1980), cert. pending, No. 80–890.[3]

The Court of Appeals purported to rely on this Court's decision in *Hines* v. *Anchor Motor Freight, Inc.,* but that decision strongly supports borrowing the limitations period for actions to vacate arbitration awards. As *Hines* makes clear, an employee may go behind a final and binding award under a collective-bargaining agreement and seek relief against his employer and union only when he demonstrates that his union's breach of its duty "seriously undermine[d] the integrity of the arbitral process." 424 U. S., at 567. *Hines* rejected the suggestion that "erroneous arbitration decisions must stand" in the face of the union's breach of its duty, *id.,* at 571, suggesting that the suits it sanctioned are aptly characterized as ones to vacate such arbitration decisions. Indeed the present

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[3] The Court of Appeals declined to borrow the limitations period for actions to vacate an arbitration award in part because of its view that discharged employees could not institute such actions under New York law, see *In re Soto,* 7 N. Y. 2d 397, 165 N. E. 2d 855 (1960). 624 F. 2d 394, 398 (1980). The fact that an employee could not bring a direct suit to vacate an arbitration award, however, does not mean that his § 301 claim, which if successful would have the same effect, is not "closely analogous" to such an action. See *Johnson* v. *Railway Express Agency, Inc.,* 421 U. S. 454, 464 (1975).

writer, though in dissent on the merits in *Hines*, characterized the action as one to "vacate an . . . arbitration award." *Id.*, at 575. See also *Humphrey* v. *Moore*, 375 U. S. 335, 336 (1964) (issue characterized as whether to enjoin implementation of decision of joint panel).

It is true that respondent's underlying claim against his employer is based on the collective-bargaining agreement, a contract. It is not enough, however, for an employee such as respondent to prove that he was discharged in violation of the collective-bargaining agreement. "To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. . . . The grievance processes cannot be expected to be error-free." *Hines*, 424 U. S., at 570–571. Thus respondent's characterization of his action against the employer as one for "breach of contract" ignores the significance of the fact that it was brought in the District Court pursuant to § 301 (a) of the LMRA and that the indispensable predicate for such an action is not a showing under traditional contract law that the discharge was a breach of the collective-bargaining agreement, but instead a demonstration that the Union breached its duty of fair representation. Since the conclusion of the Joint Panel was, under the collective-bargaining agreement, "binding on all parties," respondent was required in some way to show that the Union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim. This, in our view, makes the suit more analogous to an action to vacate an arbitration award than to a straight contract action.[4]

[4] Respondent suggests *Hines* actions might also be characterized as actions upon a statute, personal injury actions, or malpractice actions, all governed by a 3-year limitations period in New York, N. Y. Civ. Prac. Law §§ 214 (2), 214 (5), 214 (6) (McKinney 1972). All of these characterizations suffer from the same flaw as the effort to characterize the

We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of "labor law" as it has developed since the enactment of § 301 than it is of general contract law. We said in *Hoosier Cardinal* that one of the leading federal policies in this area is the "relatively rapid disposition of labor disputes." 383 U. S., at 707. Cf. 29 U. S. C. § 160 (b) (6-month period under NLRA). This policy was one of the reasons the Court in *Hoosier Cardinal* chose the generally shorter period for actions based on an oral contract rather than that for actions upon a written contract, 383 U. S., at 707, and similar analysis supports our adoption of the shorter period for actions to vacate an arbitration award in this case.[5]

It is important to bear in mind the observations made in the *Steelworkers Trilogy* that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing . . . machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960). Although the present case involves a fairly mundane

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action as one for breach of contract: they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company.

[5] New York is typical in providing a relatively short limitations period for actions to vacate arbitration awards. Of 42 States with specific limitations periods for such actions, 28 have a period of 90 days, 9 have shorter periods, 2 longer, and 3 States have periods based on the term of court. See App. to Pet. for Cert. A18–A19. The Federal Arbitration Act, 9 U. S. C. § 12, provides a limitations period of three months.

The particular choice made in *Hoosier Cardinal* to borrow the limitations period for oral contracts is not binding in this case, not only because the issue in *Hoosier Cardinal* was between a 6-year period for oral contracts and a 20-year period for written contracts, but also because the claim in *Hoosier Cardinal* was not one to overturn an arbitration award.

and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union. See, *e. g., Humphrey* v. *Moore, supra* (seniority rights of all employees). This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.

Obviously, if New York had adopted a specific 6-year statute of limitations for employee challenges to awards of a joint panel or similar body, we would be bound to apply that statute under the reasoning of *Hoosier Cardinal.* But in cases such as this, where generally state limitations periods were enacted prior to the enactment of § 301 by Congress in 1947, we are necessarily committed by prior decisional law to choosing among statutes of limitations none of which fit hand in glove with an action under § 301 (a) of the LMRA. Given the choices present here, and the undesirability of the results of the grievance and arbitral process being suspended in limbo for long periods, we think the District Court was correct when it chose the 90-day period imposed by New York for the bringing of an action to vacate an arbitration award.

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion because I am persuaded that the Court has made the correct choice between the two state-law alternatives presented by the parties. As the Court observes, the applicability of § 10 (b) of the National Labor Relations Act, 29 U. S. C. § 160 (b), was never pressed by

either party, and was not considered by the Court of Appeals. Although I find much that is persuasive in JUSTICE STEWART's analysis, resolution of the § 10 (b) question properly should await the development of a full adversarial record.

JUSTICE STEWART, concurring in the judgment.

The Court believes itself obligated by *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, to determine the applicable statute of limitations in this case "as a matter of federal law, by reference to the appropriate state statute of limitations." [1] I do not believe, however, that we are so constrained by *Hoosier*. Instead of deciding which of two almost equally relevant state limitations periods applies to the respondent employee's claims, I would impose the limitations period of § 10 (b) of the National Labor Relations Act (NLRA), 29 U. S. C. § 160 (b).

A

Hoosier involved a straightforward breach-of-contract damages suit brought by a union against an employer under § 301 of the Labor Management Relations Act (LMRA). As Congress had not provided a limitations period for § 301 suits, the Court concluded that a state statute of limitations should apply. But the Court was careful to note that it was not deciding the appropriate time limits for all suits brought under § 301:

> "The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required

[1] But see *ante*, at 60, n. 2.

to decide, and we indicate no view whatsoever on that question." 383 U. S., at 705, n. 7.

The Court also observed, in response to the claim that reliance on varying state limitations statutes was contrary to the national interest in uniformity in industrial relations, that the kind of contract dispute it had before it did not implicate "those consensual processes that federal labor law is chiefly designed to promote—*the formation of the . . . agreement and the private settlement of disputes under it.*" *Id.*, at 702 (emphasis added).

The case before us is quite unlike the one in *Hoosier.* It is a hybrid "§ 301 and breach of duty sui[t]," *Vaca* v. *Sipes,* 386 U. S. 171, 197, n. 18, brought by an employee against both his employer and his union in order to set aside a "final and binding" determination of a grievance, arrived at through the collectively bargained method of resolving the grievance. It is, therefore, a direct challenge to "the private settlement of disputes under [the collective-bargaining agreement]."

Moreover, unlike *Hoosier,* where the employee's complaint was rooted solely in § 301 of the LMRA, the respondent employee here has two claims, each with its own discrete jurisdictional base. The contract claim against the employer is based on § 301, but the duty of fair representation is derived from the NLRA.[2] Yet the two claims are inextricably inter-

[2] The Court has recognized on numerous occasions that "[t]he duty of fair representation is . . . implicit in the National Labor Relations Act." See, *e. g., Electrical Workers* v. *Foust,* 442 U. S. 42, 46, n. 8. The Court first recognized the statutory duty of fair representation in *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, a case arising under the Railway Labor Act, but in a series of decisions beginning with *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, the Court concluded that the duty of fair representation applies equally to the NLRA. The Court explained the derivation of the principle in *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 554, 563–564:

"Necessarily '[a] wide range of reasonableness must be allowed a statu-

dependent. "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 570–571. Accordingly, a plaintiff must prevail upon his unfair representation claim before he may even litigate the merits of his § 301 claim against the employer.

Thus, the suit in this case, unlike the one in *Hoosier*, cannot be likened to "an action for breach of contract cognizable at common law." 383 U. S., at 705, n. 7. Instead, it is an amalgam of § 301, which has no limitations period, and the NLRA. And, of course, the latter contains a limitations provision. Although § 10 (b) of the NLRA was designed to limit the initiation of unfair labor practice claims [3] in order

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tory bargaining representative in serving the unit it represents . . . .' *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953). The union's broad authority in negotiating and administering effective agreements is 'undoubted,' *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964), but it is not without limits. Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,' *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.' *Humphrey* v. *Moore*, *supra*, at 342. The union as the statutory representative of the employees is 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co.* v. *Huffman*, supra, at 338." That this duty of fair representation under the NLRA may be judicially enforced was made clear in *Vaca* v. *Sipes*, 386 U. S. 171.

[3] This Court has not decided whether all breaches of the duty of fair representation necessarily constitute unfair labor practices under §§ 8 (b) (1) (A) and (b) (2) of the NLRA. In *Miranda Fuel Co.*, 140 N. L. R. B. 181, the Board ruled that all violations of the duty of fair representation are unfair labor practices either under § 8 (b) (2) or under § 8 (b) (1) (A). In *Vaca* v. *Sipes*, *supra*, the Court found it unnecessary to decide whether *Miranda Fuel* was correctly decided, but simply "assume[d] for present

to safeguard the stability of collective-bargaining agreements, the policy behind it applies with equal force in this context.

B

Congress enacted § 10 (b) of the NLRA to protect continuing collective-bargaining systems from delayed attack. The 6-month bar of § 10 (b) [4] is designed to strengthen and defend the "stability of bargaining relationships." *Machinists* v. *NLRB*, 362 U. S. 411, 425. The time limitation reflects

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purposes" that the Board had been correct. 386 U. S., at 186. The three concurring Justices in *Vaca* v. *Sipes*, however, stated that "a complaint by an employee that the union has breached its duty of fair representation . . . is a charge of unfair labor practice." *Id.*, at 198. And a majority of the Courts of Appeals have concluded that breach of the fair representation duty is an unfair labor practice. See *Newport News Shipbuilding Co.* v. *NLRB*, 631 F. 2d 263 (CA4); *Abilene Sheet Metal, Inc.* v. *NLRB*, 619 F. 2d 332, 347 (CA5); *NLRB* v. *American Postal Workers Union*, 618 F. 2d 1249, 1254–1255 (CA8); *Kesner* v. *NLRB*, 532 F. 2d 1169, 1173–1174 (CA7); *Kling* v. *NLRB*, 503 F. 2d 1044 (CA9); *Truck Drivers* v. *NLRB*, 126 U. S. App. D. C. 360, 379 F. 2d 137; cf. *Denver Stereotypers* v. *NLRB*, 623 F. 2d 134, 136 (CA10). But see *NLRB* v. *Miranda Fuel Co.*, 326 F. 2d 172, 175–178 (CA2) (Judge Medina took the position that the Board had incorrectly held violation of the duty of fair representation to be an unfair labor practice; Judge Lumbard, concurring, did not reach that question; Judge Friendly dissented). Even if there are some breaches of the representation duty that are not unfair labor practices under the NLRA, § 10 (b) is, I believe, the proper source for determining when claims of breach of duty must be raised. For that limitations period is a clear indication of Congress' judgment of when claims of a very similar or identical character must be brought.

[4] Concededly, the terms of § 10 (b) are directed to the administrative procedures provided by Congress to resolve unfair labor practices. But the fact that Congress did not provide a limitations period for a judicially enforceable action later found implied in the NLRA is not comparable to a congressional failure to establish a time limitation for an action it expressly creates by statute. Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 367. In any case, it cannot reasonably be assumed here that congressional silence reflects an intent to apply state statutes of limitation for an action based in part on rights and obligations traceable to the NLRA.

the balance drawn by Congress, "the expositor of the national interest," *id.*, at 429, between the interests of employees in redressing grievances and "vindicati[ng] [their] statutory rights," *ibid.*, and the "interest in 'industrial peace which it is the overall purpose of the Act to secure.'" *Id.*, at 428 (quoting *NLRB* v. *Childs Co.*, 195 F. 2d 617, 621–622 (CA2) (L. Hand, concurring)).[5]

Of course, one aspect of the respondent employee's claim in this case is predicated on § 301 of the LMRA; if the plaintiff can establish his claim for breach of the duty of fair representation, he may then pursue his § 301 breach-of-contract claim. But here, unlike *Hoosier,* the latter action, like the breach-of-duty claim, is a challenge to a result reached in the contractual grievance resolution system. Accordingly, the policy of promoting stability in collective bargaining underlying the time bar of § 10 (b) is applicable to this aspect of the respondent employee's case as well.

In any event, the two elements of respondent employee's hybrid action cannot be disentangled: the duty of fair representation is "part and parcel of [the] § 301 [claim]." *Vaca* v. *Sipes,* 386 U. S., at 186. When the 6-month period of § 10 (b) has passed, the employee should no longer be able to challenge the alleged breach of duty by his union,[6] and as this is a precondition for maintaining the contract action, he should not be able to challenge the employer's action either.

Finally, even if it were appropriate to view the respondent employee's suit in this case as founded solely on § 301, the

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[5] The charge by the employees in *Machinists* was against the formation of a collective-bargaining agreement. Here the complaint is with the agreement's administration. But § 8 (d) of the NLRA defines the collective bargaining required by the Act to include grievance procedures as a part of the continuing collective-bargaining process. See *NLRB* v. *Acme Industrial Co.*, 385 U. S. 432, 436; 29 U. S. C. § 158 (d).

[6] The Court held in *Machinists* v. *NLRB,* 362 U. S. 411, 422, that "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10 (b) [time limit]."

Court is not obliged to apply a state statute of limitations. As already noted, *Hoosier* contemplated that "other § 301 suits different from the present one might call for application of other rules of timeliness." 383 U. S., at 705, n. 7. And the Court has indicated, in a more general context, that state limitations periods will not be applied when their employment would be inconsistent with national policy:

> "[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. . . . State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co.* v. *EEOC,* 432 U. S. 355, 367.

In § 10 (b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the "final and binding" determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates "those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it." *Hoosier,* 383 U. S., at 702. Accordingly, "[t]he need for uniformity" among procedures followed for similar claims, *ibid.*,[7] as well as the clear congressional indi-

[7] The need for speedy and final resolution of labor disputes, preferably

cation of the proper balance between the interests at stake, counsels the adoption of § 10 (b) of the NLRA as the appropriate limitations period for lawsuits such as this.

C

Because the respondent employee commenced his suit beyond the 6-month bar of § 10 (b) of the NLRA, I agree that the judgment of the Court of Appeals must be reversed.

JUSTICE STEVENS, concurring in part and dissenting in part.

In this action, the plaintiff-employee seeks a judicial remedy against his former employer for wrongful discharge, and against his union for breach of the duty of fair representation. The District Court granted summary judgment in favor of both defendants because of the employee's failure to file suit within what that court viewed as the appropriate period of limitations. The Court of Appeals reversed the District Court's judgment as to both claims and remanded for further proceedings. The employer alone sought further review in this Court. Therefore, at this stage of the litigation, the only question properly presented for our consideration is whether the Court of Appeals chose the most appropriate New York statute of limitations to govern the employee's claim against his former employer for wrongful discharge.[1] Although I agree for the most part with the

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without recourse to the courts—identified by the Court today in support of its preference for the shorter of the possible state limitations periods, *ante,* at 63, 64—also supports adoption of the relatively short period of § 10 (b).

[1] The union did not petition for review of the Court of Appeals' decision, and the employer has not taken a position with respect to which statute of limitations governs the employee's claim against the union. Indeed, the employer has vigorously denied that this question is presented in this case:

"[T]he only question raised in the petition for certiorari is the statute of

Court's resolution of that question, I fear that its failure expressly to limit its reasoning to the narrow question presented in this case may suggest that today's decision also resolves the question whether the same statute of limitations governs the employee's claim against the union for breach of the duty of fair representation. That interpretation, although understandable in light of the broad language of the Court's opinion, would be inconsistent with the procedural posture of this case and, in addition, would be conceptually unsound.

I concur in the Court's conclusion that it is appropriate, for purposes of federal labor law, to characterize the employee's suit against his employer as an action to set aside an arbitration award. In the arbitration proceeding that took place prior to this litigation, the employer prevailed on the precise claim respondent raises against it in this judicial proceeding—that the discharge violated the collective-bargaining agreement. If the employee now were to prevail against the employer on this claim, the necessary effect of the resulting court order would be to undo the arbitration award. See *ante,* at 61. Accordingly, in upholding the employer's position, the Court properly emphasizes the importance of the finality and certainty of arbitration in the collective-bargaining context, and properly treats the adverse arbitration decision as a substantial obstacle to the employee's pursuit of judicial relief against his employer.

The employee's claim against his union for breach of the duty of fair representation, however, is of a far different character. Although this claim is closely related to the claim

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limitations applicable to Mitchell's claim against his employer, UPS. *See* Liotta v. National Forge Co., 629 F. 2d 903 (3d Cir. 1980).

. . . . .

"The fact that Mitchell may have a claim against the Union does not affect the determination of which statute of limitations governs his claim against his employer. *See* Liotta v. National Forge Co., *supra,* 629 F. 2d at 905." Reply Brief for Petitioner 3, 4.

See also *Id.,* at 5–6.

against the employer, the two claims are nonetheless conceptually distinct.[2] The claim against the union may not, in my judgment, be characterized as an action to vacate an arbitration award. The arbitration proceeding did not, and indeed, could not,[3] resolve the employee's claim against the union. Although the union was a party to the arbitration, it acted only as the employee's representative; the Joint Panel did not address or resolve any dispute between the employee and the union. Therefore, with respect to the employee's action against the union, the finality and certainty of arbitration are not threatened by the prospect that the employee might prevail on his judicial claim. Because no arbitrator has decided the primary issue presented by this claim, no arbitration award need be undone, even if the employee ultimately prevails.[4]

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[2] The claims are closely related because, to prevail against the employer, the employee must establish that the union breached its duty of fair representation and that the employer breached the collective-bargaining agreement; similarly, to prevail against the union, the employee must prove that the union breached its duty of fair representation and, if he wishes to recover loss-of-employment damages for which the union is responsible, that the employer breached the agreement. See n. 4, *infra*. Cf. *Czosek* v. *O'Mara*, 397 U. S. 25, 28–29. However, despite this close relationship, the two claims are not inseparable. Indeed, although the employee in this case chose to sue both the employer and the union, he was not required to do so; he was free to institute suit against either one as the sole defendant. See *Vaca* v. *Sipes*, 386 U. S. 171, 186–187.

[3] By its very nature, the employee's claim that the union breached its duty of fair representation cannot be resolved in an arbitration proceeding because it arises out of the conduct of that proceeding itself.

[4] While an arbitration decision favorable to the employer—for example, that the discharge did not breach the collective-bargaining agreement—would be of substantial significance in an employee's suit against his union, it would not necessarily be dispositive. The determination whether the employer breached the agreement may be highly relevant to the amount of damages caused by the union's alleged breach of duty, but it is not necessarily controlling with respect to the threshold question whether there was any breach of duty by the union at all. For example, if, solely for reasons of racial bias, a union processes a discharged employee's griev-

The employee's claim against his union is properly characterized, not as an action to vacate an arbitration award, but rather as a malpractice claim. There is no conceptual reason why that claim may not survive even if the employer is able to rely on the arbitration award as a conclusive determination of its obligations under the collective-bargaining agreement.[5] Thus, by analogy, a lawyer who negligently allows the statute of limitations to run on his client's valid claim may be liable to his client even though the original defendant no longer has any exposure. Cf. *Smart* v. *Ellis Trucking Co.*, 580 F. 2d 215, 218–219 (CA6 1978), cert. denied, 440 U. S. 958.

In this case, I agree with the Court that the statute of limitations applicable to respondent's claim against his former employer is the 90-day statute governing actions to vacate or

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ance in bad faith, the union breaches its duty of fair representation. Cf. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192. The fact that the underlying discharge may not have violated the collective-bargaining agreement does not necessarily absolve the union of liability for its breach, although it may limit the size of the employee's recovery against the union. Thus, while a court considering an employee's claim against a union will evaluate the validity of the employer's underlying conduct, that evaluation is not central to the resolution of the duty-of-fair-representation claim.

[5] In *Liotta* v. *National Forge Co.*, 629 F. 2d 903 (CA3 1980), cert. pending, No. 80–890, the Court of Appeals concluded that the Pennsylvania statute of limitations governing actions to vacate arbitration awards should apply to an employee's § 301 action against his employer for wrongful discharge. However, in *Liotta* the employee had filed suit only against his employer, and not against his union. The Court of Appeals suggested that this fact was of some significance in determining which statute of limitations to apply:

"[T]he fact that Liotta alleges that the arbitration award is invalid due to the Union's breach of its duty of fair representation does not change the limitations period because the suit here is against the Company and not the Union. Thus, it is clear that Liotta was dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him." 629 F. 2d, at 905–906.

modify arbitration awards in New York.[6] It surely does not follow, however, that that statute is applicable to the claim against the union for breach of its duty of fair representation.[7] Because the union did not seek review of the judgment of the Court of Appeals, it is not appropriate to decide what period of limitations should be applied to the employee's claim against it. It is, however, noteworthy that JUSTICE STEWART's proposal that we strain to conclude that Congress intended that § 10 (b) of the National Labor Relations Act, 29 U. S. C. § 160 (b),[8] be applied to causes of action that this

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[6] N. Y. Civ. Prac. Law § 7511 (a) (McKinney 1963), quoted *ante*, at 59. I do not address any question concerning the possible tolling of that period, because no such issue is presented in this case.

[7] Under the rationale of *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 704–705, arguably the proper statute of limitations to apply to such a claim would be N. Y. Civ. Prac. Law § 214 (6) (McKinney 1972), which governs claims for nonmedical malpractice. Because the question of the appropriate statute of limitations to apply to the employee's claim against his union is not properly presented in this case, I express no definite opinion on the point. I note, however, that the Court dismisses the suggestion that this action may be characterized as a malpractice action with the observation that this characterization "overlook[s] the fact that an arbitration award stands between the employee and any relief which may be awarded against *the company*." *Ante*, at 63, n. 4 (emphasis supplied). Because no arbitration award stands between the employee and any relief which may be awarded against the union, this observation is inapplicable to the claim against the union.

[8] Section 10 (b) of the National Labor Relations Act provides:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the [National Labor Relations] Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the

Court had not yet divined when § 10 (b) was enacted,[9] cf. *Watt* v. *Alaska, post,* p. 276 (STEWART, J., dissenting), rests on a rationale that might apply to a § 301 claim against the union, but which is wholly inapplicable to the claim against the employer, because the employer is not accused of any unfair labor practice.

In sum, I concur in the Court's judgment insofar as it pertains to the employee's action against his employer.

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armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28." 29 U. S. C. § 160 (b).

The plain language of this statute indicates that it is directed solely to the administrative procedure established by Congress in the National Labor Relations Act for the resolution of unfair labor practice charges arising under, and processed in accordance with, that Act. Nothing in the statutory language suggests that Congress intended that this 6-month limitations period be applied in any other context.

[9] The National Labor Relations Act was enacted in 1935. 49 Stat. 449. Although § 10 (b) was a part of the Act at that time, in its original form it did not contain a period of limitations. 49 Stat. 453–454. The 6-month limitations period upon which JUSTICE STEWART relies was added to § 10 (b) in 1947. 61 Stat. 146. Six years later, the Court decided the first in a series of cases recognizing that the National Labor Relations Act imposes a duty of fair representation upon unions. See *Ford Motor Co.* v. *Huffman,* 345 U. S. 330. In 1967, in *Vaca* v. *Sipes,* 386 U. S. 171, the Court clearly held that this duty may be judicially enforced. See generally *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 554, 563–567.

Syllabus

NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL.

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

No. 79–1056. Argued December 2, 1980—Decided April 20, 1981

In a class action brought against petitioner airline by a female cabin attendant employee, petitioner was held liable to the class of such female employees for backpay because wage differentials between male and female cabin attendants collectively bargained with respondent unions were found to violate the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. After its postjudgment motions claiming contribution from the unions for a proportionate part of the liability were denied as untimely, petitioner brought a separate action in Federal District Court seeking such contribution. The District Court interpreted the pleadings as contending that petitioner had either an implied cause of action for contribution against the unions under the Equal Pay Act for discriminating against the class of employees in question or a federal common-law right to contribution from the unions for a share of its Equal Pay Act liability, and that the petitioner's claim for reimbursement for its Title VII liability was based solely on a federal common-law right to contribution. The court dismissed the claim for contribution based on petitioner's liability under the Equal Pay Act, but, denying the unions' motions to dismiss, held that there was a federal common-law right to contribution for liability imposed under Title VII, at least under some circumstances, and that it would reach the issues as to this right when the facts were properly developed. Both the unions and petitioner appealed. The Court of Appeals affirmed the dismissal for contribution based on petitioner's liability under the Equal Pay Act, but declined to reach the Title VII issue, remanding to the District Court for determination of the unions' assertion that the Title VII contribution claim was barred by laches.

Held: Petitioner has neither a federal statutory nor a federal common-law right to contribution from respondent unions. Pp. 86–99.

(a) Even if it is assumed that all of the elements of a typical contribution claim are established in this case, that the policy considerations under the Equal Pay Act and Title VII favor the recognition of a right to contribution, that the unions bear significant responsibility for discriminatory practices that these statutes were designed to prohibit, and that

there are circumstances in which an employer may be a "person aggrieved" by union conduct that would be remediable under Title VII, none of these assumptions provides a sufficient basis for recognizing the right to contribution asserted by petitioner. Pp. 86–91.

(b) The language of neither the Equal Pay Act nor Title VII, both of which statutes are expressly directed against employers, supports implication of a right to contribution in favor of employers against unions. The structure and legislative histories of both statutes similarly do not support such an implied right. Pp. 91–95.

(c) Whatever may be a federal court's power to fashion remedies in other areas of the law, it would be improper to add a federal common-law right to contribution to the statutory rights that Congress created in the Equal Pay Act and Title VII. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106, distinguished. A favorable reaction to the equitable considerations supporting petitioner's contribution claim is not a sufficient reason for enlarging on the remedial provisions contained in these carefully considered statutes. Cf. *Mohasco Corp.* v. *Silver*, 447 U. S. 807. Pp. 95–99.

196 U. S. App. D. C. 443, 606 F. 2d 1350, affirmed in part and vacated in part.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except BLACKMUN, J., who took no part in the consideration or decision of the case.

Philip A. Lacovara argued the cause for petitioner. With him on the briefs were *Jay Kelly Wright* and *Gerald Goldman.*

Stephen B. Moldof argued the cause for respondents and filed a brief for respondent Air Line Pilots Association, International. *Asher W. Swartz* filed a brief for respondent Transport Workers Union of America, AFL–CIO.

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amici curiae.* With him on the brief were *Solicitor General McCree, Harlon L. Dalton,* and *Leroy D. Clark.**

**J. Albert Woll, Laurence Gold, John Fillion,* and *George Kaufmann* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Herbert Prashker, Peyton H. Moss,*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in this case is whether an employer held liable to its female employees for backpay because collectively bargained wage differentials were found to violate the Equal Pay Act of 1963 [1] and Title VII of the Civil Rights Act of 1964 [2] has a federal statutory or common-law right to

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and *Eric D. Witkin* for Trans World Airlines, Inc.; by *Winn I. Newman, Carole Wilson, Richard B. Sobol,* and *Michael B. Trister* for the International Union of Electrical, Radio, and Machine Workers, AFL–CIO; and by *Michael H. Gottesman* and *Robert M. Weinberg* for Mary P. Laffey et al.

[1] The Equal Pay Act, 77 Stat. 56, 29 U. S. C. § 206 (d), which was enacted in 1963 as an amendment to the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.,* provides, in relevant part:

"(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection." 29 U. S. C. §§ 206 (d)(1)–(2).

[2] Section 703 of the Civil Rights Act, 78 Stat. 255, as amended and as set forth in 42 U. S. C. § 2000e–2, provides, in relevant part:

"(a) . . . It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compen-

contribution from unions that allegedly bear at least partial responsibility for the statutory violations.

The relevant facts are alleged in the complaint filed by the petitioner, Northwest Airlines, Inc., against the respondent unions, the Transport Workers Union of America (TWU) and the Air Line Pilots Association, International (ALPA), in the United States District Court for the District of Columbia.[3] Continuously from 1947 through 1974, petitioner paid higher wages to its male cabin attendants, who were classi-

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sation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . . .

"(c) . . . It shall be an unlawful employment practice for a labor organization—

"(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

"(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

"(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U. S. C. §§ 2000e–2 (a), (c).

[3] Because the case comes before us on respondents' motions to dismiss, we accept as true the factual allegations of petitioner's complaint. See *Scheuer* v. *Rhodes*, 416 U. S. 232, 236–237. Additional background information is taken from the District Court and Court of Appeals opinions in the underlying employment discrimination class action. See *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (1973), aff'd in part, vacated and remanded in part, 185 U. S. App. D. C. 322, 567 F. 2d 429 (1976), cert. denied, 434 U. S. 1086.

fied as pursers, than to its female cabin attendants, who were classified as stewardesses. During that period, both the male and the female cabin attendants were represented by a union—TWU from 1961 to 1971 and ALPA thereafter [4]—and their wages were fixed by collective-bargaining agreements negotiated and executed in response to union demands.

In 1970, Mary Laffey, a female cabin attendant employed by petitioner, commenced a class action against petitioner challenging the legality of the wage differential between pursers and stewardesses.[5] On November 12, 1973, after a full trial, the District Court issued an opinion in which it found that the two positions required equal skill, effort, and responsibility, and were performed under similar working conditions. Accordingly, the court held that petitioner had violated the Equal Pay Act and Title VII of the Civil Rights Act of 1964 and entered judgment in favor of the plaintiff class. *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (1973).[6] Unless that judgment is reversed or modified, peti-

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[4] From 1946 to 1961, the cabin attendants were represented by the Airline Stewards and Stewardesses Association, International, which became affiliated with TWU in 1961. See *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp., at 765. Prior to 1947, all cabin attendants employed by petitioner were females classified as stewardesses. *Ibid.*

[5] No claims were asserted against the respondent unions, although the plaintiffs subsequently joined ALPA as a nonaligned party under Federal Rule of Civil Procedure 19 (a) in order to bring before the District Court all parties necessary to implement a complete remedy. See *Laffey* v. *Northwest Airlines, Inc.*, 185 U. S. App. D. C., at 370–371, 567 F. 2d, at 477–478. The plaintiffs expressly stated that they did not consider ALPA responsible for any of the alleged discrimination, and petitioner did not oppose ALPA's participation as a nonaligned party. *Id.*, at 371, 567 F. 2d, at 478.

[6] Shortly thereafter, the District Court entered an order detailing the remedial steps, including payment of backpay, that petitioner was to take to rectify its past discrimination. *Laffey* v. *Northwest Airlines, Inc.*, 374 F. Supp. 1382 (1974).

tioner will be required to pay in excess of $20 million in back-pay, damages, and interest to the members of the *Laffey* plaintiff class.[7]

After the entry of judgment against it, petitioner filed appropriate motions in the *Laffey* case asserting claims for contribution and indemnification against TWU and ALPA.[8] Those motions were denied as untimely, and the Court of Appeals affirmed this ruling. *Laffey* v. *Northwest Airlines, Inc.*, 185 U. S. App. D. C. 322, 369–370, 567 F. 2d 429, 476–478. Promptly thereafter, petitioner commenced this separate action. The complaint prayed that each union be adjudged liable to pay a proportion of any monetary liability finally assessed against petitioner in the *Laffey* litigation. The unions moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

As the District Court interpreted the pleadings, petitioner contended that it had an implied cause of action against the unions under the Equal Pay Act for causing it to discriminate against the *Laffey* class, or, in the alternative, a federal common-law right to contribution from the unions for a share of its Equal Pay Act monetary liability. Petitioner's claim for reimbursement for its Title VII monetary liability was based solely on a federal common-law right to contribution. App. to Pet. for Cert. 2b–3b. The District Court held that because the Equal Pay Act clearly was not enacted for the spe-

[7] The opinion of the District Court in the present case indicates that petitioner's monetary liability as a result of the *Laffey* litigation has been estimated to be $24,500,000. App. to Pet. for Cert. 11b, n. 23. Petitioner in this Court asserts that its monetary liability presently is calculated to be approximately $37 million. Brief for Petitioner 6.

[8] Petitioner moved to amend its answer to include a request that ALPA be realigned as a defendant and to assert a cross-claim for contribution or indemnification from ALPA for any Equal Pay Act or Title VII monetary liability assessed against petitioner and a claim for damages under the Equal Pay Act for allegedly causing petitioner's violation. Petitioner also moved for leave to file a third-party complaint against TWU asserting similar claims.

cial benefit of employers, petitioner could not rely upon an implied private cause of action for contribution under that statute. The court also concluded that the Act did not afford employees any express or implied right of action against their unions; because it found that unions and employers do not share common liability to employees under the Equal Pay Act, the District Court held that there is no federal common-law right to contribution for liability under that statute.[9]

The District Court reached a different conclusion with respect to the claim for contribution for petitioner's Title VII monetary liability. It found that the allegations of the complaint satisfied the two principal elements of a common-law right to contribution: (1) common liability and (2) the party seeking contribution has been required to pay more than its just share of the award. *Id.*, at 10b. The court answered what it described as the "more difficult question" whether there is a right to contribution under federal law by noting a modern trend of federal-court decisions favoring contribution,[10] and by finding that the policy of the statute would

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[9] Most of the lower federal courts that have considered the question whether employers may seek contribution from unions for monetary liability under the Equal Pay Act have concluded that this right is not implicit in the statute nor available under federal common law. See, *e. g.*, *Denicola* v. *G. C. Murphy Co.*, 562 F. 2d 889 (CA3 1977); *EEOC* v. *Ferris State College*, 493 F. Supp. 707 (WD Mich. 1980); *Marshall* v. *Tombs Janitorial Service, Inc.*, 82 CCH LC ¶ 33,559 (WD Mo. 1977); *Usery* v. *Beloit College*, 12 EPD ¶ 11,203 (WD Wis. 1976); *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (SDNY 1975). But see *Love* v. *Temple University*, 366 F. Supp. 835 (ED Pa. 1973); *Wirtz* v. *Hayes Industries, Inc.*, 1 EPD ¶ 9874 (ND Ohio 1968).

[10] As the District Court explained:

"The more difficult question is whether there is a right to contribution under federal law. The traditional American rule, originating in the English case of *Merryweather* v. *Nixan*, was that there was no right to contribution between joint tortfeasors. This rule has been abrogated in most states, principally by statute although a few jurisdictions, includ-

be served by allowing contribution. Assuming, without deciding, that contribution might be denied for an intentional wrong, the court denied the unions' motions to dismiss, holding "only that there is a federal common law right to contribution for monetary liability imposed under Title VII, at least under some circumstances, and it will reach the questions as to the precise parameters of this right when the pertinent facts have been developed and properly placed before the Court." *Id.*, at 18b.[11]

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ing the District of Columbia, have done so by decisional law. As with state law, there was initially no right to contribution under federal law, absent legislation. *Union Stock Yards Co.* v. *Chicago, B & Q R. Co.*, 196 U. S. 217, 224 (1905). However, the modern trend, as evidenced by cases such as *Kohr* v. *Allegheny Airlines, Inc.*, 504 F. 2d 400 (7th Cir. 1974), *cert. denied*, 421 U. S. [978] (1975), has been to recognize a right to contribution under federal law. *Gould* v. *American-Hawaiian Steamship Company*, 387 F. Supp. 163, 169 (D. Del. 1974), *vacated on other grounds*, 535 F. 2d 761 (3rd Cir. 1976). The federal courts have come to realize that the policy considerations upon which the traditional rule was built are archaic and lead to inequities. Indeed, the most extensive body of law evidencing a significant trend toward fashioning a federal common law right to contribution concerns contribution for back pay awarded under Title VII." App. to Pet. for Cert. 11b–12b (footnotes omitted).

[11] The weight of authority in the lower federal courts supports the District Court's conclusion that a right to contribution is available to employers found liable for backpay under Title VII. See, *e. g.*, *Glus* v. *G. C. Murphy Co.*, 629 F. 2d 248 (CA3 1980), cert. pending, No. 80–461; *Stevenson* v. *International Paper Co.*, 432 F. Supp. 390 (WD La. 1977); *International Union of Electrical, Radio, and Machine Workers* v. *Westinghouse Electric Corp.*, 73 F. R. D. 57 (WDNY 1976); *Grogg* v. *General Motors Corp.*, 72 F. R. D. 523 (SDNY 1976); *Lynch* v. *Sperry Rand Corp.*, 62 F. R. D. 78 (SDNY 1973); *Gilbert* v. *General Electric Co.*, 59 F. R. D. 267 (ED Va. 1973); *Osborne* v. *McCall Printing Co.*, 4 FEP Cases 276 (SD Ohio 1972); *Torockio* v. *Chamberlain Mfg. Co.*, 51 F. R. D. 517 (WD Pa. 1970); *Blanton* v. *Southern Bell Telephone & Telegraph Co.*, 49 F. R. D. 162 (ND Ga. 1970); *Bowe* v. *Colgate-Palmolive Co.*, 272 F. Supp. 332 (SD Ind. 1967), aff'd in part and rev'd in part, 416 F. 2d 711 (CA7 1969). But see *Younger* v. *Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743 (WD Va. 1976), vacated on other grounds, 561 F. 2d 563 (CA4 1977); *Harden* v. *Illinois Bell*

The unions took an interlocutory appeal from the Title VII holding,[12] and petitioner appealed the Equal Pay Act holding.[13] The Court of Appeals affirmed the dismissal of the claim for contribution based on petitioner's liability under the Equal Pay Act, reasoning that such a claim would be inconsistent with the statutory scheme prescribing three, and only three, modes of enforcement.[14] However, the Court of Appeals declined to reach the Title VII issue. Noting that on appeal the unions had asserted for the first time that petitioner's Title VII contribution claim was barred by laches, the court remanded to the District Court with in-

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Telephone Co., No. 74 C 1505 (ND Ill., Apr. 8, 1975). Cf. *Communication Workers of America* v. *Illinois Bell Telephone Co.*, 12 EPD ¶ 11,275 (ND Ill. 1976).

[12] The District Court entered an appropriate order under 28 U. S. C. § 1292 (b), and the Court of Appeals allowed the interlocutory appeal.

[13] The District Court made the findings required by Rule 54 (b) of the Federal Rules of Civil Procedure.

[14] The Court of Appeals described this statutory scheme in detail:

"It is improbable that an employee would ever have an implied cause of action under the Equal Pay Act against his union. The statutory scheme envisions three modes of enforcement and to imply a fourth would be inconsistent with the intent evidenced by the existing three. First, under section 216 (a) of title 29, U. S. Code, 'any person' who wilfully violates the Act may be subject to criminal penalties. Under section 216 (c), the Secretary of Labor may bring suit to recover money owing 'to any employee or employees.' Finally, section 216 (b) of title 29 permits suits by employees against 'any employer' who violates the Act. The statutory scheme of enforcement is comprehensive and by omission, it insulates unions from suits by employees. This statutory protection would certainly be frustrated by a declaration that an *employer* could recover from a union, once that employer had been found liable to its employees. Of course, we need not—and do not—definitely resolve the issue of an employee's right to sue a union under the Act. We hold only that the likelihood of the implication of such a right is sufficiently remote to preclude the creation of a cause of action against a union for contribution or indemnification. Such a cause of action would, in reality, create liability on the part of the union for the benefit of employees whom Congress did not intend to protect in such a manner." 196 U. S. App. D. C. 443, 448, 606 F. 2d 1350, 1355 (1979) (footnote omitted).

structions to determine the laches question, explaining that it might thereby become unnecessary to decide the hard question concerning contribution for Title VII liability. 196 U. S. App. D. C. 443, 449, 606 F. 2d 1350, 1356 (1979).

Unlike the Court of Appeals, we think the basic legal questions raised by the motions to dismiss petitioner's contribution claims are ripe for decision.[15] The importance of these questions led us to grant certiorari. 447 U. S. 920.

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We first put to one side certain questions that we need not address. We shall then discuss the two quite different theories that might support petitioner's claimed right to contribution.

At common law there was no right to contribution among joint tortfeasors.[16] In most American jurisdictions, however,

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[15] As our discussion of the implied right of action and federal common-law theories will indicate, see Parts II and III, *infra*, we find that the same legal questions are presented by both the Equal Pay Act and Title VII contribution claims. Because the same analysis is applicable to both claims, we address the Title VII question despite the Court of Appeals' decision to avoid consideration of that question on the merits. See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 470–471, n. 14; *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 583–584, n. 24. It should be noted that the reasons for avoiding the unnecessary or premature decision of constitutional questions are not necessarily applicable to the decision of statutory questions. For if an interpretation of a statute misapprehends the actual intent of Congress or is proved by experience to have been unwise, remedial legislation can be promptly enacted.

[16] The no-contribution rule of the common law is generally traced to *Merryweather* v. *Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K. B. 1799). However, scholars have persuasively argued that *Merryweather* cannot be read to establish a general rule prohibiting contribution among joint tortfeasors; rather, they interpret *Merryweather* to announce only a rule barring contribution in cases of intentional wrongdoing. See, *e. g.*, W. Prosser, Law of Torts § 50, pp. 305–306 (4th ed. 1971); Sullivan, New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution, 1980 U. Ill. Law Forum 389, 392–393. Nevertheless, be-

that rule has been changed either by statute or by judicial decision.[17] Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for

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cause most American courts understood *Merryweather* as a general proscription of contribution, the common law in this country traditionally prohibited contribution among joint tortfeasors in all cases. See *Union Stock Yards Co.* v. *Chicago B. & Q. R. Co.*, 196 U. S. 217.

[17] Thirty-nine States and the District of Columbia recognize to some extent a right to contribution among joint tortfeasors. In 10 jurisdictions, the common-law rule was initially changed by judicial action. See *George's Radio, Inc.* v. *Capital Transit Co.*, 75 U. S. App. D. C. 187, 126 F. 2d 219 (1942); *Skinner* v. *Reed-Prentice Div. Package Machinery Co.*, 70 Ill. 2d 1, 374 N. E. 2d 437 (1977); *Best* v. *Yerkes*, 247 Iowa 800, 77 N. W. 2d 23 (1956); *Quatray* v. *Wicker*, 178 La. 289, 151 So. 208 (1933); *Bedell* v. *Reagan*, 159 Me. 292, 192 A. 2d 24 (1963); *Underwriters at Lloyds* v. *Smith*, 166 Minn. 388, 208 N. W. 13 (1926); *Royal Indemnity Co.* v. *Aetna Casualty & Surety Co.*, 193 Neb. 752, 229 N. W. 2d 183 (1975); *Goldman* v. *Mitchell-Fletcher Co.*, 292 Pa. 354, 141 A. 231 (1928); *Davis* v. *Broad Street Garage*, 191 Tenn. 320, 232 S. W. 2d 355 (1950); *Ellis* v. *Chicago & N. W. R. Co.*, 167 Wis. 392, 167 N. W. 1048 (1918). Four of these States later adopted contribution statutes. See La. Civ. Code Ann., Arts. 2100–2105 (West 1977); Pa. Stat. Ann., Tit. 42, §§ 8321–8327 (Purdon Supp. 1980); Tenn. Code Ann. §§ 23–3101 to 23–3106 (Supp. 1979); Wis. Stat. §§ 113.01–113.11 (1977). The remaining States relied upon legislative action to change the common-law rule. See Alaska Stat. Ann. §§ 09.16.010 to 09.16.060 (1980); Ark. Stat. Ann. §§ 34–1001 to 34–1009 (1962); Cal. Civ. Proc. Code Ann. §§ 875–880 (West 1980 and Supp. 1981); Colo. Rev. Stat. §§ 13–50.5–101 to 13–50.5–106 (Supp. 1980); Del. Code Ann., Tit. 10, §§ 6301–6308 (1975); Fla. Stat. § 768.31 (Supp. 1979); Ga. Code § 105–2012 (1978); Haw. Rev. Stat. §§ 663–11 to 663–17 (1976); Idaho Code §§ 6–803 to 6–806 (1979); Kan. Stat. Ann. § 60–2413 (1976); Ky. Rev. Stat. §§ 412.010–412.060 (1972); Md. Ann. Code, Art. 50, §§ 16–24 (1979); Mass. Gen. Laws Ann., ch. 231B, §§ 1–4 (West Supp. 1981); Mich. Comp. Laws Ann. §§ 600.2925a–600.2925d (West Supp. 1980–1981); Miss. Code Ann. § 85–5–5 (1972); Mo. Rev. Stat. § 537.060 (1978); Nev. Rev. Stat. §§ 17.225–17.305 (1979); N. J. Stat. Ann. §§ 2A:53A–1 to 2A:53A–5 (West 1952); N. M. Stat. Ann. §§ 41–3–1 to 41–3–8 (1978); N. Y. Civ. Prac. Law §§ 1401–1404 (McKinney 1976); N. C. Gen. Stat. §§ 1B–1 to 1B–6 (1969); N. D. Cent. Code §§ 32–38–01 to 32–38–04 (1976); Ore. Rev. Stat. §§ 18.440–18.460 (1979); R. I. Gen. Laws §§ 10–6–1 to 10–6–11

the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability.[18] Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.[19]

In this case, we assume that all of the elements of a typical contribution claim are established. This means that we assume that the plaintiffs in the *Laffey* litigation could have recovered from either the union or the employer, under both the Equal Pay Act and Title VII,[20] and that it is unfair to

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(1969 and Supp. 1980); S. D. Comp. Laws Ann. §§15–8–11 to 15–8–22 (1967); Tex. Rev. Civ. Stat. Ann., Art. 2212a, § 2 (Vernon Supp. 1980–1981); Utah Code Ann. §§ 78–27–39 to 78–27–43 (1977); Va. Code §§ 8.01–34, 8.01–35.1 (1977 and Supp. 1980); W. Va. Code § 55–7–13 (1981); Wyo. Stat. §§ 1–1–110 to 1–1–113 (1977).

[18] See Restatement (Second) of Torts § 886A (1979); Prosser, *supra,* at 307–309.

[19] See *Judson* v. *Peoples Bank & Trust Co.,* 17 N. J. 67, 88–89, 110 A. 2d 24, 34 (1954); Prosser, *supra,* § 50.

[20] Implicit in this assumption are two other important assumptions. First, we assume, as alleged in the complaint, that the unions are in fact at least partially responsible for the Equal Pay Act and Title VII violations established in the *Laffey* litigation. Second, we assume that the *Laffey* plaintiffs, if they had so chosen, could have asserted a claim for monetary relief against their unions under both the Equal Pay Act and Title VII. Title VII expressly provides for such private actions. See 42 U. S. C. §§ 2000e–5 (f), 2000e–5 (g). However, the Equal Pay Act does not expressly create such a right of action, and the lower federal courts have generally refused to find that the Act implicitly created this right. See, *e. g., Tuma* v. *American Can Co.,* 367 F. Supp. 1178 (NJ 1973). Cf. *Hodgson* v. *Sagner, Inc.,* 326 F. Supp. 371 (Md. 1971), aff'd, 462 F. 2d 180 (CA4 1972).

The Court of Appeals in this case relied upon the uncertain availability of such a remedy under the Equal Pay Act as a basis for rejecting petitioner's claim for contribution. 196 U. S. App. D. C., at 447–449, 606 F. 2d, at 1354–1356. The availability of this implied remedy, however, is relevant primarily to the question whether the elements of a contribution

require petitioner to pay the entire judgment. Furthermore, although the adversaries disagree with respect to whether recognition of a right to contribution would undermine or advance the policies of the Equal Pay Act and Title VII—and, indeed, the Equal Employment Opportunity Commission has staunchly argued both sides of that policy question at different stages of this litigation [21]—we assume that the policy considerations favor the recognition of the right.

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claim have been established; if no right to contribution exists at all, it is irrelevant that the elements of a traditional contribution claim may or may not have been established in this case. Because we conclude that no right to contribution exists under either the statute or the federal common law, we need not decide whether the elements of a contribution claim have been established in this case. Therefore, we need not and do not decide the question whether employees have an implied right of action for back-pay against their unions for violations of the Equal Pay Act.

[21] The EEOC filed a brief as *amicus curiae* in the Court of Appeals arguing as follows:

"Recognizing a right to contribution for Title VII liability against a person who was not named in an EEOC charge is fully consistent with the substantive and remedial policies of the statute. . . .

". . . Permitting a party to assert a contribution claim against another who has violated the Title, where that person was not named in a charge through inadvert[e]nce or design, manifestly serves the primary, prophylactic purpose of Title VII.

. . . . . .

"It cannot be inferred that claims for contribution constitute an exception to this policy, because there is no necessary inconsistency between the statutory scheme of Title VII and the assertion of a right to contribution for Title VII liability. This is because an employer seeking contribution is not asserting that it has been injured by conduct unlawful under the statute, but rather it is asserting an equitable claim to reimbursement, enforced at common law, from another wrongdoer who shares common liability." Brief for EEOC as *Amicus Curiae* in No. 78–1056 (CADC), pp. 12–14.

In this Court, however, the EEOC argues as follows:

"Contribution would undermine the policies, and interfere with enforcement, of the Equal Pay Act. . . . For somewhat different reasons, contribution would undermine the policies, and interfere with enforcement, of Title VII." Brief for United States and EEOC as *Amici Curiae* 5.

And, as argued by petitioner, we assume that the respondent unions in this case, as well as other unions in other industries,[22] bear significant responsibility for discriminatory practices that these statutes were designed to prohibit. Finally, we assume that there are circumstances in which an employer may be a "person aggrieved" by union conduct that would be remediable after a timely charge is filed against the union under § 706 (b) of Title VII, 42 U. S. C. § 2000e–5 (b).[23] None of these assumptions, however, provides a sufficient basis for recognizing the right petitioner is asserting in this proceeding.

That right may have been created in either of two ways. First, it may have been created by statute when Congress enacted the Equal Pay Act or Title VII. Even though Congress did not expressly create a contribution remedy, if its intent to do so may fairly be inferred from either or both statutes, an implied cause of action for contribution could be recognized on the basis of the analysis used in cases such as *Cort* v. *Ash*, 422 U. S. 66, *Cannon* v. *University of Chicago*, 441 U. S. 677, and *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754. Second, a cause of action for contribution may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct. See, *e. g.*, *Kohr* v. *Allegheny Airlines, Inc.*,

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[22] See *Steelworkers* v. *Weber*, 443 U. S. 193, 198, and n. 1; Note, Union Liability for Employer Discrimination, 93 Harv. L. Rev. 702 (1980).

[23] The federal courts that have recognized a right to contribution under Title VII are divided with respect to whether that right may be asserted against a union that has not been named in a charge filed with the EEOC. Compare *Osborne* v. *McCall Printing Co.*, 4 FEP Cases 276 (SD Ohio 1972); *Blanton* v. *Southern Bell Telephone & Telegraph Co.*, 49 F. R. D. 162 (ND Ga. 1970); *Torockio* v. *Chamberlain Mfg. Co.*, 51 F. R. D. 517 (WD Pa. 1970), with *Stevenson* v. *International Paper Co.*, 432 F. Supp. 390 (WD La. 1977); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (CA7 1969). Cf. *Gilbert* v. *General Electric Co.*, 59 F. R. D. 267 (ED Va. 1973).

504 F. 2d 400 (CA7 1974), cert. denied, 421 U. S. 978. For somewhat different reasons, we reject both theories.

II

In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction. See *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 568. The ultimate question in cases such as this is whether Congress intended to create the private remedy—for example, a right to contribution—that the plaintiff seeks to invoke. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 15–16; *Universities Research Assn., Inc., supra,* at 770. Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies. See *Cort* v. *Ash, supra,* at 78; *Cannon, supra,* at 689–709.

In matters of statutory construction, it is appropriate to begin with the language of the statute itself. See *Touche Ross & Co., supra,* at 568; *Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 337. Neither the Equal Pay Act nor Title VII expressly creates a right to contribution in favor of employers. This omission, although significant,[24] is not dispositive if, among other

[24] Congress expressly provided for contribution among joint wrongdoers in the Securities Act of 1933, see 15 U. S. C. § 77k (f), and in the Securities Exchange Act of 1934, see 15 U. S. C. §§ 78i (e), 78r (b). Thus, at least in these instances, when Congress wanted to provide a right to contribution, it did so expressly.

A number of federal courts have recognized an implied right to contribution under the securities laws where the underlying liability resulted from an implied private right of action. These courts have reasoned that because Congress expressly created a right to contribution to correspond to certain express civil remedies, contribution should also be permitted when liability is based on an implied civil remedy. See, *e. g., Heizer Corp.* v. *Ross,* 601 F. 2d 330 (CA7 1979); *Globus, Inc.* v. *Law Research Service,*

things, the language of the statutes indicates that they were enacted for the special benefit of a class of which petitioner is a member. See *Cannon, supra,* at 689. However, as the District Court correctly perceived, it cannot possibly be said that employers are members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted. App. to Pet. for Cert. 5b.[25] To the contrary, both statutes are expressly directed against employers; Congress intended in these statutes to regulate their conduct for the benefit of employees.[26] In light of this fact, petitioner "can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection." *Piper* v. *Chris-Craft Industries, Inc.,* 430 U. S. 1, 37.

Even if we focus upon the isolated provisions in each statute that arguably were intended to provide special protection

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Inc., 318 F. Supp. 955 (SDNY 1970), aff'd, 442 F. 2d 1346 (CA2 1971), cert. denied, 404 U. S. 941. Whatever the merit of this reasoning, a question we do not now address, these decisions provide no support for petitioner in this case.

[25] The Court of Appeals rejected the District Court's literal application of the first *Cort* v. *Ash* factor, finding it inappropriate for evaluation of a contribution claim. 196 U. S. App. D. C., at 447, 606 F. 2d, at 1354. Rather than focusing on the rights conferred upon employers by the Equal Pay Act, the court reasoned that the proper inquiry was to determine whether employees could bring suit against their unions under this statute. Viewed in this light, the first *Cort* factor was easily satisfied in this case; employees clearly were within the class for whose especial benefit the Equal Pay Act was enacted. 196 U. S. App. D. C., at 447–448, 606 F. 2d, at 1354–1355. However, this analysis confuses the question whether the elements of a contribution claim—in particular, common liability—are established in a given case, with the question whether Congress intended that contribution should be available under any circumstances. See n. 20, *supra.* The Court of Appeals erred in this case because it failed to focus on whether the party seeking to invoke the implied remedy is a member of a class that Congress intended to benefit.

[26] Indeed, inasmuch as petitioner was found guilty in the *Laffey* litigation of discrimination in violation of these statutes, it is a member of the *precise* class Congress intended to regulate.

for employers,[27] the same result follows. For those provisions, construed most favorably to petitioner, could at most provide a basis for implying a remedy for harm to an employer caused by union wrongdoing. Such a remedy for a violation of the employer's rights would be entirely different from a right to compel the union to share the responsibility for a joint violation of a third party's rights. Clearly, the language of neither statute supports implication of a right to contribution in favor of employers against unions.[28]

The structure of the statutes similarly counsels against recognition of the implied right petitioner advocates in this case. The Equal Pay Act and Title VII establish comprehensive programs designed to eliminate certain varieties of employment discrimination. The statutes make express provision for private enforcement in certain carefully defined circumstances, and provide for enforcement at the instance of the Federal Government in other circumstances.[29] The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to

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[27] Section 3 of the Equal Pay Act provides:

"No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection." 29 U. S. C. § 206 (d) (2).

Section 703 (c) (3) of Title VII provides:

"(c) . . . It shall be an unlawful employment practice for a labor organization—

. . . . . .

"(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U. S. C. § 2000e–2 (c) (3).

[28] A court's broad power under § 706 (g), 42 U. S. C. § 2000e–5 (g), to fashion relief against all respondents named in a properly filed charge is not, of course, at issue in this litigation since no charge was filed against either of the respondent unions.

[29] See *Glus* v. *G. C. Murphy Co.*, 629 F. 2d, at 265 (Sloviter, J., dissenting).

authorize additional remedies.[30] It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress.

Finally, we conclude that the legislative histories of the Equal Pay Act and Title VII provide no support for petitioner's position.[31] As the parties recognize, the legislative history of neither statute contains any reference, adverse or favorable, to contribution. Of course, such legislative silence is often encountered in implied-right-of-action cases; it is to be expected that "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon,* 441 U. S., at 694. Therefore, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors,* 444 U. S., at 18. But unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. In this case, we have been unable to discover any manifestation of an intent on the part of Congress to create a right to contribution in favor of employers under the Equal Pay Act and Title VII. Accord-

[30] "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453, 458. This principle of statutory construction applies with full force in this case. See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 19–20.

[31] In a case in which neither the statute nor the legislative history reveals a congressional intent to create a private right of action for the benefit of the plaintiff, we need not carry the *Cort* v. *Ash* inquiry further. See *Universities Research Assn., Inc.* v. *Coutu,* 450 U. S. 754, 770–771, n. 21; *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 575–576; *id.,* at 579–580 (BRENNAN, J., concurring).

ingly, we hold that there is no implied right to contribution under those statutes.

III

Although it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition, it remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers. See *United States* v. *Standard Oil Co.*, 332 U. S. 301, 313. Broadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition. The Court also has recognized a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States,[32] or the resolution of interstate controversies.[33] However, we consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is "subject to the paramount authority of Congress." *New Jersey* v. *New York*, 283 U. S. 336, 348.[34]

A narrow exception to the limited lawmaking role of the federal judiciary is found in admiralty. We consistently

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[32] See, *e. g.*, *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367; *Miree* v. *DeKalb County*, 433 U. S. 25, 31–32; *United States* v. *Standard Oil Co.*, 332 U. S., at 316.

[33] See, *e. g.*, *Illinois* v. *Milwaukee*, 406 U. S. 91; *Kansas* v. *Colorado*, 206 U. S. 46, 97; *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110.

[34] Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law. See, *e. g.*, *Illinois* v. *Milwaukee*, *supra*, at 107; *Arizona* v. *California*, 373 U. S. 546, 565–566.

have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law. See *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 20–21.[35] Because "the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," *id.*, at 20, "[a]dmiralty law is judge-made law to a great extent." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 259. Even in admiralty, however, where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress.[36]

Pursuant to our authority to fashion flexible and equitable remedies in admiralty, see *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409, we approved a nonstatutory federal right to contribution among joint tortfeasors in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106. In that case, relying upon ancient admiralty doctrine, we held that a shipowner may obtain contribution from another tortfeasor jointly responsible for causing injury to a longshoreman. However, contrary to petitioner's argument and the understanding of some lower federal courts,[37] *Cooper Stevedoring* did not recognize a general federal right to contribution, and no such general federal right has been recognized in any other

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[35] An analogous situation is presented under § 301 (a) of the Labor Management Relations Act, 29 U. S. C. § 185 (a). In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, we concluded that § 301 (a) supplied a basis for federal jurisdiction over certain cases and an authorization for judicial development of substantive federal law to govern those cases.

[36] See, *e. g.*, *Edmonds*, 443 U. S., at 271–273; *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625; *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 285–287; *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106, 111–113.

[37] See, *e. g.*, *Glus* v. *G. C. Murphy Co.*, 629 F. 2d, at 253; *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179, 1183 (CA8 1979); *Cohen* v. *United States*, 1975–1 USTC ¶ 9391, p. 86,967 (ED Mich. 1975).

decisions of this Court.[38] Our approval of contribution in *Cooper Stevedoring* was based on traditional admiralty doctrine [39] and on the power of the federal judiciary to fashion rules of law in admiralty. Neither of the predicates for that decision is applicable in the present context.

The liability of petitioner for discriminating against its female cabin attendants is entirely a creature of federal statute. In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. Cf. *Mobil Oil Corp.* v. *Higginbotham,* 436 U. S. 618, 625. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. Both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are such statutes. The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.[40]

Last Term, in *Mohasco Corp.* v. *Silver,* 447 U. S. 807, we had occasion to consider the enforcement scheme of Title VII with some care. Although equitable considerations strongly supported a nonliteral reading of the statutory provisions re-

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[38] Of course, federal courts, including this Court, have recognized a right to contribution under state law in cases in which state law supplied the appropriate rule of decision. See, *e. g., United States* v. *Yellow Cab Co.,* 340 U. S. 543; *Gomes* v. *Brodhurst,* 394 F. 2d 465 (CA3 1967). These cases are inapposite here.

[39] As we emphasized in *Cooper Stevedoring,* the tradition of division of damages was unique to admiralty and had been rejected at common law. 417 U. S., at 110.

[40] As *Halcyon Lines, supra,* demonstrates, even in admiralty we decline to fashion new remedies if there is a possibility that they may interfere with a legislative program. See *Cooper Stevedoring, supra,* at 111–113.

garding the time during which a claim could be asserted, see *id.*, at 827–828 (BLACKMUN, J., dissenting), we concluded that we had a duty to "respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." *Id.*, at 826. In this case, as in *Mohasco,* a favorable reaction to the equitable considerations supporting petitioner's contribution claim is not a sufficient reason for enlarging on the remedial provisions contained in these carefully considered statutes.[41]

Whatever may be a federal court's power to fashion remedies in other areas of the law,[42] we are satisfied that it would be improper for us to add a right to contribution to the statutory rights that Congress created in the Equal Pay Act and Title VII. The judgment of the Court of Appeals is therefore modified insofar as it fails to direct the District Court to grant

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[41] The equitable considerations advanced by petitioner are properly addressed to Congress, not to the federal courts. Congress is best able to evaluate these policy considerations:

"[T]he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them." *United States* v. *Gilman,* 347 U. S. 507, 511–513.

[42] Presently pending before us is a case presenting the question whether contribution is available under the federal antitrust laws. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* No. 79–1144. Although that question is analogous to the question addressed in this case, we note that *Texas Industries* involves a substantially different statutory scheme. In antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute. See *National Society of Professional Engineers* v. *United States,* 435 U. S. 679, 688.

respondent unions' motions to dismiss the complaint. Accordingly, the judgment of the Court of Appeals is affirmed in part and vacated in part.

It is so ordered.

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

CITY OF MEMPHIS ET AL. *v.* GREENE ET AL.

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

No. 79–1176. Argued December 3, 1980—Decided April 20, 1981

The city of Memphis decided to close the north end of a street (West Drive) that traverses a white residential community (Hein Park), the area to the north of which is predominantly black. West Drive is one of three streets that enter Hein Park from the north. The stated reasons for the closing were to reduce the flow of traffic using Hein Park streets, to increase safety to children who live in Hein Park or use it to walk to school, and to reduce "traffic pollution" in the residential area. Respondents, residents of the predominantly black area, and two civic associations brought a class action in Federal District Court against the city and various officials, alleging that the street closing violated 42 U. S. C. § 1982—which entitles all citizens to "have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property"—and also violated the Thirteenth Amendment, as constituting "a badge of slavery." Ultimately, the District Court entered judgment for the defendants, holding that the street closing did not create a benefit for white citizens which was denied black citizens, that racially discriminatory intent or purpose had not been proved, and that the city had not departed significantly from normal procedures in authorizing the closing. The Court of Appeals reversed and remanded, holding that the street closing was invalid because it adversely affected respondents' ability to hold and enjoy their property. The court concluded that relief under § 1982 was required by the facts (1) that the closing would benefit a white neighborhood and adversely affect blacks; (2) that a barrier was to be erected at the point of separation of the white and black neighborhoods and would have the effect of limiting contact between them; (3) that the closing was not part of a citywide plan but rather was a "unique step to protect one neighborhood from outside influences which the residents considered to be 'undesirable'"; and (4) that there was evidence of economic depreciation in the property values in the predominantly black area.

Held:

1. The record and the District Court's findings do not support the Court of Appeals' conclusions. Pp. 110–119.

2. The street closing did not violate § 1982. The evidence failed to show that the street closing would prevent blacks from exercising the same property rights as whites, that it depreciated the value of blacks' property, or that it severely restricted access to black homes. Rather, the record discloses that respondents' only injury is the requirement that one street rather than another must be used for certain trips within the city. Such an injury does not involve any impairment to the kind of property interests identified as being within the reach of § 1982. Pp. 120–124.

3. Nor did the street closing violate the Thirteenth Amendment. A review of the justification for the closing demonstrates that its disparate impact on black citizens could not be fairly characterized as a badge or incident of slavery. The record discloses no discriminatory motive on the city's part, but rather that the interests of safety and tranquility that motivated the closing are legitimate. Such interests are sufficient to justify an adverse impact on motorists who are somewhat inconvenienced by the street closing. That inconvenience cannot be equated to an actual restraint on liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate. Pp. 124–129.

610 F. 2d 395, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 129. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 135.

Clifford D. Pierce, Jr., argued the cause for petitioners. With him on the brief was *Charles V. Holmes.*

Alvin O. Chambliss, Jr., argued the cause for respondents and filed a brief for respondent Greene. *A. C. Wharton, Jr.*, *William L. Robinson, Beatrice Rosenberg, Richard S. Kohn,* and *Norman J. Chachkin* filed a brief for respondents Owens et al.*

**George E. Morrow* and *John G. McCleery, Jr.*, filed a brief for the Hein Park Civic Association as *amicus curiae* urging reversal.

Doris Peterson filed a brief for the Affirmative Action Coordinating Center et al. as *amici curiae* urging affirmance.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether a decision by the city of Memphis to close the north end of West Drive, a street that traverses a white residential community, violated § 1 of the Civil Rights Act of 1866, Rev. Stat. § 1978, 42 U. S. C. § 1982, or the Thirteenth Amendment to the United States Constitution.[1] The city's action was challenged by respondents, who resided in a predominantly black area to the north. The Court of Appeals ultimately held the street closing invalid because it adversely affected respondents' ability to hold and enjoy their property. 610 F. 2d 395. We reverse because the record does not support that holding.

I

Most of the relevant facts concerning the geography, the decision to close the street, and the course of the litigation are not in dispute. The inferences to be drawn from the evidence, however, are subject to some disagreement.

A. *Geography*

Hein Park, a small residential community in Memphis, Tenn., is bounded on three sides by thoroughfares and on the west by the campus of Southwestern University. West Drive is a two-lane street about a half mile long passing through the center of Hein Park. Its southern terminus is a short distance from an entrance to Overton Park, a large recreation

[1] Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Thirteenth Amendment provides:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

area containing, among other facilities, the municipal zoo.[2] Its northern terminus is at the intersection of Jackson Ave. and Springdale St., two heavily traveled four-lane avenues. West Drive is one of three streets that enter Hein Park from the north; two streets enter from the east.

The closing will have some effect on both through traffic and local traffic. Prior to the closing, a significant volume of traffic southbound on Springdale St. would continue south on West Drive and then—because of the location of Overton Park to the south of Hein Park—make either a right or a left turn to the next through street a few blocks away, before resuming the southerly route to the center of the city. The closing of West Drive will force this traffic to divert to the east or west before entering Hein Park, instead of when it leaves, but the closing will not make the entire route any longer. With respect to local traffic, the street closing will add some distance to the trip from Springdale St. to the entrance to Overton Park and will make access to some homes in Hein Park slightly less convenient.

The area to the north of Hein Park is predominantly black. All of the homes in Hein Park were owned by whites when the decision to close the street was made.

B. *City Approval*

In 1970, residents of Hein Park requested the city to close four streets leading into the subdivision. After receiving objections from the police, fire, and sanitation departments, the city denied the request.[3] In its report regarding the appli-

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[2] Overton Park was described in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402, 406:

"Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theater, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest."

[3] See Trial Exhibit 14. This history points up the distinction between what the local residents may request or desire and what action the city

cation, the city's Traffic Engineering Department noted that much of the traffic through the subdivision could be eliminated by closing West Drive at Jackson Ave. Trial Exhibit 14. Thereafter, on July 9, 1973, members of the Hein Park Civic Association filed with the Memphis and Shelby County Planning Commission a formal "Application to Close Streets or Alleys" seeking permission to close West Drive for 25 feet south of Jackson Ave. See Trial Exhibit 13, App. 135. The application was signed by the two property owners abutting both Jackson Ave. and West Drive and all but one of the other West Drive homeowners on the block immediately south of Jackson Ave. *Ibid.*[4] The stated reasons for the closing were:

> "(1) Reduce flow of through traffic using subdivision streets.
>
> "(2) Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School.
>
> "(3) Reduce 'traffic pollution' in a residential area, e. g., noise, litter, interruption of community living." *Ibid.*

After receiving the views of interested municipal departments, the County Planning Commission on November 1, 1973, recommended that the application be approved with the conditions that the applicants provide either an easement for existing and future utility company facilities or the funds to relocate existing facilities and that the closure provide clearance for fire department vehicles. Trial Exhibit 4, App. 130. The City Council held a hearing at which both proponents and opponents of the proposal presented their views, and the Council adopted a resolution authorizing the closing

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may authorize. It is, of course, the city's action that is challenged in this litigation.

[4] Only the signatures of the "abutting property owners" were required on the application.

subject to the conditions recommended by the Planning Commission. See Trial Exhibit 26. The city reconsidered its action and held additional hearings on later dates but never rescinded its resolution.[5] See Trial Exhibits 27–30, 41.

C. *Litigation*

In a complaint filed against the city and various officials in the United States District Court for the Western District of Tennessee on April 1, 1974, three individuals and two civic associations, suing on behalf of a class of residents north of Jackson Ave. and west of Springdale St., alleged that the closing was unconstitutional and prayed for an injunction requiring the city to keep West Drive open for through traffic.[6] The District Court granted a motion to dismiss, holding that the complaint, as amended, failed to allege any injury to the plaintiffs' own property or any disparate racial effect,[7] and

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[5] The opponents of the closing submitted to the Council written objections containing approximately 1,000 signatures.

[6] App. 4–5. In 1977, the District Court granted a motion to intervene made by three additional individual plaintiffs who lived north of Jackson Ave. *Id.*, at 46–54. The class ultimately certified by the District Court consisted of "black persons in the City of Memphis who own or stand to inherit property surrounding and adjoining the area along West Drive and Hein Park Subdivision." Stipulation of Parties as to Maintenance of Cause as a Rule 23 (b)(2) Class Action, Record Doc. No. 23; Order Granting Motion to Amend and Certification of Class Action, App. 67. The original complaint also challenged the city's action in striking from the municipal budget the construction of a $750,000 federal-state financed community center in the plaintiffs' neighborhood. *Id.*, at 4. No question related to that challenge remains in the litigation.

[7] "None of the plaintiffs [live] on West Drive; none are deprived of reasonable ingress and egress to their property; the street is not proposed to be closed to blacks and open to whites. In short, the effect of the proposed closing, whether wise or unwise, is the same upon whites as it is to blacks. *Palmer* v. *Thompson*, 403 U. S. 217 . . . . There is no facial discriminatory import to the resolution of closure, and there is no assertion that it will be implemented or administered in a racially discriminatory fashion or effect. Plaintiffs complain only that they will be denied access

that they had no standing as affected property owners to raise procedural objections to the city's action.[8]

The United States Court of Appeals for the Sixth Circuit reversed. The court first noted that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which will entitle him to relief." 535 F. 2d 976, 978. The court concluded that respondents' complaint, fairly construed, alleged that the city had conferred certain benefits—"*to wit,* the privacy and quiet of an exclusive dead-end street"—on white residents that it refused to confer on similarly situated black residents. *Ibid.* Accordingly, the court held that if respondents could prove that city officials conferred the benefit of a closed street on West Drive residents "because of their color," respondents would have a valid claim under either 42 U. S. C. § 1982 or § 1983. 535 F. 2d, at 979.[9]

Following the remand, the case was transferred to Judge McRae for trial. Respondents amended their pleadings and, in pretrial discovery, reviewed all street closings in Memphis during the prior 10-year period as well as the entire record

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to West Drive from the north just as every other citizen will be." *Id.,* at 29–30 (footnote omitted).

[8] "Plaintiffs have no constitutional property rights in continued access to West Drive under the facts asserted or on the basis asserted in the complaint. They have no standing as affected property owners on the street to due process notice and hearing." *Id.,* at 31.

[9] The Court of Appeals summarized its holding as follows:

"To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation. . . .

". . . According to the instant complaint allegations, the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street." 535 F. 2d, at 979–980.

concerning the closing of West Drive. An elaborate pretrial order entered on February 9, 1978, identified three contested issues of fact:

> "(a) Whether the defendants, by closing West Drive, have conferred certain benefits on white residents of West Drive that they have refused to confer on similarly situated black neighborhoods because of their color.
>
> "(b) Whether a discriminatory purpose was a motivating factor in the decision of the City Council to close West Drive.
>
> "(c) Whether the defendants and their agents complied with the normal procedural sequence in processing the application to close a portion of West Drive. If not, the extent to which they failed to comply." App. 87.

After a full trial Judge McRae filed a detailed memorandum decision in which he found against the respondents on each of the three contested issues of fact. He specifically concluded that the action of the City Council closing West Drive "did not create a benefit for white citizens which has been denied black citizens";[10] that racially discriminatory intent or purpose had not been proved;[11] and that the city

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[10] "Upon a consideration of the facts established, this Court concludes that the action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens." App. 159.

[11] "This Court concludes that the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation.

"As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black

had not departed significantly from normal procedures in authorizing the closing.[12] Accordingly, the District Court entered judgment for the city.

The Court of Appeals did not reject any of the District Court's findings of fact. The Court of Appeals did hold, however, that Judge McRae had erred by limiting his focus to the issue of whether the city had granted a street closing application made by whites while denying comparable benefits to blacks. 610 F. 2d, at 400–401. Although the Court of Appeals recognized that the reasoning of its earlier opinion could have induced such a narrow focus, and that the record supported Judge McRae's findings on this issue, the court held that the respondents need not show that the city had denied street-closing applications submitted by black neighborhoods to show a violation of § 1982. 610 F. 2d, at 400–

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traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

"However, this Court does not believe that the disparate impact is so stark that a purpose or intent of racial discrimination may be inferred. It must be noted that excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood.

. . . . . .

"Similarly this Court does not find a purpose or intent to racially discriminate based upon a consideration of other evidence in the case as directed in *Arlington Heights v. Metropolitan Housing Corp.*, [429 U. S. 252, 267–268.]" *Id.*, at 161–162.

[12] Respondents had contended that procedural defects violated state law and the Due Process Clause of the Fourteenth Amendment, and also provided evidence of an intent to discriminate. Judge McRae considered and rejected each of these contentions. *Id.*, at 149–153, 162–163. Although the briefs and oral arguments in this Court contained discussion of procedural issues, inasmuch as the Court of Appeals did not rely upon such issues and we find no error in their treatment by the District Court, they will not be further discussed.

402. Rather, the court held that respondents could demonstrate that this particular street closing was a "badge of slavery" under § 1982 and the Thirteenth Amendment without reference to the equal treatment issue.[13]

The Court of Appeals recognized that a street closing may be a legitimate and effective means of preserving the residential character of a neighborhood and protecting it from the problems caused by excessive traffic. 610 F. 2d, at 402. The Court of Appeals concluded, however, that relief under § 1982 was required here by the facts: (1) that the closing would benefit a white neighborhood and adversely affect blacks; (2) that a "barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them"; (3) that the closing was not part of a citywide plan but rather was a "unique step to protect one neighborhood from outside influences which the residents considered to be 'undesirable' "; and (4) that there was evidence of "an economic depreciation in the property values in the predominantly black residential area." [14] Before addressing the legal issues, we consider the

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[13] The court purported to leave open the question whether intent is ever an element of a plaintiff's § 1982 case. 610 F. 2d, at 404, n. 13.

[14] The Court of Appeals summarized its holding in this paragraph:

"Without endeavoring to establish any legal guidelines for the determination of when conduct may amount to a badge of slavery, we find the determinations made by the district court here to be altogether adequate to bring the conduct complained of within that description. The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influences which the residents considered to be 'undesirable.' Finally, there was some evidence, credited by the district court, of an economic depreciа-

extent to which each of these conclusions is supported by the record and the District Court's findings.

D. *The Evidence*

The first of the four factual predicates for the Court of Appeals' holding relates to the effect of the closing on black residents and is squarely rooted in the District Court's findings. Judge McRae expressly found that the City Council action "will have disproportionate impact on certain black citizens." App. 161. He described the traffic that will be diverted by the closing as "overwhelming black," *ibid.*, and noted that the white residents of West Drive will have less inconvenience.[15] We must note, however, that although neither Judge McRae nor the Court of Appeals focused on the extent of the inconvenience to residents living north of Jackson Ave., the record makes it clear that such inconvenience will be minimal. A motorist southbound on Springdale St. could continue south on West Drive for only a half mile before the end of West Drive at Overton Park would neces-

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tion in the property values in the predominantly black residential area with a corresponding increase in the property values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humiliations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been violated and the federal courts must provide a suitable remedy." *Id.*, at 404 (footnote omitted).

[15] Judge McRae noted that the West Drive residents will have the benefit of less traffic and will be inconvenienced less than the black residents living north of Jackson Ave., because the movement of the West Drive residents "will logically take them southbound on departure and northbound on return." App. 161. Judge McRae plainly stated his opinion that the street closing was unwise because it will interfere with the provision of municipal services and encourage vandalism in the neighborhood. *Ibid.* He clearly concluded, however, that the adverse impact on blacks was greater than on whites.

sitate a turn.[16] Thus unless the motorist is going to Overton Park, the only effect of the street closing for traffic proceeding south will be to require a turn sooner without lengthening the entire trip or requiring any more turns.[17] Moreover, even the motorist going to Overton Park had to make a turn from West Drive and a short drive down North Parkway to reach the entrance to the park. The entire trip from Springdale St. to the park will be slightly longer with West Drive closed, but it will not be significantly less convenient.[18] Thus although it is correct that the motorists who

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[16] Robert Miller, Executive Director of the Planning Commission testified:

"[T]he Planning Commission and council didn't think that closing this intersection would really impede the traffic because West Drive didn't go anywhere anyway. It is not like closing a major street in this area that goes for miles and miles and go into strategic landmarks in Memphis, strategic locations that people are getting to." Tr. 206.

One City Council member expressed surprise that anyone from north of Jackson Ave. would want to use West Drive inasmuch as West Drive is a two-lane street with no traffic light, and the alternative routes are four-lane streets with traffic lights. See Trial Exhibit 26, pp. 32–33 (remarks of Mr. Hyman).

[17] Although the street closing will also have an effect on motorists driving north along West Drive and will make the homes of the plaintiff class less accessible, the location of Overton Park will prevent motorists from using West Drive as a direct northern route.

[18] See Tr. 164–165. The District Court summarized one respondent's claim of inconvenience:

"Plaintiff N. T. Greene testified at the trial in this Court that the closure would compound the multitude of negative experiences that he has encountered as a black person. He complained that the closure would prevent convenient vehicular access to various facilities contained in Overton Park and would cause him, his family and neighbors psychological and emotional damage. His home is located on Terry Circle in Memphis, Tennessee, which is northwest from the intersection of West Drive and Jackson Avenue (T. E. 22). Insofar as his use of West Drive to and from his residence, the closure would cause him no actual inconvenience." App. 154.

Mr. Greene lives 1½ miles from the Jackson Ave.-West Drive intersec-

will be inconvenienced by the closing are primarily black, the extent of the inconvenience is not great.

As for the Court of Appeals' second point, the court attached greater significance to the closing as a "barrier" between two neighborhoods than appears warranted by the record. The physical barrier is a curb that will not impede the passage of municipal vehicles.[19] Moreover, because only one of the several streets entering Hein Park is closed to vehicular traffic, the other streets will provide ample access to the residences in Hein Park.[20] The diversion of through traffic around the Hein Park residential area affects the diverted motorists, but does not support the suggestion that such diversion will limit the social or commercial contact between residents of neighboring communities.[21]

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tion. See Tr. 45. A portion of Mr. Greene's testimony is quoted in the dissenting opinion, *post*, at 140, n. 3.

[19] The District Court described the closing as follows:

"The partial closing will be accomplished by having the northernmost property owners on West Drive buy a 25-foot east-west strip across the entire width of the street. Because officials of certain departments of the city deem it necessary that public service vehicles will be able to cross the strip, a 24-foot gap will be left in the barricade. There will be a speed breaker across the gap, but other details, such as signs, have not been finalized." App. 148–149.

[20] The District Court summarized the testimony of one witness who testified about the actual difficulty involved in reaching Hein Park homes:

"Mrs. Elnora Priest Cross, an intervening plaintiff, testified that she would like to be able to go through West Drive. She has a friend who works at the home of someone who lives on West Drive and contacts her in the event of an emergency.[2]

"[2] Mrs. Cross will still be able to reach her friend; however, she will be inconvenienced by having to use a different route." App. 154.

Mrs. Cross lives 3½ miles to the northwest of the Jackson Ave.-West Drive intersection. Tr. 62. A portion of Mrs. Cross' testimony is quoted in the dissenting opinion, *post*, at 140, n. 3.

[21] Whether the closing will have the effect of barring pedestrians from access to West Drive from Jackson Ave. is not entirely clear from the record. At trial Judge McRae asked Robert Miller, the Executive Director of the Planning Commission, whether the City Council resolution,

The Court of Appeals' reference to protecting the neighborhood from "undesirable" outside influences may be read

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which stated that the portion of West Drive to be deeded to the property owners abutting West Drive and Jackson Ave. was to be "closed to the public," meant that the public could not walk across the property. The question produced the following testimony:

"THE WITNESS: No. I don't think it means that. I think it was closed to vehicular traffic.

"THE COURT: All right.

"THE WITNESS: I think if you want to walk through there you still can do that according to the plan. There is not a high curb there, it is sort of like a roll curb, but the intended closing was for the obstruction of vehicular traffic.

"THE COURT: Do you think that that has been made plain to these—

"THE WITNESS: (Interjecting) I believe so. That was brought out at the hearings.

"There was no intention not to let people walk on through there if they wanted to, to my knowledge.

"THE COURT: Are you going to be happy if somebody tries to stop a pedestrian and have them say, 'Bob Miller said I could do this.'

"THE WITNESS: Well, all I can indicate to you—well, let me say this. There are conditions imposed in that closing. Emergency vehicles can plow on through that.

"THE COURT: That is not the public though.

"THE WITNESS: No, that is not the public, that is the city. I think the intent of the thing was not to fence it so that nobody could walk through. But to plant it, put a roll curb in there and to completely discourage the use of automobiles through that portion that is closed; automobiles, trucks, what have you—vehicles.

"THE COURT: All right.

"Thank you Mr. Miller." Tr. 215–216.

Mr. Miller later admitted, however, that the portion of the street deeded by the city would become part of the lots of the abutting property owners, that the only restrictions on the deeds would be those requiring access by municipal vehicles, and that pedestrians walking across the strip of land would be walking across private property. *Id.*, at 218–219. The abutting property owners did not testify at trial, and the District Court made no finding on this issue. The Court of Appeals noted that although the record was unclear as to whether the abutting property owners would, in fact, bar all foot traffic, "it is clear that the proposed conveyance will leave them with the absolute right to do so if they wish . . . ." 610 F. 2d, at 396.

as suggesting that the court viewed the closure as motivated by the racial attitude of the residents of Hein Park. The District Court's findings do not support that view of the record. Judge McRae expressly discounted the racial composition of the traffic on West Drive in evaluating its undesirable character; he noted that "excessive traffic in any residential neighborhood has public welfare factors such as safety, noise, and litter, regardless of the race of the traffic and the neighborhood." App. 161. The transcript of the City Council hearings indicates that the residents of West Drive perceived the traffic to be a problem because of the number and speed of the cars traveling down West Drive.[22] Even if the statements of the residents of West Drive are discounted as self-serving, there is no evidence that the closing was motivated by any racially exclusionary desire.[23] The City Council members who favored the closing expressed concerns similar to those of the West Drive residents.[24] Those who

[22] Dr. Bill Weber, a resident of West Drive, stated in support of the closing that traffic studies had counted 1,600 to 1,700 cars per 12-hour period traveling down West Drive and 200 cars per hour during the peak morning and afternoon periods. He stated that "we feel this is excessive traffic for a residential area." Trial Exhibit 26, p. 11. Mrs. Betsy Robbins, another resident of West Drive, stated:

"We're an active part of our area. This is our area. But in the midst of our interests in the whole area we found that one of the major problems is on our own doorstep. The hazardous traffic on West Drive. Our greatest worry here is children. . . . In addition to all the children on the street, each school morning and afternoon about 150 youngsters cross West Drive at my corner going to and from Snowden School. The stop sign on this corner is frequently ignored by swift traffic. Daily, I find myself rushing to the window when I hear screeching brakes. I'm terrified that some driver has hit a child." *Id.*, at 15.

[23] We must bear in mind that respondents have sued the city, the Mayor, and the City Council and its chairman. Therefore, we must focus on the decisions of these public officials, and not on the actions of the residents of Hein Park, in determining whether respondents have proved their claim.

[24] One Council member stated that the major streets running parallel to West Drive to the east and to the west are only six-tenths of a mile apart

opposed the resolution did so because they believed that a less drastic response to the traffic problems would be adequate and that the closing would create a dangerous precedent.[25] The one witness at trial who testified that "someone" soliciting signatures for a petition favoring the closure had described the traffic on West Drive as "undesirable traffic," stated that the solicitor mentioned excess traffic and danger to children as reasons for signing.[26] Unlike the Court of Ap-

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and "are designed to be thoroughfares." West Drive, however, "is not designed and never was designed to be a thoroughfare" bearing the burden of heavy traffic. *Id.*, at 31–32 (remarks of Mrs. Awsumb). Another Council member stated from personal experience that traffic was heavy on West Drive even at night and expressed doubt that a compromise, such as speedbreakers at the intersection of West Drive and Jackson Ave., would be sufficient to stop the "hotrodders." *Id.*, at 31 (remarks of Mr. Love). The Council discussed a traffic study which showed that 22,505 vehicles entered the West Drive-North Parkway intersection during a 12-hour period, and that 820 of these cars exited from West Drive onto North Parkway. *Id.*, at 34.

[25] In moving for reconsideration of the Council resolution, Councilman Alissandratos stated:

"While I certainly feel for particular neighborhood and appreciate the fact that they want to maintain a high standard of a neighborhood, we are still involved with a street that is operated and maintained by taxpayers money and I think it would be an injustice to close it, in addition to the fact that it would be establishing a very dangerous president [*sic*] in the rest of the City." Trial Exhibit 27, p. 2.

See also *id.*, at 3, 4 (remarks of Mr. James). The Council members who opposed the closing preferred a compromise solution to the traffic problem, such as a low speed limit and speedbreakers. See Trial Exhibit 26, p. 28 (remarks of Mr. Davis); *ibid.* (remarks of Mr. Ford); *id.*, at 29–31 (remarks of Mr. Alissandratos).

[26] Mrs. Terry, the one resident of the block of West Drive closest to Jackson Ave. who did not sign the application to close the street and who testified against the closing at the City Council hearing, testified as follows at the trial:

"Q. Were you approached by anyone who asked you to sign this petition? A. Yes.

"Q. Did they give you any reason as to why they would like to have you sign their petition? A. That there was excess traffic on the street and

peals, we therefore believe that the "undesirable" character of the traffic flow must be viewed as a factor supporting, rather than undermining, the validity of the closure decision. To the extent that the Court of Appeals' opinion can be read as making a finding of discriminatory intent, the record requires us to reject that finding in favor of the District Court's contrary conclusion. Judge McRae expressly found that the respondents had not proved that the City Council had acted with discriminatory intent. App. 161.[27]

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it was dangerous for children. It was my understanding that trash was thrown out of windows of cars and stuff like that so it made our street littered.

"Q. Based on what was told to you during those encounters, did you gain the impression that there was any racial consideration? A. At one point someone said to us; the person who was passing the petition, that the traffic on the street was undesirable traffic. And I did not ask what that person meant.

"Q. Did they make any reference to the people of North Memphis? A. Just the people coming through Hein Park.

"Q. How did they describe them? A. This was just one statement, that the traffic was undesirable traffic. But now, you see I did not ask a question to pursue that." App. 114–115.

Even if Mrs. Terry did receive the impression that the person who spoke to her considered the traffic undesirable because of the race of the drivers, that isolated bit of hearsay evidence is not sufficient to justify a Court of Appeals' finding that the City Council was motivated by racial animus when the District Court made a contrary finding on the basis of the record as a whole.

[27] As JUSTICE MARSHALL correctly notes in dissent, the city of Memphis continued to oppose the prompt desegregation of its municipal parks and recreational facilities as late as 1963, see *Watson* v. *Memphis*, 373 U. S. 526, cited *post*, at 144, n. 10, and 152; moreover, the pre-World War II development of Hein Park may well have been influenced by the racial segregation which was then common, see *post*, at 137, and the record contains evidence that racial prejudice still exists in Memphis, see *post*, at 142, n. 7. We agree with JUSTICE MARSHALL that these facts are relevant, but we cannot say that they required the District Court to find that the City Council's action *in this case* was racially motivated, or that its contrary finding is erroneous as a matter of law. Indeed, JUSTICE MARSHALL's own interpretation of the record is somewhat ambivalent since he sometimes

Finally, the Court of Appeals was not justified in inferring that the closure would cause "an economic depreciation in the property values in the predominantly black residential area . . . ." 610 F. 2d, at 404. The only expert testimony credited by the District Court on that issue was provided by a real estate broker called by the plaintiffs.[28] His expert opinion, as summarized by the District Court, was that "there would not be a decrease in value experienced by property owners located to the north of West Drive because of the closure." App. 155. After the witness had expressed that opinion, he admittedly speculated that some property owners to the north might be envious of the better housing that they could not afford and therefore might be less attentive to the upkeep of their own property, which in turn "could have a detrimental effect on the property values in the future." [29]

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refers to the evidence as supporting a "strong inference" of racial motivation, *post,* at 153, and elsewhere implies that the city's action was taken " 'solely because of . . . race,' " see *ibid.* The record plainly does not support a conclusion that the residents of Hein Park would have welcomed the heavy flow of transient traffic through their neighborhood if the drivers had been predominantly white. It is unlikely that a mother who finds herself "rushing to the window when I hear screeching brakes," see n. 22, *supra,* is concerned about the race of the driver of the vehicle.

[28] One of the named respondents and a class member also offered their opinion as to the effect of the closing on the value of their homes. Respondent Greene expressed the opinion that the enhancement of the value of the white-owned homes and the restricted accessibility of his home would have a detrimental effect on the value of his home. Tr. 38. One homeowner who lived to the north of Jackson Ave. expressed the opinion that the street closing would depreciate the value of his property because it would increase the amount of traffic on his street. *Id.,* at 128. The record does not support the suggestion that the closing will affect the traffic flow north of Jackson Ave. or impede access to any residence to the north. Neither the Court of Appeals nor the District Court relied on the testimony of these two witnesses.

[29] Because any adverse effect on property values has critical importance in our consideration of § 1982, we quote the relevant testimony of the witness Moore in full:

"Q. Now, Mr. Moore, what effect, if any, would this proposed closure

In our opinion the District Court correctly refused to find an adverse impact on black property values based on that speculation.[30]

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have on the property values in the Springdale area; just across Jackson there? A. I am intimately familiar with the Springdale area, having been a real estate agent who more or less was instrumental in providing some houses for those in low economic groups in that area.

"From an economic standpoint there would not be a lessening of value in those properties in the Springdale area, but from a psychological standpoint, it would have a tendency to have a demoralizing—

"Mr. Holmes: (Interjecting) I object to that answer. He is not qualified as an expert in psychological opinions.

"Mr. Wharton: Well, if he would like to strike that whole answer, we don't have a problem with that.

"Mr. Holmes: Well, we only object to the psychological evaluation. He has stated that the property values in and of themselves would not go down.

. . . . . .

"The Court: Right.

"Mr. Wharton: From his real estate background.

"Q. (By Mr. Wharton) Would you please continue with your response, Mr. Moore? A. In my opinion, with the 17 years experience in the real estate industry, psychologically it would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein Park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future." App. 111–112.

[30] Plaintiffs also called Dr. Feit, a clinical assistant professor in the Department of Psychiatry, University of Tennessee Center of Health Sciences, as an expert witness. The District Court summarized Dr. Feit's testimony as follows:

"Dr. Marvin Feit, an assistant professor at the University of Tennessee School of Social Work, testified that it was his opinion that closing West Drive would result in negative consequences in the form of hostility towards the people who live in Hein Park, increased vandalism, school

In summary, then, the critical facts established by the record are these: The city's decision to close West Drive was motivated by its interest in protecting the safety and tranquility of a residential neighborhood. The procedures followed in making the decision were fair and were not affected by any racial or other impermissible factors. The city has conferred a benefit on certain white property owners but there is no reason to believe that it would refuse to confer a comparable benefit on black property owners. The closing has not affected the value of property owned by black citizens, but it has caused some slight inconvenience to black motorists.

II

Under the Court's recent decisions in *Washington* v. *Davis*, 426 U. S. 229, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, the absence of proof of discriminatory intent forecloses any claim that the official action challenged in this case violates the Equal Protection Clause of the Fourteenth Amendment. Petitioners ask us to hold that respondents' claims under § 1982 and the Thirteenth Amendment are likewise barred by the absence of proof of discriminatory purpose. We note initially that the coverage of both

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harassment, and increased arrests by police. He also was of the opinion that the closure would result in more disgruntled drivers." *Id.*, at 155.

Over defendants' objection that he was testifying to matters outside his area of expertise, see Tr. 106–110, Dr. Feit also testified as follows:

"Q Before the luncheon recess we were at the point of asking Dr. Feit to give his professional opinion as to the negative psychological consequences of the possible closure of West Drive and how those consequences might affect property values, and I will ask you to answer that question.

"A Well, particularly on the north of Jackson it is very likely that the property values will go down, whereas in Hein Park it is most likely that they will rise equal to the rather exclusive area; whereas the area north of Jackson will go down because of the increase in the volume of traffic which has nowhere to go." *Id.*, at 118–119.

The District Court did not credit this testimony.

§ 1982 and the Thirteenth Amendment is significantly different from the coverage of the Fourteenth Amendment. The prohibitions of the latter apply only to official action, or, as implemented by 42 U. S. C. § 1983 (1976 ed., Supp. III), to action taken under color of state law. We have squarely decided, however, that § 1982 is directly applicable to private parties, *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409; cf. *Runyon* v. *McCrary,* 427 U. S. 160, 170–174; and it has long been settled that the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases,* 109 U. S. 3, 20. Thus, although respondents challenge official action in this case, the provisions of the law on which the challenge is based cover certain private action as well. Rather than confront prematurely the rather general question whether either § 1982 or the Thirteenth Amendment requires proof of a specific unlawful purpose, we first consider the extent to which either provision applies at all to this street closing case. We of course deal first with the statutory question.

III

Section 1982 provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

To effectuate the remedial purposes of the statute, the Court has broadly construed this language to protect not merely the enforceability of property interests acquired by black citizens but also their right to acquire and use property on an equal basis with white citizens. Thus, in *Hurd* v. *Hodge,* 334 U. S. 24, the Court refused to permit enforcement of private covenants imposing racial restrictions on the sale of property even though the legal rights of blacks

to purchase or to sell other property were unimpaired.[31] In *Jones, supra,* we held that § 1982 "must encompass every racially motivated refusal to sell or rent." 392 U. S., at 421–422.[32] In *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, we interpreted the term "lease" in § 1982 to include an assignable membership share in recreational facilities.[33] In *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.,* 410 U. S.

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[31] The Court stated:

"The Negro petitioners entered into contracts of sale with willing sellers for the purchase of properties upon which they desired to establish homes. Solely because of their race and color they are confronted with orders of court divesting their titles in the properties and ordering that the premises be vacated. White sellers, one of whom is a petitioner here, have been enjoined from selling the properties to any Negro or colored person. Under such circumstances, to suggest that the Negro petitioners have been accorded the same rights as white citizens to purchase, hold, and convey real property is to reject the plain meaning of language." 334 U. S., at 34.

[32] The Court indicated that Congress had the power, through the passage of § 1982, to eradicate such discrimination:

"At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." 392 U. S., at 443.

[33] Little Hunting Park, Inc., was a corporation organized to operate recreational facilities for the benefit of residents of Fairfax County, Va. A person holding a membership share who rented his home to another was entitled to assign his share to the lessee. This Court held that both the lessor and the lessee had a cause of action under § 1982 for the corporation's refusal, on racial grounds, to approve such an assignment. The Court held that the membership was part of the lease and that the right to lease was specifically guaranteed by § 1982:

"There has never been any doubt but that Freeman paid part of his $129 monthly rental for the assignment of the membership share in Little Hunting Park. . . . Respondents' actions in refusing to approve the assignment of the membership share in this case was clearly an interference with Freeman's right to 'lease.'" 396 U. S., at 236–237.

431, we extended that holding to cover a preference to purchase a nontransferable swim club membership.[34] Although these cases broadly defined the property rights protected by § 1982, our cases, like the statutory language itself, all concerned the right of black persons to hold and acquire property on an equal basis with white persons and the right of blacks not to have property interests impaired because of their race.[35]

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[34] Any resident of a geographical area within a ¾-mile radius of the swim club received three preferences: the right to apply for membership without seeking the recommendation of a current member, a preference over nonresidents when applying for a vacancy, and the right to pass to the successor in title of his home the first option on the membership. 410 U. S., at 436. The Court held that these preferences conferred property rights on the owner of a home in the area of the swim club that could not be denied on the basis of the homeowner's race. The Court noted that the right to confer an option on a subsequent purchaser could have an effect on the value of a home. Furthermore:

"[T]he automatic waiting-list preference given to residents of the favored area may have affected the price paid by the Presses when they bought their home. Thus the purchase price to them, like the rental paid by Freeman in *Sullivan,* may well reflect benefits dependent on residency in the preference area. For them, however, the right to acquire a home in the area is abridged and diluted.

"When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U. S. C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident." *Id.*, at 437.

[35] The lower federal courts have also required plaintiffs alleging a violation of § 1982 to demonstrate some impairment of property interests. In *Wright* v. *Salisbury Club, Ltd.*, 632 F. 2d 309 (CA4 1980), the court held that the right to join a country club was a property interest attaching to a home in a subdivision when all residents of the subdivision were encouraged to join the club and residency as a practical matter assured approval of an application. See, *e. g., Moore* v. *Townsend,* 525 F. 2d 482 (CA7 1975) (discriminatory refusal to sell home); *Clark* v. *Universal Builders, Inc.,* 501 F. 2d 324 (CA7) (allegation that blacks forced to accept prices and terms in excess of terms available to whites purchasing

Therefore, as applied to this case, the threshold inquiry under § 1982 must focus on the relationship between the street closing and the property interests of the respondents. As the Court of Appeals correctly noted in its first opinion, the statute would support a challenge to municipal action benefiting white property owners that would be refused to similarly situated black property owners. For official action of that kind would prevent blacks from exercising the same property rights as whites. But respondents' evidence failed to support this legal theory. Alternatively, as the Court of Appeals held in its second opinion, the statute might be violated by official action that depreciated the value of property owned by black citizens. But this record discloses no effect on the value of property owned by any member of the respondent class. Finally, the statute might be violated if the street closing severely restricted access to black homes, because blacks would then be hampered in the use of their property. Again, the record discloses no such restriction.[36]

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comparable housing stated claim under § 1982), cert. denied, 419 U. S. 1070 (1974); *Gore* v. *Turner,* 563 F. 2d 159 (CA5 1977) (discriminatory refusal to lease apartment); *Scott* v. *Eversole Mortuary,* 522 F. 2d 1110 (CA9 1975) (alleged discrimination in sale of burial plots); *Concerned Tenants Assn.* v. *Indian Trails Apartments,* 496 F. Supp. 522 (ND Ill. 1980) (§ 1982 applies to abandonment of services previously provided to white tenants of apartment complex and now denied to black tenants); *Newbern* v. *Lake Lorelei, Inc.,* 308 F. Supp. 407 (SD Ohio 1968) (discrimination in modes of negotiation for sale of property); *Sims* v. *Order of Commercial Travelers of America,* 343 F. Supp. 112 (Mass. 1972) (insurance contracts constitute property for purposes of § 1982); *Gonzalez* v. *Southern Methodist University,* 536 F. 2d 1071 (CA5 1976) (no property interest in law school admission), cert. denied, 430 U. S. 987 (1977).

[36] The absence of such restriction distinguishes this case from the Fifth Circuit's decision in *Jennings* v. *Patterson,* 488 F. 2d 436 (1974). In *Jennings,* the defendants placed a barricade across a street on the outskirts of Dadeville, Ala., and prohibited landowners on the other side of the barricade from using the street. All but one of the landowners so restricted were black, and the one white landowner was given private access to the closed street. The street closing had the effect of adding 1½

The injury to respondents established by the record is the requirement that one public street rather than another must be used for certain trips within the city. We need not assess the magnitude of that injury to conclude that it does not involve any impairment to the kind of property interests that we have identified as being within the reach of § 1982. We therefore must consider whether the street closing violated respondents' constitutional rights.

IV

In relevant part, the Thirteenth Amendment provides:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

In this case respondents challenge the conferring of a benefit upon white citizens by a measure that places a burden on black citizens as an unconstitutional "badge of slavery." Relying on Justice Black's opinion for the Court in *Palmer* v. *Thompson,* 403 U. S. 217, the city argues that in the absence of a violation of specific enabling legislation enacted pursuant to § 2 of the Thirteenth Amendment, any judicial characterization of an isolated street closing as a badge of slavery would constitute the usurpation of "a law-making power far beyond the imagination of the amendment's authors." *Id.,* at 227.[37]

Pursuant to the authority created by § 2 of the Thirteenth

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to 2 miles to the trip into town. The court held that the plaintiffs, "because they are black, have been denied the right to hold and enjoy their property on the same basis as white citizens." *Id.,* at 442. Thus *Jennings,* unlike this case, involved a severe restriction on the access to property. See *supra,* at 110–112, and nn. 15–18.

[37] In *Palmer,* the Court rejected petitioners' claim that a city's decision to close public swimming pools rather than desegregate them violated the Thirteenth Amendment. The Court noted that § 2 of the Amendment gave Congress the power to eradicate "badges of slavery," and that Congress had not prohibited the challenged conduct. 403 U. S., at 227.

Amendment, Congress has enacted legislation to abolish both the conditions of involuntary servitude and the "badges and incidents of slavery." [38] The exercise of that authority is not inconsistent with the view that the Amendment has self-executing force. As the Court noted in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S., at 439:

> " 'By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery' and established universal freedom.' *Civil Rights Cases,* 109 U. S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more." [39]

In *Jones,* the Court left open the question whether § 1 of the Amendment by its own terms did anything more than abolish

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[38] In addition to § 1982, which we have identified as providing broad protection to property rights, Congress has enacted, pursuant to § 2 of the Thirteenth Amendment, Rev. Stat. § 1977, 42 U. S. C. § 1981, which protects the right of all citizens to enter into and enforce contracts, see *Runyon* v. *McCrary,* 427 U. S. 160, 170; cf. *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 440–441; Rev. Stat. § 1980, 42 U. S. C. § 1985 (3) (1976 ed., Supp. III), which protects blacks from conspiracies to deprive them of "the equal protection of the laws, or of equal privileges and immunities under the laws," see *Griffin* v. *Breckenridge,* 403 U. S. 88, 104–105; Rev. Stat. § 1990, 42 U. S. C. § 1994, which prohibits peonage, see *Pollock* v. *Williams,* 322 U. S. 4, 8; and 18 U. S. C. § 1581, which provides for criminal punishment of those who impose conditions of peonage on any person, see *Clyatt* v. *United States,* 197 U. S. 207, 218.

[39] The Court continued:

"For that clause clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.' Ibid.* (Emphasis added.)

. . . . .

"Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." 392 U. S., at 439–440.

slavery.[40] It is also appropriate today to leave that question open because a review of the justification for the official action challenged in this case demonstrates that its disparate impact on black citizens could not, in any event, be fairly characterized as a badge or incident of slavery.

We begin our examination of respondents' Thirteenth Amendment argument by reiterating the conclusion that the record discloses no racially discriminatory motive on the part of the City Council.[41] Instead, the record demonstrates that the interests that did motivate the Council are legitimate. Proper management of the flow of vehicular traffic within a city requires the accommodation of a variety of conflicting interests: the motorist's interest in unhindered access to his destination, the city's interest in the efficient provision of municipal services, the commercial interest in adequate parking, the residents' interest in relative quiet, and the pedestrians' interest in safety. Local governments necessarily exercise wide discretion in making the policy decisions that accommodate these interests.

In this case the city favored the interests of safety and tranquility. As a matter of constitutional law a city's power to adopt rules that will avoid anticipated traffic safety problems is the same as its power to correct those hazards that have been revealed by actual events. The decision to reduce the flow of traffic on West Drive was motivated, in part, by

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[40] In *Jones* the Court did hold, of course, that § 2 of the Amendment, which in terms merely authorized the enactment of legislation to enforce § 1, did more than authorize legislation to enforce the ban against slavery. See nn. 32, 38, *supra*. Although the Court expressly overruled *Hodges* v. *United States*, 203 U. S. 1, see 392 U. S., at 441–443, n. 78, the Court neither agreed nor disagreed with the first Justice Harlan's statement in dissent in *Hodges* that "by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom." See 203 U. S., at 27.

[41] See *supra*, at 106–108, 113–116, and nn. 22–27.

an interest in the safety of children walking to school.[42] That interest is equally legitimate whether it provides support for an arguably unnecessary preventive measure or for a community's reaction to a tragic accident that adequate planning might have prevented. See *Thomas Cusack Co.* v. *Chicago,* 242 U. S. 526.

The residential interest in comparative tranquility is also unquestionably legitimate. That interest provides support for zoning regulations, designed to protect a "quiet place where yards are wide, people few, and motor vehicles restricted . . . ." *Village of Belle Terre* v. *Boraas,* 416 U. S. 1, 9; *Arlington County Board* v. *Richards,* 434 U. S. 5, and for the accepted view that a man's home is his castle. The interest in privacy has the same dignity in a densely populated apartment complex, cf. *Payton* v. *New York,* 445 U. S. 573, or in an affluent neighborhood of single-family homes.[43] In either context, the protection of the individual interest may involve the imposition of some burdens on the general public.

Whether the individual privacy interests of the residents of Hein Park, coupled with the interest in safety, should be considered strong enough to overcome the more general interest in the use of West Drive as a thoroughfare is the type of question that a multitude of local governments must resolve every day. Because there is no basis for concluding that the interests favored by the city in its decision were contrived or pretextual, the District Court correctly concluded that it had no authority to review the wisdom of the city's policy decision. See *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 109.

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[42] See nn. 22–25 and accompanying text, *supra.*

[43] As the Court in *Village of Belle Terre* noted:

"The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U. S., at 9.

The interests motivating the city's action are thus sufficient to justify an adverse impact on motorists who are somewhat inconvenienced by the street closing. That inconvenience cannot be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate. The argument that the closing violates the Amendment must therefore rest, not on the actual consequences of the closing, but rather on the symbolic significance of the fact that most of the drivers who will be inconvenienced by the action are black.

But the inconvenience of the drivers is a function of where they live and where they regularly drive—not a function of their race; the hazards and the inconvenience that the closing is intended to minimize are a function of the number of vehicles involved, not the race of their drivers or of the local residents. Almost any traffic regulation—whether it be a temporary detour during construction, a speed limit, a one-way street, or a no-parking sign—may have a differential impact on residents of adjacent or nearby neighborhoods. Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom. Proper respect for the dignity of the residents of any neighborhood requires that they accept the same burdens as well as the same benefits of citizenship regardless of their racial or ethnic origin.

This case does not disclose a violation of any of the enabling legislation enacted by Congress pursuant to § 2 of the Thirteenth Amendment. To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be

prohibited by the Amendment itself. We merely hold that the impact of the closing of West Drive on nonresidents of Hein Park is a routine burden of citizenship; it does not reflect a violation of the Thirteenth Amendment.

The judgment of the Court of Appeals is

Reversed.

JUSTICE WHITE, concurring in the judgment.

In this civil rights action, respondents sought relief under the Thirteenth and Fourteenth Amendments as well as under 42 U. S. C. §§ 1982, 1983. The District Court held that while the closure of West Drive in Memphis, Tenn., would have a disproportionate impact upon certain black residents of Memphis, the evidence did not support a finding of a purpose or intent to discriminate. Neither was the disparate impact "so stark that a purpose or intent of racial discrimination" could be inferred. As a consequence, and following instructions from the initial remand, the District Court concluded that respondents had failed to prove a violation of either § 1982 or § 1983.[1] The District Court did not specifically address the alleged constitutional violations, but implicity those allegations fell on the same basis. The Court of Appeals for the Sixth Circuit reversed the District Court's ultimate conclusion that there was no violation of § 1982, but the appellate court did not disturb the trial court's finding that there was no purposeful discrimination. Without

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[1] The initial opinion of the Court of Appeals instructed the District Court as follows:

"To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation." 535 F. 2d 976, 979.

In the opinion rendered by the Court of Appeals following the initial remand, the above language was described as dicta.

explicitly saying so, the Court of Appeals necessarily held that a violation of § 1982 could be established without proof of discriminatory intent.[2] The petition for a writ of certiorari sought review of that precise point.

We granted review to answer the question presented in the petition for a writ of certiorari. The parties in their briefs proceeded on the same assumption. However, instead of addressing the question which was explicitly presented by the findings and holdings below, raised by the petitioners, granted review by this Court and briefed by the parties, the Court inexplicably assumes the role of factfinder, peruses the cold record, rehashes the evidence, and *sua sponte* purports to resolve questions that the parties have neither briefed nor argued. It is not surprising that the dissent has taken this same record and interpreted it in quite another way. In any event, rather than becoming involved in the imbroglio between the majority and the dissent, I much prefer as a matter of policy and common sense to answer the question for which we took the case. There is no good reason here to disregard our own Rule 21.1 (a), which states that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court."

We are called upon to determine whether a nonintentional adverse impact upon black citizens is a sufficient basis for relief under 42 U. S. C. § 1982. That statute declares that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Under that language, a person's

[2] Respondents' § 1983 claim based on the Fourteenth Amendment necessarily fell on the District Court's conclusion that respondents had failed to meet their burden of establishing discriminatory intent. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); *Washington* v. *Davis*, 426 U. S. 229 (1976). The Court of Appeals did not hold otherwise. Nor is the reach of the Thirteenth Amendment properly before us. The Court of Appeals' judgment was based on § 1982.

race is irrelevant to the existence of the declared rights. No person is to be denied the enumerated rights merely because that person is not white. Purposeful racial discrimination is quite clearly the focus of the proscription, and this understanding of § 1982 is supported by the legislative history of the Civil Rights Act of 1866, the enactment from which § 1982 was derived.

The Civil Rights Act of 1866 was enacted pursuant to § 2 of the Thirteenth Amendment. That Amendment had been adopted by the States in 1865 after the close of the Civil War. It announced the legal demise of slavery.[3] Section 2 of the Amendment provides: "Congress shall have power to enforce this article by appropriate legislation." Although slavery was legally abolished, the Amendment foresaw that specific implementation of its command would be required to eradicate completely the deep-seated institution of slavery. The Civil Rights Act of 1866 was explicitly designed as such a practical measure.

When the 39th Congress undertook consideration of the proposed Civil Rights Act of 1866, there was a growing perception that the plight of the southern blacks had not been resolved by the adoption of the Thirteenth Amendment.[4] In

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[3] Section 1 of the Thirteenth Amendment provides:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[4] The fear that the former slaves were doomed to second-class citizenship was supported by the report submitted by Major General Carl Schurz to President Andrew Johnson. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865). President Johnson had assigned Schurz the task of traveling through a number of Southern States for the purpose of gathering information and making observations as to the postwar conditions to be found in that region. The report is a detailed and lucid account of these journeys. In it, Schurz describes the precarious social position of the freedmen as well as the numerous abuses to which those individuals were being subjected. The report expressed the general view that the South was having difficulty adjusting to the abolition of slavery and that in the

the words of one contemporary observer: "The general government of the republic has, by proclaiming the emancipation of the slaves, commenced a great social revolution in the south, but has, as yet, not completed it. Only the negative part of it is accomplished. The slaves are emancipated in point of form, but free labor has not yet been put in the place of slavery in point of fact." S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 38 (1865). Individual Southern States had begun enacting the so-called Black Codes,[5] which, although not technically resurrecting the institution of slavery, were viewed by the Republican Congress as a large step in that direction. See generally H. Flack, Adoption of the Fourteenth Amendment 11–54 (1908). In addition, there was evidence that former slaves were being subjected to serious abuses at the hands of the white majority. See Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., xvii and *passim* (1866). The proposed Civil Rights Act was specifically designed to stem this tide of oppression. See *Jones*

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absence of federal intervention, a substitute for slavery was not unlikely. Schurz' report concludes with the admonition: "As to the future peace and harmony of the Union, it is of the highest importance that the people lately in rebellion be not permitted to build up another 'peculiar institution' whose spirit is in conflict with the fundamental principles of our political system; for as long as they cherish interests peculiar to them in preference to those they have in common with the rest of the American people, their loyalty to the Union will always be uncertain." *Id.*, at 46. The themes sounded in this report were repeated in the debates over the Civil Rights Act.

[5] Apropos of the effect of these Black Codes, Major General Schurz commented: "But while accepting the 'abolition of slavery,' they think that some species of serfdom, peonage, or some other form of compulsory labor is not slavery, and may be introduced without a violation of their pledge. . . . What particular shape the reactionary movement will assume it is at present unnecessary to inquire. There are a hundred ways of framing apprenticeship, vagrancy, or contract laws, which will serve the purpose." *Id.*, at 35. The Codes are collated and described in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 29–44 (1871).

v. *Alfred H. Mayer Co.*, 392 U. S. 409, 426–429, and nn. 34–45 (1968). Senator Trumbull, sponsor of the bill, made this precise purpose of the Act abundantly clear:

> "Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment." Cong. Globe, 39th Cong., 1st Sess., 474 (1866).

The theme sounded by Senator Trumbull was repeated on numerous occasions during the lengthy floor debates which took place in both Houses of Congress. The supporters of the bill emphasized time and again that the measure was designed to eradicate blatant deprivations of civil rights. See, *e. g., id.*, at 322, 339–340, 474–475, 516–517, 1123, 1151–1152, 1159–1160, 1833–1835. The purpose of the Act was to insure that the abolition of slavery was accomplished in fact as well as theory:

> "[The Thirteenth Amendment] declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits. . . . And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws

are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?

"It is the intention of this bill to secure those rights." *Id.*, at 474 (remarks of Sen. Trumbull).

The Civil Rights Act of 1866 thus was a response to the perception held by Congress that former slaves were being denied basic civil rights. The Act would give practical effect to the Thirteenth Amendment. "The bill under consideration is intended only to carry into practical effect the amendment of the Constitution. Its object is to declare not only that slavery shall be abolished upon the pages of your Constitution, but that it shall be abolished in fact and in deed . . . ." *Id.*, at 1152 (remarks of Mr. Thayer). But nothing in the legislative history of this Act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves.[6]

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[6] Respondents suggest that certain of the discriminations with which Congress was concerned arose out of facially neutral vagrancy laws, applicable equally to blacks and whites. From this we are to infer the creation of a disparate-impact standard. But this argument overlooks the congressional view that these ostensibly neutral statutes were intentionally being used to oppress blacks. "Vagrant laws have been passed; laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude . . . ." Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (remarks of Mr. Cook); see also *id.*, at 1151 (remarks of Mr. Thayer), 1160 (remarks of Mr. Windom). For example, General Terry ordered nonenforcement of the Virginia Vagrant Act since he had concluded that white farmers had entered into combinations fixing the wages to be paid former slaves at an unreasonably low level, forcing the freedmen to either accept the unfair wage or risk criminal conviction under the Vagrant Act. General Terry observed:

" 'The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers. It places

On the contrary, the theme of the debates surrounding this statute is that the former slaves continued to be subject to direct, intentional abuses at the hands of their former masters. That was the problem Congress intended to address and that focus should determine the reach and scope of this statute. We have no basis for concluding anything other than that a violation of § 1982 requires some showing of racial animus or an intent to discriminate on the basis of race. The Court of Appeals proceeded on a contrary basis and reversed the District Court's judgment without disturbing the District Court's conclusion that no discriminatory purpose had been found. This was error, and for that reason I concur in the judgment of reversal, but would remand for further proceedings consistent with this opinion.

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

This case is easier than the majority makes it appear. Petitioner city of Memphis, acting at the behest of white property owners, has closed the main thoroughfare between an all-white enclave and a predominantly Negro area of the city. The stated explanation for the closing is of a sort all

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them wholly in the power of their employers, and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated—a condition which will be slavery in all but its name.'" McPherson, *supra* n. 5, at 41–42.

The objection to the vagrancy laws was not to their disproportionate impact, but to the intentional use of those statutes to impose upon freedmen a system tantamount to slave labor. See also Kohl, The Civil Rights Act of 1866, Its Hour Come Round at Last: *Jones v. Alfred H. Mayer Co.*, 55 Va. L. Rev. 272, 276–283 (1969). Some of these vagrancy laws were not race neutral. The Vagrant Act of Mississippi was directed only at unemployed freedmen. See McPherson, *supra* n. 5, at 30.

too familiar: "protecting the safety and tranquility of a residential neighborhood" by preventing "undesirable traffic" from entering it. Too often in our Nation's history, statements such as these have been little more than code phrases for racial discrimination. These words may still signify racial discrimination, but apparently not, after today's decision, forbidden discrimination. The majority, purporting to rely on the evidence developed at trial, concludes that the city's stated interests are sufficient to justify erection of the barrier. Because I do not believe that either the Constitution or federal law permits a city to carve out racial enclaves I dissent.

I

In order to determine "whether the State 'in any of its manifestations' has become significantly involved in private discriminations," it is necessary to " 'sif[t] facts and weig[h] circumstances' " so that " 'nonobvious involvement of the State in private conduct [can] be attributed its true significance.' " *Reitman* v. *Mulkey,* 387 U. S. 369, 378 (1967), quoting *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722 (1961). The key to the majority's conclusion is the view that it takes of the facts, and consequently I will review the relevant parts of the record in some detail.

The majority treats this case as involving nothing more than a dispute over a city's race-neutral decision to place a barrier across a road. My own examination of the record suggests, however, that far more is at stake here than a simple street closing. The picture that emerges from a more careful review of the record is one of a white community, disgruntled over sharing its street with Negroes, taking legal measures to keep out the "undesirable traffic," and of a city, heedless of the harm to its Negro citizens, acquiescing in the plan.

I readily accept much of the majority's summary of the circumstances that led to this litigation. I would, however,

begin by emphasizing three critical facts. First, as the District Court found, Hein Park "was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained." App. 148. Second, the area to the north of Hein Park, like the "undesirable traffic" that Hein Park wants to keep out, is predominantly Negro. And third, the closing of West Drive stems entirely from the efforts of residents of Hein Park. Up to this point, the majority and I are in agreement. But we part company over our characterizations of the evidence developed in the course of the trial of this case. At the close of the evidence, the trial court described this as "a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street." Tr. 323. In the legal and factual context before us, I find that a revealing summary of the case. The majority apparently does not.

According to the majority, the Court of Appeals concluded that respondents were entitled to relief based on four facts that the panel gleaned from the District Court's findings. These facts were:

> "(1) that the closing would benefit a white neighborhood and adversely affect [Negroes]; (2) that a 'barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them'; (3) that the closing was not part of a citywide plan but rather was a 'unique step to protect one neighborhood from outside influences which the residents considered to be "undesirable" '; and (4) that there was evidence of 'an economic depreciation in the property values in the predominantly black residential area.' " *Ante,* at 109 (footnote omitted).

By purportedly examining the evidence supporting each of the four points, the majority is able to conclude that the court below was mistaken and that the only effect of the closing

of West Drive is "some slight inconvenience to black motorists." *Ante,* at 119. A more detailed study of the record convinces me, to the contrary, that the Court of Appeals was entirely justified in each of its conclusions.

The majority does not seriously dispute the first of the four facts relied on by the Court of Appeals. In fact it concedes that the trial court "clearly concluded . . . that the adverse impact on blacks was greater than on whites." *Ante,* at 110, n. 15. The majority suggests, however, that this "impact" is limited to the "inconvenience" that will be suffered by drivers who live in the predominantly Negro area north of Hein Park and who will no longer be able to drive through the subdivision. This, says the majority, is because residents of the area north of Hein Park will still be able to get where they are going; they will just have to go a little out of their way and thus will take a little longer to complete the trip.

This analysis ignores the plain and powerful symbolic message of the "inconvenience." Many places to which residents of the area north of Hein Park would logically drive lie to the south of the subdivision.[1] Until the closing of West Drive, the most direct route for those who lived on or near Springdale St. was straight down West Drive. Now the Negro drivers are being told in essence: "You must take the long way around because you don't live in this 'protected' white neighborhood." Negro residents of the area north of Hein Park testified at trial that this is what they thought the city was telling them by closing West Drive. See, *e. g.,* Tr. 22–23, 34 (testimony of N. T. Greene); *id.,* at 64 (testimony of Eleanore Cross). See also *id.,* at 111 (testimony of

[1] As the majority notes, *ante,* at 103, n. 2, Hein Park is bordered on the south by Overton Park, which contains numerous municipally owned outdoor attractions. In fact, the entire central city lies south of Hein Park. Negro residents drive down West Drive for purposes as diverse as going to visit friends, Tr. 36 (testimony of N. T. Greene), and just looking at the scenery, *id.,* at 63 (testimony of Eleanore Cross).

Dr. Marvin Feit). Even the District Court, which granted judgment for petitioners, conceded that "[o]bviously, the black people north of [Hein Park] . . . are being told to stay out of the subdivision." *Id.*, at 317. In my judgment, this message constitutes a far greater adverse impact on respondents than the majority would prefer to believe.[2]

The majority also does not challenge the Sixth Circuit's second finding, that the barrier is being erected at the point of contact of the two communities. Nor could it do so, because the fact is not really in dispute. The Court attempts instead to downplay the significance of this barrier by calling it "a curb that will not impede the passage of municipal vehicles." *Ante*, at 112. But that is beside the point. Respondents did not bring this suit to challenge the exclusion of municipal vehicles from Hein Park. Their goal is to preserve access for their own vehicles. But in fact, they may not even be able to preserve access for their own persons. The city is creating the barrier across West Drive by deeding public property to private landowners. Nothing will prevent the residents of Hein Park from excluding "undesirable" pedestrian as well as vehicular traffic if they so choose. See Tr. 136, 217–219, 317–318. What *is* clear is that there will be a barrier to traffic that *is* to be erected precisely at the point where West Drive (and thus, all-white Hein Park) ends and Springdale St. (and the mostly Negro section) begins.

The psychological effect of this barrier is likely to be significant. In his unchallenged expert testimony in the trial court, Dr. Marvin Feit, a professor of psychiatry at the University of Tennessee, predicted that the barrier between West Drive and Springdale St. will reinforce feelings about the city's "favoritism" toward whites and will "serve as a monument to racial hostility." *Id.*, at 103, 104–105. The testi-

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[2] As I discuss *infra*, at 145–147, I also conclude that as a result of the closing, Negro property owners in the area north of Hein Park will suffer substantial impairments in both the enjoyment and value of their property.

mony of Negro residents and of a real estate agent familiar with the area provides powerful support for this prediction.[3] As the District Court put it: "[Y]ou are not going to be able to convince those black people out there that they didn't do it because they were black. They are helping a white neighborhood. Now, that is a problem that somebody is going to have to live with . . . ." *Id.*, at 325. I cannot subscribe to the majority's apparent view that the city's erection of this "monument to racial hostility" amounts to nothing more than a "slight inconvenience." Thus, unlike the majority, I do not minimize the significance of the barrier itself in determining the harm respondents will suffer from its erection.[4]

The majority does not attempt to question the third conclusion by the Court of Appeals, that the closing of West Drive is intended as a protection of Hein Park against "undesirable" outside influences. Rather, its disagreement with

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[3] One Negro resident, N. T. Greene, testified: "[B]ecause we are Black, we cannot drive through a piece of property that is owned collectively by us. This would cause psychological damage to me personally." Tr. 23. He added that he perceived the barrier as "simply an extension of the insult and humiliation that we have tolerated and experienced too long already." *Id.*, at 39. Another resident, Eleanore Cross, was asked how she would feel if West Drive were closed. She responded: "That would put a fear on me that if they said, 'Closed,' that means 'Closed,' and that would mean put a fear on me." *Id.*, at 64. One of respondents' expert witnesses, real estate agent H. C. Moore, testified that he anticipated similar effects. See *infra*, at 145–146.

[4] The majority makes much of the fact that even after the closing of West Drive, three other streets are available for access into Hein Park. Of these, however, only one, Charles Place, which is west of West Drive and parallel to it, is arguably convenient. But drivers coming down West Drive have to go out of their way to reach Charles Place. There is, moreover, nothing to prevent the white property owners along Charles Place from seeking to close it at the northern end, for they could surely come up with reasons as vague as those set forth for the closing of West Drive itself. In any event, the fact remains that predominantly Negro traffic is being disadvantaged for the exclusive benefit of a community that was designed to be, and still remains, entirely white.

the Court of Appeals is over the inference to be drawn. The majority insists that to the extent that the Court of Appeals found racially discriminatory intent, that finding is not supported by the record. The majority also asserts, *ante,* at 114, that there is "no evidence" that either the residents of Hein Park or the city officials were motivated by any racial considerations. A proper reading of the record demonstrates to the contrary that respondents produced at trial precisely the kind of evidence of intent that we deemed probative in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 267–268 (1977).[5]

The term "undesirable traffic" first entered this litigation through the trial testimony of Sarah Terry. Terry, a West

[5] In *Arlington Heights* we explained:

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it 'bears more heavily on one race than another' . . . —may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . But such cases are rare [and ordinarily] impact alone is not determinative, and the Court must look to other evidence.

"The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

"The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. . . .

"The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." 429 U. S., at 266–268 (citations and footnotes omitted).

Drive resident who opposed the closing, testified that she was urged to support the barrier by an individual who explained to her that "the traffic on the street was undesirable traffic." Tr. 140.[6] The majority apparently reads the term "undesirable" as referring to the prospect of having any traffic at all on West Drive. But the common-sense understanding of Terry's testimony must be that the word "undesirable" was meant to describe the traffic that was actually using the street, as opposed to any traffic that might use it. Of course, the traffic that was both actually using the street and would be affected by the barrier was predominantly Negro.[7]

But Terry's testimony is not, as the majority implies, the only *Arlington Heights*-type evidence produced at trial. The testimony of city planning officials, for example, strongly suggests that the city deviated from its usual procedures in deciding to close West Drive. In particular, despite an unambiguous requirement that applications for street closings be signed by "all" owners of property abutting on the thoroughfare to be closed, the city here permitted this application to go through without the signature or the consent of

[6] Terry's testimony on this point is set forth in full in the majority opinion, *ante*, at 115–116, n. 26.

[7] Emmanuel Goldberger, a white citizen who opposed the closing of West Drive but who died before trial, explained in testimony before the City Council some of the reasons that he considered the closing racially motivated:

"Mr. Chairman, there's been enough said about the number of cars, or the speed of the cars going on West Drive. You know and I know that that isn't the issue . . . .

"But if you want me to, I will spell it out for you. Mr. Chairman, the answer is sitting right here. The well-to-do white people living in Hein Park do not want black people or the few of us who refuse to run away living north of Jackson to drive on . . . what they think is their street. I phoned a man—I phoned a man with whom I have been friendly for more than 65 years. His wife answered and would not let me speak to him. So as the rights and wrongs were discussed, she said to me[,] 'Leo and I were surprised to see you sitting with that group of niggers.' That[,] Mr. Chairman[,] is the issue here." Ex. 30, p. 1.

Sarah Terry.[8] Perhaps more important, the city gave no notice to the Negro property owners living north of Hein Park that the Planning Commission was considering an application to close West Drive. The Planning Commission held its hearing without participation by any of the affected Negro residents and it declined to let them examine the file on the West Drive closing. It gave no notice that the City Council would be considering the issue. When respondents found out about it, they sought to state their case. But the Council gave opponents of the proposal only 15 minutes, even though some members objected that that was not enough time. Furthermore, although the majority treats West Drive as just another closing, it is, according to the city official in charge of closings, the *only* time the city has *ever* closed a street for traffic control purposes. Tr. 297–298 (testimony of Paul Goldstein). See *id.*, at 313, 321–322 (comments of trial judge). And it cannot be disputed that all parties were aware of the disparate racial impact of the erection of the barrier.[9] The city of Memphis, moreover, has an

[8] City officials asserted at trial that there is no requirement that the opinions of affected property owners be solicited before a street is closed, and the District Court found that there had been no substantial departure from usual practices. But the city's own application forms state that they must be signed by "[a]ll owners abutting the thoroughfare to be closed." App. 137. At trial, city officials took the position that this language only refers to individuals owning property abutting at the point of the closing. If that is accurate, then on the city's theory, any two property owners living across a street from one another could seek to close it, and the city would have no obligation to consult any other residents at all before approving the closing. Put gently, such testimony is contrary to common sense and not worthy of great deference.

[9] During the brief City Council hearing, residents of the area north of Hein Park presented petitions with approximately 1,000 signatures protesting the closing of West Drive, stating: "This Closing symbolizes in unmistakable terms a White neighborhood shutting its door on its adjacent Black and integrated communities." These petitions made express reference to the racial impact. Witnesses before the Council also made reference to the racial character of the neighborhoods involved. See, *e. g.*,

unfortunate but very real history of racial segregation—a history that has in the past led to intercession by this Court.[10] All these factors represent precisely the kind of evidence that we said in *Arlington Heights* was relevant to an inquiry into motivation. Regardless of whether this evidence is viewed as conclusive, it can hardly be stated with accuracy that "no evidence" exists.[11]

Ex. 30, pp. 2–3, 6, 7, 11. The trial judge took judicial notice of the fact that the area to the north of Hein Park was predominantly Negro, and he added: "[I]f the City Council didn't know that that property coming up to Jackson Avenue [northern boundary of Hein Park] was predominently [*sic*] black, then I have got my doubts about them." Tr. 324.

[10] See *Watson* v. *Memphis*, 373 U. S. 526 (1963).

[11] I do not mean by this discussion to imply that a showing of discriminatory motivation is required before a violation of § 1982 may be made out. I merely suggest that if such a finding is required, the record in this case contains considerable evidence from which it could be made. See n. 14, *infra*. Nor am I deterred by the trial court's conclusion that no discriminatory motive was involved in the closing of West Drive. The Court of Appeals disagreed with this finding because the panel believed that the District Judge "conceived himself limited in his capability to grant relief by the language in [the first opinion] and that he placed too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment." 610 F. 2d 395, 402. In its first opinion, the panel discussed § 1982 only insofar as it related to the city's willingness to grant a white community a benefit (the closing of a street) that was denied to a Negro community. 535 F. 2d 976, 978 (1976). Much of the evidence presented at trial concerned this issue, and some of the comments of the trial judge suggest that he might have thought it the only one to be decided. In fact, § 1982 encompasses considerably more than the granting of a benefit to a white community when the same right is denied to Negroes. For example, a violation of the statute might be made out through a showing that a benefit was granted to a white community in such a manner that it harmed Negro property rights. See *infra*, at 148–149. Thus if the District Court in fact thought that respondents could show a violation of § 1982 only by showing that they had been denied a benefit granted to white residents, it was applying an improper legal standard in considering whether there was discrimination. This likelihood that the District Court indeed applied an improper standard must in turn taint the finding that intentional discrimination

Most important, I believe that the findings of the District Court and the record in this case fully support the Court of Appeals' conclusion that Negro property owners are likely to suffer economic harm as a result of the construction of the barrier. In attempting to demonstrate to the trial court that the closing of West Drive would adversely affect their property, respondents first introduced the testimony of H. C. Moore, a real estate agent with 17 years' experience in the field. Moore began by predicting that after West Drive was closed, Hein Park would become "more or less a Utopia within the city of Memphis," families who had left the inner city for the suburbs would probably return in order to live there, and the property values in Hein Park "would be enhanced greatly." Tr. 91–92. Moore was then asked what effect the closing would have on the property values in the Springdale area. He responded: "From an economic standpoint there would not be a lessening of value in those properties in the Springdale area, but from a psychological standpoint, it would have a tendency to have a demoralizing—." *Id.*, at 92. At this point, counsel for petitioners interposed an objection, but Moore was eventually permitted to answer the question, and he testified as follows:

> "In my opinion, with the 17 years experience in the real estate industry, psychologically it would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein Park

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was absent. Thus, to the extent that the majority reaches its conclusion through reliance on that finding by the District Court, it is relying on a fact not properly found. The appropriate response in this situation should be to instruct the Court of Appeals to remand the case to the District Court for reconsideration of the evidence under the correct legal standard.

> area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future." *Id.*, at 95.

Surely Moore's uncontroverted expert testimony is evidence of an impairment of property values, an impairment directly traceable to the closing of West Drive. The majority dismisses this aspect of Moore's testimony as "speculation." *Ante,* at 117–118. Yet the majority has no trouble crediting Moore's brief and conclusory testimony that the immediate impact of the closing would be negligible. Unlike the majority, I am unable to dismiss so blithely the balance of his comments.

The majority also gives insufficient weight to the testimony of Dr. Feit on this point. Dr. Feit testified, based on his experience as Director of Planning for Allegheny County, Pa., that the shift in traffic patterns as a result of the closing of West Drive would lower the property values for owners living north of Hein Park. He further testified that the closing of West Drive would lead to increased hostility toward Hein Park residents and, ultimately, to increased police harassment of residents of the Springdale area. Tr. 102–104, 118–120.[12] I would have thought it indisputable that increased police harassment of property owners must be construed as a significant impairment of their property interests. In my view, the combined testimony of Dr. Feit and real estate ex-

[12] The District Court expressly credited Dr. Feit's testimony that racial hostility and arrests of Negro residents would increase. App. 155. That court did not discuss Dr. Feit's testimony that property values in the area north of Hein Park would decrease as a result of the closing of West Drive. There is absolutely no record evidence contravening either Dr. Feit's or real estate agent Moore's testimony that property values would fall.

pert Moore is sufficient to demonstrate that the closing of West Drive will cause genuine harm to the property rights of the Negro residents of the area north of Hein Park.

In sum, I cannot agree with the majority's suggestion that "[t]he injury to respondents established by the record is the requirement that one public street rather than another must be used for certain trips within the city," *ante,* at 124, and that this requirement amounts to no more than "some slight inconvenience," *ante,* at 119. Indeed, as should be clear from the foregoing, the problem is less the closing of West Drive in particular than the establishment of racially determined districts which the closing effects. I can only agree with the Court of Appeals, which viewed the city's action as nothing more than "one more of the many humiliations which society has historically visited" on Negro citizens. 610 F. 2d, at 404. In my judgment, respondents provided ample evidence that erection of the challenged barrier will harm them in several significant ways. Respondents are being sent a clear, though sophisticated, message that because of their race, they are to stay out of the all-white enclave of Hein Park and should instead take the long way around in reaching their destinations to the south. Combined with this message are the prospects of increased police harassment and of a decline in their property values. It is on the basis of these facts, all firmly established by the record, that I evaluate the legal questions presented by this case.

II

When Congress enacted § 1 of the Civil Rights Act of 1866, 14 Stat. 27, now 42 U. S. C. § 1982, it intended "to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein. . . ." *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 436 (1968). See *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.,* 410 U. S. 431, 435 (1973); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 235 (1969). These enumerated rights include the rights

"to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U. S. C. § 1982. At bottom, as the majority recognizes, § 1982 creates a right in Negroes "not to have property interests impaired because of their race." *Ante,* at 122.[13] Our decisions have recognized that the language of the statute is to be broadly construed. We have said that "'[w]e are not at liberty to seek ingenious analytical instruments,'" to carve exceptions from § 1982. *Jones* v. *Alfred H. Mayer Co., supra,* at 437, quoting *United States* v. *Price,* 383 U. S. 787, 801 (1966). On the contrary, "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 . . . ." *Sullivan* v. *Little Hunting Park, Inc., supra,* at 237. If the language of the statute is given the broad reading that our cases require, then it is difficult to see how petitioners can avoid its effect.

The majority concludes that the kind of harm that § 1982 was meant to prohibit does not exist in this case, but as I have stated, a proper reading of the record demonstrates substantial harm to respondents' property rights as a result of the establishment of a barrier at the northern edge of Hein Park. The closing will both burden respondents' ability to enjoy their property and also depress its value, thus falling within the literal language of § 1982.[14] Even the majority

[13] Indeed, we have in the past implied that a violation of § 1982 can be made out when the challenged action *may* have an adverse impact on property values in the future. *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.,* 410 U. S. 431, 437 (1973). See *Wright* v. *Salisbury Club, Ltd.,* 632 F. 2d 309, 314–316 (CA4 1980).

[14] Like the majority, I do not reach the question whether a showing of discriminatory intent is a necessary element of a violation of § 1982. JUSTICE WHITE, in his opinion concurring in the judgment, examines the language of the statute and the legislative history and concludes that a showing of racially discriminatory purpose is indeed required. I do not believe that his arguments support his conclusion. The language of the statute simply declares that "[a]ll citizens of the United States shall have

concedes that "the statute might be violated by official action that depreciated the value of property owned by [Negro] citizens." *Ante,* at 123. I believe that that is precisely what is challenged in this case.[15]

The legislative history of § 1982 also supports my conclusion that the carving out of racial enclaves within a city is

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the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The plain language does not suggest an intent requirement, because it does not condition a violation of § 1982 on the motivation of any person or persons. There is nothing in the statute to suggest, for example, that a right denied through sheer insensitivity is entitled to less protection than one denied through racial animus. I agree with JUSTICE WHITE that the legislative history suggests a congressional intent to strike down both state laws that by their terms served to oppress the former slaves and those that were enforced with that goal in mind. But particularly in light of the broad statutory language, I find no basis for concluding that that is all that Congress meant to do. Even if JUSTICE WHITE is correct, and racially discriminatory motivation must be demonstrated under § 1982, it is enough for me if the evidence raises an inference of intent and the government fails to rebut it with a sufficiently strong explanation. And on that premise, I would certainly hold that intent must be inferred when, as here, municipal officials were acting on behalf of what they knew to be and what had always been an all-white community, were acting not in accordance with any municipal plan but instead for the sole benefit of that white community, were aware in the course of their proceedings that a predominantly Negro community would be injured by their official action, deviated significantly from their usual procedures, and gave the Negro community no meaningful opportunity to state its case. I do not believe that this inference is successfully rebutted on the facts of this case. See infra, at 152–153.

[15] The majority implies, see *ante,* at 114, n. 23, that there is analytical significance in the fact that although the defendants are the city and its officials, respondents introduced evidence as to the motivations of the private citizens who petitioned the city to close West Drive. But it is beyond dispute that § 1982 has application to official government action that merely ratifies private discriminatory conduct. See *Hurd* v. *Hodge,* 334 U. S. 24, 31–34 (1948). See also Cong. Globe, 39th Cong., 1st Sess., 1833 (1866) (remarks of Rep. Lawrence) (statute reaches State's failure to protect rights as well as its actions that infringe them).

precisely the kind of injury that the statute was enacted to prevent. In *Jones* v. *Alfred H. Mayer Co., supra,* at 422–437, this Court discussed the legislative history of the Civil Rights Act of 1866 in some detail, and there is no need to duplicate all of that discussion here. A few examples should suffice.

When the Civil Rights Act of 1866 was introduced, both its supporters and its opponents alike recognized the revolutionary scope of its intended purpose of eliminating discrimination. As we noted in *Jones* v. *Alfred H. Mayer Co., supra:*

> "That the bill would indeed have so sweeping an effect was seen as its great virtue by its friends and its great danger by its enemies but was disputed by none. Opponents of the bill charged that it would not only regulate state laws but would directly 'determine the persons who [would] enjoy . . . property within the States,' *threatening the ability of white citizens 'to determine who [would] be members of [their] communit[ies]. . . .'*" 392 U. S., at 433 (footnotes omitted; emphasis added).

Senator Van Winkle, the Member of Congress quoted by the Court in that passage from *Jones,* spoke at some length about the "dangers" inherent in the bill that would eventually become § 1982:

> "I believe that the division of men into separate communities and their living in society and association with their fellows . . . are both divine institutions . . . . We have the right to determine who shall be members of our community, and . . . I do not see where it comes in that we are bound to receive into our community those whose mingling with us might be detrimental to our interests. I do not believe that a superior race is bound to receive among it those of an inferior race . . . ." Cong. Globe, 39th Cong., 1st Sess., 498 (1866).

The Senate of course passed the bill in spite of Senator Van Winkle's fears, thus repudiating his view that white residents should enjoy the absolute right to close their communities to Negroes. In enacting § 1982, Congress was "fully aware of the breadth of the measure it had approved." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S., at 433. Senator Lane, a supporter of the bill, answered the arguments of Senator Van Winkle and others by explaining that the bill would prevent a white person from "invok[ing] the power of local prejudice" against a Negro. Cong. Globe, 39th Cong., 1st Sess., at 603. Senator Trumbull, a sponsor of the legislation, made plain that it was intended to prohibit local discriminatory customs as well as discriminatory state laws. *Id.*, at 1759. During the House debate over the Civil Rights Act, Representative Cook argued that without the legislation, slavery might be perpetuated "under other names and in other forms" because "[a]ny combination of men in [a Negro's] neighborhood" might join to oppress him. *Id.*, at 1124. As we recognized in *Jones* v. *Alfred H. Mayer Co., supra,* at 427–428, one goal of the Reconstruction Congress in enacting the statute was to provide protection for Negroes when "white citizens . . . combined to drive them out of their communities." See Cong. Globe, 39th Cong., 1st Sess., at 1156, 1835; J. tenBroek, Equal Under Law 181 (rev. ed. 1965).

I do not, of course, mean to suggest that the Reconstruction Congress that enacted § 1982 anticipated the precise situation presented by this case. Nor do I wish to imply that the Act prevents government from ever closing a street when the effect is to inflict harm on Negro property owners. But because of our Nation's sad legacy of discrimination and the broad remedial purpose of § 1982, I believe that official actions whose effects fall within its terms ought to be closely scrutinized. When, as here, the decisionmaker takes action with full knowledge of its enormously dispropor-

tionate racial impact,[16] I believe that § 1982 requires that the government carry a heavy burden in order to justify its action. Absent such a justification, the injured property owners are entitled to relief. There is no need to suggest here just how great the government's burden should be, because the reasons set forth by the city for the closing of West Drive could not, on the facts of this case, survive any but the most minimal scrutiny.

In sustaining the closing of West Drive, the majority points to petitioners' "[p]roper management of the flow of vehicular traffic within a city," and their exercise of the "unquestionably legitimate" "residential interest in comparative tranquility," *ante,* at 126, 127.[17] Those interests might, as the majority contends, well prove "sufficient to justify an adverse impact on motorists who are somewhat inconvenienced by the street closing," *ante,* at 128, but that is not the impact that the city must explain in this case. It must instead justify the substantial injury that it has inflicted on Negro citizens solely for the benefit of the white residents of Hein Park. For that purpose, the proffered explanations are insufficient. "[A] city's possible motivations to ensure safety and save money cannot validate an otherwise impermissible state action." *Palmer* v. *Thompson,* 403 U. S. 217, 226 (1971). See *Watson* v. *Memphis,* 373 U. S. 526, 537 (1963); *Cooper* v. *Aaron,* 358 U. S. 1, 16 (1958); *Buchanan* v. *Warley,* 245 U. S. 60, 74, 81 (1917). It is simply unrealistic to suggest, as does the Court, that the harm suffered by respondents

[16] See n. 9, *supra.*

[17] I do not understand the majority to dispute the conclusion by the Court of Appeals that "[t]he proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city." 610 F. 2d, at 404. That statement would in fact be difficult to dispute in light of the testimony by a city official that a street closing for traffic control purposes is in fact unprecedented. See Tr. 297–298 (testimony of Paul Goldstein). Of course, the result that I reach does not turn on the accuracy of the statement by the Court of Appeals.

has no more than "symbolic significance," *ante,* at 128, and it defies the lessons of history and law to assert that if the harm is only symbolic, then the federal courts cannot recognize it. Compare *Plessy* v. *Ferguson,* 163 U. S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it"), with *Brown* v. *Board of Education,* 347 U. S. 483, 494 (1954) ("To separate them from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson,* this finding is amply supported by modern authority"). The message the city is sending to Negro residents north of Hein Park is clear, and I am at a loss to understand why the majority feels so free to ignore it.

Indeed, until today I would have thought that a city's erection of a barrier, at the behest of a historically all-white community, to keep out predominantly Negro traffic, would have been among the least of the statute's prohibitions. Certainly I suspect that the Congress that enacted § 1982 would be surprised to learn that it has no application to such a case. Even the few portions of debate that I have cited make clear that a major concern of the statute's supporters was the elimination of the effects of local prejudice on Negro residents. In my view, the evidence before us supports a strong inference that the operation of such prejudice is precisely what has led to the closing of West Drive. And against this record, the government should be required to do far more than it has here to justify an action that so obviously damages and stigmatizes a racially identifiable group of its citizens.

In short, I conclude that the plain language of § 1982 and its legislative history show that the harm established by a fair reading of this record falls within the prohibition of the statute. Because the Court of Appeals reached the same conclusion, I would affirm its judgment.[18]

[18] In light of my disposition of the statutory question, I would ordinarily find it unnecessary to consider the merits of the Thirteenth Amendment argument. But I cannot let the Court's discussion of the constitutional claim pass without comment. The majority reserves until another case the issue whether § 1 of the Amendment by its own force bans "badges and incidents of slavery" because, in its view, "a review of the justification for the official action challenged in this case demonstrates that its disparate impact on black citizens could not . . . be fairly characterized as a badge or incident of slavery." *Ante*, at 126. For reasons that I have already indicated, I believe that the degree of harm to respondents from the erection of a barrier at the end of West Drive far exceeds the minimal inconvenience found by the majority. Assuming with the majority that the Amendment would, even without implementing legislation, ban more than the mere practice of slavery, I would conclude that official action causing harm of the magnitude suffered here plainly qualifies as a "badge or incident" of slavery, at least as those terms were understood by the Reconstruction Congress.

When the Thirteenth Amendment was being debated, supporters and opponents alike acknowledged that it would have the effect of striking down racial discrimination in a wide variety of areas. See, *e. g.*, Cong. Globe, 38th Cong., 1st Sess., 1465, 2944, 2962, 2979, 2982–2983, 2987 (1865). See generally J. tenBroek, Equal Under Law 162–168 (rev. ed. 1965). In enacting § 1 of the Civil Rights Act of 1866, the provision that produced both § 1981 and § 1982, see *Runyon* v. *McCrary*, 427 U. S. 160, 168, n. 8, 170 (1976), Congress did not believe it was doing more than spelling out the guarantees implicit in § 1 of the Thirteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., 503–504 (1866) (remarks of Sen. Howard); *id.*, at 602–603 (remarks of Sen. Lane); R. Kluger, Simple Justice 47, 627–629 (1975). Because that Congress included so many of those who had a hand in drafting the Thirteenth Amendment, cf. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 439–440 (1968), I would give its judgment considerable deference. Consequently, I would hold that because the closing of West Drive is forbidden on these facts by § 1982, it is *a fortiori* a violation of the Thirteenth Amendment as well. Of course, this should not be taken as an argument that Congress *cannot* under § 2 of the Thirteenth Amendment enact legislation forbidding more than would § 1 of the Amend-

III

I end, then, where I began. Given the majority's decision to characterize this case as a mere policy decision on the part of the city of Memphis to close a street for valid municipal reasons, the conclusion that it reaches follows inevitably. But the evidence in this case, combined with a dab of common sense, paints a far different picture from the one emerging from the majority's opinion. In this picture a group of white citizens has decided to act to keep Negro citizens from traveling through their urban "utopia," and the city has placed its seal of approval on the scheme. It is this action that I believe is forbidden, and it is for that reason that I dissent.

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ment standing alone. I simply suggest that Congress *did not* do so when it enacted § 1 of the Civil Rights Act of 1866.

I also do not mean to imply that all municipal decisions that affect Negroes adversely and benefit whites are prohibited by the Thirteenth Amendment. I would, however, insist that the government carry a heavy burden of justification before I would sustain against Thirteenth Amendment challenge conduct as egregious as erection of a barrier to prevent predominantly Negro traffic from entering a historically all-white neighborhood. For reasons that I have already stated, I do not believe that the city has discharged that burden in this case, and for that reason I would hold that the erection of the barrier at the end of West Drive amounts to a badge or incident of slavery forbidden by the Thirteenth Amendment.

SCINDIA STEAM NAVIGATION CO., LTD. *v.* DE LOS SANTOS ET AL.

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

No. 79–512. Argued December 1, 1980—Decided April 21, 1981

Respondent longshoreman, an employee of respondent stevedore who was engaged by petitioner shipowner to load its vessel, was injured while working in the ship's hold when he was struck by cargo that fell from a pallet being held in suspension by a winch that was part of the ship's gear and was being operated by another longshoreman. The winch's braking mechanism allegedly had been malfunctioning for two days preceding the day of the accident, but there was a dispute as to whether the cargo fell because the suspended pallet was swinging back and forth or because the braking mechanism slipped while the pallet was suspended, and as to whether the shipowner knew or should have known of the alleged condition of the winch. Respondent longshoreman brought suit against petitioner under the provision of the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972, 33 U. S. C. § 905 (b), which states that a longshoreman injured "by the negligence of a vessel . . . may bring an action against such vessel as a third party" and that the vessel's liability "shall not be based upon the warranty of seaworthiness." The District Court granted summary judgment for petitioner, holding that under the negligence standards governing liability under § 905 (b), a shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore is in exclusive control of the work, and that even if petitioner knew or should have known of the defective winch, a shipowner has no duty to warn the stevedore or his employees of open and obvious defects. The Court of Appeals reversed, holding that under the proper standard, petitioner had a duty to continue to inspect conditions of the vessel even if it had been turned over to the stevedore in safe condition, and that if dangerous conditions subsequently developed, in light of the vessel's practical opportunities to discover and remedy the dangers, failure to do so could be negligence. Concluding that there were several material facts in dispute that were for a jury to resolve, the court remanded the case for further proceedings.

Held:

1. A shipowner has a duty to have the ship and its equipment in such

condition that the stevedore may carry on its cargo operations with reasonable safety; and if the shipowner fails at least to warn the stevedore of hidden danger which was known to the shipowner, or should have been known to him in the exercise of reasonable care, he is liable if his negligence causes injury to a longshoreman. But once the stevedore's cargo operations have begun, absent contract provision, positive law, or custom to the contrary the shipowner has no general duty under § 905 (b) by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. Thus, the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is consistent with Congress' intent under the 1972 Amendments of the Act to foreclose the shipowner's previous faultless liability based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoreman to inspect or supervise cargo operations. Pp. 166–172.

2. However, there are circumstances in which the shipowner has a duty to act where a danger to longshoremen arises from the malfunctioning of the ship's gear being used in cargo operations. In this case, it is possible that the stevedore's judgment in continuing to use the winch despite its malfunctioning was so obviously improvident that petitioner, if it knew of the defect and that the stevedore was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the winch. The same would be true if the defect existed from the outset and petitioner must be deemed to have been aware of its condition. The stevedore's duties under positive law to provide a safe workplace and to use safeguards with respect to the ship's gear, as well as the vessel's justifiable expectations that those duties will be performed, are relevant in determining whether the shipowner has breached its duty. But an equally necessary inquiry is whether the pertinent statutes, regulations, or custom place or assume a continuing duty on the vessel to repair defective ship's gear being used by the stevedore in the cargo operation. Here, the record supports the Court of Appeals' holding that there was a triable issue as to whether the shipowner had actual knowledge of the alleged failure in the winch's braking mechanism or was chargeable with knowledge because the winch was defective from the outset. Thus, the District Court erred in granting summary judgment, and the case should be

returned to it and, if necessary, tried to a jury under appropriate instructions. Pp. 172–179.

598 F. 2d 480, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which all other Members joined except BURGER, C. J., who took no part in the decision of the case. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. 179. POWELL, J., filed a concurring opinion, in which REHNQUIST, J., joined, *post,* p. 180.

Graydon S. Staring argued the cause for petitioner. With him on the briefs was *Robert H. Madden.*

James A. Grutz argued the cause for respondents and filed a brief for respondent De Los Santos.*

JUSTICE WHITE delivered the opinion of the Court.

Respondent Santos, a longshoreman and an employee of respondent Seattle Stevedore Co., was injured while he was helping load the M/S *Jalaratna,* a vessel owned by petitioner Scindia Steam Navigation Co., Ltd. He later brought an action against Scindia pursuant to § 5 (b) of the Longshoremen's and Harbor Workers' Compensation Act (Act), as amended in 1972,[1] which, as set forth in 33 U. S. C. § 905 (b), provides in relevant part as follows:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary

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**Harry M. Philo, Arthur Roth,* and *Nathan Baker* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

E. D. Vickery filed a brief for Apex Marine Corp. et al. as *amici curiae.*

[1] Pub. L. 92–576, 86 Stat. 1251, amending 33 U. S. C. §§ 901–950.

> shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." [2]

The District Court granted petitioner's motion for summary judgment; [3] the Court of Appeals, disagreeing with the District Court on both the facts and the law, reversed and remanded for further proceedings. 598 F. 2d 480 (CA9 1979). We granted certiorari, 446 U. S. 934, because the Courts of Appeals are in considerable disagreement as to the meaning and application of § 905 (b).[4]

I

For present purposes, we take the facts from the opinion of the Court of Appeals, which properly viewed the case in the light most favorable to Santos, against whom summary judgment had been granted.

On December 10, 1972, Seattle Stevedore Co., pursuant to its undertaking with Scindia, was engaged in loading a cargo of wheat into a hold of the M/S *Jalaratna*. A winch, part of the ship's gear, was being used to lower wooden pallets, each containing seventy 50-pound sacks of wheat, into the hold. Because of the location of the winch controls, the longshoreman operator relied on the hatch tender, another long-

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[2] Section 933, referred to in § 905 (b), among other things provides that an injured longshoreman need not elect between compensation and suing a third party. It also specifies the relative rights of the longshoreman and his employer where the longshoreman accepts compensation and sues a third party or fails to do so within a specified time. Because its compensation payments to Santos gave it an interest in Santos' recovery, Seattle Stevedore Co. intervened and is a respondent here.

[3] The District Court's opinion is reported at 1976 A. M. C. 2583 and is Appendix A to the petition for certiorari.

[4] See n. 9, *infra*.

shoreman, to signal him when to start and stop the winch while lowering a pallet of sacks into the hold. Santos and three other longshoremen were in the hold. Their task was to remove sacks of wheat from the pallet and properly stow them.

On the day of the accident, as it had for the two previous days, the braking mechanism of the winch was malfunctioning in that it would not quickly stop the descent of a loaded pallet, which would continue to drop for several feet before coming to a stop. At the time important here, while a pallet was being lowered, the hatch tender signaled the winch operator to stop the descent of the load. The brake was applied, but the pallet did not stop before striking a pallet jack [5] with some force and spilling about half the sacks of wheat from the pallet. The hatch tender signaled the operator to raise the pallet about 15 feet and, believing that the remaining sacks on the pallet were secure enough not to fall, permitted Santos and the other men to clear away the spilled sacks then lying below in the hold. Some minutes later, however, more sacks fell from the pallet, striking and injuring Santos. There was dispute as to whether the additional sacks fell because the suspended pallet was swinging back and forth or because while the pallet was suspended the braking mechanism slipped on three or four occasions, each time requiring the operator to raise it again, thus working loose the additional sacks that fell on Santos.

Relying on the legislative history of the 1972 Amendments to the Act, the District Court held that the negligence standards governing the longshoreman's action against a shipowner under § 905 (b) are best expressed in Restatement (Second) of Torts §§ 343 and 343A (1965), which purport to

[5] A pallet jack is a small, wheeled, cartlike vehicle with prongs on the front like a forklift with which the longshoremen in the hold would cart the pallet load to the wings of the hold where they would then remove the sacks and stow them by hand. Record 77.

state the prevailing or preferred rules governing the liability of a possessor of land to an invitee.[6] Under these land-based negligence standards, the District Court thought

> "a shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore [is] in exclusive control over the manner and area of the work . . . , nor is the shipowner under a duty to warn the stevedore or his employees of dangers or open and obvious defects which are known to the stevedore or his employees or which are so obvious and apparent that they may reasonably be expected to discover them." 1976 A. M. C. 2583, 2585.

Based on the admissions of the parties and the depositions available to the court, the District Court concluded (1) that there was no dispute that the premises were in the exclusive control of Seattle during the loading operation and (2) that

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[6] Restatement (Second) of Torts § 343 provides:

"§ 343. Dangerous Conditions Known to or Discoverable by Possessor

"A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

"(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

"(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

"(c) fails to exercise reasonable care to protect them against the danger."

Restatement (Second) of Torts § 343A provides:

"§ 343A. Known or Obvious Dangers

"(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

"(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated."

even if Scindia knew or should have known of the defective winch,[7] the condition of the winch "was open and obvious to the plaintiff" and "the fact that plaintiff undertook his actions free from any direction by the defendant while recognizing that the circumstances were so dangerous, is such that the defendant cannot be held liable as a matter of law." *Id.*, at 2586–2587. In addition, the District Court found that "the alleged defective condition of the winch had only a remote cause-of-fact relationship to plaintiff's accident and could not have been the proximate cause thereof as a matter of law." *Id.*, at 2587. Hence, summary judgment was granted.[8]

Reversing, the Court of Appeals disagreed with the District Court and with other Courts of Appeals with respect to the applicable law. Sections 343 and 343A of the Restatement were improper measures of the shipowner's liability for negligence under § 905 (b) [9] because those sections in effect

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[7] The District Court stated, 1976 A. M. C., at 2586, that "[p]laintiff does not controvert defendant's claim that no one from the ship's crew was ever informed of the winch's condition prior to the accident" and further stated that if the winch was defective, it was a "condition [about] which the Court finds the shipowner did not know nor should it reasonably have been expected to know, given the exclusive control of the gear by the stevedores during the relevant time period." *Ibid.* Scindia contended in any event that the winch was not defective but concedes that for present purposes the case should be judged on the assumption that it was.

[8] Federal Rule of Civil Procedure 56 (c) provides that judgment shall be entered in favor of the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[9] The Court of Appeals acknowledged that the Courts of Appeals for the Second, Fourth, and Fifth Circuits had relied on these sections in § 905 (b) suits. See, *e. g.*, *Canizzo* v. *Farrell Lines, Inc.*, 579 F. 2d 682 (CA2 1978); *Gay* v. *Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233 (CA5 1977); *Anuszewski* v. *Dynamic Mariners Corp., Panama*, 540 F. 2d 757 (CA4 1976); *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (CA2 1976). The Court of Appeals for the Second Circuit has recently reaffirmed its position. *Evans* v. *S.S. "Campeche,"* 639 F. 2d 848 (1981). On the other

incorporated notions of contributory negligence and assumption of risk that were inapplicable under the maritime law. Instead, the Court of Appeals declared the controlling standard under § 905 (b) to be the following:

> "A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner
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> "(a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and
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> "(b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger." 598 F. 2d, at 485.

Under this standard, Scindia's duty to inspect did not end even if the vessel was turned over to the stevedore in safe condition. If conditions dangerous to the longshoremen subsequently developed, in light of the vessel's practical opportunities to discover the dangers and remedy them, failure to do so could be negligence on its part.[10]

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hand, the First and Third Circuits, like the Ninth Circuit, have held that these sections should not apply in § 905 (b) suits since they might bar a longshoreman from recovery because he was contributorily negligent or because he voluntarily encountered a known or obvious risk. See *Sarauw* v. *Oceanic Navigation Corp.*, 622 F. 2d 1168 (CA3 1980); *Johnson* v. *A/S Ivarans Rederi*, 613 F. 2d 334 (CA1 1980); *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 610 F. 2d 116 (CA3 1979); *Lawson* v. *United States*, 605 F. 2d 448 (CA9 1979); *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*, 605 F. 2d 438 (CA9 1979); 598 F. 2d 480 (CA9 1979) (case below).

[10] The Court of Appeals referred to its standard as being a "reasonable care under the circumstances" approach. *Id.*, at 486. It found support for this formulation in *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625 (1959). In that case, a visitor paying a social call on a member of the ship's crew was injured when he fell on a defective stairway. The jury found the shipowner negligent and returned a verdict, which was set aside on appeal because the visitor had been a

Under the Court of Appeals' view of the law there were several material facts in dispute that were for a jury to resolve: whether the shipowner knew or should have known of the defective winch; whether Seattle was in exclusive control of the loading in the sense that only Seattle could have repaired the winch; whether the defective operation of the winch had caused the initial spillage of the sacks, thus necessitating a cleanup, or had later been the proximate cause of the additional sacks falling from the pallet and injuring Santos. Accordingly, the Court of Appeals set aside the judgment of the District Court and remanded for further proceedings.

II

Initially, we must briefly revisit the 1972 Amendments to the Act. Prior to 1972, a longshoreman injured while loading or unloading a ship could receive compensation payments and also have judgment against the shipowner if the injury was caused by the ship's unseaworthiness or negligence. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946). Proof of unseaworthiness required no proof of fault on the part of the shipowner other than an unsafe, injury-causing condition on the vessel. This was true even though the condition was

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licensee rather than an invitee. This Court reversed, preferring to adopt a single duty of "exercising reasonable care under the circumstances of each case," rather than to incorporate in the maritime law the complexities of the common law of invitee and licensee. *Id.,* at 632. The *Kermarec* standard was reaffirmed in *Marine Terminals* v. *Burnside Shipping Co.,* 394 U. S. 404 (1969), a case involving a suit by a stevedore against the shipowner. We have no quarrel with this standard. Inevitably, however, the rule will undergo refinement as it is applied to various categories of cases. Thus, in considering the reasonableness of Scindia's conduct under this standard, the Court of Appeals found it appropriate to inquire whether the shipowner had a continuing duty to inspect and held that it did. As will become evident, we have a different view: the shipowner's duty of reasonable care under the circumstances does not impose a continuing duty to inspect the cargo operations once the stevedore begins its work.

caused, created, or brought into play by the stevedore or its employees.[11] In the latter event, the shipowner could recover over against a stevedore for breach of express or implied warranty to handle the cargo in a reasonably safe manner. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956).[12]

The 1972 Amendments, particularly by adding § 905 (b), radically changed this scheme of things. The compensation payments due the longshoreman from the stevedore for injuries incurred in the course of his employment were substantially increased; the longshoreman's right to recover for unseaworthiness was abolished; his right to recover from the shipowner for negligence was preserved in § 905 (b), which provided a statutory negligence action against the ship; and the stevedore's obligation to indemnify the shipowner if the latter was held liable to the longshoreman was abolished.

Section 905 (b) did not specify the acts or omissions of the vessel that would constitute negligence. In light of the differences among the lower federal courts as to the construction and application of § 905 (b), neither can it be said that the legislative history, which has been analyzed and reanalyzed in the course of these cases, furnishes sure guidance for construing § 905 (b).[13] Much was left to be resolved through

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[11] *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396 (1954); *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Crumady* v. *The J. H. Fisser*, 358 U. S. 423 (1959); *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421 (1960); *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964).

In *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494 (1971), however, we ruled that a single act of operational negligence by the stevedore did not render the vessel unseaworthy or subject the vessel to liability.

[12] See also the cases cited in n. 11, *supra*.

[13] Section 905 (b) itself negates the vessel's liability for unseaworthiness, and the Committee Reports state that the purpose of eliminating this remedy was to place the injured longshoreman "in the same position he would be if he were injured in non-maritime employment ashore . . . and not to endow him with any special maritime theory of liability or cause of

the "application of accepted principles of tort law and the ordinary process of litigation." Rep., p. 11.

III

We held in *Marine Terminals* v. *Burnside Shipping Co.*, 394 U. S. 404, 415 (1969), that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at

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action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delegable duty', or the like." S. Rep. No. 92–1125, p. 10 (1972) (hereafter Rep.). (H. R. Rep. No. 92–1441 (1972) is in all relevant respects identical to the Senate Report.) The vessel was not to be liable on the theory of unseaworthiness for the acts or omissions of stevedores, or of the employees of stevedores, for the manner in which the stevedore performed its work, or for its defective gear or equipment. Rep., p. 10. Its liability was to be "based on its own negligence" and could be proved only if it was shown "to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." *Id.*, at 11.

At the same time, the Committees observed that the statutory cause of action for negligence would "meet the objective of encouraging safety because the vessel would still be required to exercise the same care as a land-based person in providing a safe place to work." *Id.*, at 10. Nothing was intended "to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition" as long as the vessel was not "chargeable with the negligence of the stevedore or employees of the stevedore." *Id.*, at 10, 11.

The Committees also anticipated that in § 905 (b) cases, as in other admiralty cases, the rule of comparative negligence would apply and the defense of assumption of risk would be barred. Furthermore, the Reports emphasized that the amendments were not intended to relieve any person from his duties and obligations under the Occupational Safety and Health Act of 1970.

Otherwise, the definition of the vessel's negligence and its resulting liability were left to be "resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties." Rep., p. 11. It was anticipated, however, that questions arising in § 905 (b) cases "shall be determined as a matter of Federal law." Rep., p. 12.

least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. *Id.*, at 416, n. 18. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman. Petitioner concedes as much. Brief for Petitioner 20–21. It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation.

The parties, however, like the District Court and the Court of Appeals, are in sharp disagreement as to the vessel's duty under § 905 (b) once the stevedore's cargo operations have begun. Scindia contends that the shipowner has no duty to supervise or inspect the stevedore's cargo operations or to take reasonable care to discover dangerous conditions that develop or come to light during the loading or unloading. Scindia also submits that even if the vessel learns of the hazard, it has no duty to correct it and is entitled as a matter of law to rely on the stevedore to protect his employees from injury. This is true, Scindia argues, even though the hazard is an ob-

viously defective ship's winch being used by the stevedore and his longshoremen employees,[14] and even if the winch was defective when the stevedore came aboard and the vessel is charged with knowledge of the condition. Respondents, on the other hand, defend the view of the Court of Appeals that the vessel is subject to a continuing duty to use reasonable care to discover dangerous conditions exposing longshoremen to unreasonable risk of harm and to exercise reasonable care under the circumstances to protect them. We are unable to agree wholly with either of these submissions.

Considering first the position of the Court of Appeals, we cannot agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation. Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected.[15] It would

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[14] Because the legislative history suggests that the shipowner's liability is to be judged by land-based standards, see n. 13, *supra,* it is urged that the District Court properly turned to and applied §§ 343 and 343A of the Restatement (Second) of Torts. But the legislative history does not refer to the Restatement and also states that land-based principles of assumption of risk and contributory negligence are not to be applied in § 905 (b) cases. This strongly suggests, as *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U. S. 625 (1959), indicated, that maritime negligence actions are not necessarily to be governed by principles applicable in nonmaritime contexts. Furthermore, since the lower courts are in disagreement not only as to the applicability of §§ 343 and 343A but also as to their import and meaning when applied in the maritime context, those sections, while not irrelevant, do not furnish sure guidance in cases such as this.

[15] "Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act. *Crumedy* vs. *The J. H. Fisser,* 358 U. S. 423, *Albanese* vs. *Matts,* 382 U. S. 283, *Skibinski* vs. *Waterman SS Corp.,* [360] F. 2d 539; for the manner or method in which stevedores or employees of stevedores subject to this

be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same. "[C]reation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905 (b)." *Hurst* v. *Triad Shipping Co.*, 554 F. 2d 1237, 1249–1250, n. 35 (CA3 1977); *Evans* v. *S.S. "Campeche,"* 639 F. 2d 848, 856 (CA2 1981).[16]

Act perform their work, *A. N. G. Stevedores* vs. *Ellerman Lines,* 369 U. S. 355, *Blassingill* vs. *Waterman SS Corp.,* 336 F. 2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co.* vs. *Peterson,* 347 U. S. 396, *Italia Societa* vs. *Oregon Stevedoring Co.,* 376 U. S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel's negligence." Rep., p. 10.

[16] Much is made of the Committees' statement that nothing in the bill "is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." *Ibid.* But the statement did not explain what the vessel's "responsibility" is and what "appropriate" action might be, or when it "should have known" of the condition. The Committees did offer an example:

"So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover, he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the

As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U. S. C. § 941, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen.[17] The ship is not the common employer of the longshoremen [18] and owes no such statutory duty to them. Furthermore, as our cases indicate, the stevedore normally warrants to discharge his duties in a workmanlike manner; and although the 1972 Amendments relieved the stevedore of his duty to indemnify the shipowner for damages paid to longshoremen for injuries caused by the stevedore's breach of warranty, they did not otherwise disturb the contractual undertaking of the stevedore nor the rightful expectation of the vessel that the stevedore would perform his task properly without supervision by the ship.

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exercise of reasonable care by the vessel under the circumstances." *Id.*, at 10–11.

However, when the failure to remove the oil spill would be "willful" or "negligent" or what the exercise of reasonable care under the circumstances would require was not explicated except to say that the "vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." *Id.*, at 11.

[17] Title 33 U. S. C. § 941 provides in relevant part as follows:

"(a) . . . Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees."

[18] The Committees rejected the proposal that the vessel and the stevedore be considered joint employers of longshoremen. Rep., p. 8.

The approach of the indemnity cases in this Court, beginning with *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956), was that the stevedore was in the best position to avoid accidents during cargo operations and that the shipowner could rely on the stevedore's warranty to perform competently. In *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964), for example, the vessel was found liable for injuries to a longshoreman caused by an unseaworthy condition arising when the stevedore, without negligence, supplied defective equipment used in handling the cargo. We held the vessel entitled to recover over against the stevedore, saying:

> "Oregon, a specialist in stevedoring, was hired to load and unload the petitioner's vessels and to supply the ordinary equipment necessary for these operations. The defective rope which created the condition of unseaworthiness on the vessel and rendered the shipowner liable to the stevedore's employee was supplied by Oregon, and the stevedoring operations in the course of which the longshoreman was injured were in the hands of the employees of Oregon. Not only did the agreement between the shipowner place control of the operations on the stevedore company, but Oregon was also charged under the contract with the supervision of these operations. Although none of these factors affect the shipowner's primary liability to the injured employee of Oregon, since its duty to supply a seaworthy vessel is strict and nondelegable, and extends to those who perform the unloading and loading portion of the ship's work, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, cf. *Pope & Talbot* v. *Hawn*, 346 U. S. 406, they demonstrate that Oregon was in a far better position than the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedoring contractor in the

selection and use of equipment and relies on the competency of the stevedore company." *Id.*, at 322–323.[19]

The 1972 Amendments foreclosed indemnity of the shipowner by the stevedore in § 905 (b) cases; but they also rejected the notion of a nondelegable duty on the shipowner to provide a safe place to work and did not undermine the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations.

We are of the view that absent contract provision, positive law, or custom to the contrary—none of which has been cited to us in this case—the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, *is* entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations. To the extent that the judgment of the Court of Appeals rested on a contrary view, we disagree.

IV

We arrive at the more difficult and recurring issue involved in this case: What are the shipowner's duties when he learns that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the steve-

[19] See also the cases cited in n. 11, *supra*. Of course, in the situation presented in the *Italia* case, the faultless liability of the shipowner would no longer obtain under § 905 (b).

dore and which may cause injury to the longshoreman? Must the owner take some action? Scindia and the District Court would have it that the vessel is entitled to rely on the expertise and responsibility of the stevedore and is not liable for injuries caused by dangers known by or obvious to the stevedore, who, if he fails to take proper precautions, is necessarily the sole and proximate cause of the injury. There is arguable support for this position in our cases.

In *Crumady* v. *The J. H. Fisser,* 358 U. S. 423 (1959), a ship's winch had been set by ship's officers to shut off the current at twice the safe working load of the unloading gear. The gear parted when subjected to undue strain because of the negligence of the stevedore. The Court held the ship unseaworthy. Consistent with past cases, the Court declared that the longshoremen's protection against unseaworthiness "imposes a duty which the owner of the vessel cannot delegate," a duty which, as to appliances, "does not end with supplying them; he must keep them in order." The shipowner "is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedoring company." *Id.,* at 427. The Court, nevertheless, permitted the ship to recover over from the stevedore "since the negligence of the stevedores . . . brought the unseaworthiness of the vessel into play . . . ." *Id.,* at 429.[20]

In *Crumady,* the Court declared that "those acting for the vessel owner" had adjusted the winch "in a way that made it unsafe and dangerous for the work at hand." *Id.,* at 427. It thus appeared that the vessel had at least been negligent, yet it was entitled to shift its entire liability to the stevedore

[20] Justice Harlan, joined by Justices Frankfurter and Whittaker, dissented, being of the view that the ship was not unseaworthy and that if it was, the ship was not entitled to indemnity if the stevedore merely brought into play the unseaworthy condition of the ship's own equipment. *Crumady* was reaffirmed in *Waterman S.S. Co.* v. *Dugan & McNamara, Inc.,* 364 U. S., at 423.

because it was entitled to rely on the stevedore's undertaking to perform in a workmanlike manner. Arguably, Scindia should likewise be justified in expecting Seattle to perform its undertaking and should therefore have no duty or responsibility with respect to the ship's winch, which, if defective, was obviously so and which the stevedore continued to use.

The court below rejected this position, holding that if the vessel should realize that the condition presents an unreasonable risk of harm, it is liable if it "fails to exercise reasonable care under the circumstances" to protect the longshoremen. The court did not suggest how to recognize an "unreasonable risk" of harm from an obvious danger or suggest what reasonable care under the circumstances might be.

The Court of Appeals for the Second Circuit, while disagreeing with the duty-to-inspect thesis of the Court of Appeals in the present case, has also rejected this position, ruling that although the shipowner is normally entitled to rely on the stevedore to guard against hazards to its employees, "there may be circumstances in which it would not be reasonable for the shipowner to assume that the stevedore will correct the problem." *Evans* v. *S.S. "Campeche,"* 639 F. 2d, at 856.[21] As that court sees it, mere knowledge of the

[21] The panel was divided. Judge Meskill wrote the principal opinion joined for the most part by Judge Friendly, who also wrote a concurring opinion. District Judge Bonsal, sitting by designation, dissented. The majority could not accept the notion that the shipowner had a continuing duty to inspect the cargo operations since "to so require would 'saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905 (b).' *Hurst* v. *Triad Shipping Co., supra,* 554 F. 2d at 1249 n. 35." 639 F. 2d, at 856. The majority also rejected the so-called "control test" which the court thought would, inconsistently with the statute, entirely relieve the shipowner from any liability for accidents occurring in the course of operations under the control of the stevedore. The majority's approach, which is considered consistent with § 343A of the Restatement and which it called the "reasonable anticipation standard," would place a duty of care on the vessel when it would be unreasonable to assume the stevedore will deal with an

danger would not be sufficient in itself to fasten such a duty on the shipowner, but if the shipowner should anticipate that the stevedore will not or cannot correct the danger and that the longshoremen cannot avoid it, then the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard. We are presently unprepared to agree that the shipowner has precisely the duty described by the Court of Appeals for the Second Circuit, but for the reasons that follow we agree that there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations.

On the facts posited here, for two days prior to the accident, it had been apparent to those working with the winch that this equipment was malfunctioning. Even so, whether it could be safely used or whether it posed an unreasonable risk of harm to Santos or other longshoremen was a matter of judgment committed to the stevedore in the first instance. The malfunctioning being obvious and Seattle having continued to use it, Scindia submits that if it was aware of the condition or was charged with knowledge of it, it was nevertheless entitled to assume that Seattle, the specialist in loading and unloading, considered the equipment reasonably safe and was entitled to rely on that judgment.

Yet it is quite possible, it seems to us, that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented

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apparent hazard—for example, "where the dangerous condition would be too difficult for the stevedore alone to remedy, or where the custom in the industry places the burden of acting on the shipowner, or where the ship affirmatively joins in the decision to continue despite the hazard." 639 F. 2d, at 856. The court should endeavor "to reach a realistic conclusion concerning the shipowner's reasonable anticipation." *Id.*, at 856–857.

an unreasonable risk of harm to the longshoremen,[22] and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.

As we have indicated, the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty. The trial court, and where appropriate the jury, should thus be made aware of the scope of the stevedore's duty under the positive law. But an equally necessary inquiry is whether the pertinent statutes, regulations, or custom place or assume a continuing duty on the vessel to repair defective ship's gear being used by the stevedore in the cargo operation.[23]

The statutory duty of the stevedore under § 941 to provide a safe place to work has been implemented by the Safety and Health Regulations for Longshoring. 29 CFR § 1918.1 *et seq.* (1980). Subpart F of these regulations, § 1918.51 *et seq.*, deals with the use of the ship's gear by the stevedore. Section 1918.51 (b) provides that "[a]ny component of cargo handling gear . . . which is visibly unsafe shall not be used until made safe." In addition, § 1918.53, dealing with cargo winches, provides that "[a]ny defect or malfunction of winches shall be reported immediately to the officer in charge of the vessel," § 1918.53 (a)(5); that in the case of electrical winches "[w]hen the electromagnetic or other service brake is unable to hold the load, the winch shall not be used,"

[22] We agree with the Court of Appeals that the shipowner may not defend on the ground that Santos should have refused to continue working in face of an obviously dangerous winch which his employer, Seattle, was continuing to use. The District Court erred in ruling otherwise, since the defense of assumption of risk is unavailable in § 905 (b) litigation. See also *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d, at 509.

[23] It may also be that the contract between the stevedore and the shipowner will have provisions specifically bearing on the dispute. The contract between Scindia and Seattle is not part of the record in this case.

§ 1918.53 (c)(1); and that "[e]mployees shall not be permitted to tamper with or adjust electric control circuits," § 1918.53 (c)(2).[24] Even in the absence of other statutory or regulatory law placing on the shipowner the obligation to repair a defective winch,[25] a possible inference from the

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[24] Petitioner acknowledged in its brief that only the shipowner could have repaired the defective winch, Brief for Petitioner 24, but argued that even if notified of the defect, it would merely have had the opportunity, but not the duty, to repair. Tr. of Oral Arg. 10.

[25] The United States Coast Guard has issued regulations with respect to the gear and equipment of cargo ships. 46 CFR Ch. 1, Subchapter 1, Cargo and Miscellaneous Vessels (1980). For ships to which the regulations are applicable, the shipowner must obtain a certificate of inspection at stated intervals. There are detailed requirements for the testing of winches. There is provision for accepting the certificate of private testing organizations recognized by the Coast Guard, such as the International Cargo Gear Bureau, Inc., which has its own manual specifying necessary testing procedures. The regulations, however, do not appear to specify the respective duties of the vessel and the stevedore in situations such as we now have before us. Scindia asserts that the Coast Guard regulations place no continuing duty on the shipowner to inspect the ship's equipment during cargo operations. Tr. of Oral Arg. 14. Also, the M/S *Jalaratna* appears to be an Indian ship and may not be covered by the regulations, which do not apply to "[a]ny vessel of a foreign nation signatory to the International Convention for Safety of Life at Sea, 1960, and which has on board a current, valid safety equipment certificate." 46 CFR § 90.05–1 (1980).

We note with some interest that in affirming a jury verdict for a longshoreman in *Irizarry* v. *Compania Maritime Navegacion Netumar, S. A.*, No. 79–7876 (CA2, May 22, 1980), cert. pending, No. 80–94, the Court of Appeals for the Second Circuit relied on the Joint Maritime Safety Code issued by the New York Shipping Association, Inc., the International Longshoremen's Association, and the Port of New York Joint Safety Committee. The Code was prepared pursuant to the terms of the labor agreement between the shipping association and the longshoremen's union and contains what is described as "the commonly agreed on practices for working together safely." The provision of the Code relied on by the Court of Appeals states that "[t]he owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear equipment, tools and work spaces which are to be used in stevedoring operations."

provisions already described is that when a defective winch is discovered, it should not be repaired by the stevedore but should be reported to and repaired by the shipowner. If this is the case, the situation comes down to this: If Scindia was aware that the winch was malfunctioning to some degree, and if there was a jury issue as to whether it was so unsafe that the stevedore should have ceased using it, could the jury also have found that the winch was so clearly unsafe that Scindia should have intervened and stopped the loading operation until the winch was serviceable?

We raise these questions but do not answer them, since they are for the trial court in the first instance and since neither the trial nor appellate courts need deal with them unless there is sufficient evidence to submit to the jury either that the shipowner was aware of sufficient facts to conclude that the winch was not in proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition. The District Court concluded that there was no triable issue of fact as to whether the shipowner knew or should have known of the alleged condition of the winch. The Court of Appeals read the record quite differently, ruling that there was a disputed material fact, which the District Court should not itself have resolved, with respect to the shipowner's actual or constructive knowledge of the condition of the winch. To the extent that this conclusion was based on the Court of Appeals' erroneous view that the vessel should have known the facts because of its duty to inspect the stevedore's cargo handling operation, it was infirm. But as we understand the opinion below, the Court of Appeals held that there was a triable issue as to whether the shipowner had actual knowledge of the failure in the winch's braking mechanism or was chargeable with knowledge because the winch was defective from the outset. Based on our own examination of the record, we agree with the Court of Appeals in this respect and with its conclusion that the District Court erred in granting

summary judgment. The case should be returned to the District Court and, if necessary, tried to a jury under appropriate instructions.[26]

Accordingly, we affirm the judgment of the Court of Appeals and remand the case to that court for further proceedings consistent with this opinion.

So ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

My views are that under the 1972 Amendments: (1) a shipowner has a general duty to exercise reasonable care under the circumstances; (2) in exercising reasonable care, the shipowner must take reasonable steps to determine whether the ship's equipment is safe before turning that equipment over to the stevedore; (3) the shipowner has a duty to inspect the equipment turned over to the stevedore or to supervise the stevedore if a custom, contract provision, law or regulation creates either of those duties; and (4) if the shipowner has actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition, the shipowner has a duty either to halt the stevedoring operation, to make the stevedore eliminate the unsafe condition, or to eliminate the unsafe condition itself.

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[26] Of course, it has not been determined whether the winch was defective or if it was, when it became defective and whether the defect contributed to the accident. If the effective cause was a simple act of operational negligence by the crane operator or the hatch tender, the vessel would not be liable in any event. Cf. *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494 (1971). The District Court apparently thought this conclusion was necessitated by the fact that the stevedore was in operational control and was necessarily the sole cause of the accident.

Since I read the Court's opinion to be consistent with these views, I join the Court's opinion.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion because I agree with its basic thrust—placing the primary burden on the stevedore for avoiding injuries caused by obvious hazards. I write only to emphasize the distinction between this approach and the general "reasonableness" standard adopted by the Ninth Circuit in this case.

Under the Court's opinion, "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Ante,* at 172. In addition, the opinion makes clear that the shipowner has only a limited duty with respect to obvious hazards of which it *is* aware. Although the shipowner cannot rely in all cases on the judgment and primary responsibility of the stevedore concerning what conditions allow safe work to continue, safety is a "matter of judgment committed to the stevedore in the first instance." *Ante,* at 175. Only where the judgment of the stevedore is "obviously improvident," *ibid.,* and this poor judgment either is known to the shipowner or reasonably should be anticipated under the circumstances, does the shipowner have a duty to intervene.[1] As the opinion points out, the customs and regulations allocating responsibility for particular repairs are highly relevant to this inquiry.

[1] In my view, the Restatement standard adopted by the Second, Fourth, and Fifth Circuits, see *ante,* at 162, n. 9, and discussed most recently in *Evans* v. *S.S. "Campeche,"* 639 F. 2d 848 (CA2 1981), is consistent with the plain intent of Congress to impose the primary responsibility on the stevedore. Although it is unnecessary in this case for the Court to adopt this standard fully, I do not understand our opinion to be inconsistent with it.

The difficulty with a more general reasonableness standard like that adopted by the court below is that it fails to deal with the problems of allocating responsibility between the stevedore and the shipowner. It may be that it is "reasonable" for a shipowner to rely on the stevedore to discover and avoid most obvious hazards. But when, in a suit by a longshoreman, a jury is presented with the single question whether it was "reasonable" for the shipowner to fail to take action concerning a particular obvious hazard, the jury will be quite likely to find liability. If such an outcome were to become the norm, negligent stevedores would be receiving windfall recoveries in the form of reimbursement for the statutory benefit payments made to the injured longshoremen.[2] This would decrease significantly the incentives toward safety of the party in the best position to prevent injuries, and undercut the primary responsibility of that party for ensuring safety.

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[2] Under 33 U. S. C. § 905 (b), the shipowner is liable in damages to the longshoreman if it was negligent, and it may not seek to recover any part of this liability from the stevedore. The longshoreman's recovery is not reduced to reflect the negligence of the stevedore. *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S. 256 (1979). Under 33 U. S. C. § 933, the stevedore—even if concurrently negligent—receives reimbursement for its statutory benefit payments to the longshoreman, up to the full amount of those payments. See also *Bloomer* v. *Liberty Mutual Ins. Co.,* 445 U. S. 74 (1980) (stevedore's lien is not reduced by its proportional share of the costs of litigating the negligence suit). As a result of this automatic reimbursement, there is a danger that "concurrently negligent stevedores will be insulated from the obligation to pay statutory workmen's compensation benefits, and thus will have inadequate incentives to provide a safe working environment for their employees." *Edmonds, supra,* at 274 (BLACKMUN, J., dissenting). In cases involving obvious and avoidable hazards, this danger will be realized unless the shipowner's liability is limited to the unusual case in which it should be anticipated that the stevedore will fail to act reasonably. Any more stringent, or less defined, rule of shipowner liability will skew the statutory scheme in a way Congress could not have intended. Cf. *Canizzo* v. *Farrell Lines, Inc.,* 579 F. 2d 682, 687–688 (CA2 1978) (Friendly, J., dissenting).

ROSALES-LOPEZ *v.* UNITED STATES

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

No. 79–6624. Argued January 12, 1981—Decided April 21, 1981

Petitioner, who is of Mexican descent, was tried in Federal District Court for his participation in a plan by which Mexican aliens were smuggled into the country. Another participant in the plan, one Bowling, was apparently a Caucasian with whose daughter petitioner had been living. Prior to his trial, petitioner requested that the judge, in his *voir dire* examination of prospective jurors, ask a question as to possible prejudice toward Mexicans. The judge refused to ask such question, but did ask questions concerning possible prejudice against aliens. Petitioner was subsequently convicted, and the Court of Appeals affirmed, rejecting petitioner's challenge of the trial judge's refusal to question the jurors about possible racial or ethnic bias.

Held: The judgment is affirmed. Pp. 188–194; 194–195.

617 F. 2d 1349, affirmed.

JUSTICE WHITE, joined by JUSTICE STEWART, JUSTICE BLACKMUN, and JUSTICE POWELL, concluded that there was no reversible error in the *voir dire* afforded petitioner. Pp. 188–194.

(a) Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*. "Special circumstances" under which the Constitution requires questioning prospective jurors about racial or ethnic bias exist only when racial issues are inextricably bound up with the conduct of the trial and there are substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in the particular case. See *Ristaino* v. *Ross,* 424 U. S. 589; *Ham* v. *South Carolina,* 409 U. S. 524. Under this Court's supervisory power over the federal courts, failure to honor a defendant's request to inquire into racial or ethnic prejudice, where such an inquiry is not constitutionally mandated, is reversible error only where the circumstances of the case indicate a "reasonable possibility" that such prejudice might influence the jury. Federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different

racial or ethnic groups. See *Ristaino, supra; Aldridge* v. *United States,* 283 U. S. 308. Pp. 188–192.

(b) In this case, there were no "special circumstances" of constitutional dimension requiring an inquiry as to racial or ethnic bias, since the issues in the trial did not involve allegations of racial or ethnic prejudice. And the circumstances of the case did not reveal a violent criminal act with a victim of a different racial or ethnic group from that of the defendant. Nor did the external circumstances of the case indicate a "reasonable possibility" that racial or ethnic prejudice would influence the jury's evaluation of the evidence. Pp. 192–194.

JUSTICE REHNQUIST, joined by CHIEF JUSTICE BURGER, concurring in the result, concluded that the decision as to inquiry on *voir dire* as to racial or ethnic prejudice rested primarily with the trial court, subject to case-by-case review by the appellate courts, even in the case of "violent crimes" where the defendant and victim were members of different racial or ethnic groups. Pp. 194–195.

WHITE, J., announced the judgment of the Court and delivered an opinion, in which STEWART, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed an opinion concurring in the result, in which BURGER, C. J., joined, *post,* p. 194. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 195.

John J. Cleary, by appointment of the Court, 449 U. S. 947, argued the cause and filed a brief for petitioner.

George W. Jones argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey,* and *John De Pue.*

JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in which JUSTICE STEWART, JUSTICE BLACKMUN, and JUSTICE POWELL joined.

The question here is whether it was reversible error for a federal trial court in a criminal case to reject the defendant's request that the court's *voir dire* of prospective jurors inquire further into the possibility of racial or ethnic prejudice against the defendant.

I

Petitioner is of Mexican descent. In February 1979, he was tried before a jury in the United States District Court for the Southern District of California for his alleged participation in a plan by which three Mexican aliens were illegally brought into the country.[1]

The Government's evidence at trial described the following events. On the night of December 10, 1978, three aliens were led across the Mexican-American border and taken to a car, previously left for them on the American side. They drove to Imperial Beach, Cal., a town about eight miles inside the border. Early in the morning of December 11, they reached the home of Virginia Hendricks Bowling, where they were admitted into the garage of the house by petitioner. Bowling was an American citizen, apparently Caucasian, living in Imperial Beach with her 19-year-old daughter. Petitioner had been living with Bowling's daughter in her mother's house since July 1978.

Later in the morning, petitioner hid the three aliens and their guide in the trunk of a green Oldsmobile. Bowling drove the Oldsmobile north, through the San Clemente checkpoint, while petitioner followed in a grey Ford. After passing through the checkpoint, Bowling and petitioner exchanged cars. Petitioner proceeded to Los Angeles in the Oldsmobile and Bowling returned to Imperial Beach in the Ford. In Los Angeles, petitioner went to an apartment, which agents of the Immigration and Naturalization Service had had under surveillance for several weeks because they suspected that it was a drop site for illegal aliens. Upon

[1] Petitioner was charged with one count of conspiracy to conceal, harbor and shield, and illegally transport aliens, in violation of 18 U. S. C. § 371 and 8 U. S. C. § 1324; three counts of aiding and abetting the illegal transportation of aliens, in violation of 8 U. S. C. § 1324 (a)(2) and 18 U. S. C. § 2, and three counts of concealing, harboring, and shielding aliens, in violation of 8 U. S. C. § 1324 (a)(3).

arrival, the aliens were let out of the trunk and told to go into the apartment by petitioner. Shortly thereafter, petitioner was arrested when he left the apartment with one of the aliens.

At trial, the INS agents, Bowling, the three illegal aliens, and David Falcon-Zavala, another named principal in the smuggling arrangement who was arrested with petitioner, testified for the Government. Petitioner did not testify; his defense was principally to challenge the credibility of the Government witnesses. The jury convicted him of all the charges and the Court of Appeals for the Ninth Circuit affirmed. 617 F. 2d 1349 (1980).

Prior to trial, petitioner's counsel formally requested that he be allowed personally to *voir dire* the prospective members of the jury. At the same time, he filed a list of 26 questions that he requested the trial judge to ask, if the court denied his first motion. Among the questions submitted was one directed toward possible prejudice toward Mexicans:

> "Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?"

As permitted by Rule 24 of the Federal Rules of Criminal Procedure and pursuant to the practice in the Southern District of California, the trial judge conducted the *voir dire* himself. He asked about half of the questions submitted by petitioner.[2] Although he did not ask any question directed specifically to possible racial or ethnic prejudice, he did ask a question directed to attitudes toward the substantive charges

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[2] The trial court asked the panel as a group questions concerning the following: knowledge of the participants in the trial; outside knowledge of the case; physical impairments that would interfere with their responsibilities as jurors; legal training; possible disagreement with the principle that a criminal defendant is presumed to be innocent. Each juror was asked to state some basic facts about himself or herself, including name, occupation, and spouse's occupation.

involved: "Do any of you have any feelings about the alien problem at all?" He subsequently rephrased this: "Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?" App. 17–18.[3] The judge began the *voir dire* with the following general statement to the panel:

> "In order that this defendant shall have a fair and impartial jury to try the charges against him, it is necessary that we address certain questions to the panel to make sure that there are no underlying prejudices, there are no underlying reasons why you can't sit as a fair and impartial juror if chosen to do so in this case." *Id.*, at 14.

He ended his general questioning with the following:

> "Does any reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, any reason whatsoever?" *Id.*, at 21.

Following the *voir dire,* defense counsel restated his request with respect to six of the submitted questions, including the one directed toward racial or ethnic prejudice.[4] He argued at sidebar that under *Aldridge* v. *United States,* 283 U. S. 308 (1931), a federal court "must explore all racial antagonism against my client because he happens to be of Mexican descent." App. 25. The judge declined to ask any further

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[3] Two jurors were excused because of their responses to this question.

[4] The other five questions were:

1. "Have you ever employed or have friends that have employed illegal aliens?"

2. "Have you ever worked for the federal Government? If so, as what? How long?"

3. "Have you ever been the victim of a crime?"

4. "Have you ever sat as a juror in a civil or criminal case? What was the nature of the case and the verdict?"

5. "Are you able to speak Spanish? If so, how well? Would you be willing to accept the interpreter's translation?"

questions of the jury panel. Peremptory challenges were then exercised and the jury was sworn.

Petitioner appealed, unsuccessfully challenging the refusal of the trial judge to question the jurors about possible racial or ethnic bias.[5] The Court of Appeals for the Ninth Circuit noted that there is

> "[a] longstanding rule of criminal justice in the federal courts . . . that questions regarding possible racial prejudice should be put to the venire in prosecutions of minority defendants, at least where 'special circumstances' indicate that the defendant's race may be a factor in the trial." 617 F. 2d, at 1354.

The court noted that "[t]he extent of the federal rule is unclear." *Ibid.* It concluded, however, that this case did not contain such "special circumstances."

The Courts of Appeals have adopted conflicting rules as to when the failure to ask such questions will constitute reversible error. Some Circuits have adopted a *per se* rule, requiring reversal whenever the trial judge fails to ask a question on racial or ethnic prejudice requested by a defendant who is a member of a minority group. See *United States* v. *Bowles,* 574 F. 2d 970 (CA8 1978); *United States* v. *Robinson,* 485 F. 2d 1157 (CA3 1973); *United States* v. *Carter,* 440 F. 2d 1132 (CA6 1971); *United States* v. *Gore,* 435 F. 2d 1110 (CA4 1970); *Frasier* v. *United States,* 267 F. 2d 62 (CA1 1959). Other Circuits, including the Ninth, have rejected such a *per se* rule, holding that a trial judge is required to pose such a question only where there is some indication

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[5] On appeal, petitioner also challenged the failure of the trial court to provide him a free copy of the transcript of a suppression hearing, the sentencing procedure applied to him, the denial of an evidentiary hearing on possible prosecutorial vindictiveness, the trial court's refusal to give an instruction on a lesser-included offense, the propriety of imposing consecutive sentences, and the constitutionality of 8 U. S. C. § 1324. The Court of Appeals rejected all of these contentions.

that the particular case is likely to have racial overtones or involve racial prejudice. See *United States* v. *Polk,* 550 F. 2d 1265 (CA10 1977); *United States* v. *Perez-Martinez,* 525 F. 2d 365 (CA9 1975). In light of this diversity of views, we granted certiorari. 449 U. S. 819.

II

Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. See *Connors* v. *United States,* 158 U. S. 408, 413 (1895). Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.[6]

Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. See *Ristaino* v. *Ross,* 424 U. S. 589, 595 (1976), quoting *Rideau* v. *Louisiana,* 373 U. S. 723, 733 (1963) (Clark, J., dissenting). In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses.

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[6] In *Swain* v. *Alabama,* 380 U. S. 202 (1965), we noted the connection between *voir dire* and the exercise of peremptory challenges: "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories . . . ." *Id.,* at 218–219. We also noted there that although there is no federal constitutional requirement that peremptory challenges be permitted, the challenge is widely used in federal and state courts pursuant to statute or rule and is deemed to be an important aspect of trial by jury. *Id.,* at 219.

Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire.* In *Aldridge* v. *United States,* 283 U. S. 308 (1931), the Court recognized the broad role of the trial court: "[T]he questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked." *Id.,* at 310. See also *Ham* v. *South Carolina,* 409 U. S. 524, 528 (1973) (recognizing "the traditionally broad discretion accorded to the trial judge in conducting *voir dire* . . ."). Furthermore, Rule 24 (a), Federal Rules of Criminal Procedure, provides that the trial court may decide to conduct the *voir dire* itself or may allow the parties to conduct it. If the court conducts it, the parties may "supplement the examination by such further inquiry as [the court] deems proper"; alternatively, the court may limit participation to the submission of additional questions, which the court must ask only "as it deems proper."

There are, however, constitutional requirements with respect to questioning prospective jurors about racial or ethnic bias. The "special circumstances" under which the Constitution requires a question on racial prejudice were described in *Ristaino* v. *Ross, supra,* by contrasting the facts of that case with those in *Ham* v. *South Carolina, supra,* in which we held it reversible error for a state court to fail to ask such a question.

Ham involved a black defendant charged with a drug offense. His defense was that the law enforcement officers had "framed" him in retaliation for his active, and widely known, participation in civil rights activities. The critical factor present in *Ham,* but not present in *Ristaino,* was that racial issues were "inextricably bound up with the conduct of the trial," and the consequent need, under all the circumstances, specifically to inquire into possible racial prejudice in order to assure an impartial jury. *Ristaino, supra,* at 596,

597. Although *Ristaino* involved an alleged criminal confrontation between a black assailant and a white victim, that fact pattern alone did not create a need of "constitutional dimensions" to question the jury concerning racial prejudice. 424 U. S., at 596, 597. There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. As *Ristaino* demonstrates, there is no *per se* constitutional rule in such circumstances requiring inquiry as to racial prejudice. *Id.*, at 596, n. 8. Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.

Absent such circumstances, the Constitution leaves it to the trial court, and the judicial system within which that court operates, to determine the need for such questions. In the federal court system, we have indicated that under our supervisory authority over the federal courts, we would require that questions directed to the discovery of racial prejudice be asked in certain circumstances in which such an inquiry is not constitutionally mandated. *Ristaino, supra,* at 597, n. 9.

Determination of an appropriate nonconstitutional standard for the federal courts does not depend upon a comparison of the concrete costs and benefits that its application is likely to entail. These are likely to be slight: some delay in the trial versus the occasional discovery of an unqualified juror who would not otherwise be discovered. There is, however, a more significant conflict at issue here—one involving the appearance of justice in the federal courts. On the one hand, requiring an inquiry in every case is likely to create the impression "that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth." *Ristaino, supra,* at 596, n. 8. Trial judges are understandably hesitant to introduce such a suggestion into their courtrooms.

See *Aldridge, supra,* at 310; *Ristaino, supra,* at 591. Balanced against this, however, is the criminal defendant's perception that avoiding the inquiry does not eliminate the problem, and that his trial is not the place in which to elevate appearance over reality.

We first confronted this conflict in *Aldridge, supra,* and what we said there remains true today:

> "The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." 283 U. S., at 314–315.

In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued.[7] Failure to honor his request, however, will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.

In *Ristaino,* the Court indicated that under the circumstances of that case, a federal trial court would have been required to "propound appropriate questions designed to identify racial prejudice if requested by the defendant." 424 U. S., at 597, n. 9. In *Ristaino,* the Court also made clear that the result reached in *Aldridge,* was based on this Court's

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[7] Of course, the judge need not defer to a defendant's request where there is no rational possibility of racial prejudice. But since the courts are seeking to assure the appearance and reality of a fair trial, if the defendant claims a meaningful ethnic difference between himself and the victim, his *voir dire* request should ordinarily be satisfied.

supervisory power over the federal courts. 424 U. S., at 598, n. 10. In *Aldridge*, which *Ristaino* embraced, the Court held that it was reversible error for a federal trial court to fail to inquire into racial prejudice in a case involving a black defendant accused of murdering a white policeman. The circumstances of both cases indicated that there was a "reasonable possibility" that racial prejudice would influence the jury.

Aldridge and *Ristaino* together, fairly imply that federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups. This supervisory rule is based upon and consistent with the "reasonable possibility standard" articulated above. It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise such a possibility. There may be other circumstances that suggest the need for such an inquiry, but the decision as to whether the total circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury remains primarily with the trial court, subject to case-by-case review by the appellate courts.

III

Evaluated against these standards, there was no reversible error in the *voir dire* afforded petitioner. At no point has petitioner argued that the matters at issue in his trial involved allegations of racial or ethnic prejudice: neither the Government's case nor his defense involved any such allegations. There were, then, no "special circumstances" of constitutional dimension in this case. Neither did the circumstances of the case reveal a violent criminal act with a victim of a different racial or ethnic group. In fact, petitioner was accused of a victimless crime: aiding members of his own ethnic group to gain illegal entry into the United States. Petitioner, therefore, falls within that category of cases in which the trial court must determine if the external circum-

stances of the case indicate a reasonable possibility that racial or ethnic prejudice will influence the jury's evaluation of the evidence. For two reasons, we do not believe that such a reasonable possibility has been demonstrated in this case.

First, the trial court reasonably determined that a juror's prejudice toward aliens might affect his or her ability to serve impartially in this case. The court, therefore, questioned the prospective jurors as to their attitudes toward aliens. There can be no doubt that the jurors would have understood a question about aliens to at least include Mexican aliens. The trial court excused two jurors for cause, based on their responses to this question. Removing these jurors eliminated, we believe, any reasonable possibility that the remaining jurors would be influenced by an undisclosed racial prejudice toward Mexicans that would have been disclosed by further questioning.[8]

Second, petitioner contends that "any latent racial antagonism" of the jurors toward Mexicans was likely to be exacerbated by Bowling's testimony concerning the relationship between petitioner and her daughter. Petitioner, however, failed to make this argument to the trial court in support of his requested question. Even if he had, however, it would not create a reasonable possibility that the jury's determination would be influenced by racial prejudice. Bowling's testimony as to petitioner's role in the particular smuggling operation involved in this trial was substantially corroborated by the other witnesses presented by the Government, including Falcon-Zavala and the three illegal aliens. Under the circumstances of this case, the racial or ethnic differences be-

[8] We also note that the trial court asked generally whether there were any grounds which might occur to the jurors as to why they could not sit as "fair and impartial" jurors. Coupled with the question concerning aliens, there is little reason to believe that a juror who did not answer this general question would have answered affirmatively a question directed narrowly at racial prejudice.

tween the defendant and a key Government witnesss did not create a situation meeting the standard set out above. The judge was not, therefore, required to inquire further than he did.

Under these circumstances, we cannot hold that there was a reasonable possibility that racial or ethnic prejudice would affect the jury. Therefore, the trial court did not abuse its discretion in denying petitioner's request, and the judgment of the Court of Appeals is affirmed.

So ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring in the result.

I agree with the result reached by the plurality today and with most of its reasoning. I cannot, however, embrace the language contained in the last paragraph of Part II of the opinion which may be perceived as creating a *per se* rule requiring reversal of any criminal conviction involving a "violent crime" between members of different racial or ethnic groups if the district court refused to *voir dire* on the issue of racial prejudice. I do not disagree *in toto* with that paragraph, but fear that its use of the term "violent crime" and the term "different racial or ethnic groups" is apt to spawn new litigation over the meaning of these terms and whether the trial court properly assessed the possibility of racial or ethnic prejudice infecting the selection of the jury. It is undoubtedly true that such prejudice may occur in the case of a defendant accused of a violent crime where the defendant and victim are members of different racial or ethnic groups, and it is also undoubtedly true that there are circumstances other than these which may suggest to the trial judge the need for an inquiry into the possibility of prejudice. But knowing the contentiousness of our profession, the suggestion that a precise definition of "violent crime" or "different racial or ethnic groups" will ever be arrived at

leaves me unwilling to lay down the flat rule which seems to be proposed in the last paragraph of Part II. I would think that in the case of "violent crimes" where the defendant and victims are members of "different racial or ethnic groups," the decision as to inquiry on *voir dire* as to racial or ethnic prejudice "remains primarily with the trial court, subject to case-by-case review by the appellate courts." See *ante,* at 192. In my view, it is inappropriate for us to decide that there is always a "reasonable possibility" of prejudice solely because the crime is "violent." I would also not rule out the possibility of a finding of harmless error, but that may well be embraced in footnote 7 to the plurality's opinion.

As can be seen, my differences with the plurality are not great, but we are beseeched on so many appeals to reverse a judgment for procedural reasons which cannot fairly have been said to play a part in the factfinding process that I would leave somewhat more to the trial court's discretion than does the plurality, the decision as to whether or not questions on such as racial or ethnic prejudice should be asked on *voir dire.* We cannot, in the nature of things, always lay down "bright line" rules, but we should try to avoid definitions that do not define or clarify and hence invite litigation. It seems to me quite conceivable that a thoroughly competent and fairminded district court judge could conclude that the asking of such questions, or the devotion of a substantial amount of time to the inquiry, could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The question in this case is whether, in the conduct of the *voir dire* examination of prospective jurors in criminal prosecutions in the federal courts, the trial judge must, upon request, ask at least one question concerning possible prejudice

against the minority group to which the defendant belongs. Settled law provides a simple answer to this question.[1]

The plurality's new answer to that question contains two parts: it holds that "federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." *Ante,* at 192. Because no such "special circumstances" are present in this case, the plurality affirms the judgment of the Court of Appeals. *Ante,* at 192–194. Heretofore, federal law has required that a racial or ethnic prejudice inquiry be made when requested by the defendant, regardless of the presence or absence of special circumstances indicating that there is a reasonable possibility that prejudice will influence the jury. In this case, because the general questions asked by the learned trial judge were inadequate, I respectfully dissent.

An impartial tribunal is an indispensable element of a fair criminal trial. See *In re Murchison,* 349 U. S. 133, 136; *Irvin* v. *Dowd,* 366 U. S. 717, 722.[2] Before any citizen may be permitted to sit in judgment on his peers, some inquiry into his potential bias is essential. Such bias can arise from two principal sources: a special reaction to the facts of the particular case, or a special prejudice against the individual defendant that is unrelated to the particular case. Much as we wish it were otherwise, we should acknowledge the fact that there are many potential jurors who harbor strong prejudices against all members of certain racial, religious, or

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[1] "For more than four decades, it has been the rule in federal courts that a trial court *must* inquire as to possible racial bias of the veniremen when the defendant is a member of a racial minority. Aldridge v. United States, 283 U. S. 308 . . . (1931)." *United States* v. *Powers,* 482 F. 2d 941, 944 (CA8 1973) (emphasis in original), cert. denied, 415 U. S. 923.

[2] A criminal defendant's right to an impartial jury arises from both the Sixth Amendment and principles of due process. See *Ristaino* v. *Ross,* 424 U. S. 589, 595, n. 6.

ethnic groups for no reason other than hostility to the group as a whole.[3] Even when there are no "special circumstances" connected with an alleged criminal transaction indicating an unusual risk of racial or other group bias, a member of the Nazi Party should not be allowed to sit in judgment on a Jewish defendant.

In 1931, in *Aldridge* v. *United States,* 283 U. S. 308, this Court addressed the problem of protecting criminal defendants in the federal courts from the possibility of racial or ethnic bias among prospective jurors. That case was not argued or decided in a vacuum. Rather, it followed a long line of state-court decisions requiring that prospective jurors be questioned about such potential prejudices. *Aldridge* itself involved the special circumstances that the crime at issue was murder, and that the defendant was black and the victim was a white police officer, but neither the reasoning in Chief Justice Hughes' opinion for the Court, nor the reasoning in the state-court opinions from which he quoted at length, relied on such special circumstances. The character of the *Aldridge* holding is best explained by a quotation of both the text and the appended footnotes discussing the leading cases from Florida, Mississippi, North Carolina, Texas, and South Carolina:

> "The propriety of such an inquiry has been generally recognized. In *Pinder* v. *State,* 27 Fla. 370; 8 So. 837,

[3] The fact that such prejudice may not be a pervasive influence in the particular community from which the jury is drawn or even in society at large does not make this concern any less serious. As Chief Justice Hughes explained in *Aldridge* v. *United States,* 283 U. S. 308, 314:

"But the question is not . . . as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit."

the counsel for the accused sought to have the jurors asked on their *voir dire:* 'Could you give the defendant, who is a negro, as fair and as impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?' The Supreme Court of Florida held that the refusal of the court to allow the question was error and reversed the conviction.[1] In *Hill* v. *State,* 112 Miss. 260; 72 So. 1003, the Supreme Court of Mississippi held that it was fatal error to refuse to permit a negro on trial for murder to put to prospective jurors on their *voir dire* the following question: 'Have you got any prejudice against the negro, as a negro, that would induce you to return a verdict on less or slighter evidence than you would return a verdict of guilty against a white man under the same circumstances?' The Supreme Court of North Carolina reversed the conviction of a negro because of the refusal of the trial judge to permit a juror to be asked if 'he believed he could, as a juror, do equal and impartial justice between the State and a colored man.' *State* v. *McAfee,* 64 N. C. 339.[2] See, also, *Fendrick* v. *State,* 39 Tex. Cr. 147; 45 S. W. 589; *State* v. *Sanders,* 103 S. C. 216; 88 S. E. 10.

"[1] In the *Pinder* case, *supra,* the court said: 'Though the question is not in express terms provided for in the statute above cited' (McClellan's Digest, § 10, p. 446) 'yet it was a pertinent, and, as we think, proper question, to test fully the existence of bias or prejudice in the minds of the jurors. It sought to elicit a fact that was of the most vital import to the defendant; and a fact, too, that if existent, was locked up entirely within the breasts of the jurors to whom the question was propounded; a knowledge of the existence of which could only be acquired by interrogating the juror himself. The answer to it if in the affirmative could have worked no harm to the juror or to anyone else, but would have done credit to the humanity and intelligence of the juror, and would have satisfactorily exhibited to the court and to the defendant his entire competency,

> so far as the element of bias or prejudice was involved. But, if the answer to it from the jurors had been in the negative, then, we have no hesitancy in saying that it would have shown them to be wholly unfit and incompetent to sit upon the trial of a man of the negro race, whose right to a trial by a fair and impartial jury is as fully guaranteed to him under our constitution and laws, as to the whitest man in Christendom. And such incompetency asserts itself with superadded force in such a case as this where the life or death of the defendant was the issue to tip the scale in the jury's hands for adjustment.'
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> "[2] In that case, the court said (at p. 340): 'It is essential to the purity of trial by jury, that every juror shall be free from bias. If his mind has been poisoned by prejudice of any kind, whether resulting from reason or passion, he is unfit to sit on a jury. Here, his Honor refused to allow a proper question to be put to the juror, in order to test his qualifications. Suppose the question had been allowed, and the juror had answered, that the state of his feelings toward the colored race was such that he could not show equal and impartial justice between the State and the prisoner, especially in charges of this character, it is at once seen that he would have been grossly unfit to sit in the jury box.'"
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> 283 U. S., at 311–313, and nn. 1, 2.

To avoid the risk that the opinion might be construed as applicable only to prejudice against members of the black race, Chief Justice Hughes added the following paragraph:

> "The right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character. *Potter* v. *State,* 86 Tex. Cr. 380, 384; 216 S. W. 886; *People* v. *Reyes,* 5 Cal. 347, 349; *Watson* v. *Whitney,* 23 Cal. 375, 379; *People* v. *Car Soy,* 57 Cal. 102; *Horst* v. *Silverman,* 20 Wash. 233, 234; 55 Pac. 52. In *People* v. *Reyes, supra,* Mexicans were charged with assault with intent to commit murder, and conviction was reversed because of the refusal to allow questions to determine whether a prospective juror was a member of

the Know Nothing party, and whether he had taken any oath or obligation which resulted in prejudice, or whether independent of such an oath he entertained a prejudice, which would prevent him from giving the accused a fair trial.[3]

"[3] The court in that case said (at p. 349): 'As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not, unless questions similar to the foregoing are propounded to him? . . .

" 'Prejudice being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and (if the answer is affirmative), whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is, probably, the only sure method of fathoming his thoughts and feelings. If the person called had not taken an obligation which would prejudice him against foreigners in such a manner as to imperil their rights in a court of law, he could say so, and the question and answer would be harmless. If, upon the other hand, he had taken oaths, and was under obligations which influenced his mind and feelings in such a manner as to deny to a foreigner an impartial trial, he is grossly unfit to sit as a juror, and such facts should be known.' "

283 U. S., at 313–314, and n. 3.

Then, toward the end of the *Aldridge* opinion, Chief Justice Hughes again made it clear that the Court's holding was not limited to a risk of racial prejudice arising from the special circumstances of a particular case:

"The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that

> inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." *Id.*, at 314–315.

In light of Chief Justice Hughes' reasoning, it is not surprising that the overwhelming majority of Federal Circuit Judges who have confronted the question presented in this case have interpreted *Aldridge* as establishing a firm rule entitling a minority defendant to some inquiry of prospective jurors on *voir dire* about possible racial or ethnic prejudice unrelated to the specific facts of the case.[4] I so read *Aldridge* in 1973,[5] and I think the message of the case is equally clear in 1981.[6] The state-court decisions on which Chief Jus-

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[4] See *Frasier* v. *United States*, 267 F. 2d 62, 66 (CA1 1959); *King* v. *United States*, 124 U. S. App. D. C. 138, 139, 362 F. 2d 968, 969 (1966); *United States* v. *Gore*, 435 F. 2d 1110, 1111–1113 (CA4 1970); *United States* v. *Carter*, 440 F. 2d 1132, 1134–1135 (CA6 1971); *United States* v. *Bamberger*, 456 F. 2d 1119, 1129 (CA3 1972), cert. denied *sub nom. Crapps* v. *United States*, 406 U. S. 969; *United States* v. *Robinson*, 466 F. 2d 780, 781–782 (CA7 1972); *United States* v. *Booker*, 480 F. 2d 1310, 1310–1311 (CA7 1973); *United States* v. *Powers*, 482 F. 2d 941, 944 (CA8 1973), cert. denied, 415 U. S. 923; *United States* v. *Robinson*, 485 F. 2d 1157, 1158–1160 (CA3 1973); *United States* v. *Johnson*, 527 F. 2d 1104, 1106–1107 (CA4 1975); *United States* v. *Bell*, 573 F. 2d 1040, 1042–1043 (CA8 1978); *United States* v. *Bowles*, 574 F. 2d 970, 971–973 (CA8 1978); *United States* v. *Williams*, 612 F. 2d 735, 736–737 (CA3 1979), cert. denied, 445 U. S. 934. Cf. *Kuzniak* v. *Taylor Supply Co.*, 471 F. 2d 702, 703 (CA6 1972); *United States* v. *Grant*, 494 F. 2d 120, 122–123, and n. 6 (CA2 1974), cert. denied, 419 U. S. 849; *United States* v. *Bear Runner*, 502 F. 2d 908, 911–913 (CA8 1974).

[5] See *United States* v. *Booker*, *supra*.

[6] Nothing in *Ristaino* v. *Ross*, 424 U. S. 589, is inconsistent with this interpretation of *Aldridge*. *Ristaino* defined the circumstances under which a state trial court is constitutionally required to inquire into racial prejudice on *voir dire*. The Court in *Ristaino* expressly noted that it would require, under its supervisory power, that federal trial courts inquire into racial prejudice in cases in which such inquiry was not constitutionally required. 424 U. S., at 597, n. 9. The Court also noted that

tice Hughes relied in *Aldridge* did not rest upon the presence of special circumstances indicating an unusual likelihood that racial or other prejudice would infect the jury venire.[7] Therefore, although such special circumstances were present in *Aldridge,* that decision has a broader significance. I can "perceive no reason why *Aldridge* should be applied more restrictively than the precedent on which it rests." *United States* v. *Gore,* 435 F. 2d 1110, 1112, (CA4 1970). Accordingly, unlike the plurality, I would join the majority of Federal Circuit Judges and decline to limit *Aldridge* to cases involving crimes of interracial violence.

In this case, I agree with the plurality's view that the *voir dire* was adequate to determine whether any special circumstances might give rise to juror prejudice. The trial judge did inquire about prejudice related to the smuggling of aliens into California, and I agree that the possibility of prejudice resulting from the relationship between the defendant and the witness Bowling's daughter was a matter that the trial judge could best evaluate. However, the *voir dire* was inadequate as a matter of law because it wholly ignored the risk that potential jurors in the Southern District of California might be prejudiced against the defendant simply because he is a person of Mexican descent. Because the defendant's lawyer perceived a risk of such irrational prejudice in that

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Aldridge was based on the supervisory power, not on the Federal Constitution. 424 U. S., at 598, n. 10. See *United States* v. *Williams, supra; United States* v. *Bowles, supra.*

[7] The Fourth Circuit, in *United States* v. *Gore, supra,* examined the state-court decisions cited in *Aldridge* and found that some involved crimes with no racial overtones whatsoever. See 435 F. 2d, at 1111–1112. Chief Justice Hughes' discussion of these decisions in *Aldridge* indicates that that case established "a broad rule that in any criminal case an accused has a right to inquire whether racial prejudice precludes any juror from reaching a fair and impartial verdict." 435 F. 2d, at 1111. See also *King* v. *United States, supra,* at 139, 362 F. 2d, at 969.

District, his request for a specific question concerning it should have been granted.[8]

I respectfully dissent.

[8] It is, of course, clear that the trial judge's duty to give such an instruction was not dependent on the phrasing of the particular questions submitted by defense counsel. See *Aldridge,* 283 U. S., at 311. It is equally clear that, although trial judges have broad discretion to formulate *voir dire* questions, the general question whether there was any reason "why you could not sit in this case as a fair and impartial juror," see *ante,* at 186, is not an adequate substitute for a specific inquiry; if it were, trial judges might be well advised simply to ask that question and nothing else. See, *e. g., United States* v. *Carter, supra,* at 1134–1135; *United States* v. *Robinson, supra,* at 782.

STEAGALD *v.* UNITED STATES

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

No. 79-6777. Argued January 14, 1981—Decided April 21, 1981

Pursuant to an arrest warrant for one Lyons, Drug Enforcement Administration agents entered petitioner's home to search for Lyons without first obtaining a search warrant. In the course of searching the home the agents found cocaine and other incriminating evidence but did not find Lyons. Petitioner was then arrested and indicted on federal drug charges. His pretrial motion to suppress all evidence uncovered during the search of his home on the ground that it was illegally obtained because the agents had failed to obtain a search warrant was denied by the District Court, and petitioner was convicted. The Court of Appeals affirmed.

Held:

1. The Government is precluded from contending in this Court that petitioner lacked an expectation of privacy in his searched home sufficient to prevail on his Fourth Amendment claim, where this argument was never raised in the courts below but rather the Government had made contrary assertions in those courts and acquiesced in their contrary findings. Pp. 208–211.

2. The search in question violated the Fourth Amendment, where it took place in the absence of consent or exigent circumstances. Pp. 211–222.

(a) Absent exigent circumstances or consent, a home may not be searched without a warrant. Two distinct interests were implicated by the search in this case—Lyons' interest in being free from an unreasonable seizure and petitioner's interest in being free from an unreasonable search of his home. Because the arrest warrant for Lyons addressed only the former interest, the search of petitioner's home was no more reasonable from petitioner's perspective than it would have been if conducted in the absence of any warrant. The search therefore violated the Fourth Amendment. Pp. 211–216.

(b) Common law, contrary to the Government's assertion, does not furnish precedent for upholding the search in question but rather sheds little light on the narrow issue presented of whether an arrest warrant, as opposed to a search warrant, is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their home is searched without their consent and in the absence of exigent

circumstances. Moreover, the history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned the search in question. Pp. 217–220.

(c) A search warrant requirement under the circumstances of this case will not significantly impede effective law enforcement efforts. An arrest warrant alone suffices to enter a suspect's own residence, and, if probable cause exists, no warrant is required to apprehend a suspected felon in a public place. Moreover, the exigent-circumstances doctrine significantly limits the situations in which a search warrant is needed. And in those situations in which a search warrant is necessary, the inconvenience incurred by the police is generally insignificant. In any event, whatever practical problems there are in requiring a search warrant in cases such as this, they cannot outweigh the constitutional interest at stake in protecting the right of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the government. Pp. 220–222.

606 F. 2d 540 and 615 F. 2d 642, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., concurred in the judgment. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 223.

John Richard Young, by appointment of the Court, 449 U. S. 948, argued the cause and filed a brief for petitioner.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Peter Buscemi, Elliott Schulder, William G. Otis,* and *Patty Merkamp Stemler.**

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether, under the Fourth Amendment, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant. Concluding that a search warrant must be obtained absent exigent circum-

**John McNally* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

stances or consent, we reverse the judgment of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction.

I

In early January 1978, an agent of the Drug Enforcement Administration (DEA) was contacted in Detroit, Mich., by a confidential informant who suggested that he might be able to locate Ricky Lyons, a federal fugitive wanted on drug charges. On January 14, 1978, the informant called the agent again, and gave him a telephone number in the Atlanta, Ga., area where, according to the informant, Ricky Lyons could be reached during the next 24 hours. On January 16, 1978, the agent called fellow DEA Agent Kelly Goodowens in Atlanta and relayed the information he had obtained from the informant. Goodowens contacted Southern Bell Telephone Co., and secured the address corresponding to the telephone number obtained by the informant. Goodowens also discovered that Lyons was the subject of a 6-month-old arrest warrant.

Two days later, Goodowens and 11 other officers drove to the address supplied by the telephone company to search for Lyons. The officers observed two men standing outside the house to be searched. These men were Hoyt Gaultney and petitioner Gary Steagald. The officers approached with guns drawn, frisked both men, and, after demanding identification, determined that neither man was Lyons. Several agents proceeded to the house. Gaultney's wife answered the door, and informed the agents that she was alone in the house. She was told to place her hands against the wall and was guarded in that position while one agent searched the house. Ricky Lyons was not found, but during the search of the house the agent observed what he believed to be cocaine. Upon being informed of this discovery, Agent Goodowens sent an officer to obtain a search warrant and in the meantime conducted a second search of the house, which uncovered

additional incriminating evidence. During a third search conducted pursuant to a search warrant, the agents uncovered 43 pounds of cocaine. Petitioner was arrested and indicted on federal drug charges.

Prior to trial, petitioner moved to suppress all evidence uncovered during the various searches on the ground that it was illegally obtained because the agents had failed to secure a search warrant before entering the house. Agent Goodowens testified at the suppression hearing that there had been no "physical hinderance" preventing him from obtaining a search warrant and that he did not do so because he believed that the arrest warrant for Ricky Lyons was sufficient to justify the entry and search. The District Court agreed with this view, and denied the suppression motion. Petitioner was convicted, and renewed his challenge to the search in his appeal. A divided Court of Appeals for the Fifth Circuit affirmed the District Court's denial of petitioner's suppression motion. *United States* v. *Gaultney,* 606 F. 2d 540 (1979).[1] Because the issue presented by this case is an important one[2] that has divided the Circuits,[3] we granted certiorari. 449 U. S. 819.

[1] The court relied on a previous decision in the Circuit that held that "when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the subject." *United States* v. *Cravero,* 545 F. 2d 406, 421 (1976), cert. denied, 430 U. S. 983 (1977). Circuit Judge Kravitch dissented on the ground that the information known to the agents was insufficient to establish a reasonable belief that Lyons could be found in the house to be searched. 606 F. 2d, at 548. On the petition for rehearing, Judge Kravitch, again in dissent, contended that the majority's decision announced a "rule of questionable validity and wisdom" and represented a "disturbing erosion of the Fourth Amendment rights of third parties." *United States* v. *Gaultney,* 615 F. 2d 642, 644 (1980).

[2] Last Term we noted that this question remained unresolved. See *Payton* v. *New York,* 445 U. S. 573, 583 (1980).

[3] Three Circuits have held that in the absence of exigent circumstances a search warrant is required before law officers may enter the home of

II

The Government initially seeks to avert our consideration of the Fifth Circuit's decision by suggesting that petitioner may, regardless of the merits of that decision, lack an expectation of privacy in the house sufficient to prevail on his Fourth Amendment claim. This argument was never raised by the Government in the courts below. Moreover, in its brief in opposition to certiorari the Government represented

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a third party to execute an arrest warrant. See *Government of Virgin Islands* v. *Gereau,* 502 F. 2d 914, 928 (CA3 1974), cert. denied, 420 U. S. 909 (1975); *Wallace* v. *King,* 626 F. 2d 1157, 1158–1159 (CA4 1980), cert. pending, No. 80–503; *United States* v. *Prescott,* 581 F. 2d 1343, 1347–1350 (CA9 1978). Two Circuits have joined the Court of Appeals in this case in adopting the contrary view that a search warrant is not required in such situations if the police have an arrest warrant and reason to believe that the person to be arrested is within the home to be searched. See *United States* v. *McKinney,* 379 F. 2d 259, 262–263 (CA6 1967); *United States* v. *Harper,* 550 F. 2d 610, 612–614 (CA10), cert. denied, 434 U. S. 837 (1977). The Second Circuit has suggested in dictum that it subscribes to this latter view, see *United States* v. *Manley,* 632 F. 2d 978, 983 (1980), while the Court of Appeals for the District of Columbia Circuit has recently indicated that it would require a search warrant in such cases. See *United States* v. *Ford,* 180 U. S. App. D. C. 1, 14, n. 45, 553 F. 2d 146, 159, n. 45 (1977). Two other Courts of Appeals have left the issue open. See *United States* v. *Adams,* 621 F. 2d 41, 44, n. 7 (CA1 1980); *Rice* v. *Wolff,* 513 F. 2d 1280, 1291–1292, and n. 7 (CA8 1975), rev'd on other grounds *sub nom. Stone* v. *Powell,* 428 U. S. 465 (1976). The Seventh Circuit has not considered the question.

While the courts are in conflict, most modern commentators agree that a search warrant is necessary to fully protect the privacy interests of third parties when their home is searched for the subject of an arrest warrant. See 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 374, 384–385 (1978); Rotenberg & Tanzer, Searching for the Person to Be Seized, 35 Ohio St. L. J. 56, 67–71 (1974); Groot, Arrests in Private Dwellings, 67 Va. L. Rev. 275 (1981); Note, The Neglected Fourth Amendment Problem in Arrest Entries, 23 Stan. L. Rev. 995, 997–999 (1971); Comment, Arresting a Suspect in a Third Party's Home: What is Reasonable?, 72 J. Crim. L. & C. 293 (1981). But see Mascolo, Arrest Warrants and Search Warrants: The Seizure of A Suspect in the Home of a Third Party, 54 Conn. Bar J. 299 (1980).

to this Court that the house in question was "petitioner's residence" and was "occupied by petitioner, Gaultney, and Gaultney's wife." Brief in Opposition 1, 3. However, the Government now contends that the record does not clearly show that petitioner had a reasonable expectation of privacy in the house, and hence urges us to remand the case to the District Court for re-examination of this factual question.

We decline to follow the suggested disposition. Aside from arguing that a search warrant was not constitutionally required, the Government was initially entitled to defend against petitioner's charge of an unlawful search by asserting that petitioner lacked a reasonable expectation of privacy in the searched home, or that he consented to the search, or that exigent circumstances justified the entry. The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.

We conclude that this is such a case. The Magistrate's report on petitioner's suppression motion, which was adopted by the District Court, characterized the issue as whether an arrest warrant was sufficient to justify the search of "the home of a third person" for the subject of the warrant. App. 12. The Government never sought to correct this characterization on appeal, and instead acquiesced in the District Court's view of petitioner's Fourth Amendment claim. Moreover, during both the trial and the appeal in this case the Government argued successfully that petitioner's connection with the searched home was sufficient to establish his constructive possession of the cocaine found in a suitcase in the closet of the house.[4] Moreover, the Court of Appeals concluded, as

[4] The Court of Appeals, in accepting this contention, cited the Government's own evidence that several checks and papers bearing petitioner's name were found in the house and that "Steagald, when taken into cus-

had the Magistrate and the District Court, that petitioner's Fourth Amendment claim involved the type of warrant necessary to search "premises belonging to a third party." 606 F. 2d, at 544. Again, the Government declined to disturb this characterization. When petitioner sought review in this Court, the Government could have filed a cross-petition for certiorari suggesting, as it does now, that the case be remanded to the District Court for further proceedings. Instead, the Government argued that further review was unnecessary. Finally, the Government in its opposition to certiorari expressly represented that the searched home was petitioner's residence.

Thus, during the course of these proceedings the Government has directly sought to connect petitioner with the house, has acquiesced in statements by the courts below characterizing the search as one of petitioner's residence, and has made similar concessions of its own. Now, two years after petitioner's trial, the Government seeks to return the case to the District Court for a re-examination of this factual issue.[5]

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tody, was wearing only slacks and a long-sleeve shirt, clothing inconsistent with the coldness of the January afternoon, and that once taken inside the . . . house, told a DEA agent that he was cold and requested that she get a sweater or coat for him from the kitchen area." 606 F. 2d, at 546–547.

[5] The Government asserts that it was unable to raise this issue in the courts below because both courts had acted before this Court decided *United States* v. *Salvucci*, 448 U. S. 83 (1980). We do not find this justification to be compelling. Under the "automatic standing" rule of *Jones* v. *United States*, 362 U. S. 257 (1960), any person charged with a possessory offense could challenge the search in which the incriminating evidence was obtained. *Salvucci* overruled *Jones* and instead limited such Fourth Amendment claims to those persons who had a reasonable expectation of privacy in the area or object of the search. Although *Salvucci* thus altered Fourth Amendment jurisprudence to some extent, the rationale of that decision was in large part simply an extension of this Court's earlier reasoning in *Rakas* v. *Illinois*, 439 U. S. 128 (1978). The *Rakas* decision held that an illegal search violated the Fourth Amendment rights only of those persons who had a "legitimate expectation of

The tactical advantages to the Government of this disposition are obvious, for if the Government prevailed on this claim upon a remand, it would be relieved of the task of defending the judgment of the Court of Appeals before this Court. We conclude, however, that the Government, through its assertions, concessions, and acquiescence, has lost its right to challenge petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home. We therefore turn to the merits of petitioner's claim.

III

The question before us is a narrow one.[6] The search at issue here took place in the absence of consent or exigent circumstances. Except in such special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. See *Payton* v. *New*

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privacy in the invaded place." *Id.*, at 143. While that decision did not directly address the "automatic standing" rule of *Jones* v. *United States,* it was clearly an ill omen for the continued vitality of that decision. Since *Rakas* was decided well before this case was briefed and argued in the Court of Appeals, the Government could easily have raised before that court the question of whether petitioner's Fourth Amendment rights were even implicated by the search at issue here. Indeed, the Government in *Salvucci* clearly recognized the significance of *Rakas,* for in that case, despite the contrary authority of *Jones* v. *United States,* it argued from the outset that the defendant lacked a sufficient expectation of privacy to challenge the legality of the search under the Fourth Amendment. We are given no explanation why the Government failed to regard *Rakas* as of equal significance to this case. In any event, *Salvucci* was decided before certiorari was sought in this case, but rather than oppose certiorari on the ground that petitioner lacked a legitimate expectation of privacy in the searched home, the Government made explicit concessions to the contrary.

[6] Initially, we assume without deciding that the information relayed to Agent Goodowens concerning the whereabouts of Ricky Lyons would have been sufficient to establish probable cause to believe that Lyons was at the house searched by the agents.

York, 445 U. S. 573 (1980); *Johnson* v. *United States,* 333 U. S. 10, 13–15 (1948). Thus, as we recently observed: "[I]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton* v. *New York, supra,* at 590. See *Coolidge* v. *New Hampshire,* 403 U. S. 443, 474–475, 477–478 (1971); *Jones* v. *United States,* 357 U. S. 493, 497–498 (1958); *Agnello* v. *United States,* 269 U. S. 20, 32–33 (1925). Here, of course, the agents had a warrant—one authorizing the arrest of Ricky Lyons. However, the Fourth Amendment claim here is not being raised by Ricky Lyons. Instead, the challenge to the search is asserted by a person not named in the warrant who was convicted on the basis of evidence uncovered during a search of his residence for Ricky Lyons. Thus, the narrow issue before us is whether an arrest warrant—as opposed to a search warrant—is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances.

The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this checkpoint between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States, supra,* at 14, may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home. *Coolidge* v. *New Hampshire, supra,* at 449–451; *McDonald* v. *United States,* 335 U. S. 451, 455–456 (1948). However, while an arrest warrant and a search warrant both serve to subject the probable-cause determina-

tion of the police to judicial review, the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast, is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.

Thus, whether the arrest warrant issued in this case adequately safeguarded the interests protected by the Fourth Amendment depends upon what the warrant authorized the agents to do. To be sure, the warrant embodied a judicial finding that there was probable cause to believe that Ricky Lyons had committed a felony, and the warrant therefore authorized the officers to seize Lyons. However, the agents sought to do more than use the warrant to arrest Lyons in a public place or in his home; instead, they relied on the warrant as legal authority to enter the home of a third person based on their belief that Ricky Lyons might be a guest there. Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer. Thus, while the warrant in this case may have protected Lyons from an unreasonable seizure, it did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, petitioner's only protection from an illegal entry and search was the agent's personal determination of probable cause. In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant.

Payton v. *New York, supra; Johnson* v. *United States, supra.* We see no reason to depart from this settled course when the search of a home is for a person rather than an object.[7]

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[7] Indeed, the plain wording of the Fourth Amendment admits of no exemption from the warrant requirement when the search of a home is for a person rather than for a thing. As previously noted, absent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant. The second clause of the Fourth Amendment, which governs the issuance of such warrants, provides 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." This language plainly suggests that the same sort of judicial determination must be made when the search of a person's home is for another person as is necessary when the search is for an object. Specifically, absent exigent circumstances the magistrate, rather than the police officer, must make the decision that probable cause exists to believe that the person or object to be seized is within a particular place.

In *Payton*, of course, we recognized that an arrest warrant alone was sufficient to authorize the entry into a person's home to effect his arrest. We reasoned:

"If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U. S., at 602–603.

Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home. This analysis, however, is plainly inapplicable when the police seek to use an arrest warrant as legal authority to enter the home of a third party to conduct a search. Such a warrant embodies no judicial determination whatsoever regarding the person whose home is to be searched. Because it does not authorize the police to deprive the third person of his liberty, it cannot embody any derivative authority to deprive this person of his interest in the privacy of his home. Such a deprivation must instead be based on an independent showing that a legitimate object of a search is located in the third party's home. We have consistently held, however,

A contrary conclusion—that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant—would create a significant potential for abuse. Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances. See, *e. g., Lankford* v. *Gelston,* 364 F. 2d 197 (CA4 1966) (enjoining police practice under which 300 homes were searched pursuant to arrest warrants for two fugitives). Moreover, an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place. Cf. *Chimel* v. *California,* 395 U. S. 752, 767 (1969). The Government recognizes the potential for such abuses,[8] but contends that existing remedies—such as motions to suppress illegally procured evidence and damages actions for Fourth Amendment violations—provide adequate means of redress. We do not agree. As we observed on a previous occasion, "[t]he [Fourth] Amendment is designed to prevent, not simply to redress, unlawful police action." *Chimel* v. *California, supra,* at 766, n. 12. Indeed, if suppression motions and damages actions were sufficient to implement the Fourth Amendment's prohibition against unreasonable searches and seizures, there would be no need for the constitutional requirement that in the absence of exigent circumstances a warrant

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that such a determination is the province of the magistrate, and not that of the police officer.

[8] The Government concedes that "an arrest warrant may be thought to have some of the undesirable attributes of a general warrant if it authorizes entry into third party premises." Brief for United States 42. Similarly, the Government agrees that "the potential for abuse is much less if the implicit entry authorization of an arrest warrant is confined to the suspect's own residence and is not held to make the police free to search for the suspect in anyone else's house without obtaining a particularized judicial determination that the suspect is present." *Ibid.*

must be obtained for a home arrest or a search of a home for objects. We have instead concluded that in such cases the participation of a detached magistrate in the probable-cause determination is an essential element of a reasonable search or seizure, and we believe that the same conclusion should apply here.[9]

In sum, two distinct interests were implicated by the search at issue here—Ricky Lyons' interest in being free from an unreasonable seizure and petitioner's interest in being free from an unreasonable search of his home. Because the arrest warrant for Lyons addressed only the former interest, the search of petitioner's home was no more reasonable from petitioner's perspective than it would have been if conducted in the absence of any warrant. Since warrantless searches of a home are impermissible absent consent or exigent circumstances, we conclude that the instant search violated the Fourth Amendment.

IV

The Government concedes that this view is "apparently logical," that it furthers the general policies underlying the Fourth Amendment, and that it "has the virtue of producing symmetry between the law of entry to conduct a search for things to be seized and the law of entry to conduct a search for persons to be seized." Brief for United States 36. Yet we are informed that this conclusion is "not without its flaws" in that it is contrary to common-law precedent and creates some practical problems of law enforcement. We treat these contentions in turn.

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[9] Moreover, the remedies suggested by the Government are not without their pitfalls and limitations. For example, absent a search warrant requirement, a person seeking to recover civil damages for the unjustified search of his home may possibly be thwarted if a good-faith defense to such unlawful conduct is recognized. See, *e. g., Wallace* v. *King,* 626 F. 2d, at 1161.

A

The common law may, within limits,[10] be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable. See, *e. g., Payton* v. *New York,* 445 U. S., at 591. The Government contends that at common law an officer could forcibly enter the home of a third party to execute an arrest warrant. To be sure, several commentators do suggest that a constable could "break open doors" to effect such an arrest. See 1 J. Chitty, Criminal Law *57 (Chitty); M. Foster, Crown Law 320 (1762) (Foster); 2 M. Hale, Pleas of the Crown 116–117 (1st Am. ed. 1847) (Hale). But see 4 E. Coke, Institutes *177. As support for this proposition, these commentators all rely on a single decision, *Semayne's Case,* 5 Co. Rep. 91a, 92b–93a, 77 Eng. Rep. 194, 198 (K. B. 1603).[11] See 1 Chitty *57;

[10] The significance accorded to such authority, however, must be kept in perspective, for our decisions in this area have not "simply frozen into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton* v. *New York,* 445 U. S., at 591, n. 33. The common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper. Cf. *Katz* v. *United States,* 389 U. S. 347, 352–353 (1967). Instead, the Amendment's prohibition against "unreasonable searches and seizures" must be interpreted "in light of contemporary norms and conditions." *Payton* v. *New York, supra,* at 591, n. 33.

[11] The three other decisions cited by the Government do not address the issue raised here. *Johnson* v. *Leigh,* 6 Taunt. 246, 248, 128 Eng. Rep. 1029, 1029–1030 (C. P. 1815), dealt with the authority of a constable to enter the home of a third person to make an arrest when the "outer door" was open. Under the common law, "a privilege attaches to the outer door of a dwelling, because . . . it is the owner's castle." *Hutchison* v. *Birch,* 4 Taunt. 619, 625, 128 Eng. Rep. 473, 476 (C. P. 1812). Thus, an open outer door was apparently regarded as the equivalent of a consent of the occupant for the constable to enter the home and conduct a search. The other two decisions cited by the Government, *Sheers* v. *Brooks,* 2 Bl. H.

Foster 320; 2 Hale 116. Although that case involved only the authority of a sheriff to effect civil service on a person within his own home, the court noted in dictum that a person could not "escape the ordinary process of law" by seeking refuge in the home of a third party. 5 Co. Rep., at 93a, 77 Eng. Rep., at 198. However, the language of the decision, while not free from ambiguity, suggests that forcible entry into a third party's house was permissible only when the person to be arrested was pursued to the house. The decision refers to a person who "flies" to another's home, *ibid.*, and the annotation notes that "in order to justify the breaking of the outer door; after denial on request to take a person . . . in the house of a stranger, it must be understood . . . that the person *upon a pursuit* taketh refuge in the house of another." *Id.*, at 93a, n. (I), 77 Eng. Rep., at 198, n. (I) (emphasis in original). The common-law commentators appear to have adopted this limitation. See 1 Chitty *57 (sheriff may enter third parties' home "if the offender fly to it for refuge"); Foster 320 ("For if a Stranger whose ordinary Residence is elsewhere, upon a Pursuit taketh Refuge in the House of another, this is not *his* Castle, He cannot claim the Benefit of Sanctuary in it"); 2 Hale 116, n. 20 (forcible entry permissible "only upon strong necessity"). We have long recognized that such "hot pursuit" cases fall within the exigent-circumstances exception to the warrant requirement, see *Warden* v. *Hayden*, 387 U. S. 294 (1967), and therefore are distinguishable from the routine search situation presented here.

More important, the general question addressed by the common-law commentators was very different from the issue presented by this case. The authorities on which the Government relies were concerned with whether the *subject* of the arrest warrant could claim sanctuary from arrest by hiding

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120, 122, 126 Eng. Rep. 463, 464 (C. P. 1792), and *Kelsy* v. *Wright*, 1 Root 83 (Conn. 1783), dealt only with the authority of the constable to enter the home of the person to be arrested.

in the home of a third party. See 1 Chitty *57; Foster 320; 2 Hale 116–117. Thus, in *Semayne's Case* it was observed:

> "[T]he house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods." 5 Co. Rep., at 93a, 77 Eng. Rep., at 128.

The common law thus recognized, as have our recent decisions, that rights such as those conferred by the Fourth Amendment are personal in nature, and cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched. See *United States* v. *Salvucci,* 448 U. S. 83 (1980); *Rakas* v. *Illinois,* 439 U. S. 128 (1978). The issue here, however, is not whether the subject of an arrest warrant can object to the absence of a search warrant when he is apprehended in another person's home, but rather whether the residents of that home can complain of the search. Because the authorities relied on by the Government focus on the former question without addressing the latter, we find their usefulness limited. Indeed, if anything, the little guidance that can be gleaned from common-law authorities undercuts the Government's position. The language of *Semayne's Case* quoted above, for example, suggests that although the subject of an arrest warrant could not find sanctuary in the home of the third party, the home remained a "castle or privilege" for its residents. Similarly, several commentators suggested that a search warrant, rather than an arrest warrant, was necessary to fully insulate a constable from an action for trespass brought by a party whose home was searched. See, *e. g.,* 1 Chitty *57; 2 Hale 116–117, 151.

While the common law thus sheds relatively little light on the narrow question before us, the history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned the instant search. The Fourth Amendment was intended partly to protect against the abuses of the general warrants that had occurred in England and of the writs of assistance used in the Colonies. See *Payton* v. *New York*, 445 U. S., at 608–609 (WHITE, J., dissenting); *Boyd* v. *United States*, 116 U. S. 616, 624–629 (1886); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13–78 (1937). The general warrant specified only an offense—typically seditious libel—and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched. Similarly, the writs of assistance used in the Colonies noted only the object of the search—any uncustomed goods—and thus left customs officials completely free to search any place where they believed such goods might be. The central objectionable feature of both warrants was that they provided no judicial check on the determination of the executing officials that the evidence available justified an intrusion into any particular home. *Stanford* v. *Texas*, 379 U. S. 476, 481–485 (1965). An arrest warrant, to the extent that it is invoked as authority to enter the homes of third parties, suffers from the same infirmity.[12] Like a writ of assistance, it specifies only the object of a search—in this case, Ricky Lyons—and leaves to the unfettered discretion of the police the decision as to which particular homes should be searched. We do not believe that the Framers of the Fourth Amendment would have condoned such a result.

B

The Government also suggests that practical problems might arise if law enforcement officers are required to obtain

[12] The Government recognizes this problem. See n. 8, *supra*.

a search warrant before entering the home of a third party to make an arrest.[13] The basis of this concern is that persons, as opposed to objects, are inherently mobile, and thus officers seeking to effect an arrest may be forced to return to the magistrate several times as the subject of the arrest warrant moves from place to place. We are convinced, however, that a search warrant requirement will not significantly impede effective law enforcement efforts.

First, the situations in which a search warrant will be necessary are few. As noted in *Payton* v. *New York, supra,* at 602–603, an arrest warrant alone will suffice to enter a suspect's own residence to effect his arrest. Furthermore, if probable cause exists, no warrant is required to apprehend a suspected felon in a public place. *United States* v. *Watson,* 423 U. S. 411 (1976). Thus, the subject of an arrest warrant can be readily seized before entering or after leaving the home of a third party.[14] Finally, the exigent-circumstances doctrine significantly limits the situations in which a search warrant would be needed. For example, a warrantless entry of a home would be justified if the police were in "hot pursuit" of a fugitive. See *United States* v. *Santana,* 427 U. S. 38, 42–43 (1976); *Warden* v. *Hayden,* 387 U. S. 294

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[13] A number of Circuits already require a search warrant for entries of this sort, see n. 3, *supra,* and there is no indication in the record that law enforcement efforts in these jurisdictions have suffered as a result. Thus, we are inclined to view the Government's argument on this point with considerable skepticism. Cf. *Payton* v. *New York,* 445 U. S., at 602.

Moreover, we are informed by the Government that "it is the present policy of the Drug Enforcement Administration, whose agents conducted the search in the present case, to secure a search warrant prior to making an arrest entry into third party premises, in the absence of exigent circumstances or consent." Brief in Opposition 9, n. 7.

[14] Indeed, the "inherent mobility" of persons noted by the Government suggests that in most situations the police may avoid altogether the need to obtain a search warrant simply by waiting for a suspect to leave the third person's home before attempting to arrest that suspect.

(1967). Thus, to the extent that searches for persons pose special problems, we believe that the exigent-circumstances doctrine is adequate to accommodate legitimate law enforcement needs.

Moreover, in those situations in which a search warrant is necessary, the inconvenience incurred by the police is simply not that significant. First, if the police know of the location of the felon when they obtain an arrest warrant, the additional burden of obtaining a search warrant at the same time is miniscule. The inconvenience of obtaining such a warrant does not increase significantly when an outstanding arrest warrant already exists. In this case, for example, Agent Goodowens knew the address of the house to be searched two days in advance, and planned the raid from the federal courthouse in Atlanta where, we are informed, three full-time magistrates were on duty. In routine search cases such as this, the short time required to obtain a search warrant from a magistrate will seldom hinder efforts to apprehend a felon. Finally, if a magistrate is not nearby, a telephonic search warrant can usually be obtained. See Fed. Rule Crim. Proc. 41 (c)(1), (2).

Whatever practical problems remain, however, cannot outweigh the constitutional interests at stake. Any warrant requirement impedes to some extent the vigor with which the Government can seek to enforce its laws, yet the Fourth Amendment recognizes that this restraint is necessary in some cases to protect against unreasonable searches and seizures. We conclude that this is such a case. The additional burden imposed on the police by a warrant requirement is minimal. In contrast, the right protected—that of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the Government—is weighty. Thus, in order to render the instant search reasonable under the Fourth Amendment, a search warrant was required.

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

So ordered.

THE CHIEF JUSTICE concurs in the judgment.

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, dissenting.

The Court's opinion reversing petitioner's conviction proceeds in a pristinely simple manner: Steagald had a Fourth Amendment privacy interest in the dwelling entered by the police, and even though the police entered the premises for the sole purpose of executing a valid arrest warrant for Lyons, a fugitive from justice, whom they had probable cause to believe was within, the arrest warrant was not sufficient absent exigent circumstances to justify invading Steagald's privacy interest in the dwelling. Petitioner Steagald's privacy interest is different from Lyons' interest in being free from an unreasonable seizure, according to the Court, and the arrest warrant only validated the invasion of the latter. In the words of the Court:

> "[T]he search of petitioner's home was no more reasonable from petitioner's perspective than it would have been if conducted in the absence of any warrant. Since warrantless searches of a home are impermissible absent consent or exigent circumstances, we conclude that the instant search violated the Fourth Amendment." *Ante,* at 216.

This "reasoning" not only assumes the answer to the question presented—whether the search of petitioner's dwelling could be undertaken without a search warrant—but also conveniently ignores the critical fact in this case, the existence of an arrest warrant for a fugitive believed on the basis of probable cause to be in the dwelling. The Court assumes

that because the arrest warrant did not specifically address petitioner's privacy interest it is of no further relevance to the case. Incidental infringements of distinct Fourth Amendment interests may, however, be reasonable when they occur in the course of executing a valid warrant addressed to other interests. In *Dalia* v. *United States,* 441 U. S. 238 (1979), the Court rejected the argument that a separate search warrant was required before police could enter a business office to install an eavesdropping device when a warrant authorizing the eavesdropping itself had already been obtained. As the Court put it: "This view of the Warrant Clause parses too finely the interests protected by the Fourth Amendment. *Often in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant.*" *Id.,* at 257 (emphasis supplied). In *Payton* v. *New York,* 445 U. S. 573 (1980), the Court rejected the suggestion that a separate search warrant was required before police could execute an arrest warrant by entering the home of the subject of the warrant. Although the subject of the warrant had a Fourth Amendment interest in the privacy of his dwelling quite distinct from the interest in being free from unreasonable seizures addressed by the arrest warrant, the Court concluded that it was "constitutionally reasonable to require him to open his doors to the officers of the law." *Id.,* at 602–603.

This case, therefore, cannot be resolved by the simple Aristotelian syllogism which the Court employs. Concluding as it does that the arrest warrant did not address the privacy interest affected by the search by no means ends the matter; it simply presents the issue for decision. Resolution of that issue depends upon a balancing of the "need to search against the invasion which the search entails." *Camara* v. *Municipal Court of San Francisco,* 387 U. S. 523, 537 (1967). Here, as in all Fourth Amendment cases, "reasonableness is still the ultimate standard." *Id.,* at 539. See *Wyman* v. *James,* 400 U. S. 309, 318 (1971); *Marshall* v. *Barlow's, Inc.,*

436 U. S. 307, 315–316 (1978). In determining the reasonableness of dispensing with the requirement of a separate search warrant in this case, I believe that the existence of a valid arrest warrant is highly relevant.

The government's interests in the warrantless entry of a third-party dwelling to execute an arrest warrant are compelling. The basic problem confronting police in such situations is the inherent mobility of the fugitive. By definition, the police have probable cause to believe that the fugitive is in a dwelling which is not his home. He may stay there for a week, a day, or 10 minutes. Fugitives from justice tend to be mobile, and police officers will generally have no way of knowing whether the subject of an arrest warrant will be at the dwelling when they return from seeking a search warrant. See *United States* v. *McKinney,* 379 F. 2d 259, 263 (CA6 1967); *State* v. *Jordan,* 288 Ore. 391, 400–401, 605 P. 2d 646, 651 (1980) (en banc). Imposition of a search warrant requirement in such circumstances will frustrate the compelling interests of the government and indeed the public in the apprehension of those subject to outstanding arrest warrants.

The Court's responses to these very real concerns are singularly unpersuasive. It first downplays them by stating that "the situations in which a search warrant will be necessary are few," *ante,* at 221, because no search warrant is necessary to arrest a suspect at his home and, if the suspect is at another's home, the police need only wait until he leaves, since no search warrant is needed to arrest him in a public place. *Ibid.* These beguilingly simple answers to a serious law enforcement problem simply will not wash. Criminals who know or suspect they are subject to arrest warrants would not be likely to return to their homes, and while "[t]he police could reduce the likelihood of escape by staking out all possible exits . . . the costs of such a stakeout seem excessive in an era of rising crime and scarce police re-

sources." *Payton* v. *New York, supra,* at 619 (WHITE, J., dissenting). The Court's ivory tower misconception of the realities of the apprehension of fugitives from justice reaches its apogee when it states: "In routine search cases such as this, the short time required to obtain a search warrant from a magistrate will seldom hinder efforts to apprehend a felon." *Ante,* at 222. The cases we are considering are *not* "routine search cases." They are cases of attempted arrest, pursuant to a warrant, when the object of the arrest may flee at any time—including the "short time" during which the police are endeavoring to obtain a search warrant.

At the same time the interference with the Fourth Amendment privacy interests of those whose homes are entered to apprehend the felon is not nearly as significant as suggested by the Court. The arrest warrant serves some of the functions a separate search warrant would. It assures the occupants that the police officer is present on official business. The arrest warrant also limits the scope of the search, specifying what the police may search for—*i. e.,* the subject of the arrest warrant. No general search is permitted, but only a search of those areas in which the object of the search might hide. See *Fisher* v. *Volz,* 496 F. 2d 333, 343 (CA3 1974); *State* v. *Jordan, supra,* at 400–401, 605 P. 2d, at 651; *United States* v. *Cravero,* 545 F. 2d 406, 421, nn. 1. 2 (CA5 1976), cert. denied, 429 U. S. 1100 and 430 U. S. 983 (1977). Indeed there may be no intrusion on the occupant's privacy at all, since if present the suspect will have the opportunity to voluntarily surrender at the door. Even if the suspect does not surrender but secretes himself within the house, the occupant can limit the search by pointing him out to the police. It is important to remember that the contraband discovered during the entry and search for Lyons was in plain view, and was discovered during a "sweep search" for Lyons, not a probing of drawers or cabinets for contraband. *United States* v. *Gaultney,* 606 F. 2d 540, 544 (1979).

Because the burden on law enforcement officers to obtain a separate search warrant before entering the dwelling of a third party to execute a concededly valid arrest warrant is great, and carries with it a high possibility that the fugitive named in the arrest warrant will escape apprehension, I would conclude that the application of the traditional "reasonableness" standard of the Fourth Amendment does not require a separate search warrant in a case such as this.

This conclusion is supported by the common law as it existed at the time of the framing of the Fourth Amendment, which incorporated the standard of "reasonableness." As the Court noted last Term in *Payton:* "An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable." 445 U. S., at 591; see also *id.*, at 604 (WHITE, J., dissenting). The duty of the populace to aid in the apprehension of felons was well established at common law, see *Roberts* v. *United States,* 445 U. S. 552, 557 (1980), and in light of the overriding interest in apprehension, the common law permitted officers to enter the dwelling of third parties when executing an arrest warrant. Chitty wrote that "[t]he house of a third person, if the offender fly to it for refuge, is not privileged, but may be broken open after the usual demand; for it may even be so upon civil process." 1 J. Chitty, Criminal Law *57 (hereafter Chitty). Gabbett agreed: "Neither is the house of a third person, if the offender fly to it for refuge, privileged, but it may be broken open, after the usual demand; for it may be even so upon civil process." 2 J. Gabbett, Criminal Law 142 (1843) (hereafter Gabbett). Hale noted that an officer could forcibly enter the house of the subject of an arrest warrant, "[a]nd so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process." 2 M. Hale, Pleas of the Crown 117

(1736) (hereafter Hale). See also M. Foster, Crown Law 320 (1762).[1] A 17-century work on constables noted:

> "[I]t is the chief part of their office to represse fellony, and albeit it be a man's house he doth dwell in, which they doe suspect the fellon to be in, yet they may enter in there to search; and if the owner of the house, upon request, will not open his dores, it seems the officer may break open the dores upon him to come in to search." W. Sheppard, The Offices of Constables, ch. 8, § 2, no. 4 (c. 1650) (quoted in T. Taylor, Two Studies in Constitutional Interpretation 28–29 (1969)).

The leading authority, *Semayne's Case,* 5 Co. Rep. 91a, 93a, 77 Eng. Rep. 194, 198 (K. B. 1603), recognized that "[t]he house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house . . . to prevent a lawful execution, and to escape the ordinary process of law . . . and therefore in such cases after denial on request made, the sheriff may break the house." In *Ratcliffe* v. *Burton,* 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 126–127 (C. P. 1802), Judge Heath ruled that before breaking doors, officers must announce their authority, because a contrary rule "must equally hold good in cases of process upon escape, where the party has taken refuge in the house of a stranger. Shall it be said that in such case the officer may break open the outer door of a stranger's house without declaring the authority under which he acts . . . ?" Thus no distinction was recognized between authority to enter the suspect's home and that of a stranger. See also

[1] The Court cites Coke as a contrary authority, *ante,* at 217, but Coke's disagreement with the rule that the constable could "break open doors" extended only to requiring that the suspect sought first be indicted. He wrote that "if the party suspected be indicted, then the sherif by force of the kings writ may demand the party indicted to be delivered; and that not done, he may break open the house, &c. and apprehend the felon . . . ." 4 E. Coke, Institutes *177. Lyons had been indicted, *United States* v. *Gaultney,* 606 F. 2d 540, 543 (1979).

Commonwealth v. *Reynolds,* 120 Mass. 190, 196–197 (1876); cf. *State* v. *Brown,* 5 Del. 505 (1854).[2]

The Court argues that the common-law authorities are not relevant because they do not consider the rights of third parties whose dwellings were entered but only the rights of the arrestee. *Ante,* at 218–219. This is not so. The authorities typically concern the right of the third party to resist the officer's attempted entry or the offense committed by the officer against the third party in entering. See, *e. g., Commonwealth* v. *Reynolds, supra;* 1 Chitty *57–*58; 2 Hale 117; 1 Russell 519–521.

The basic error in the Court's treatment of the common law is its reliance on the adage that "a man's home is his castle." Though there is undoubtedly early case support for this in the common law, it cannot be accepted as an uncritical statement of black letter law which answers all questions in this area. William Pitt, when he was Prime Minister of England, used it with telling effect in a speech on the floor of the House of Commons; but parliamentary speaking ability and analytical legal ability ought not to be equated with one

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[2] The Court strives to minimize the significance of the common-law rule by suggesting that it only applied in cases of "hot pursuit," *ante,* at 218. Even if the authorities did impose some "pursuit" requirement, and by no means all did, see, *e. g.,* 2 Hale 117; 1 W. Russell, Crimes and Misdemeanors 521 (2d ed. 1826) (hereafter Russell), the "pursuit" referred to was apparently "the old Common Law mode of pursuing," by the "hue and cry." 1 Chitty *26; 4 W. Blackstone, Commentaries 293 (J. Wendell ed. 1847); 2 Hale 98. See *Semayne's Case,* 5 Co. Rep. 91a, 91b–93a, 77 Eng. Rep. 194, 196 (K. B. 1603) ("J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J. retreats into the house of T. they who pursue him, if the house be kept and defended with force (which proves that first request ought to be made) may lawfully break the house of T. for it is at the K.'s suit"). The "hue and cry," however, was not the same as "hot pursuit" by officers of the law, and the situations in which it might be invoked—for example, simply to apprehend a person suspected of a felony—would not be considered exigent circumstances. See 1 Chitty *27–*29.

another. It is clear that the privilege of the home did not extend when the King was a party, *i. e.*, when a warrant in a criminal case had been issued. See 1 Russell 520; 2 Gabbett 141; *Burdett* v. *Abbott,* 14 East. 1, 79, 104 Eng. Rep. 501, 531 (K. B. 1811); *Commonwealth* v. *Reynolds, supra,* at 196. That a man's home may be his castle in civil cases, but not in criminal cases, was recognized as far back as the Year Books. See Y. B. 13 Ewd. IV, f. 9a (quoted in *Burdett, supra,* at 79, 104 Eng. Rep., at 531). The suggestion in the Court's opinion, *ante,* at 219, that "[t]he language of *Semayne's Case* . . . suggests that although the subject of an arrest warrant could not find sanctuary in the home of the third party, the home remained a 'castle or privilege' for its residents," is thus completely unfounded in the present context.

An officer could break into one's own home to execute an arrest warrant for the owner, and "so much more may he break open the house of another person to take him," 2 Hale 117. Entry into the house of a third party to effect arrest was considered to follow *a fortiori* from the accepted entry into the home of the subject of the arrest warrant himself. This was because those in the home of a third party had no protection against civil process, let alone criminal process. See 1 Chitty *57; 2 Gabbett 142; 2 Hale 117. See generally Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 800–801 (1924). At common law the Sovereign's key—criminal process—unlocked all doors, whether to apprehend the owner or someone else.

While I cannot subscribe to the Court's decision today, I will not falsely cry "wolf" in this dissent. The decision rests on a very special set of facts, and with a change in one or more of them it is clear that no separate search warrant would be required even under the reasoning of the Court.

On the one side *Payton* makes clear that an arrest warrant is all that is needed to enter the suspect's "home" to effect the arrest. 445 U. S., at 602–603. If a suspect has been living in a particular dwelling for any significant period, say

a few days, it can certainly be considered his "home" for Fourth Amendment purposes, even if the premises are owned by a third party and others are living there, and even if the suspect concurrently maintains a residence elsewhere as well. In such a case the police could enter the premises with only an arrest warrant. On the other side, the more fleeting a suspect's connection with the premises, such as when he is a mere visitor, the more likely that exigent circumstances will exist justifying immediate police action without departing to obtain a search warrant. The practical damage done to effective law enforcement by today's decision, without any basis in the Constitution, may well be minimal if courts carefully consider the various congeries of facts in the actual case before them.

The genuinely unfortunate aspect of today's ruling is not that fewer fugitives will be brought to book, or fewer criminals apprehended, though both of these consequences will undoubtedly occur; the greater misfortune is the increased uncertainty imposed on police officers in the field, committing magistrates, and trial judges, who must confront variations and permutations of this factual situation on a day-to-day basis. They will, in their various capacities, have to weigh the time during which a suspect for whom there is an outstanding arrest warrant has been in the building, whether the dwelling is the suspect's home, how long he has lived there, whether he is likely to leave immediately, and a number of related and equally imponderable questions. Certainty and repose, as Justice Holmes said, may not be the destiny of man, but one might have hoped for a higher degree of certainty in this one narrow but important area of the law than is offered by today's decision.

ARIZONA *v.* MANYPENNY

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

No. 79–621. Argued November 10, 1980—Decided April 21, 1981

Respondent was indicted in an Arizona state court for the commission of a state crime. Because the charge arose from an act committed while he was on duty as a federal Border Patrol Agent, respondent, pursuant to 28 U. S. C. § 1442 (a)(1), removed the case to Federal District Court. After a jury trial, a guilty verdict was returned, but ultimately the District Court *sua sponte* concluded that respondent had a valid immunity defense and entered a judgment of acquittal. The State appealed, but the Court of Appeals dismissed the appeal for lack of jurisdiction, holding, *inter alia,* that a criminal proceeding removed to federal court under § 1442 (a)(1) arises under federal law, and accordingly is controlled by that law. The court concluded that only Congress can authorize an appeal by a State in a § 1442 (a)(1) criminal prosecution and that it had not done so. The court rejected the suggestion that Arizona's appeal was authorized by 28 U. S. C. § 1291, which confers jurisdiction on United States courts of appeals over appeals from all final decisions of federal district courts, except where a direct review may be had in the Supreme Court.

Held: In a criminal proceeding removed to federal court under § 1442 (a)(1), a State may appeal under § 1291 from an adverse judgment if statutory authority to seek such review is conferred by state law. Thus, because Arizona law conferred such authority here, and because removal does not alter the nature of the authority conferred, the State must be allowed to appeal from the post-guilty-verdict judgment of acquittal. Pp. 239–250.

(a) Arizona statutes, as construed by Arizona courts, authorize the prosecution to seek review when it claims that the trial court has exceeded its jurisdiction or abused its discretion, as is the claim in this case. Pp. 239–240.

(b) Respondent, by obtaining a federal forum, fully vindicated the federal policies supporting removal—permitting a trial on the merits of the state-law question free from local interests or prejudice and enabling the defendant to have the validity of his immunity defense adjudicated in a federal forum. No further purpose of the removal statute would be served by denying the State a right to seek review when that very

right is available under state law. On the contrary, it would be anomalous to conclude that the State's appellate rights were diminished solely because of the removal. Pp. 241–243.

(c) This Court's prior decisions restricting the availability of § 1291 and its predecessors when the Government seeks to appeal in a criminal case flow from a tradition of requiring that a prosecutorial appeal be affirmatively sanctioned by the same sovereign that sponsors the prosecution. The intention to restrict sovereign power in this area is adequately addressed when the legislature responsible for that power has spoken in express terms, or when a legislative enactment has been authoritatively construed by the sovereign's highest court. Section 1291 neither compels nor forecloses appellate jurisdiction in an appeal taken by a State as prosecutor. Instead, the provision permits a State to appeal if it is authorized to do so by state law. Arizona can rely on § 1291 combined with appellate authorization from the Arizona Legislature. In the circumstances of this case, no more is required. Pp. 244–249.

608 F. 2d 1197, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 250. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 251.

Daniel Jesse Smith argued the cause for petitioner. With him on the briefs was *Stephen D. Neely*.

James D. Whitney argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent, a federal officer, was charged in Arizona with the commission of a state crime. On the officer's motion, the case was removed from state court and tried in federal court. The issue presented is whether a federal appellate court has jurisdiction to entertain Arizona's appeal from the District Court's judgment of acquittal entered after a jury verdict of guilty.

**Solicitor General McCree* and *Assistant Attorney General Heymann* filed a brief for the United States as *amicus curiae* urging reversal.

I

A

Respondent William Dale Manypenny had been employed for six years as a Border Patrol Agent in the United States Immigration and Naturalization Service (INS). On the moonlit evening of March 15, 1976, he and fellow Agent Gerald Wayne Hjelle were assigned to patrol the Sweetwater Pass, located on federal land in Pima County, Ariz., approximately 10 miles from the Mexican border.[1] INS officials knew that the Pass was frequently traveled by aliens illegally entering the United States. While patrolling the Pass, respondent and his colleague were expected to stop and question any person suspected of being an alien and to arrest that person if he could not produce a lawful entry permit.[2] Both agents wore plain clothes, as was customary for patrol work in that rugged desert area. Tr. 248–249, 293.

Three Mexican males were traveling north along the trail when respondent's electronic sensor system signaled their approach.[3] Following standard procedure, Agent Hjelle stationed himself near where the path emerged from the canyon onto higher ground. Respondent took a position some 100 yards to the south, on a bluff overlooking but out of sight of the path. The plan called for Hjelle to stop any suspected illegal alien, identify himself, and conduct a brief inquiry to determine the suspect's status, while respondent approached from behind.

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[1] Sweetwater Pass is located about 29 miles southeast of Ajo, Ariz. The Pass is bounded on the west by the Organ Pipe Cactus National Monument, and on the east by the Papago Indian Reservation. It is undisputed that the events in question occurred on land owned by the Federal Government.

[2] Under 8 U. S. C. § 1325, an alien not previously convicted of illegal entry who enters the United States at an improper time or place is guilty of a misdemeanor.

[3] According to testimony at trial, the Mexicans were unarmed and were seeking employment in this country. Tr. 15, 23.

The three men emerged from the canyon and saw Hjelle, who ordered them to stop. *Id.*, at 16–17, 283–284. Before Hjelle could begin his questioning, one of the men turned and ran back south toward the border. Respondent shouted after him to halt. *Id.*, at 174. When the fleeing man failed to stop, respondent fired three shotgun blasts in his direction. One hit the fugitive in the buttocks, causing multiple wounds. *Id.*, at 105–106. Another struck him in the upper spine, severing the cord and leaving him a quadriplegic. *Id.*, at 87–88, 93.

B

Respondent was indicted in the Superior Court of Pima County, Ariz., for assault with a deadly weapon, in violation of Ariz. Rev. Stat. Ann. §§ 13–249 A and B (Supp. 1973).[4] Because the charge arose from an act committed while on duty for the INS, respondent, pursuant to 28 U. S. C. § 1442 (a)(1),[5] removed the case to the United States District Court

[4] The statute then read in pertinent part:

"A. A person who commits assault upon the person of another with a deadly weapon or instrument . . . shall be punished by imprisonment in the state prison for not less than one nor more than ten years, by a fine not exceeding five thousand dollars, or both.

"B. A crime as prescribed by the terms of subsection A, committed by a person armed with a gun or other deadly weapon, is punishable by imprisonment in the state prison, for the first offense, for not less than five years . . . and in no case . . . shall the person convicted be eligible for suspension or commutation of sentence, probation, pardon or parole until such person has served the minimum sentence imposed."

Section 13–249 was repealed by 1977 Ariz. Sess. Laws, ch. 142, § 4, effective Oct. 1, 1978, and replaced by other legislation. See Ariz. Rev. Stat. Ann. § 13–1204 (1978).

[5] Title 28 U. S. C. § 1442 (a)(1) provides:

"(a) A civil action or criminal prosecution commenced in a State court against any one of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of

for the District of Arizona. The case was tried before a jury, and a verdict of guilty was returned. Respondent then timely moved for arrest of judgment or, alternatively, for a new trial. See Fed. Rules Crim. Proc. 33 and 34.[6] The District Court granted respondent's motion to arrest judgment and dismissed the indictment; it did so on the ground that the State could not assert its criminal jurisdiction over federal lands. 7 Record 7–8. The State immediately moved for reconsideration; the District Court also granted the State's motion and took the matter under advisement. App. 36–38.

Nine months later, the District Court vacated its previous order arresting judgment. 445 F. Supp. 1123 (1977). The court on reconsideration held that Arizona retained criminal jurisdiction over all land within its exterior boundaries.[7] Having determined that it properly could exercise jurisdiction over Arizona's claim, the District Court then proceeded *sua sponte* to construe respondent's motion under Rule 34 as a motion for judgment of acquittal, pursuant to Federal Rule of Criminal Procedure 29 (c). Although an immunity defense had not been raised at trial, and the State had not introduced any evidence designed to overcome that defense, the court concluded that it had erred in failing to instruct the jury on such a defense. Relying on principles enunciated in *In re Neagle,* 135 U. S. 1, 75 (1890), and *Clifton* v. *Cox,* 549 F. 2d 722 (CA9 1977), the District Court reasoned that re-

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any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

[6] In his motion in arrest of judgment under Rule 34, respondent maintained that the State of Arizona, and therefore the United States District Court on removal, had no criminal jurisdiction over the federal land where the shooting occurred. Respondent further contended that any attempt to prosecute him under a state statute unlawfully interfered with the exclusively federal interest in regulating immigration.

[7] The court further concluded that the federal interest in enforcement of the immigration laws did not pre-empt the applicability of state criminal law in this instance. 445 F. Supp., at 1125–1127.

spondent would be immune from prosecution on a state criminal charge if he acted under color of federal law and in the honest belief that his actions were necessary and proper for the execution of his federal duties. 445 F. Supp., at 1126–1127. The court applied this standard to the evidence adduced at trial, and concluded that a reasonable jury could not have found respondent guilty beyond a reasonable doubt. *Id.*, at 1128. The presumed motion for acquittal was granted and the jury verdict was set aside.

Claiming that the trial court had exceeded its authority,[8] the State filed a timely notice of appeal from the acquittal. It invoked the appellate court's jurisdiction under 18 U. S. C. § 3731.[9] The United States Court of Appeals for the Ninth Circuit, by a brief *per curiam* opinion citing *Sanabria* v. *United States*, 437 U. S. 54 (1978), initially dismissed the appeal on double jeopardy grounds.[10] Upon timely petition for rehearing, however, the Court of Appeals withdrew the opinion, App. to Pet. for Cert. 1a, and substituted another in its place. This time, by a divided vote, the court dismissed Arizona's appeal on the ground that jurisdiction was lacking.

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[8] Arizona argued that the District Court lacked jurisdiction to act on a Rule 29 (c) motion 11 months after a guilty verdict, in violation of the Rule's 7-day requirement. Brief for Appellant in No. 77–3453 (CA9), pp. 8–11. The State also contended that the District Court had misapplied relevant immunity law and that the evidence was more than sufficient to sustain the jury verdict. *Id.*, at 17–24.

[9] Section 3731 provides in pertinent part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

[10] The court reasoned that even if, in a removed criminal prosecution, the State of Arizona had the same right of appeal under 18 U. S. C. § 3731 as is accorded the United States in a federal prosecution, the judgment of acquittal nonetheless was unreviewable on double jeopardy grounds. App. to Pet. for Cert. 39a–40a.

608 F. 2d 1197 (1979). It noted that under settled precedent of this Court, the Government may take an appeal from an adverse decision in a criminal case only if expressly authorized by statute to do so. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 568 (1977); *United States* v. *Wilson*, 420 U. S. 332, 336 (1975); *United States* v. *Sanges*, 144 U. S. 310, 312, 318–323 (1892). Emphasizing the language of 18 U. S. C. § 3731, the court held that the statute authorizes an appeal only when the *United States* is the prosecutor, not when a state prosecution has been removed to federal court.

The Court of Appeals declined to consider whether state law provided Arizona with a right to appeal in this case. Instead, the court reasoned that a criminal proceeding removed to federal court under 28 U. S. C. § 1442 (a)(1) arises under federal law, and accordingly is to be controlled by that law rather than state law. The court concluded that "only Congress can authorize an appeal by a state in a § 1442 (a)(1) criminal prosecution," and Congress had not done so. 608 F. 2d, at 1200. The Court of Appeals also rejected the suggestion that the general appeals statute, 28 U. S. C. § 1291,[11] provided authorization for Arizona's appeal. 608 F. 2d, at 1199, n. 3.

The dissenting judge discerned separate bases for appellate jurisdiction in 18 U. S. C. § 3731 and 28 U. S. C. § 1291. 608 F. 2d, at 1200–1202.[12]

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[11] Title 28 U. S. C. § 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[12] Having found jurisdiction, the dissent concluded on the merits that the judgment of acquittal should be reversed. 608 F. 2d, at 1205. The Court of Appeals' majority, however, did not reach the merits. In view of the posture of the case, we also intimate no view on the merits. Neither do we have any occasion now to decide whether the instant appeal would be barred under the Double Jeopardy Clause of the Fifth Amendment,

We granted certiorari in order to resolve a problem of appellate jurisdiction created by the federal removal statute. 445 U. S. 960 (1980). Because it is an issue that carries significance for federal-state relations, we pay close attention to both state and federal law bearing on its resolution.

II

We begin by noting that had respondent's trial occurred in state rather than federal court, Arizona's statutes, as construed and applied by the courts of that State, would enable the State to obtain the appellate review it seeks. Under Arizona law, the prosecution is authorized to seek review, by certiorari, when its claim is that the lower court has exceeded its jurisdiction or has abused its discretion. See Ariz. Rev. Stat. Ann. § 12–2001 (1956).[13] The State's petition for re-

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which is enforceable against the States through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U. S. 784, 793–796 (1969). That question was not decided by the Court of Appeals, and the parties have not raised it before this Court. See Tr. of Oral Arg. 33.

[13] Section 12–2001 reads:

"The writ of certiorari may be granted by the supreme and superior courts or by any judge thereof, in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court, a plain, speedy and adequate remedy."

A writ of certiorari may be obtained by filing a petition for special action, pursuant to Rule 4, Rules of Procedure for Special Actions, vol. 17A, Ariz. Rev. Stat. Ann. (1973). The certiorari provision itself speaks of review to determine whether the lower court has exceeded its jurisdiction, but as consistently construed by the Arizona Supreme Court, the statute also authorizes review for abuse of discretion. *State ex rel. Hyder* v. *Superior Court* (*Clifton, Real Party in Interest*), 128 Ariz. 216, 222, 624 P. 2d 1264, 1270 (1981); *State ex rel. Dawson* v. *Superior Court*, 112 Ariz. 123, 538 P. 2d 397 (1975); *State ex rel. Ronan* v. *Superior Court*, 95 Ariz. 319, 322, 390 P. 2d 109, 111 (1964); *State ex rel. Mahoney* v. *Stevens*, 79 Ariz. 298, 300, 288 P. 2d 1077, 1078 (1955). See Rule 3, Rules of Procedure for Special Actions, vol. 17A, Ariz. Rev. Stat. Ann. (1973).

view has been routinely granted in numerous instances exactly like this case, where the prosecution seeks review of a judgment of acquittal following a guilty verdict. See, *e. g.*, *State ex rel. Hyder* v. *Superior Court (Clifton, Real Party in Interest)*, 128 Ariz. 216, 624 P. 2d 1264 (1981); *State ex rel. Hyder* v. *Superior Court (Moya, Real Party in Interest)*, 124 Ariz. 560, 606 P. 2d 411 (1980); *State ex rel. Dawson* v. *Superior Court*, 112 Ariz. 123, 538 P. 2d 397 (1975). See also *State* v. *Allen*, 27 Ariz. App. 577, 557 P. 2d 176 (1976); *State* v. *Lopez*, 26 Ariz. App. 559, 550 P. 2d 113 (1976); *State* v. *Gradillas*, 25 Ariz. App. 510, 512, 544 P. 2d 1111, 1113 (1976).[14]

Thus, the sole question posed here is whether respondent's removal of the state prosecution to federal court for trial alters the nature of the State's otherwise well-established right, under state law, to seek review of the instant judgment of acquittal. We consider this question first by reviewing the legal effect of and the policies served by removal for trial under § 1442 (a)(1). We then examine respondent's argument that the federal law governing federal appellate jurisdiction not only does not permit but also, in fact, bars the State's criminal appeal in federal court.

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[14] The dissent maintains that this longstanding application of the statute, never questioned by the Arizona Legislature, is an insufficiently clear expression of state law. But it is obvious that in the precise circumstances of this case, the Arizona Legislature and the Arizona Supreme Court have authorized the appellate review requested by the State. The absence of a statutory formula providing for automatic appeal by the State in *every* criminal prosecution does not alter this fact.

A separate Arizona statute permits the State to appeal from an "order made after judgment affecting the substantial rights of the state." Ariz. Rev. Stat. Ann. § 13–4032.5 (1978), formerly § 13–1712.5. Although there is little case law interpreting this provision, it may furnish an additional basis for appellate review here. See generally *State ex rel. Hyder* v. *Superior Court (Clifton, Real Party in Interest)*, 128 Ariz., at 220, 624 P. 2d, at 1268; *State* v. *Wynn*, 114 Ariz. 561, 563, 562 P. 2d 734, 736 (App. 1977).

A

The Court of Appeals concluded that the fact of removal substantially alters the State's right to seek review. Reasoning that a case brought pursuant to § 1442 (a)(1) arises under federal law, the court held that state enabling statutes retain no significance. But a state criminal proceeding against a federal officer that is removed to federal court does not "arise under federal law" in this pre-empting sense. Rather, the federal court conducts the trial under federal rules of procedure while applying the criminal law of the State. *Tennessee* v. *Davis,* 100 U. S. 257, 271–272 (1880). See Fed. Rule Crim. Proc. 54 (b)(1), Advisory Committee Notes, 18 U. S. C. App., pp. 1480–1481.[15]

This principle is entirely consistent with the purpose underlying the removal of proceedings commenced in state court against a federal officer. Historically, removal under § 1442 (a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties.[16] The act

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[15] In concluding that federal law controls all aspects of a case before the federal court under § 1442 (a)(1), the Court of Appeals relied on several decisions, none of which involved proceedings removed from state to federal court. See *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447 (1942); *Deitrick* v. *Greaney,* 309 U. S. 190 (1940); *Board of Comm'rs* v. *United States,* 308 U. S. 343 (1939); *United States* v. *Crain,* 589 F. 2d 996 (CA9 1979). Moreover, in each of these cases federal law was deemed controlling because the rights that the complainant sought to protect or enforce were created by federal statutes. In contrast, petitioner here seeks to enforce a state statute.

[16] This Court elsewhere has reviewed the "long history" of the federal-officer removal statute. *Willingham* v. *Morgan,* 395 U. S. 402, 405–406 (1969). It has been 100 years since the Court in *Tennessee* v. *Davis,* 100 U. S. 257 (1880), first emphasized the need to safeguard the exercise of legitimate federal authority:

"[The Federal Government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought

of removal permits a trial upon the merits of the state-law question free from local interests or prejudice. See *Colorado* v. *Symes,* 286 U. S. 510, 517–518 (1932); *Maryland* v. *Soper,* 270 U. S. 9, 32 (1926). It also enables the defendant to have the validity of his immunity defense adjudicated in a federal forum. *Willingham* v. *Morgan,* 395 U. S. 402, 407 (1969). For these reasons, this Court has held that the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal "should not be frustrated by a narrow, grudging interpretation of § 1442 (a)(1)." *Ibid.*

At the same time, the invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied. In this respect, it is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties.[17] Federal involvement is necessary in order to insure a federal forum, but it is limited to assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law. Thus, while giving full effect to the purpose of re-

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to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members." *Id.,* at 263.

[17] In the area of general civil removals, it is well settled that if the state court lacks jurisdiction over the subject matter or the parties, the federal court acquires none upon removal, even though the federal court would have had jurisdiction if the suit had originated there. *Freeman* v. *Bee Machine Co.,* 319 U. S. 448, 449 (1943); *Minnesota* v. *United States,* 305 U. S. 382, 389 (1939); *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.,* 258 U. S. 377, 382 (1922). This principle of derivative jurisdiction is instructive where, as here, relevant state-court jurisdiction is found to exist and the question is whether the federal court in effect loses such jurisdiction as a result of removal. Of course, because appellate rather than original jurisdiction is at issue, the analogy is not perfect. See Subpart B, *infra.*

moval, this Court retains the highest regard for a State's right to make and enforce its own criminal laws. *Colorado* v. *Symes,* 286 U. S., at 517–518.

Under our federal system, "[i]t goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson* v. *New York,* 432 U. S. 197, 201 (1977). Because the regulation of crime is pre-eminently a matter for the States, we have identified "a strong judicial policy against federal interference with state criminal proceedings." *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592, 600 (1975). A State's interest in enforcing its criminal laws merits comparable judicial respect when pursued in the federal courts. Cf. *Colorado* v. *Symes,* 286 U. S., at 518.

Respondent here, by obtaining a federal forum, has fully vindicated the federal policies supporting removal. The plainest evidence of this vindication is the District Court's application of the immunity defense. No further purpose of the removal statute would be served by denying the State a right to seek review when that very right is available under applicable state law. On the contrary, it would be anomalous to conclude that the State's appellate rights were diminished solely because of the removal. The statutory goal of ensuring fair and impartial adjudication is not advanced when the State in effect can be penalized by the defendant's decision to remove a criminal prosecution. Absent any indication that the removal statute was intended to derogate from the State's interest in evenhanded enforcement of its laws, we see no justification for providing an unintended benefit to a defendant who happens to be a federal officer.[18]

[18] By enacting the current version of 18 U. S. C. § 3731, see 84 Stat. 1890, Congress manifested an intent to remove all statutory barriers to a criminal appeal taken by the Federal Government. *United States* v. *Wilson,* 420 U. S. 332, 337 (1975). Petitioner argues that this intent should inform our deliberations concerning a state prosecution's appellate rights upon removal to federal court. A proper respect for the State's

B

Although the purposes of the removal statute do not support denial of a State's customary right to seek appellate review, we do not suggest that this alone establishes the State's right to appeal in federal court. Authorization to seek review under Arizona law is not a grant of federal appellate jurisdiction. Nor, when added to the conclusion that removal itself fails to diminish Arizona's appellate rights, does this authorization amount to a grant of equivalent federal jurisdiction at the appellate level. Because the criminal removal statute does not confer federal *appellate* jurisdiction, some independent federal basis is required if a State is to perfect its appeal. Petitioner contends in part that such authorization derives from 28 U. S. C. § 1291, the general statutory grant of appellate jurisdiction. Brief for Petitioner 49–58. Respondent argues, however, that § 1291 cannot support Arizona's appeal because it has been found inadequate, standing alone, to support a criminal appeal by the Federal Government. Brief for Respondent 32–40. This argument deserves close attention, for it draws on the important tradition disfavoring criminal appeals by the sovereign.

Under 28 U. S. C. § 1291, any litigant armed with a final judgment from a lower federal court is entitled to take an appeal. By its terms, the statute addresses neither the identity of particular parties nor the nature of the prior legal

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interest in enforcing its own criminal laws, however, counsels against that conclusion. While the policy announced in § 3731 might perhaps be viewed as indicative of congressional support for any prosecutor's appeal in federal court, the statute does not speak in such terms. Moreover, if § 3731 is construed to extend broad appellate rights to a State that does not authorize comparable rights under state law, one result might be to inhibit the exercise of the removal right, contrary to established federal policy. In light of these uncertainties, and our resolution of the case on other grounds, we do not reach the question whether § 3731 applies to the States.

proceedings.[19] But while it is settled that a civil appeal, or an appeal by the defendant in a criminal case, may be taken from any final decision of a District Court, this Court has observed on prior occasions that, " 'in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored.' " *Will* v. *United States,* 389 U. S. 90, 96 (1967), quoting from *Carroll* v. *United States,* 354 U. S. 394, 400 (1957). This federal policy has deep roots in the common law, for it was generally understood, at least in this country, that the sovereign had no right to appeal an adverse criminal judgment unless expressly authorized by statute to do so.[20] Accordingly, from the early days of the Republic, most state courts refused to consider appeals by prosecutors who lacked the requisite statutory authority.[21]

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[19] Congress from the very beginning provided that final civil judgments were reviewable as a matter of statutory right. Judiciary Act of Sept. 24, 1789, § 22, 1 Stat. 84. Later, when the growing volume of appellate business threatened to overwhelm this Court's docket, Congress acted to establish circuit courts of appeals. Judiciary Act of Mar. 3, 1891, 26 Stat. 826. See, *e. g.*, H. R. Rep. No. 1295, 51st Cong., 1st Sess., 3–4 (1890); 21 Cong. Rec. 10220–10222 (1890) (remarks of Sen. Evarts). While preserving, under § 5 of the 1891 Act, 26 Stat. 827, several designated categories of cases under this Court's direct appellate jurisdiction, the Act, in § 6, conferred on the new intermediate appellate court the power to review and revise final judgments in all other cases, civil and criminal, "unless otherwise provided by law." 26 Stat. 828. Through a succession of recodifications and technical amendments, § 6 of the 1891 Act has been carried forward as 28 U. S. C. § 1291.

[20] There is disagreement among scholars as to whether, at common law in England, the prosecution could appeal. See R. Moreland, Modern Criminal Procedure 273 (1959); L. Orfield, Criminal Appeals in America 57 (1939); Miller, Appeals by the State in Criminal Cases, 36 Yale L. J. 486, 491 (1927); Note, Criminal Procedure—Right of State to Appeal, 45 Ky. L. J. 628, 629 (1957). See generally *United States* v. *Sanges,* 144 U. S. 310, 312 (1892).

[21] See *United States* v. *Sanges,* 144 U. S., at 313–318, and cases cited therein. See also L. Orfield, Criminal Appeals in America 58 (1939);

Both prudential and constitutional interests contributed to this tradition. The need to restrict appeals by the prosecutor reflected a prudential concern that individuals should be free from the harassment and vexation of unbounded litigation by the sovereign. See, *e. g., State* v. *Jones,* 7 Ga. 422, 425–426 (1849); *People* v. *Corning,* 2 N. Y. 9, 16 (1848). This concern also underlies the constitutional ban against double jeopardy, which bars an appeal by the prosecutor following a jury verdict of acquittal. See, *e. g., People* v. *Webb,* 38 Cal. 467, 476–480 (1869); *State* v. *Burris,* 3 Tex. 118 (1848); *State* v. *Hand,* 6 Ark. 169, 171 (1845). See also *Burks* v. *United States,* 437 U. S. 1, 16 (1978); *Fong Foo* v. *United States,* 369 U. S. 141, 143 (1962). See generally *United States* v. *DiFrancesco,* 449 U. S. 117, 129–130 (1980). In general, both concerns translate into the presumption that the prosecution lacks appellate authority absent express legislative authorization to the contrary.

This presumption was first announced as a rule of federal law in *United States* v. *Sanges,* 144 U. S. 310 (1892). There, the Court held that no appellate right by the Federal Government exists in the absence of express enabling legislation from Congress. The Court also concluded that the general grant of appellate jurisdiction contained in the Judiciary Act of 1891 did not satisfy this requirement.[22] In subsequent decisions, the Court has reaffirmed that the Federal Government enjoys no inherent right to appeal a criminal judgment, and that the grant of general appellate jurisdiction, now contained in 28 U. S. C. § 1291, does not authorize such a federal appeal. *DiBella* v. *United States,* 369 U. S. 121, 130 (1962); *Carroll* v. *United States,* 354 U. S.

Comment, State Appeals in Criminal Cases, 32 Tenn. L. Rev. 449, 450–451 (1965).

[22] In *Sanges,* the Government sought review of a lower court judgment quashing the federal indictment. The Court determined that no provision of the new 1891 Judiciary Act had conferred upon the United States the right to appeal a criminal judgment. 144 U. S., at 322–323.

394, 400–403 (1957). See *Will* v. *United States,* 389 U. S. 90, 96–97 (1967); *United States* v. *Burroughs,* 289 U. S. 159, 161 (1933).

Respondent contends that *Sanges* and its progeny must be read to foreclose a criminal appeal in federal court by *any* governmental entity unless the appellate right derives from an express *federal* statute. We do not believe that *Sanges* is to be so broadly construed. *Sanges* holds simply that the federal sovereign may not subject one of its citizens to continued federal prosecution in its own courts where it has not been expressly permitted to do so under federal law. 144 U. S., at 323.[23] Our continuing refusal to assume that the United States possesses any inherent right to appeal reflects an abiding concern to check the Federal Government's possible misuse of its enormous prosecutorial powers. By insisting that Congress speak with a clear voice when extending to the Executive a right to expand criminal prosecutions, *Sanges* and its subsequent applications have placed the responsibility for such assertions of authority over citizens in the democratically elected Legislature where it belongs. Congress has properly assumed this responsibility by first defining, and then broadening and clarifying, the Federal Government's right to appeal an adverse criminal judgment.[24]

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[23] After finding no such express permission in the federal statute there at issue, the Court concluded as follows:

"In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." *Id.,* at 323.

[24] At least partially in response to the *Sanges* decision, Congress passed the Criminal Appeals Act of Mar. 2, 1907, ch. 2564, 34 Stat. 1246, conferring limited rights of appeal on the United States in criminal cases. See, *e. g.,* H. R. Rep. No. 2119, 59th Cong., 1st Sess., 3 (1906);

The concern to restrict prosecuting authority to express congressional grants, however, does not justify a requirement of express authorization by *Congress* when the sovereign seeking to appeal is a State rather than the Federal Government. Nothing in the language or logic of the *Sanges* opinion contains any suggestion of that kind. Nor should such an intimation be read into the Court's subsequent decisions adhering to *Sanges*' principle.[25] For the purposes of

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S. Rep. No. 5650, 59th Cong., 2d Sess., 1 (1907). Following this Court's opinion in *United States* v. *Sisson,* 399 U. S. 267 (1970), Congress broadened the Federal Government's right of appeal to its current status under 18 U. S. C. § 3731. 84 Stat. 1890.

[25] Respondent and the dissent unsuccessfully attempt to derive support from the decision in *Maryland* v. *Soper,* 270 U. S. 9 (1926). There this Court awarded Maryland mandamus relief after the State had challenged the legality of removing a particular criminal prosecution to federal court. In general, this decision supports the ability of a State to secure review in a removed criminal prosecution. Moreover, the decision held simply that mandamus was appropriate in the absence of any other means of reviewing the District Court's order refusing remand. Respondent and the dissent seek to rely on the Court's further statement in *Soper,* 270 U. S., at 30, that once a criminal action is removed to federal court "a judgment of acquittal in that court is final. *United States* v. *Sanges,* 144 U. S. 310." Although this statement is merely dictum, to respondent and the dissent it implies that a state prosecutor lacks congressional authorization to take an appeal in federal court. We, however, adopt what we view as a more sensible reading, namely, that the Court's statement reflects an awareness of controlling double jeopardy doctrine, which at the time was thought to protect a defendant once a judgment of acquittal had been entered in federal court. See, *e. g., Kepner* v. *United States,* 195 U. S. 100, 130, 133 (1904); *United States* v. *Ball,* 163 U. S. 662, 671 (1896). But see *United States* v. *Wilson,* 420 U. S. 332 (1975). Since this Court had earlier assumed without deciding that the Double Jeopardy Clause of the Fifth Amendment applied to state prosecutions, see *Dreyer* v. *Illinois,* 187 U. S. 71, 85–86 (1902), it would not have been unreasonable for a state court or prosecutor to make the same assumption in 1926. Of course, the decision in *Soper* could hardly reflect awareness that 11 years later the Court would decline to extend Fifth Amendment double jeopardy protection in prosecutions brought by a State. See *Palko* v. *Connecticut,* 302 U. S. 319 (1937), overruled by *Benton* v. *Maryland,* 395 U. S. 784 (1969).

congressional restriction of prosecution by the sovereign, the Federal Executive, not the State, is the relevant sovereign. The decision to limit or extend a State's appellate authority is a matter of state law within constitutional constraints. If a State wishes to empower its prosecutors to pursue a criminal appeal under certain conditions, it is free so to provide, limited only by the guarantees afforded the criminal defendant under the Constitution. Requiring Congress also to address explicitly the State's authority contributes nothing to the policy concerns that prompt the requirement of express sovereign action. There is, in short, no basis for concluding that Congress' neglect specifically to authorize a state appeal in a removed criminal proceeding impairs the appellate rights of the state prosecutor acting to enforce his separate body of criminal law.

In sum, the Court's prior decisions restricting the availability of § 1291 in a criminal context flow from a tradition of requiring that a prosecutorial appeal be affirmatively sanctioned by the same sovereign that sponsors the prosecution. The intention to restrict sovereign power in this area is adequately addressed when the legislature responsible for that power has spoken in express terms, or when a legislative enactment has been authoritatively construed by the sovereign's highest court. We conclude that § 1291 neither compels nor forecloses appellate jurisdiction in an appeal taken by a State as prosecutor. Instead, the provision permits a State to appeal if it is authorized to do so by state law. Petitioner Arizona can rely on § 1291 combined with appellate authorization from the Arizona Legislature.[26] In the circumstances of this case, no more is required.[27]

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[26] The relevance of state authorization to our jurisdictional determination under 28 U. S. C. § 1291 does not affect the exclusively federal character of the forms of review available once the state sovereign enters federal court. Thus, while Arizona's authorization of appellate review by certiorari has no precise analogue in the federal system, it is necessary to

[*Footnote 27 is on p. 250*]

III

We hold that in a criminal proceeding removed to federal court, a State may appeal under § 1291 from an adverse judgment if statutory authority to seek such review is conferred by state law. Because Arizona law conferred such authority here, and because removal does not alter the nature of the authority conferred, the State must be allowed to appeal from the post-guilty-verdict judgment of acquittal. Accordingly, the judgment of the United States Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

There is a distinction between a court's power to accept an appeal and an executive's power to prosecute an appeal. The question whether the United States Court of Appeals in this case had jurisdiction to entertain the appeal is a federal

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choose from among the available forms of federal review. As noted above, Arizona law authorizing review for abuse of discretion is administered in a sufficiently routine manner as to be more akin to ordinary federal appellate review than to the federal mandamus remedy reserved for extraordinary circumstances. We express no view regarding the correct federal analogue for a State with a right of review that is more limited than that afforded by Arizona law.

[27] We have no occasion to address the situation where state law does not authorize the review sought by its prosecutor in federal court. We note, however, that in the majority of States the prosecution possesses at least some rights to appeal from an adverse judgment in a criminal case. See Note, Limited Right of Appeal for the State, 14 Hous. L. Rev. 735, 737 (1977). Similarly, because we find that appellate jurisdiction exists under § 1291 combined with relevant Arizona law, we do not decide the applicability of § 3731 to the States. See n. 18, *supra*.

The dissent suggests that this case presents an anomalous circumstance. But an anomaly is created only if we accept that Congress denied a State the right, established under state law, to prosecute an appeal when the proceeding is removed to federal court.

question. I agree with the Court's conclusion that such jurisdiction is conferred by 28 U. S. C. § 1291.*

The question whether the prosecutor had authority to prosecute an appeal is, I believe, a question controlled by the law of the sovereign that the prosecutor represents. I therefore agree with the Court's conclusion that the holding in *United States* v. *Sanges,* 144 U. S. 310, to the effect that a federal prosecutor had no such authority in 1892, is not controlling in this case. The controlling authority is conferred by Arizona, which does empower its prosecutors to appeal in the situation presented here.

Although this simple analysis persuades me to join the Court's opinion, I write separately to emphasize that it lends no support to an argument that 18 U. S. C. § 3731 or any other federal statute would authorize an appeal by a state prosecutor.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

United States v. *Sanges,* 144 U. S. 310 (1892), announced the general rule that governments may not appeal in criminal cases in the federal courts in the absence of express statutory authority. Finding, *inter alia,* that the predecessor to 28 U. S. C. § 1291 was not sufficiently express,[1] *Sanges* refused to allow an appeal by the Federal Government. To-

*Title 28 U. S. C. § 1291 provides in part:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

[1] This statute, the Judiciary Act of 1891, provided that "appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court . . . [i]n any case that involves the construction or application of the Constitution of the United States," 26 Stat. 827–828, and to the circuit courts of appeal from final decisions of the district courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided for by law," *id.,* at 828.

day, however, the Court intertwines § 1291 with an Arizona statute authorizing writs of certiorari on behalf of the State in criminal cases in the Arizona courts to make § 1291 "sufficiently express" to authorize a State to appeal from a federal district court's judgment of acquittal. Because this result flouts Congress' authority to regulate the jurisdiction of the lower federal courts, I respectfully dissent.

I

The Court proposes the novel interpretation of *Sanges* and its progeny as "flow[ing] from a tradition of requiring that a prosecutorial appeal be affirmatively sanctioned by the same sovereign that sponsors the prosecution." *Ante,* at 249.[2] I find this reading of the *Sanges* rule inaccurate: in my view, *Sanges* plainly requires express authorization *from the legislative body controlling federal-court jurisdiction* for all government appeals in criminal cases in the federal courts.[3] The Court stated that the express authorization must be made by the legislature "acting within its constitutional authority." 144 U. S., at 318. Since Congress is the only entity constitutionally empowered to grant express authority for government appeals *in the federal courts,* the *Sanges* principle necessarily confines our inquiry to whether there is express authorization in federal statutes controlling criminal appeals by the States in federal court. Therefore, the Court's finding that Arizona, the sovereign sponsoring the prosecution in the instant case, has sanctioned prosecutorial appeals in its courts is irrelevant to the question of federal appellate jurisdiction

[2] The Court also finds that allowing an appeal would not frustrate the removal statute's primary purpose of providing an impartial setting in which a federal official's immunity defense may be considered. *Ante,* at 241–242. But the Court candidly admits that this alone would not establish the State's right to appeal in federal court. *Ante,* at 244.

[3] Because *Sanges* dealt with a Government appeal to this Court, see n. 1, *supra,* the Court observed that "[t]he appellate jurisdiction of [this Court] rests wholly on the acts of Congress." 144 U. S., at 319.

here. Focusing as we must on federal statutes, I find the pertinent federal statutes wholly barren of any express authorization of criminal appeals by States to the federal courts of appeals.[4] Today, as in 1892, § 1291 "says nothing as to the party by whom the writ of error may be brought, and cannot therefore be presumed to have been intended to confer upon the government the right to bring [an appeal]." *Id.*, at 323.

This conclusion is supported by *Maryland* v. *Soper,* 270 U. S. 9 (1926), which relied on the *Sanges* rule to conclude that a State has no right of appeal from a decision of a federal district court in a criminal case removed from state court. In *Soper,* four United States prohibition agents and their chauffeur were indicted for murder in the State of Maryland. The defendants petitioned the Federal District Court for removal, averring that they were federal agents[5] and that their acts "were done in the discharge of their official duties as prohibition agents." 270 U. S., at 22. The District Court granted defendants' petition and the State subsequently applied to this Court for a writ of mandamus to overturn the removal order. Over respondent's objection that mandamus did not lie to correct an erroneous removal order, this Court granted the writ. Observing that "there should be a more liberal use of mandamus [in removal of State criminal cases] than in removal of civil cases," *id.*, at 29, the Court specifically noted:

> "Except by issue of mandamus, [the State] is without an opportunity to invoke the decision of this Court upon the issue it would raise. The order of the United States District Judge refusing to remand is not open to re-

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[4] Title 18 U. S. C. § 3731, authorizing criminal appeals from federal district courts *by the United States,* obviously cannot be read to give that authority to state prosecutors in removal cases.

[5] The petition claimed that the chauffeur was assisting the four agents under the authority of the Prohibition Director.

> view on a writ of error, and a *judgment of acquittal in that court is final. United States* v. *Sanges,* 144 U. S. 310 . . . ." *Id.,* at 30 (emphasis added).

Significantly, the predecessor to § 1291 was available then, as it is now, to support an argument that the State had a right of appeal. Nonetheless, on the strength of *Sanges,* the Court concluded that a judgment of acquittal was unreviewable [6] because there was no express *federal* statute authorizing an appeal by the State. See *Government of Virgin Islands* v. *Hamilton,* 475 F. 2d 529, 530–531 (CA3 1973).

The Court attempts to deflect the force of this precedent by interpreting *Maryland* v. *Soper* as merely "reflect[ing] an awareness of controlling double jeopardy doctrine, which at the time was thought to protect a defendant once a judgment of acquittal had been entered in federal court." *Ante,* at 248, n. 25. But this is a clearly incorrect reading, for it ignores the fact that at the time *Maryland* v. *Soper* was decided, the prohibition contained in the Fifth Amendment's Double Jeopardy Clause was applicable only against the *Federal Government in federal prosecutions,* and not against *state governments in state prosecutions.* See *Palko* v. *Connecticut,* 302 U. S. 319 (1937).[7] It was not until 32 years later that *Benton*

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[6] The State of Maryland had conceded as much in its argument in its brief that, "[s]hould the final judgment be an acquittal, in whole or in part, the State could not have a writ of error to review it. *United States* v. *Sanges,* 144 U. S. 310. Unless this Court entertains the petition for mandamus, the State is without any redress." See *Maryland* v. *Soper,* 270 U. S., at 12.

[7] In *Palko,* the Court rejected the broad thesis that "[w]hatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state." 302 U. S., at 323. Observing that "[t]o retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States," the Court declined to adopt the argument that "there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State." *Id.,* at 322.

v. *Maryland,* 395 U. S. 784 (1969), overruled *Palko* and held that the Double Jeopardy Clause was applicable against the States. Since the Double Jeopardy Clause did not apply to prosecutions initiated by the States, and state substantive law governed criminal cases removed to federal district court, *Tennessee* v. *Davis,* 100 U. S. 257, 271 (1880), the Court's suggestion that the statement in *Maryland* v. *Soper* referred to double jeopardy limitations is plainly unfounded.

II

Even on its own terms the Court's opinion is unpersuasive. The Court concludes that appeals by the States are permissible under § 1291 "when the legislature responsible for that power has spoken in express terms, or when a legislative enactment has been authoritatively construed by the sovereign's highest court." *Ante,* at 249. The Arizona statute supposedly authorizing appeal, however, is anything but "express." That statute provides:

> "The writ of certiorari *may be granted* by the supreme and superior courts or by any judge thereof, in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court, a plain, speedy and adequate remedy." Ariz. Rev. Stat. Ann. §12–2001 (1956) (emphasis added).

The State may obtain a writ of certiorari by filing a petition for special action pursuant to Rule 4, Rules of Procedure for Special Actions, vol. 17A, Ariz. Rev. Stat. Ann. (1973).

If it be true the State's petition for review "has been routinely granted" by the appellate courts, *ante,* at 240, this hardly qualifies as an authoritative construction by the State's highest court that the *statute itself* authorizes review in every case. The Court has failed to cite a single precedent in which the Arizona Supreme Court has investigated the intent of the state legislature in passing the statute authoriz-

ing prosecutorial appeals. More importantly, by relying on state-court decisions allowing certiorari review on behalf of the State, the Court has undercut the only rationale justifying today's result. The Court reasons:

> "Our continuing refusal to assume that the United States possesses any inherent right to appeal reflects an abiding concern to check the Federal Government's possible misuse of its enormous prosecutorial powers. By insisting that Congress speak with a clear voice when extending to the Executive a right to expand criminal prosecutions, *Sanges* and its subsequent applications have placed the responsibility for such assertions of authority over citizens in the democratically elected legislature where it belongs." *Ante,* at 247.

It is difficult to understand how the Court's insistence that the democratically elected legislature speak with a clear voice can be satisfied without interpretive decisions of the State's highest court holding that the state legislature has done so in the case of § 12–2001. Indeed, the Court's application of a less stringent requirement of clarity in the case of state legislation than in the case of federal legislation, see, *e. g., United States* v. *Martin Linen Supply Co.,* 430 U. S. 564, 568 (1977) ("express congressional authorization"); *United States* v. *Wilson,* 420 U. S. 332, 336 (1975) ("express statutory authority"); *DiBella* v. *United States,* 369 U. S. 121, 130 (1962) ("expressly authorized by statute"); *Carroll* v. *United States,* 354 U. S. 394, 399 (1957) ("expressly conferred by statute"); *United States* v. *Burroughs,* 289 U. S. 159, 161 (1933) ("express statutory authority"); *United States* v. *Sanges,* 144 U. S., at 318 ("statute expressly giving the right"), is surely unprecedented. The Court has offered no justification for its more expansive treatment of state statutes. Indeed, since the Court has convinced itself that there are "express" provisions in the Arizona statute, I see no logical barrier—under the Court's novel determination of what is

"express"— to a construction of § 1291 as an express grant of authority for state appeals, *without reference to state statutes.*

III

The Court has noted time and again that appeals by the government in criminal cases are exceptional and not favored. *E. g., Will* v. *United States,* 389 U. S. 90, 96–97 (1967); *DiBella* v. *United States, supra,* at 130; *Carroll* v. *United States, supra,* at 400. I would have thought, therefore, that the Court would be especially careful before concluding that Congress intended that § 1291 would authorize criminal appeals by the State in removal cases.[8] See *Will* v. *United States, supra,* at 96–97 ("the Criminal Appeals Act is strictly construed against the Government's right of appeal"). Instead, the Court has abandoned its traditional presumption in this area to imply—on the strength of its own policy analysis—authorization for a state appeal in a criminal case where no federal statute expressly authorizes one. But

> "[i]t is axiomatic . . . that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction . . . , they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction." *Carroll* v. *United States, supra,* at 399.

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[8] Indeed, until Congress amended 18 U. S. C. § 3731 in 1971, no appeal would have been permitted the United States in a prosecution similar to the instant case. The Court's opinion today introduces the anomaly that § 1291 could be interpreted to permit appeals by state, but not by federal, prosecutors in federal court. Surely it is more reasonable to read § 1291 as not authorizing government appeals in *any* criminal case, whether federal or state.

It is hard to imagine a federal "statutory mandate" for government appeals that is less clear than one that fluctuates depending on state law.

This case admittedly presents an anomalous circumstance,[9] and concededly there is great temptation to correct it. But because I believe it is for Congress, not the courts, to make changes in federal jurisdictional statutes, cf. *Will* v. *United States, supra,* at 97, n. 5, I respectfully dissent.

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[9] I suspect that Congress has never considered the issue presented in this case. The Court does not suggest the contrary.

Syllabus

WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* ALASKA

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

No. 79–1890. Argued January 13, 1981—Decided April 21, 1981*

The Kenai National Moose Range was created in 1941 as a national wildlife refuge by withdrawing acreage from public lands in Alaska. Commercially significant quantities of oil underlie the Range, and the Secretary of the Interior issued oil and gas leases for the Range, beginning in the 1950's. The Secretary has distributed revenues from these leases according to the formula provided in § 35 of the Mineral Leasing Act of 1920, whereby 90% of the revenues are paid to Alaska and 10% to the United States Treasury. In 1964, § 401 (a) of the Wildlife Refuge Revenue Sharing Act was amended so as to add the word "minerals" to the list of refuge resources, the revenues from which were to be distributed according to the formula provided in § 401 (c) of that Act, whereby 25% of the revenues are paid to counties in which the wildlife refuge lies, and the remaining funds are used by the Department of the Interior for public purposes. The Department's Solicitor then made a determination, in which the Comptroller General concurred, that the amended § 401 (a) superseded § 35 of the Mineral Leasing Act of 1920, with the result that the formula under § 401 (c) was to be applied to oil and gas lease revenues from wildlife refuges. Petitioner Kenai Peninsula Borough, the "county" within which Moose Range lies, thereafter brought suit in Federal District Court, seeking a declaration that the amended § 401 (a) governed the distribution of oil and gas revenues from the Range. Alaska also filed suit in the same court, seeking a declaration that § 35 still governed such distribution, and the suits were consolidated. The District Court granted summary judgment for Alaska, and the Court of Appeals affirmed.

Held: Revenues generated by oil and gas leases on federal wildlife refuges consisting of *reserved* public lands, as here, must be distributed according to the formula provided in § 35 of the Mineral Leasing Act of 1920. Absent any expression of congressional intention to repeal

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*Together with No. 79–1904, *Kenai Peninsula Borough* v. *Alaska et al.*, also on certiorari to the same court.

§ 35 by implication, the term "minerals" in § 401 (a) of the Wildlife Refuge Revenue Sharing Act applies only to minerals on land *acquired* for wildlife refuges. Pp. 265–273.

612 F. 2d 1210, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 273. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and MARSHALL, J., joined, *post*, p. 276.

Deputy Solicitor General Claiborne argued the cause for petitioners in No. 79–1890. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman,* and *Dirk D. Snel. Charles K. Cranston* argued the cause and filed briefs for petitioner in No. 79–1904.

G. Thomas Koester, Assistant Attorney General of Alaska, argued the cause for respondents in both cases. With him on the brief was *Wilson L. Condon,* Attorney General.

JUSTICE POWELL delivered the opinion of the Court.

The narrow issue presented by these cases is which of two federal statutes provides the formula for distribution of revenues received from oil and gas leases on national wildlife refuges reserved from public lands.

I

The Kenai National Moose Range was created in 1941 by the withdrawal of nearly two million acres from public lands on the Kenai Peninsula in Alaska. See Exec. Order No. 8979, 3 CFR 1043 (1938–1943 Comp.). See also Public Land Order No. 3400, 29 Fed. Reg. 7094–7095 (1964) (adjusting the boundaries). The Kenai Moose Range, as its name suggests, provides a refuge and breeding ground for moose. The Fish and Wildlife Service in the Department of the Interior administers it as part of the national wildlife refuge system.

Commercially significant quantities of oil underlie the Kenai Moose Range.[1] Pursuant to authority under the Mineral Leasing Act of 1920, 30 U. S. C. § 181 *et seq.*, the Secretary of the Interior issued oil and gas leases for the Kenai Moose Range, beginning in the mid-1950's. See *Udall* v. *Tallman,* 380 U. S. 1 (1965). The United States has received substantial revenues from these leases.[2] From first receipt in 1954, the Secretary has distributed these revenues according to the formula provided in § 35 of the Mineral Leasing Act of 1920, 41 Stat. 450, as amended, 30 U. S. C. § 191. This formula prescribes that 90% of the revenues be paid to the State of Alaska and 10% to the United States Treasury.[3]

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[1] Today, the Kenai Moose Range is the only national wildlife refuge created from public lands where oil is being pumped. See Brief for Federal Petitioners 4, n. 4. Substantial quantities of oil, however, are thought to underlie other reserved refuge lands in Alaska.

[2] Between 1966 and 1976, Kenai Range generated more than $57 million in oil lease revenues. App. 64. In 1964, Kenai Range generated more than $3.8 million in revenues from oil and gas leases. In that same year, refuges on reserved public land in the contiguous 48 States generated $3,143 in oil and gas revenues. App. to Brief for Federal Petitioners 1a–2a. In interpreting Congress' directions for distribution of oil revenues from reserved refuge lands, it should be remembered that historically Kenai alone has generated such revenues.

[3] In pertinent part, the current § 35, as set forth in 30 U. S. C. § 191, provides:

"All money received from sales, bonuses, royalties, and rentals of the public lands under the provisions of this chapter . . . shall be paid into the Treasury of the United States; . . . of those from Alaska . . . 90 per centum thereof shall be paid to the State of Alaska for disposition by the legislature . . . ."

States other than Alaska receive only 50% of public land mineral revenues under the Act. *Ibid.*

By its terms, the Mineral Leasing Act applies to specified minerals, including oil and gas, on all lands owned by the United States, except those lands excluded by the Act. 30 U. S. C. § 181. See *Udall* v. *Tallman,* 380 U. S. 1, 4, and n. 3 (1965).

In 1975, the Director of the Fish and Wildlife Service inquired of the Solicitor of the Department of the Interior whether revenues from oil and gas leases in wildlife refuges created by withdrawal of public lands should be distributed according to § 401 (c) of the Wildlife Refuge Revenue Sharing Act, 49 Stat. 383, as amended, 16 U. S. C. § 715s (c), rather than under the Mineral Leasing Act of 1920. The Director's inquiry was prompted by the 1964 amendments to § 401 (a), which added the word "minerals" to a list of refuge resources, the revenues from which were to be distributed according to the statutory formula.[4] Pub. L. 88–523, 78 Stat. 701. According to this formula, 25% of the revenues are paid to counties wherein the refuge lies, and remaining funds are used by the Department of the Interior for public purposes.[5]

[4] Prior to 1964, § 401 governed distribution of revenues from "the sale or other disposition of surplus wildlife, or of timber, hay, grass, or other spontaneous products of the soil, shell, sand, or gravel, and from other privileges on refuges." Act of June 15, 1935, ch. 261, 49 Stat. 378, 383. The current version of § 401 (a) is given in the text, *infra*, at 265.

[5] Section 401 (c) currently provides:

"(1) The Secretary shall pay out the fund, for each fiscal year . . . , to each county in which is situated any fee area whichever of the following amounts is greater:

"(A) An amount equal to the product of 75 cents multiplied by the total acreage of that portion of the fee area which is located within such county.

"(B) An amount equal to three-fourths of 1 per centum of the fair market value, as determined by the Secretary, of that portion of the fee area . . . which is located within such county.

"(C) An amount equal to 25 per centum of the net receipts collected by the Secretary in connection with operation of and management of such fee area during the fiscal year . . . .

"(2) At the end of each fiscal year the Secretary shall pay out of the fund for such fiscal year to each county in which any reserve area is situated, an amount equal to 25 per centum of the net receipts collected by the Secretary in connection with the operation and management of such area during such fiscal year . . . ." 16 U. S. C. § 715s (c) (1976 ed., Supp. III).

Section 401 (b) allows the Secretary to pay any expenses related to revenue production or distribution from this fund. Section 401 (e) pro-

The Solicitor ruled that the 1964 amendment governed, superseding § 35 of the Mineral Leasing Act of 1920. App. to Pet. for Cert. in No. 79–1890, p. 26a. The Comptroller General concurred in the view of the Solicitor. 55 Comp. Gen. 117 (1975). Upon request for reconsideration by the State of Alaska in 1976, the Comptroller General affirmed his initial decision. See Op. Comp. Gen. in File: B–118678, June 11, 1976, reprinted in App. to Pet. for Cert. in No. 79–1890, p. 42a.

The Kenai Peninsula Borough then brought suit against the Secretary of the Interior in the United States District Court for the District of Alaska, seeking a declaration that the amended § 401 (a) of the Wildlife Refuge Revenue Sharing Act governed the distribution of oil and gas revenues from the Kenai Moose Range. Kenai Borough is the "county" within which the Moose Range lies. If § 401 (a) governs, it will receive 25% of the revenues and the State none. The State of Alaska then filed suit in the same court against the Secretary and various federal officials, seeking a declaration that § 35 of the Mineral Leasing Act still governed distribution of these same oil and gas revenues. If that provision applies, the State will continue to receive 90% of the funds and, so far as federal law is concerned, Kenai Borough none. The District Court consolidated the lawsuits.[6]

The District Court granted summary judgment for the State of Alaska. 436 F. Supp. 288 (1977). Upon exami-

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vides that funds remaining after expenses and the States are paid are transferred to the Migratory Bird Conservation Fund, established for the laudable purpose of purchasing migratory bird refuges.

[6] Since this litigation commenced in 1976, 90% of oil and gas revenues from the Kenai Range has been paid into an escrow account that now contains more than $23 million. Brief for Federal Petitioners 4, n. 4. In addition to declaratory relief, Kenai Borough sought an accounting of revenues paid to the State since 1964 under the Mineral Leasing Act of 1920 but allegedly due the Borough, and recovery of such payments. The State sought a resumption of accustomed payments under the Mineral Leasing Act.

nation of the apparently conflicting statutes, the court held that the term "minerals" in the amended Wildlife Refuge Revenue Sharing Act referred only to oil and gas found on land *acquired* for wildlife refuges. *Id.*, at 292. Distribution of oil and gas revenues from leases on public land *reserved* for wildlife refuges, it held, continues to be determined by § 35 of the Mineral Leasing Act of 1920.[7] *Ibid.* The court viewed the legislative history of the 1964 amendments as demonstrating that Congress was concerned primarily with the difficulties of acquiring land for refuges and that Congress expected no increase in revenues from the Kenai Moose Range to result from the amendments. *Id.*, at 291–292.

The Court of Appeals for the Ninth Circuit affirmed. 612 F. 2d 1210 (1980). That court found the legislative history largely ambiguous. *Id.*, at 1213. It refused to find that the addition of the word "minerals" to the amended Wildlife Refuge Revenue Sharing Act had repealed by implication the Mineral Leasing Act of 1920 without a clear showing that this was the intent of Congress. See *Morton* v. *Mancari*, 417 U. S. 535, 549–551 (1974). The court further approved the District Court's holding because it gave effect to each statute. 612 F. 2d, at 1214–1215.

We granted certiorari. *Sub nom. Andrus* v. *Alaska*, 449 U. S. 818 (1980).[8] We now affirm.

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[7] In general, "acquired lands are those granted or sold to the United States by a State or citizen and public domain lands were usually never in state or private ownership." *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 65, n. 2 (1966). The Mineral Leasing Act of 1920 applies only to public lands. *Id.*, at 65.

[8] In 1978, Congress rejected new amendments to § 401 (a) that would have defined minerals as "including, but not limited to, crude petroleum and natural gas." H. R. 8394, 95th Cong., 2d Sess. (1978). The House Report recommending this bill stated that the language was added to "insure" that after the effective date oil and gas revenues from Kenai would be distributed according to the formula in § 401 (c). H. R. Rep. No. 95–1197, p. 8 (1978). The Report disclaims any intention to affect

II

The Secretary and the Kenai Borough rely primarily on the "plain language" of § 401 (a) of the Wildlife Refuge Revenue Sharing Act. They contend that it provides without ambiguity that mineral resources from all national wildlife refuges be distributed according to the formula described in § 401 (a) of the Act. As currently phrased, § 401 (a) provides:

> "[A]ll revenues received by the Secretary of the Interior from the sale or other disposition of animals, salmonoid carcassas [*sic*], timber, hay, grass, or other products of the soil, minerals, shells, sand, or gravel, [or] from other privileges . . . shall be . . . reserved in a separate fund for disposition as hereafter prescribed." 16 U. S. C. § 715s (a) (1976 ed., Supp. III).

The provision defines the wildlife refuge system to include lands "acquired or reserved" for conservation and protection of certain fish and wildlife. No restriction is placed upon the common meaning of "minerals." Given this clarity, it is argued, resort to the legislative history is unnecessary or improper.

We agree with the Secretary that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S.

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the outcome of these cases, then pending in the Court of Appeals. *Ibid.* The Senate then rejected even this amendment, Members stating that it would be inappropriate to make any judgment about the proper allocation of these resources while these cases were still in the courts. 124 Cong. Rec. 31436–31440 (1970) (remarks of Sen. Culver and Sen. Gravel).

The sole issue that has been before the courts during this five years of litigation is the intent of Congress in adding the single term "minerals" to the statute in 1964. Congress declined to clarify its intent in 1978. Accordingly, we are left to resolve by judicial construction what should be addressed as a question of legislative policy judgment: the appropriate distribution among federal, state, and local governments of natural resource revenues.

723, 756 (1975) (POWELL, J., concurring). See *Rubin* v. *United States,* 449 U. S. 424 (1981). But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. *Train* v. *Colorado Public Interest Research Group,* 426 U. S. 1, 10 (1976); *United States* v. *American Trucking Assns., Inc.,* 310 U. S. 534, 543–544 (1940). This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48 (1928) (Holmes, J.).[9] The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect. *E. g., Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 459 (1892); *United States* v. *Ryan,* 284 U. S. 167, 175 (1931).

Sole reliance on the "plain language" of § 401 (a) would assume the answer to the question at issue. These cases involve two statutes, each of which by its literal terms applies to the facts before us. Restatement of the terms of § 401 (a) cannot answer which statute Congress intended to control. Recognizing this, the Secretary invokes the maxim of construction that the more recent of two irreconcilably conflicting statutes governs. 2A C. Sands, Sutherland on Statutes and Statutory Construction § 51.02 (4th ed. 1973). Without depreciating this general rule, we decline to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. Our examination of the

[9] "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell* v. *Markham,* 148 F. 2d 737, 739 (CA2) (L. Hand, J.), aff'd, 326 U. S. 404 (1945).

legislative history is guided by another maxim: " 'repeals by implication are not favored,' " *Morton* v. *Mancari,* 417 U. S., at 549, quoting *Posadas* v. *National City Bank,* 296 U. S. 497, 503 (1936). "The intention of the legislature to repeal must be 'clear and manifest.' " *United States* v. *Borden Co.,* 308 U. S. 188, 198 (1939), quoting *Red Rock* v. *Henry,* 106 U. S. 596, 602 (1883). We must read the statutes to give effect to each if we can do so while preserving their sense and purpose. *Mancari, supra,* at 551; see *Haggar Co.* v. *Helvering,* 308 U. S. 389, 394 (1940).

III

Congress gave extensive consideration to the purpose and probable effect of the 1964 amendments to the Wildlife Refuge Revenue Sharing Act. Pub. L. 88–523, 78 Stat. 701. Nonetheless, and we think it significant, there is no explanation in the legislative history for the addition of the single word "minerals" to the list of refuge resources subject to the Act. See H. R. Rep. No. 1753, 88th Cong., 2d Sess. (1964) (hereinafter 1964 H. R. Rep.); S. Rep. No. 1096, 88th Cong., 2d Sess. (1964) (hereinafter 1964 S. Rep.); 110 Cong. Rec. 19882–19883 (1964) (remarks of Rep. Ostertag). Our study of the few legislative materials pertinent to the insertion of "minerals" persuades us that Congress intended to work no change in the pre-existing formula for distribution of mineral revenues from federal wildlife refuges.

A

Prior to 1964, § 35 of the Mineral Leasing Act of 1920 governed distribution of revenues from mineral leases on wildlife refuges withdrawn from public lands. This conclusion cannot be seriously questioned. First, from the time the first mineral revenues were generated on such lands until well after 1964, the Secretary invariably distributed the revenues as provided in the Mineral Leasing Act. Second, the Comptroller General long ago ruled that the only other arguably

applicable statute, the then unamended Wildlife Refuge Revenue Sharing Act, Act of June 15, 1935, ch. 261, 49 Stat. 383 (hereinafter 1935 Refuge Act), see n. 4, *supra,* did not govern the disposal of revenues from mineral leases on wildlife refuges. 21 Comp. Gen. 873 (1942). See also Comp. Gen., B–105133, Oct. 10, 1951, App. 82.[10]

Third, our opinion in *Udall* v. *Tallman,* 380 U. S. 1 (1965), strongly suggests that the Mineral Leasing Act of 1920 governed the distribution of revenues from reserved refuge lands prior to 1964. That case involved the authority of the Secretary to issue oil leases on the Kenai Moose Range after the lands had been withdrawn from the public domain by

[10] The Secretary speculates that Congress in 1964 probably assumed that oil and gas revenues from refuges on reserved lands were governed by the 1935 Refuge Act. The basis for this argument is language in the 1935 Refuge Act, continued today, that the Act governed the disposition of "shell, sand, or gravel, and from other privileges on refuges." See n. 4, *supra.* It sometimes was contended that "other privileges" included oil and gas leases. See Memorandum of July 6, 1951, Chief Counsel of the Fish and Wildlife Service, App. 87.

As noted, the Comptroller General rejected this contention in 1942 and 1951. For the reasons elaborated in the text, we believe that it was understood by Congress that the 1935 Refuge Act did not govern the leasing of minerals. Indeed, even the 1946 opinion of the Solicitor of the Department of the Interior that the provision authorized oil leases on acquired refuge lands, App. 68, is contradicted by Congress' passage of the Mineral Leasing Act for Acquired Lands, Act of Aug. 7, 1947, ch. 513, 61 Stat. 913, 30 U. S. C. § 351 *et seq.,* which subsequently conferred this very authority on the Department. See also 40 Op. Atty. Gen. 9 (1941).

The dissent also speculates—inconsistently, we think—that Congress embraced this often discredited interpretation of the 1935 Refuge Act, *post,* at 279–280, n. 3. The dissent criticizes the Court for concluding that Congress' insertion of "minerals" in § 401 (a) did not change pre-existing law. *Post,* at 278–279. The dissent then explains that Congress added "minerals" in 1964 not to change the law, but to reaffirm that the 1935 Refuge Act already governed disposition of oil revenues from reserved refuge lands. *Post,* at 279–280, n. 3. In other words, the dissent contradicts itself and joins us in positing that the addition of "minerals" was never intended to work a substantive change, but disagrees merely about what the law provided prior to the 1964 amendments.

Executive Order. In holding that the Executive Order did not deprive the Secretary of this power, this Court held that the Mineral Leasing Act of 1920 conferred the necessary statutory authorization on the Secretary to grant the leases. "The Act excluded from its application certain designated lands, but did not exclude land within wildlife refuge areas." *Id.*, at 4 (footnote omitted).[11] Because § 35 of the Mineral Leasing Act prescribes the distribution formula for revenues received from all leases issued "under the provisions of this chapter," we think it an inescapable deduction from *Tallman* that, prior to 1964, the Act continued to provide the formula for disposition of revenues generated by leases on public lands after the lands were withdrawn for wildlife refuges.

Neither the Mineral Leasing Act of 1920 nor the 1935 Refuge Act authorized the Secretary to issue leases for mineral extraction from refuges created from acquired lands. 40 Op. Atty. Gen. 9 (1941) (Attorney General Jackson); 21 Comp. Gen. 873 (1942). Congress responded by passing the Mineral Leasing Act for Acquired Lands, Act of Aug. 7, 1947, ch. 513, 61 Stat. 913, 30 U. S. C. § 351 *et seq.* See n. 10, *supra.* In addition to conferring authority on the Secretary to issue leases for specified minerals, including oil and gas, it provided that revenues from the leases be "distributed in the same manner as prescribed for other receipts from the lands affected by the lease." 30 U. S. C. § 355. As applied to wildlife refuges created from acquired lands, this provision requires that mineral revenues be distributed according to the formula in the 1935 Refuge Act.

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[11] The Secretary argues that *Tallman*'s construction of the Mineral Leasing Act should not now be binding, because the Court did not need to construe the Act. This is incorrect. The Court was required to determine that the Secretary had statutory authority to issue oil leases on refuges withdrawn from public lands, before it could reach the question whether the Executive Orders withdrawing the refuge lands limited that authority. The Court examined the language of § 1 of the Act and found that it gave the Secretary the requisite authority. See 380 U. S., at 4, n. 3.

Thus, when Congress amended the Wildlife Refuge Revenue Sharing Act in 1964, the disposition of oil and gas revenues was reasonably clear. Such revenues from reserved refuge lands were distributed according to the Mineral Leasing Act of 1920. Revenues from acquired refuge lands were distributed according to the formula in the 1935 Refuge Act, not by its own terms, but by operation of the 1947 Mineral Leasing Act for Acquired Lands.

B

The question presented by these cases is whether Congress intended to alter this program of revenue distribution when it amended the 1935 Refuge Act in 1964. The impetus for proposals leading to the passage of the amendments was the difficulty the Department had experienced in acquiring new refuge lands. See 1964 S. Rep. 5; 1964 H. R. Rep. 2. Localities resisted having land removed from local tax roles. The purpose of the amendments was to "provide a more equitable formula for payments to counties as compensation for loss of taxable properties that have been acquired by the Federal wildlife refuge system." 1964 S. Rep. 2. See 1964 H. R. Rep. 2–3. Public Law 88–523 met this problem by changing the formula for distribution of revenues from refuges consisting of acquired lands. § 401 (c)(1), 78 Stat. 701. The new formula provided that counties within which acquired refuge lands lay could receive, at their option, a payment based on the adjusted cost of the lands rather than on revenues produced.[12] Congress intended the Department to pay more to counties under the new law than it had under the old.

There is no explanation in the legislative history of Pub. L. 88–523 for the insertion of "minerals" in the list of resources

[12] The 1964 payment formula was liberalized further in 1978. Pub. L. 95–469, § 1 (a)(3), 92 Stat. 1319. See n. 5, *supra* (quoting present law).

subject to the Wildlife Refuge Revenue Sharing Act. Such silence is suggestive, because Congress was concerned that the Department have sufficient funds to make the increased payments mandated by the amendments.[13] See 1964 S. Rep. 12 (statement of Secretary Udall); 1964 H. R. Rep. 11. Congress might be expected to have mentioned a change wrought through the amendments which would increase refuge revenues by amounts exceeding total existing refuge revenues.[14]

During deliberations on the amendments, the Fish and Wildlife Service presented to Senate and House Committees tables showing present payments to counties containing refuges, and payments estimated under the proposed amendments. 1964 S. Rep. 13; 1964 H. R. Rep. 3. The relevant table shows no change in the expected payments to the Borough of Kenai Peninsula. This table assumed that oil and gas revenues were governed by the Mineral Leasing Act of 1920 both before and after the amendments.[15]

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[13] The silence of Congress may provide a treacherous guide to its intent. *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4, 11 (1942). Here, however, it is almost inconceivable that Congress knowingly would have changed substantially a longstanding formula for distribution of substantial funds without a word of comment. In 1978, Congress inserted "salmonoid carcass[e]s" into the list of resources governed by § 401 (a) of the Wildlife Refuge Revenue Sharing Act. Pub. L. 95–469, § 1 (a)(1), 92 Stat. 1319. Even for this comparatively trivial addition, Congress explicitly stated, "[s]almonoid carcasses have been included to allow for the sale of salmon used in hatchery operations." H. R. Rep. No. 95–1197, p. 8 (1978).

[14] In 1963, net receipts from the national wildlife system totaled $2,350,000. 1964 H. R. Rep. 11. In 1964, revenues from oil and gas leases in the Kenai Moose Range exceeded $3,800,000. App. to Brief for Federal Petitioners 2a.

[15] The table indicated that 1963 payments to the Kenai Peninsula Borough under the Wildlife Refuge Revenue Sharing Act, amended or unamended, totaled $1,768. 1964 H. R. Rep. 3. This figure cannot include 25% of the revenues from oil and gas leases. See n. 14, *supra.*

The inference seems inescapable that Congress in 1964 did not intend by the insertion of "minerals" in § 401 (a) of the Wildlife Refuge Revenue Sharing Act to subject revenues from oil leases on reserved refuge lands to its distribution formula. The more reasonable explanation for the intended effect of including "minerals" is provided by the Department of the Interior. The insertion of "minerals" appears first in 1962 in proposed bills supported by the Department as substitutes for other bills then pending before the House and Senate to increase payments to counties. S. 2138, 87th Cong., 1st Sess. (1961); H. R. 13176, 87th Cong., 2d Sess. (1962). In its report to the Committees, the Department offered no particular explanation for this new term, but the Secretary here concedes that this change was included within the proposal's descriptive category of "various perfecting . . . provisions." See Letter from Frank P. Briggs, Assistant Secretary of the Interior, June 20, 1962, in S. Rep. No. 1919, 87th Cong., 2d Sess., 13 (1962); H. R. Rep. No. 2499, 87th Cong., 2d Sess., 4 (1962).

The insertion of "minerals" in § 401 (a) could both leave the mineral revenues from reserved lands subject to the Mineral Leasing Act of 1920 and "perfect" § 401 (a) by incorporating prior changes. The 1947 Mineral Leasing Act for Acquired Lands subjected mineral revenues from lands acquired for wildlife refuges to the distribution formula in the 1935 Refuge Act. We hold that Congress inserted "minerals" in the amended § 401 (a) to recognize the effect of the 1947 Act and to make clear that the amended distribution formula applied to mineral revenues from acquired lands. This conclusion draws support from the evident fact that Congress was concerned almost exclusively with problems related to acquired refuge lands in adopting the 1964 amendments.

Finally, the Department of the Interior interpreted the amendments when passed, and for 10 years thereafter, as not altering the distribution formula. The Department's con-

temporaneous construction carries persuasive weight. *Udall* v. *Tallman,* 380 U. S., at 16. Such attention to contemporaneous construction is particularly appropriate in these cases, because the Department first proposed the amendment. See *SEC* v. *Sloan,* 436 U. S. 103, 120 (1978). The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference. See *General Electric Co.* v. *Gilbert,* 429 U. S. 125, 143 (1976). In these cases, we find it wholly unpersuasive.

IV

In summary, we hold that revenues generated by oil and gas leases on federal wildlife refuges consisting of reserved public lands must be distributed according to the formula provided in § 35 of the Mineral Leasing Act of 1920. Finding no "clearly expressed congressional intention" to repeal this provision by implication, *Morton* v. *Mancari,* 417 U. S., at 551, we conclude that the term "minerals" in § 401 (a) of the Wildlife Refuge Revenue Sharing Act applies only to minerals on acquired refuge lands. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, concurring.

My colleagues periodically criticize the way the Court manages its docket. Most frequently, such criticism takes the form of a dissent from the denial of certiorari. See, *e. g., Brown Transport Corp.* v. *Atcon, Inc.,* 439 U. S. 1014 (WHITE, J., dissenting). Although I consider the practice of dissenting from denials of certiorari counterproductive, see *Singleton* v. *Commissioner,* 439 U. S. 940, 942–946 (opinion of STEVENS, J.), in the context of the present cases it may be appropriate to suggest that the Court may misuse its scarce resources not only by occasionally denying certiorari in cases deserving plenary consideration, but also by granting certio-

rari without adequate justification.[1] As long as the Court creates unnecessary work for itself in this manner, its expressions of concern about the overburdened federal judiciary will ring with a hollow echo.

In these cases, the Court of Appeals for the Ninth Circuit should have been permitted to provide the final answer to the unique question of statutory construction presented by the petitions for certiorari. The decision of the Court of Appeals did not conflict with any other judicial decision, and there is no reason to anticipate that a comparable issue will arise in another Circuit in the foreseeable future.[2] I fully agree with the majority's explanation of why the Court of Appeals correctly read these ambiguous statutes, but even if I were persuaded that JUSTICE STEWART had the better of the argument, I still would feel that the public interest would have been better served by allowing this litigation to terminate in the Court of Appeals.

The question of how to divide the revenues from oil and gas leases on public lands in the Kenai Peninsula is clearly a matter for Congress to decide. If Congress is displeased with the decisions of this Court and the Court of Appeals, it may promptly reverse them by revising the relevant statutes. If that is its view, it no doubt would have acted more promptly if we had simply denied certiorari.[3] On the other

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[1] Of course, these two problems are not wholly independent of one another. In light of the ever-increasing number of petitions for certiorari and the severe practical constraints on our ability freely to grant certiorari, it is certainly safe to assume that whenever we grant certiorari in a case not deserving plenary review, we increase the likelihood that certiorari will be denied in other, more deserving, cases.

[2] Neither of the petitions for certiorari filed in these cases suggested that the Court of Appeals' decision conflicted with any other judicial decision. In addition, the Solicitor General, in the petition filed on behalf of the federal parties, observed that the question of statutory construction presented here was unlikely to arise in the foreseeable future in another Circuit. See Pet. for Cert. in No. 79–1890, p. 18.

[3] In fact, Congress declined to clarify its intention with respect to the

hand, if we have correctly perceived the intent of the legislature, nothing has been gained by protracting this litigation. Admittedly, a significant amount of money was at stake, see *ante,* at 263, n. 6, but the offsetting costs associated with holding the funds in escrow pending our review, as well as the costs associated with the expenditure of this Court's material and human resources, are also significant.

The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our courts of appeals. Today they are in truth the courts of last resort for almost all federal litigation. Like other courts of last resort—including this one—they occasionally render decisions that will not withstand the test of time. No judicial system is perfect and no appellate structure can entirely eliminate judicial error. Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals. Although our work is often accorded special respect because of its finality,[4] we possess no judicial monopoly on either finality or respect. The quality of the work done by the courts of appeals merits the esteem of the entire Nation, but, unfortunately, is not nearly as well or as widely recognized as it should be. Indeed, I believe that if we accorded those dedicated appellate judges the deference that their work merits, we would be better able to resist the temptation to grant certiorari for no reason other than a tentative prediction that our review of a case may produce an answer different from theirs. In my opinion, that is not a sufficient reason for granting certiorari.[5]

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distribution of the Kenai oil and gas leasing revenues in part because of the concerns of some of its Members that such legislative action would be inappropriate while these cases were still pending in the federal courts. See *ante,* at 264–265, n. 8; *post,* at 285, n. 10.

[4] Indeed, as Justice Jackson once noted, "[w]e are not final because we are infallible, but we are infallible only because we are final." *Brown* v. *Allen,* 344 U. S. 443, 540 (concurring in result).

[5] The possibility that a lower court may have incorrectly decided a federal question is, of course, a relevant factor when this Court decides

Because no other reason for reviewing this case is apparent, a simple denial of certiorari would have been an appropriate and efficient disposition.

My disagreement in these cases with the Court's management of its docket does not, of course, prevent me from joining JUSTICE POWELL's opinion for the Court on the merits.

JUSTICE STEWART, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, dissenting.

Today the Court strains to conclude that Congress did not mean what it said, and judicially repeals a reasonable [1]

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whether to exercise its discretionary certiorari jurisdiction. However, as Rule 17.1 of the Rules of this Court makes plain, our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases:

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

By its own terms, Rule 17.1 "neither control[s] nor fully measur[es]" the extent of our discretion to grant or to deny certiorari. Nonetheless, it is surely significant that none of the factors identified in the Rule can fairly be said to be present in these cases.

[1] There is nothing unreasonable, or even unusual, about a system of revenue sharing that returns a portion to the locality most immediately

and specific legislative provision because the provision announced a change in the law the Court divines to have been unintended.

A

The Wildlife Refuge Revenue Sharing Act, as amended in 1964, expressly provides that "all revenues received by the Secretary of the Interior from the sale or other disposition of . . . minerals . . ." within federal wildlife refuges administered by the Fish and Wildlife Service shall be "reserved in a separate fund for disposition as hereafter prescribed." 16 U. S. C. § 715s (a) (1976 ed., Supp. III). At the end of each fiscal year, a portion of these revenues is to be distributed to the counties in which the refuges are located. In the case of "any reserve area," expressly defined as "land withdrawn from the public domain" for wildlife refuge purposes, § 715s (g)(3), the allocation to the county is 25% of net receipts. § 715s (c)(2). Alternative formulas are specified for refuges created out of "fee areas." § 715s (c)(1). Net receipts remaining after the payments to counties "shall be transferred to the Migratory Bird Conservation Fund for use in the acquisition of suitable areas for migratory bird refuges." § 715s (e). The statute draws no distinction between mineral revenues and receipts from other natural resources or between revenues from "acquired" lands and those from "reserved" lands. The statutory scheme is therefore clear: receipts from mineral leases, like all other revenues generated from wildlife refuges, whether the refuge is comprised of reserved or acquired lands, are to be apportioned between the

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affected rather than to the State at large. The payment of 25% of the revenues to the county in which the refuge is situated compensates the county for tax revenue lost because of the public status of the lands and for any local services made necessary because of the refuge, and the payment of 75% to the special fund provided for in 16 U. S. C. § 715s (1976 ed., Supp. III) satisfies the need to provide a source of revenue for refuge management and maintenance.

counties and the federal Migratory Bird Conservation Fund. No receipts are to go to the State itself.

The Court argues that the addition of the word "minerals" to the Wildlife Refuge Revenue Sharing Act must be read to apply only to acquired refuge lands and not to reserved refuge lands. But there is no support, in law or legislative history, for exempting mineral revenues from refuges consisting of reserved public lands from the distribution formula of the Wildlife Refuge Revenue Sharing Act. The District Court concluded that "there is nothing in 16 U. S. C. § 715s which would support a restrictive construction of the word 'minerals,'" and that "a literal approach of statutory construction would dictate an expansive definition including both reserved and acquired lands." 436 F. Supp. 288, 291. Similarly, the Court of Appeals found that "under the plain meaning of minerals and of the other provisions of § 715s, its language fairly brings the Kenai Moose Range oil and gas revenues within it scope." 612 F. 2d 1210, 1213. It was a mistake for either court to proceed further.

The addition of the word "minerals" to the Wildlife Refuge Revenue Sharing Act in 1964 would be meaningless if it reached only leases of acquired lands. And, "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339. Section 6 of the Mineral Leasing Act for Acquired Lands, 30 U. S. C. § 355, already provided that mineral leases of acquired lands "shall be distributed in the same manner as prescribed for other receipts from the lands affected by the lease." Accordingly, any allocation scheme established for wildlife refuges encompassing acquired lands would automatically apply to mineral revenues, as well as those from the resources specified in the Refuge Act. As there was no ambiguity on that point, there was no useful purpose for Congress to declare once again how mineral revenues from acquired lands within wildlife refuges would be allocated.[2]

[2] But see n. 3, *infra*.

The suggestion, therefore, that the 1964 amendment reached only acquired lands presumes that the design of Congress in adding the word minerals was to accomplish precisely nothing.

B

The Court concludes that the statute does not mean what it says because the Wildlife Refuge Revenue Sharing Act of 1964 is in conflict with the Mineral Leasing Act of 1920,[3]

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[3] While it is clear there is a conflict, it is not at all clear that the conflict is even relevant to these cases. The Court assumes that the 1964 amendment, if given its plain meaning, changed the allocation of oil and gas lease revenues to affected counties. Although, as the Court of Appeals correctly noted, "the legislative history of the 1964 amendments to 16 U. S. C. § 715s sheds no direct light on the issue here," 612 F. 2d 1210, 1213, it is arguable that before 1964, oil and gas lease receipts generated from lands in federal wildlife refuges were subject to § 401 of the Wildlife Refuge Act of 1935, ch. 261, 49 Stat. 383, and *not* to the Mineral Leasing Act of 1920, despite the vigorous contentions of today's Court. See *ante,* at 267–268.

Section 401 of the 1935 Act established a distribution scheme for refuge revenues "from the sale or other disposition" of natural resources and receipts "from other privileges." Although oil and gas leases are not mentioned, the provision was intended to give the administering agency broad authority to make "disposition of surplus . . . products on these reservations or refuges upon such terms and conditions as [it] shall determine to be for the best interests of the Government." H. R. Rep. No. 886, 74th Cong., 1st Sess., 3 (1934). In 1946, the Interior Department ruled that oil and gas leases could be granted on wildlife refuge lands under the 1935 Act. Op. Solic. Interior Dept. M. 34516 (Aug. 5, 1946). Under the 1964 amendments to the Wildlife Refuge Revenue Sharing Act, 25% of oil and gas lease revenues are apportioned to the affected counties embracing reserved refuge lands. Accordingly, Congress may have intended that the addition of the word "minerals" in 16 U. S. C. § 715s (1976 ed., Supp. III) was merely a "perfecting provision," S. Rep. No. 1919, 87th Cong., 2d Sess., 2 (1962); H. R. Rep. No. 2499, 87th Cong., 2d Sess., 4 (1962), and not an amendment of existing law at all.

Indeed, Interior Department spokesmen in the 1962, 1963, and 1964 congressional hearings described the existing law for receipts collected from both reserved public lands and acquired lands as generally subject to § 401 of the 1935 Act. See S. Rep. No. 1919, *supra,* at 2, 13;

and because "repeals by implication are not favored." *Ante*, at 267. But that canon of construction has no force in this context. The challenged section in the 1964 Act, far from "repealing" the 1920 Act, merely established a limited and specific exception to one of the provisions in the earlier law. When the text of a new statute, dealing with a discrete subject, is unambiguous, it should be given effect even if it alters a previous law that dealt with the same general subject.

The maxim that "repeals by implication are disfavored" has force when the argument is made that a general statute, wholly occupying a field, eviscerates an earlier and more specific enactment of limited coverage but without an indication of congressional intent to do so. In such a case, it may be reasonable to presume that Congress had not antici-

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H. R. Rep. No. 2499, *supra*, at 4; H. R. Rep. No. 1753, 88th Cong., 2d Sess., 14 (1964); S. Rep. No. 1096, 88th Cong., 2d Sess., 25 (1964). The Secretary of the Interior stated that "*[u]nder existing law, enacted in 1935,* the counties in which our refuges are located receive 25 percent of the net revenue from operations on national wildlife refuges, such as *oil production,* grazing, timber harvest, and the like." More Equitable Payments To Counties Having Wildlife Refuges: Hearings on S. 179, S. 1363, S. 1720, and S. 2498 before the Senate Committee on Commerce, 88th Cong., 2d Sess., 19 (1964) (emphasis added); Participation By Counties In Refuge Receipts: Hearings on H. R. 1127, H. R. 2393, H. R. 5596, H. R. 9030 and H. R. 11008 before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 88th Cong., 2d Sess., 34 (1964) (emphasis added).

But it is not important to decide today what the true rule for apportionment of mineral resources from refuge lands was before 1964. And, contrary to the Court's assertion, I do not do so here, and "explai[n] that Congress added 'minerals' . . . to reaffirm" that the 1935 Act already controlled the disposition of oil revenues from reserved refuge lands. *Ante*, at 268, n. 10. In 1964, Congress did not have to resolve the question of what the law had been before; its concern was properly with the future. Ideally, it could have prefaced § 715s with the language "notwithstanding any other provision of law." But it did not. Instead, it introduced an entirely unambiguous prospective rule with the phrase: "Beginning with the next full fiscal year and for each fiscal year thereafter . . . ." At least for me, it needed to do no more.

pated that its broad pronouncement would have serious implications in a peripheral, or even quite different, area, and that had it recognized that a specific earlier law would be rendered meaningless by a new enactment, it would have expressly indicated its intent to repeal or amend.

Thus, in *Morton* v. *Mancari,* 417 U. S. 535, the Court refused to find a repeal where the words of the Equal Employment Opportunity Act of 1972, if taken literally, would have worked a repeal of an Indian preference policy consistently recognized by Congress for almost 40 years. The Court's description of *Mancari* as "a prototypical case where an adjudication of repeal by implication is not appropriate," *id.,* at 550, is instructive: "The preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem." *Ibid.;* see also *Fussell* v. *Gregg,* 113 U. S. 550. The contrast with these cases is obvious. The provision in the more recent enactment deals specifically with the *same* subject—distribution of revenue from leases on federal lands—that had been the object of an earlier, and more general,[4] statute.[5] In any case, there is more than enough evidence

[4] While the Mineral Leasing Act of 1920 covers in general terms the distribution of revenue from federal lands, the later Wildlife Refuge Revenue Sharing Act, as amended in 1964, embraced new provisions that apply with particularity to wildlife refuges, without distinction between those reserved or acquired. To that extent, the later Act must constitute a repeal of the former. "[T]he narrowly drawn, specific . . . provision . . . must prevail over the broader . . . provision . . . ." *Radzanower* v. *Touche Ross & Co.,* 426 U. S. 148, 158.

[5] These cases do not involve an apparent limitation on an important and pervasive statute, such as the Sherman Act. See, *e. g., United States* v. *Borden Co.,* 308 U. S. 188. In such a case, as in *Mancari,* implied repeals are not found because it would be unreasonable to assume Congress would alter fundamental policy without an unambiguous expression of its intent to do so. But it is equally unreasonable to expect

to indicate that Congress was aware of what it was doing when the word "minerals" was added to the Wildlife Refuge Revenue Sharing Act.

The legislative history of the 1964 amendments to 16 U. S. C. § 715s (1976 ed., Supp. III) discloses that Congress had before it numerous bills from which to choose to compensate counties in which wildlife refuges were located, some of which omitted any reference to "minerals," S. 2138, 87th Cong., 1st Sess. (1961); S. 2678, 2770, 2927, 3201, 87th Cong., 2d Sess. (1962); H. R. 12144, 12143, 11535, 11525, 10714, 87th Cong., 2d Sess. (1962); S. 1720, 88th Cong., 1st Sess. (1963); and some that included such reference, H. R. 2393, 1004, 1127, 9030, 5996, 88th Cong., 1st Sess. (1963); H. R. 11008, 88th Cong., 2d Sess. (1964); S. 179, 1363, 88th Cong., 1st Sess. (1963); S. 2498, 88th Cong., 2d Sess. (1964). Presumably when Congress adopted a bill containing the term, it was aware of the difference. Moreover, the 1964 amendment was not a "technical" amendment, nor was it a last-minute addition from the floor. See *United States* v. *Batchelder*, 442 U. S. 114, 120. The suggestion that the word "minerals" be added to 16 U. S. C. § 715s (1976 ed., Supp. III) was raised in June 1962 when the Interior Department submitted a substitute bill for those pending in the House and Senate. Report of the Department of the Interior dated June 20, 1962, in S. Rep. No. 1919, 87th Cong., 2d Sess., 13, 15 (1962); Report of the Department of the Interior of June 22, 1962, in Authorize Increased Payments to Counties for Wildlife Refuges: Hearings on H. R. 10714, H. R. 11525, H. R. 11535, H. R. 12143, and H. R. 12144 before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 87th Cong., 2d Sess., 7, 9 (1962).

Congress to specify, or indeed even to consider, the effect of a new statutory provision on all earlier provisions affecting the same subject that may be swept away by the enactment, particularly if the old provisions are unclear. See n. 3, *supra*.

The amendment was not highlighted, but it is unlikely that it escaped notice.[6] Later the same year, the relevant Committees of both the House and the Senate adopted the language, S. Rep. No. 1919, *supra,* at 19; H. R. Rep. No. 2499, 87th Cong., 2d Sess., 9 (1962), and the text was before Congress for the following two years.

It is therefore very difficult to conclude that the addition was inadvertent or unnoticed.[7] But, in any case, nothing in the legislative history demonstrates congressional intent different from that reflected in the words of the statute. " 'The most that can be said for the legislative history is that it is on the whole inconclusive. Certainly, it contains nothing that requires the court to reject the construction which the statu-

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[6] The Court makes much of the fact that a statistical table comparing revenues actually received by counties with those estimated to result from the amendment showed no change in the amounts from the Kenai Range, and if the amendment meant what a plain reading of it indicates, an increase should have been reflected. *Ante,* at 271. That straw of evidence scarcely compels the conclusion that the amendment does not mean what it says. It would hardly be surprising if the legislators overlooked a single disparity in a single entry in a lengthy exhibit. And it is noteworthy that the table the Court refers to appeared in the 1964 Reports only, while the addition of the word "minerals" to § 715s was proposed in 1962, when the comparable statistical table did not include any indication of the anticipated payments to counties from public land areas under the proposed amendment. See S. Rep. No. 1919, 87th Cong., 2d Sess., 11, nn. 1 and 2 (1962).

[7] That Congress explained the addition of "[s]almonoid carcasses," see *ante,* at 271, n. 13, hardly supports the inference that Congress would also have explained the addition of the word "minerals." By the Court's strained logic, premised on the notion that "[t]he silence of Congress may provide a treacherous guide to its intent," *ibid.,* Congress is put on notice that any time it explains one provision of a statute, no matter how trivial, it does so at its peril. For if it fails similarly to explain all provisions, no matter how important, a court would be free to strike those unexplained provisions as unintended. That, in my view, leads to far more "treacherous" results than those feared by today's Court.

tory language clearly requires.'" *Ullman* v. *United States,* 350 U. S. 422, 433.

The Court today is bothered because the literal meaning of a statute altered prevailing law.[8] But usually the very point of new legislation is to alter prevailing law. "Every act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law; and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment." T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 104 (2d ed. 1874). Congress does not have the affirmative obligation to explain to this Court why it deems a particular enactment wise or necessary, or to demonstrate that it is aware of the consequences of its action.[9] See *Harrison* v. *PPG Industries, Inc.,* 446 U. S. 578, 592. And "[i]t

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[8] This is not a case where the plain meaning of statutory language would lead to an absurd or futile result, see, *e. g., Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.,* 305 U. S. 315, or to an unreasonable result at variance with the policy of the legislation as a whole. See, *e. g., United States* v. *American Trucking Assns., Inc.,* 310 U. S. 534. See also *Shapiro* v. *United States,* 335 U. S. 1, 31.

[9] The Court relies on the fact that the Department of the Interior ignored the 1964 amendment for a decade with respect to oil and gas revenues from the Kenai Range. *Ante,* at 272–273. But administrative errors are not self-validating. See *SEC* v. *Sloan,* 436 U. S. 103, 117–119; *Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 287–288, n. 5; *Dixon* v. *United States,* 381 U. S. 68, 78. Unauthorized payments from the federal Treasury are not immune from correction, and the United States can retrieve money mistakenly dispersed by its officials. *United States* v. *Wurts,* 303 U. S. 414, 415–416; *Wisconsin Central R. Co.* v. *United States,* 164 U. S. 190, 212. In any case, there is no indication that the administrative practice until 1975 was the result of considered evaluation of the 1964 amendments. Instead it appears that it was the inertial continuation of earlier practice. A much more reliable indication of the administrative construction of the 1964 amendment is the "detailed and comprehensive" re-evaluation by the Department in 1975, confirmed by the Comptroller General. *Andrus* v. *Sierra Club,* 442 U. S. 347, 358. See also *NLRB* v. *Iron Workers,* 434 U. S. 335, 351.

is not a function of this Court to presume that 'Congress was unaware of what it accomplished.'" *Albernaz* v. *United States,* 450 U. S. 333, 342 (quoting *U. S. Railroad Retirement Board* v. *Fritz,* 449 U. S. 166, 179).

Rather than join the Court in its speculative efforts to deal with the doctrine of implied repeal, I would rest decision of these cases upon an established rule of statutory construction: *leges posteriores, priores contrarias abrogant.* Sedgwick describes this rule with approval as follows: "'If two inconsistent acts be passed at different times, the last,' said the Master of the Rolls, 'is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way.'" Sedgwick, *supra,* at 104. See *District of Columbia* v. *Hutton,* 143 U. S. 18, 26–27; *Henderson's Tobacco,* 11 Wall. 652, 657; *United States* v. *Tynen,* 11 Wall. 88, 92. Observance of this rule also allows the Court to respect the most basic of all canons of statutory construction: that statutes mean what they plainly say.[10] As Chief Justice Marshall said more than a century and a half ago: "[T]he intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must

[10] Of course, if I am wrong, and Congress did not intend that oil revenues from reserved refuge lands be distributed according to the scheme of the 1964 Act, Congress is always free to revise the statute. It would be far more appropriate, given the constitutional allocation of lawmaking power to Congress and not to the courts, if this Court were to respect the plain meaning of the statute, and leave it to Congress to make any changes it thinks necessary. The Court's readiness to rewrite legislation contributes, I am afraid, to undue congressional willingness to leave it to the courts to do its redrafting. Indeed, the Senate Committee on Environment and Public Works, when confronted with the dispute involved in these cases chose to "tak[e] no position as to whether disposition of mineral revenues should be made pursuant to the Mineral Leasing Act or the Refuge Revenue Sharing Act." S. Rep. No. 95–1174, pp. 4, 8 (1978). See also *ante,* at 264–265, n. 8.

be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96.

I respectfully dissent.

Syllabus

CALIFORNIA ET AL. *v.* SIERRA CLUB ET AL.

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

No. 79–1252. Argued January 21, 1981—Decided April 28, 1981*

Section 10 of the Rivers and Harbors Appropriation Act of 1899 (Act) prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." An environmental organization and two private citizens (hereafter respondents) brought an action in Federal District Court seeking to enjoin, as a violation of § 10, the construction and operation of water diversion facilities which are part of the California Water Project, a series of water storage and transportation facilities designed to transport water from northern to central and southern California. The District Court held, *inter alia*, that respondents could avail themselves of a "private cause of action" to enforce § 10, and the Court of Appeals agreed, concluding that the Act was designed for the especial benefit of private parties who may suffer "special injury" caused by unauthorized obstruction to a navigable waterway.

Held:

1. No private action can be implied on behalf of those allegedly injured by a claimed violation of § 10. Pp. 292–298.

(a) Section 10's language, which states no more than a general proscription of certain activities, does not indicate any intent by Congress to provide for private rights of action. Section 10 is the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons. P. 294.

(b) Nor is there anything in the legislative history suggesting that § 10 was created for the especial benefit of a particular class. On the contrary, the history suggests the view that the Act was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures. Pp. 294–296.

2. The question on the merits, raised by petitioner State of California, as to whether the Act requires permits for the state water allocation projects involved in these cases, will not be reached, as the above ruling

*Together with No. 79–1502, *Kern County Water Agency et al.* v. *Sierra Club et al.*, also on certiorari to the same court.

that there is no private cause of action disposes of the cases. This Court cannot consider the merits of a claim that Congress has not authorized respondents to raise. P. 298.

610 F. 2d 581, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 298. REHNQUIST, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and STEWART and POWELL, JJ., joined, *post*, p. 301.

Roderick Walston, Deputy Attorney General of California, argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 79–1252 were *George Deukmejian*, Attorney General, *R. H. Connett*, Assistant Attorney General, and *Gregory K. Wilkinson*, Deputy Attorney General. *Warren J. Abbott, Victor E. Gleason, Albert T. Henley, Daniel F. Gallery*, and *Clifford W. Schulz* filed briefs for petitioners in No. 79–1502.

Elinor Hadley Stillman argued the cause in both cases for the federal parties, respondents under this Court's Rule 19.6. With her on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Macbeth, Deputy Solicitor General Claiborne, Jacques B. Gelin*, and *Robert L. Klarquist*.

John B. Clark argued the cause for respondents Sierra Club et al. in both cases. With him on the brief were *James E. Harrington, Robert B. Thum*, and *Michael R. Sherwood*.†

†A brief for the State of Arizona et al. as *amici curiae* urging reversal was filed by *Ralph E. Hunsaker* and by the Attorneys General and other officials of their respective States as follows: *J. D. MacFarlane*, Attorney General of Colorado, and *Richard Hennessey*, Deputy Attorney General; *David H. Leroy*, Attorney General of Idaho; *Robert T. Stephan*, Attorney General of Kansas and *Bruce E. Miller; Mike Greely*, Attorney General of Montana; *Paul L. Douglas*, Attorney General of Nebraska, and *Judy K. Hoffman*, Assistant Attorney General; *Richard H. Bryan*, Attorney General of Nevada; *Jeff Bingaman*, Attorney General of New Mexico, and *Richard A. Simms*, Special Assistant Attorney General; *Allen I. Olson*, Attorney General of North Dakota, and *Murray Sagsveen*, Assistant Attor-

JUSTICE WHITE delivered the opinion of the Court.

Under review here is a decision of the Court of Appeals for the Ninth Circuit holding that private parties may sue under the Rivers and Harbors Appropriation Act of 1899 to enforce § 10 of that Act. An environmental organization and two private citizens (hereafter respondents) [1] seek to enjoin the construction and operation of water diversion facilities which are part of the California Water Project (CWP). They rely upon § 10 of the Act, which prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States . . . ." [2] Since the Act does not explicitly create a pri-

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ney General; *Jan Eric Cartwright,* Attorney General of Oklahoma; *James A. Redden,* Attorney General of Oregon, and *Peter S. Herman; Mark V. Meierhenry,* Attorney General of South Dakota, and *Lawrence Kyte,* Assistant Attorney General; *Mark White,* Attorney General of Texas, and *Douglas G. Caroom,* Assistant Attorney General; *Robert B. Hansen,* Attorney General of Utah; *Slade Gorton,* Attorney General of Washington, and *Charles B. Roe, Jr.,* Senior Assistant Attorney General; and *John D. Troughton,* Attorney General of Wyoming, and *Jack D. Palma II,* Senior Assistant Attorney General.

Briefs of *amici curiae* urging affirmance were filed by *James A. Hourihan, Harold E. Masback III,* and *Kenneth S. Kamlet* for the National Wildlife Federation et al., and by *John B. Clausen, Cressey H. Nakagawa, Gerald A. Sherwin, Richard W. Dickenson, Dante John Nomellini,* and *John A. Wilson* for the Public Water Agencies.

[1] The Sierra Club is a nonprofit California corporation; Hank Schramm is a commercial fisherman active in the San Francisco Bay and Pacific Ocean; and William Dixon is a Sacramento-San Joaquin Delta landowner. See 400 F. Supp. 610, 619 (ND Cal. 1975).

[2] Section 10 of the Rivers and Harbors Appropriation Act of 1899 provides:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans

vate enforcement mechanism, the initial question presented by these consolidated cases is whether such a private right of action can be implied on behalf of those allegedly injured by a claimed violation of § 10. Petitioner State of California also asks us to decide whether the Act requires permits for the state water allocation projects involved in these cases.

I

The California Water Project consists of a series of water storage and transportation facilities designed primarily to transport water from the relatively moist climate of northern California to the more arid central and southern portions of the State. The water which will be used by the CWP is initially stored behind dams on the Sacramento River and, as needed, released into the Sacramento-San Joaquin Delta. The CWP then diverts a quantity of this water from the Delta and directs it into canals and aqueducts which will carry it south. The project has both federal and state components. The federal component, the Central Valley Project, is designed in part to provide a constant source of water for irrigation to the Central Valley of California. Water for this project is diverted from the Delta by the Tracy Pumping Plant into the 115-mile Delta-Mendota Canal which transports the water to the Mendota Pool in California's Central Valley. The State Water Project supplies water to both central and southern California by way of the California Aqueduct. Water for this project is drawn from the Delta by the Delta Pumping Plant and deposited in the

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recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 30 Stat. 1151, 33 U. S. C. § 403.

northern terminus of the California Aqueduct, through which it flows to its destinations in central and southern California.

Under the present system the quality of water captured in the north and released into the Delta may be degraded by intruding salt waters from the Pacific Ocean. As a consequence the water which is diverted from the Delta to the Delta-Mendota Canal or the California Aqueduct is potentially of a lesser quality than is the water which is transported to the Delta from storage facilities in the north and from there deposited in the Delta. The State of California has proposed the construction of a 42-mile Peripheral Canal along the eastern edge of the Delta area, which would avoid any mixing of the water from the north with the saline water of the Delta. Instead of depositing water in the Delta, the canal would carry high quality water directly to the Tracy and Delta Pumping Plants.

Respondents commenced the present action in 1971 in the United States District Court for the Northern District of California. *Sierra Club* v. *Morton,* 400 F. Supp. 610 (1975). Named as defendants were the various federal and state officials who administer the agencies responsible for overseeing the operation, construction, and regulation of the CWP facilities in question.[3] Petitioner water agencies, which had contracted with the State for water from the Delta and which had incurred extensive financial obligations in reliance thereon, were permitted to intervene.[4] The respondents alleged that present

[3] The federal defendants were the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, the Secretary of the Army, the Chief of Engineers of the Army Corps of Engineers, and the Division Engineer of the Corps' South Pacific Division. The state defendants were the Secretary for Resources and the Director of the Department of Water Resources. 400 F. Supp., at 620.

[4] According to affidavits filed in 1974 in support of motions to intervene, Kern County Water Agency has contracted to purchase up to 1,153,000 acre-feet annually, which is resold primarily to agricultural

and proposed diversions of water from the Delta degraded the quality of Delta water, and that such diversion violated § 10 of the Rivers and Harbors Appropriation Act of 1899. They sought to enjoin further operation or construction of water diversion facilities until the consent of the Army Corps of Engineers was obtained as required by the Act.

The District Court concluded that respondents could avail themselves of a "private cause of action" to enforce § 10 of the Act, and ruled on the merits that approval of the Corps of Engineers was required by § 10 for the Tracy and Delta Pumping Plants and the Peripheral Canal. *Sierra Club* v. *Morton, supra.* The Court of Appeals for the Ninth Circuit agreed that a private cause of action to enforce the Act existed. *Sierra Club* v. *Andrus,* 610 F. 2d 581 (1979). It reversed the District Court as to the Tracy Pumping Plant, however, ruling that Congress has consented to its construction and operation.[5] We granted petitions for certiorari filed by the water agencies and the State of California. 449 U. S. 818 (1980).

II

Cort v. *Ash,* 422 U. S. 66 (1975), outlined a "preferred approach for determining whether a private right of action should be implied from a federal statute . . . ." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 26 (1979) (WHITE, J., dissenting); see *Cannon* v. *University of Chicago,*

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users. The Metropolitan Water District of Southern California has contracted to purchase up to 2,011,500 acre-feet annually to serve the water needs of an area of some 4,900 square miles with 10 million inhabitants. The Tulare Lake Basin Water Storage District and the Santa Clara Valley Water District have contracted to purchase lesser amounts. See App. 99a–112a.

[5] Judge Tang wrote separately to explain why the conclusion that the Tracy Pumping Plant had been authorized by Congress did not conflict with the Ninth Circuit's recent decision in *Libby Rod & Gun Club* v. *Poteat,* 594 F. 2d 742 (1979). 610 F. 2d, at 607.

441 U. S. 677 (1979). This approach listed four factors thought to be relevant to the inquiry:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U. S., at 78.

Combined, these four factors present the relevant inquiries to pursue in answering the recurring question of implied causes of action. Cases subsequent to *Cort* have explained that the ultimate issue is whether Congress intended to create a private right of action, see *Universities Research Assn., Inc.* v. *Coutu,* 450 U. S. 754, 771–772 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* at 23–24; *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 568, 575–576 (1979); but the four factors specified in *Cort* remain the "criteria through which this intent could be discerned." *Davis* v. *Passman,* 442 U. S. 228, 241 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* at 27 (WHITE, J., dissenting).

Under *Cort,* the initial consideration is whether the plaintiff is a member of a class for "'whose *especial* benefit the statute was enacted.'" *Cort* v. *Ash, supra,* at 78, 80–82; see *Touche Ross & Co.* v. *Redington, supra,* at 569–570; *Cannon* v. *University of Chicago, supra,* at 689–694. Without analyzing either the language or legislative history of the Act, the Court of Appeals here concluded that the Act was designed for the especial benefit of private parties who may suffer "special injury" caused by an unauthorized obstruc-

tion to a navigable waterway. It was apparently reasoned that since Congress enacted a statute that forbids such obstructions in navigable waters, any person who would be "especially harmed" by an unauthorized obstruction was an especial beneficiary of the Act. But such a definition of "especial" beneficiary makes this factor meaningless. Under this view, a victim of any crime would be deemed an especial beneficiary of the criminal statute's proscription. *Cort* did not adopt such a broad-gauge approach. *Cort* v. *Ash, supra,* at 80–82. The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries. See *Cannon, supra,* at 690–693, n. 13.

In ascertaining this intent, the first consideration is the language of the Act. Here, the statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action. "There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX [of the Education Amendments of 1972] with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Cannon* v. *University of Chicago, supra,* at 690–693; see also *Touche Ross & Co.* v. *Redington, supra,* at 569; *Cort* v. *Ash, supra,* at 80–82. Section 10 of the Rivers and Harbors Appropriation Act is the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons.

Neither the Court of Appeals nor respondents have identified anything in the legislative history suggesting that § 10 was created for the especial benefit of a particular class. On the contrary, the legislative history supports the view that

the Act was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures. In part, the Act was passed in response to this Court's decision in *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1 (1888). There the Court held that there was no federal common law "which prohibits obstructions and nuisances in navigable rivers." *Id.,* at 8. Although *Willamette* involved private parties, the clear implication of the Court's opinion was that in the absence of specific legislation no party, including the Federal Government, would be empowered to take any action under federal law with respect to such obstructions. The Act was intended to enable the Secretary of War to take such action.[6] See 21 Cong. Rec. 8603, 8605, and 8607 (1890); see also *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U. S. 655, 663–664 (1973); *United States* v. *Standard Oil Co.,* 384 U. S. 224, 227–229 (1966); *United States* v. *Republic Steel Corp.,* 362 U. S. 482, 485–488, 499–500 (1960). Congress was not concerned with the rights of individuals.

It is not surprising, therefore, that there is no "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Cort* v. *Ash,* 422 U. S., at 78, 82–

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[6] In addition, § 12 of the Act, 33 U. S. C. § 406, provides criminal penalties for violations of the provisions of various sections of the Act, including the provisions of § 10; and, § 17 of the Act, 33 U. S. C. § 413, provides that "[t]he Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of [§ 10]." The creation of one explicit mode of enforcement is not dispositive of congressional intent with respect to other complementary remedies. See *Cort* v. *Ash,* 422 U. S. 66, 82–83, n. 14 (1975); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 29, n. 6 (1979) (WHITE, J., dissenting). However, here, considering the clear focus of the legislative history on the need to enable the Government to respond to obstructions in navigable waterways, the creation of this enforcement mechanism and the absence of the remedy sought by respondents, certainly reinforces the view that Congress was not concerned with private rights or remedies in designing this legislation.

84; *Touche Ross & Co.* v. *Redington,* 442 U. S., at 571; *Cannon* v. *University of Chicago,* 441 U. S., at 694–703. The Court of Appeals recognized as much: "The legislative history of the Rivers and Harbors Act of 1899 does not reflect a congressional intent either to afford a private remedy or to deny one." 610 F. 2d, at 588. This silence on the remedy question serves to confirm that in enacting the Act, Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways.[7]

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[7] Respondents suggest that the legislative history of the Act must be read in light of the historical context during which the measure was being considered. See *Cannon* v. *University of Chicago,* 441 U. S. 677, 698–699 (1979). That context, they argue, included a general awareness that the obstruction of any navigable stream could have been addressed through the common law of nuisance and that this private remedy had been recognized at one time as federal in nature. Furthermore, they argue that the contemporary legal climate recognized that the abrogation of this federal remedy in cases such as *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1 (1888), did not undermine the accepted view that the enactment of any federal prohibition of obstructions on navigable streams would resurrect the federal private right of action. Congressional silence as to private remedies should be interpreted, therefore, as acquiescing in the accepted view.

For both of these positions respondents rely heavily upon *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 518 (1852). There, the State of Pennsylvania sought equitable relief from the construction of a bridge across the Ohio River. The Court took the case under its original jurisdiction, a State being the plaintiff, and, having done so, held that it was empowered to consider all issues presented by the parties, state as well as federal. Respondents suggest that the *Wheeling* Court held that federal courts were regularly available to entertain actions for nuisance brought by private parties with respect to obstructions on navigable rivers. But nothing in the opinion supports that view. The discussion in that case of the common law of nuisance is based on the Court's position that it was entitled to consider state as well as federal issues in the cause before it. Indeed, that the opinion did not establish a general federal law of nuisance with respect to navigable waterways was a point reiterated in *Willamette, supra,* at 15–17. In short, although

As recently emphasized, the focus of the inquiry is on whether Congress intended to create a remedy. *Universities Research Assn., Inc.* v. *Coutu,* 450 U. S., at 771–772; *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S., at 23–24; *Touche Ross & Co.* v. *Redington, supra,* at 575–576. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. Here consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the

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there may have been a common-law nuisance cause of action for obstructions of navigable waterways, *Wheeling Bridge* did not federalize that law. Respondents have cited no decision by this Court that did.

Equally unavailing is respondents' assertion that *Wheeling Bridge* stands for the broad proposition that if Congress legislated in this area, any prohibition of obstructions would automatically support a private right of action. This position is extrapolated from discussions of the law of nuisance in both *Wheeling Bridge, supra,* at 604–607 and the subsequent *Gilman* v. *Philadelphia,* 3 Wall. 713, 722–724 (1866). In both cases the Court merely expressed agreement with the proposition that a court of equity could enjoin a public nuisance in a case brought by a private person who had sustained specific injury. Whether a congressional enactment prohibiting obstructions would automatically give rise to a private right of action was not an issue raised or discussed in either case.

The most that may be legitimately concluded as to legislative understanding of the law preceding the enactment of this statute is that Congress was aware that the Supreme Court had held that there was no federal law which empowered anyone to contest obstructions to navigable rivers. See 21 Cong. Rec. 8604–8607 (1890). We cannot assume from legislative silence on private rights of action, that Congress anticipated that a general regulatory prohibition of obstructions to navigable streams would provide an automatic basis for a private remedy in the nature of common-law nuisance. The Rivers and Harbors Appropriation Act of 1899 was no doubt in part a legislative response to the *Willamette* decision. But there is nothing to suggest that that response was intended to do anything more than empower the Federal Government to respond to obstructions on navigable rivers. The broad view supported by respondents is without support.

especial benefit of a class of persons but rather that it was intended to benefit the public at large through a general regulatory scheme to be administered by the then Secretary of War. Nor is there any evidence that Congress anticipated that there would be a private remedy. This being the case, it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of interest. These factors are only of relevance if the first two factors give indication of congressional intent to create the remedy. *Touche Ross & Co.* v. *Redington, supra,* at 574–576. There being no such indication, the judgment of the Court of Appeals must be reversed.

III

Petitioner the State of California urges that we reach the merits of these cases—whether permits are required for the state water allocation projects—regardless of our disposition of the private-cause-of-action issue. This we decline to do. Our ruling that there is no private cause of action permitting respondents to commence this action disposes of the cases: we cannot consider the merits of a claim which Congress has not authorized respondents to raise.

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

It is so ordered.

JUSTICE STEVENS, concurring.

In 1888 this Court reversed a decree enjoining the construction of a bridge over a navigable river. *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1. The Court's opinion in that case did not question the right of the private parties to seek relief in a federal court; rather, the Court held that no federal rule of law prohibited the obstruction of the navigable water-

way.[1] Congress responded to the *Willamette* case in the Rivers and Harbors Act of 1890 by creating a federal prohibition of such obstructions absent a permit from the Secretary of War. 26 Stat. 426, 454. At the time the statute was enacted, I believe the lawyers in Congress simply assumed that private parties in a position comparable to that of the litigants in the *Willamette* case would have a remedy for any injury suffered by reason of a violation of the new federal statute.[2] For at that time the implication of private causes

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[1] The *Willamette* Court explained the issue presented as follows:

"The gravamen of the bill was, the obstruction of the navigation of the Willamette River by the defendants, by the erection of the bridge which they were engaged in building. The defendants pleaded the authority of the state legislature for the erection of the bridge. The court held that the work was not done in conformity with the requirements of the state law; but whether it were or not, it lacked the assent of Congress, which assent the court held was necessary in view of that provision in the act of Congress admitting Oregon as a State, which has been referred to. The court held that this provision of the act was tantamount to a declaration that the navigation of the Willamette River should not be obstructed or interfered with; and that any such obstruction or interference, without the consent of Congress, whether by state sanction or not, was a violation of the act of Congress; and that the obstruction complained of was in violation of said act. And this is the principal and important question in this case, namely, whether the erection of a bridge over the Willamette River at Portland was a violation of said act of Congress. If it was not, if it could not be, if the act did not apply to obstructions of this kind, then the case did not arise under the constitution or laws of the United States, unless under some other law referred to in the bill." 125 U. S., at 7–8.

[2] The then-current edition of Cooley's treatise on the Law of Torts 790 (2d ed. 1888) described the common-law remedy for breach of a statutory duty in this way:

"[W]hen the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none."

A few years earlier this Court quoted with approval an opinion by Judge Cooley in support of its holding that a railroad's breach of a stat-

of action was a well-known practice at common law and in American courts.[3] Therefore, in my view, the Members of Congress merely assumed that the federal courts would follow the ancient maxim *"ubi jus, ibi remedium"* and imply a private right of action. See *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39–40.[4] Accordingly, if I were writing on a clean slate, I would hold that an implied remedy is available to respondents under this statute.

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utory duty to fence its right-of-way gave an injured party an implied damages remedy. See *Hayes* v. *Michigan Central R. Co.,* 111 U. S. 228, 240.

[3] See *Anonymous,* 6 Mod. 27, 87 Eng. Rep. 791 (1703) (per Holt, C. J.); 2 E. Coke, Institutes on the Laws of England 55 (6th ed. 1681); 3 W. Blackstone, Commentaries *23, *51, *109, *123; 1 Comyns' Digest 433–445 (1822); *Couch* v. *Steel,* 3 El. & Bl. 402, 118 Eng. Rep. 1193 (1854). In Comyns' Digest, at 442, the rule was broadly stated:

"So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law."

[4] As Justice Frankfurter stated in dissent in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U. S. 246, 261–262:

"Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515; *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282. A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has 'left the matter at large for judicial determination,' our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. See *Board of Comm'rs* v. *United States,* 308 U. S. 343, 351. If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized. *Texas & Pac. R. Co.* v. *Rigsby,* 241 U. S. 33; *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210; cf. *De Lima* v. *Bidwell,* 182 U. S. 1."

The slate, however, is not clean. Because the problem of ascertaining legislative intent that is not expressed in legislation is often so difficult, the Court has wisely developed rules to guide judges in deciding whether a federal remedy is implicitly a part of a federal statute. In *Cort* v. *Ash,* 422 U. S. 66, all of my present colleagues subscribed to a unanimous formulation of those rules, and in *Cannon* v. *University of Chicago,* 441 U. S. 677, a majority of the Court joined my attempt to explain the application of those rules in that case. The *Cort* v. *Ash* analysis is therefore a part of our law.[5]

In these cases, I believe the Court correctly concludes that application of the *Cort* v. *Ash* analysis indicates that no private cause of action is available. I think it is more important to adhere to the analytical approach the Court has adopted than to base my vote on my own opinion about what Congress probably assumed in 1890. Cf. *Florida Dept. of Health & Rehabilitative Services* v. *Florida Nursing Home Assn.,* 450 U. S. 147, 151 (STEVENS, J., concurring). I therefore join JUSTICE WHITE's opinion for the Court.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL join, concurring in the judgment.

I agree completely with the conclusion of the Court that in these cases "Congress was not concerned with the rights of individuals" and that "[i]t is not surprising, therefore, that there is no 'indication of legislative intent, explicit or implicit, either to create . . . a [private] remedy or to deny one.'" *Ante,* at 295.

[5] In a separate concurrence in this case, four Members of the Court have undertaken to explain the legal effect of certain "implied right of action" opinions decided more recently than *Cort* v. *Ash.* As THE CHIEF JUSTICE, JUSTICE STEWART, JUSTICE REHNQUIST, and I noted in our separate opinion in *University of California Regents* v. *Bakke,* 438 U. S. 265, 408, n. 1, "it is hardly necessary to state that only a majority can speak for the Court" or give an authoritative explanation of the meaning of its judgments.

I also agree with the Court's analysis, *ante,* at 297, where it says:

> "As recently emphasized, the focus of the inquiry is on whether Congress intended to create a remedy. *Universities Research Assn., Inc.* v. *Coutu,* 450 U. S., at 771–772; *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S., at 23–24; *Touche Ross & Co.* v. *Redington,* [442 U. S.], at 575–576. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."

My only difference, and the difference which leads me to write this separate concurrence in the judgment, is that I think the Court's opinion places somewhat more emphasis on *Cort* v. *Ash,* 422 U. S. 66 (1975), than is warranted in light of several more recent "implied right of action" decisions which limit it. These decisions make clear that the so-called *Cort* factors are merely guides in the central task of ascertaining legislative intent, see *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 575–576 (1979); *Cannon* v. *University of Chicago,* 441 U. S. 677, 739–740 (1979) (POWELL, J., dissenting), that they are not of equal weight, *Transamerica, supra,* at 15, 23–24; *Touche Ross, supra,* at 575–576; and that in deciding an implied-right-of-action case courts need not mechanically trudge through all four of the factors when the dispositive question of legislative intent has been resolved, *Transamerica, supra,* at 24; *Touche Ross, supra,* at 575–576; *Kissinger* v. *Reporters Committee for Freedom of the Press,* 445 U. S. 136, 148–149 (1980). Surely it cannot be seriously argued that a mechanical application of the *Cort* analysis lends "predictability" to implied-right-of-action jurisprudence: including today's decision, five of the last six statutory implied-right-of-action cases in which we have reviewed analysis by the Courts of Appeals after *Cort* have resulted in reversal of erroneous Court of Appeals deci-

sions. See *Universities Research Assn., Inc.* v. *Coutu,* 450 U. S. 754 (1981); *Transamerica, supra; Touche Ross, supra; Cannon, supra.* Cf. *Northwest Airlines, Inc.* v. *Transport Workers, ante,* p. 77. While this may be predictability of a sort, it is not the sort which the Court in *Cort* v. *Ash, supra,* or in any other case seeking to afford guidance to statutory construction intended.

But in these cases, I am happy to agree with the Court that there is no implied right of action because "[t]he language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the especial benefit of a class of persons," *ante,* at 297–298, and because there is no "evidence that Congress anticipated that there would be a private remedy." *Ante,* at 298.

CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL.

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

No. 79–408. Argued December 2, 1980—Decided April 28, 1981

In original proceedings brought by respondent State of Illinois, alleging that petitioners—the city of Milwaukee, its Sewerage Commission, and Milwaukee County's Metropolitan Sewerage Commission—and other Wisconsin cities were polluting Lake Michigan because of overflows of untreated sewage from their sewer systems and discharges of inadequately treated sewage from their treatment plants, this Court recognized the existence of a federal "common law" which could give rise to a claim for abatement of a nuisance caused by interstate water pollution, but declined to exercise original jurisdiction because of the availability of a lower court action. *Illinois* v. *Milwaukee,* 406 U. S. 91. Accordingly, Illinois filed suit (and respondent State of Michigan intervened) in Federal District Court seeking abatement, under federal common law, of the public nuisance petitioners were allegedly creating by their discharges. Five months later, Congress passed the Federal Water Pollution Control Act (Act) Amendments of 1972, which established a new system of regulation making it illegal to discharge pollutants into the Nation's waters except pursuant to a permit that incorporated as conditions regulations of the Environmental Protection Agency (EPA) establishing specific effluent limitations. Permits are issued either by the EPA or a qualifying state agency, and petitioners operated their sewer systems under permits issued by the Wisconsin Department of Natural Resources (DNR). While the federal-court action was pending, DNR brought an action in a Wisconsin state court to compel compliance with the permits' requirements, and the state court entered a judgment requiring discharges from the treatment plants to meet effluent limitations in the permits and establishing a timetable for additional construction to control sewage overflows. Thereafter, the District Court found that the existence of a federal common-law nuisance had been proved and entered a judgment specifying effluent limitations for treated sewage and a construction timetable to eliminate overflows that went considerably beyond the terms of petitioners' permits and the state court's enforcement order. The Court of Appeals, ruling that the 1972 Amendments of the Act had not preempted the federal common law of nuisance, upheld the District Court's order as to elimination of overflows, but reversed insofar as the District

Court's effluent limitations on treated sewage were more stringent than those in the petitioners' permits and applicable EPA regulations.

Held:

1. Federal common law in an area of national concern is resorted to in the absence of an applicable Act of Congress and because the Court is compelled to consider federal questions which cannot be answered from federal statutes alone. As recognized in *Illinois* v. *Milwaukee, supra,* at 107, when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears. Unlike the determination of whether federal law pre-empts state law, which requires evidence of a clear and manifest congressional purpose to pre-empt state law, the determination of whether federal statutory or federal common law governs starts with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law. Pp. 312–317.

2. No federal common-law remedy was available to respondents in this case. Pp. 317–332.

(a) At least so far as concerns respondents' claims, Congress, which viewed the 1972 Amendments of the Act as a "total restructuring" and "complete rewriting" of the existing water pollution legislation considered in *Illinois* v. *Milwaukee,* has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. Pp. 317–319.

(b) As contemplated by Congress, the problem of effluent limitations for discharges from petitioners' treatment plants has been thoroughly addressed through the administrative scheme established by Congress, and thus there is no basis for a federal court, by reference to federal common law, to impose more stringent limitations. Similarly, the overflows of untreated sewage from petitioners' sewer system have been addressed by the regulatory regime established by the Act, through DNR's imposing conditions suited to further the Act's goals and bringing an enforcement action specifically addressed to the overflow problem. Nor does the absence of overflow effluent limitations in the permits and the state-court enforcement order render federal common law available, since the relevant question is not what concentration of various pollutants will be permitted, but what degree of control will be required in preventing overflows and ensuring that the sewage undergoes treatment. Decision is to be made by the appropriate

agency on a case-by-case basis, through the permit procedure, as was done here. Pp. 319–324.

(c) When *Illinois* v. *Milwaukee* was decided, Illinois did not have any forum in which to protect its interests unless federal common law were created. However, in the 1972 Amendments, Congress provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress. Respondents did not avail themselves of the statutory procedures. Pp. 325–326.

(d) Section 510 of the Act, which provides that nothing in the Act shall preclude States from adopting and enforcing limitations on the discharge of pollutants more stringent than those adopted under the Act, does not indicate congressional intent to preserve the federal common-law remedy recognized in *Illinois* v. *Milwaukee*. Nothing in § 510 suggests that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state discharges. Nor does a subdivision in the citizen-suit provision of the Act—§ 505 (e), which provides that nothing "in this section" shall limit any other remedies which might exist—indicate congressional intent to preserve the federal common-law remedy. It does not mean that the Act as a whole does not supplant formerly available federal common-law actions but means only that the particular section authorizing citizen suits does not do so. Pp. 327–329.

(e) The legislative history of the 1972 Amendments with regard to certain discussions as to provisions relating to the effect of the amendments on pending lawsuits is not relevant. The discussions focused on suits brought under federal statutes, not federal common law; related to suits brought by or against the Federal Government; and did not suggest any intent concerning the continued validity of federal common law. Pp. 329–332.

599 F. 2d 151, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and POWELL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 332.

Elwin J. Zarwell argued the cause for petitioners. With him on the briefs were *Richard W. Cutler, Samuel J. Recht, James H. Baxter III, Andrew M. Barnes, James B. Brennan,* and *Michael J. McCabe.*

Joseph V. Karaganis, Special Assistant Attorney General of

Illinois, argued the cause for respondents. With him on the brief for respondent State of Illinois were *Tyrone C. Fahner,* Attorney General, *Sanford R. Gail,* Special Assistant Attorney General, and *Russell R. Eggert.* On the brief for respondent State of Michigan were *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman* and *Thomas J. Emery,* Assistant Attorneys General.

Andrew J. Levander argued the cause *pro hac vice* for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Dirk D. Snel, Martin W. Matzen,* and *Michele B. Corash.**

JUSTICE REHNQUIST delivered the opinion of the Court.

When this litigation was first before us we recognized the existence of a federal "common law" which could give rise to a claim for abatement of a nuisance caused by interstate water pollution. *Illinois* v. *Milwaukee,* 406 U. S. 91 (1972). Subsequent to our decision, Congress enacted the Federal Water Pollution Control Act Amendments of 1972. We granted cer-

*Briefs of *amici curiae* urging reversal were filed by *Bronson C. La Follette,* Attorney General, *David J. Hanson,* Deputy Attorney General, and *Nancy L. Arnold* and *Linda H. Bochert,* Assistant Attorneys General, for the State of Wisconsin; by *George W. Crockett, Jr.,* for the City of Detroit; and by *John M. Cannon* for Mid-America Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams,* Attorney General, *Shirley Siegel,* Solicitor General, and *Cyril H. Moore, Jr.,* and *Mary L. Lyndon,* Assistant Attorneys General, for the State of New York; and by *William W. Becker* for the New England Legal Foundation.

Briefs of *amici curiae* were filed by *Richard J. Kissel* and *Jeffrey C. Fort* for the Illinois State Chamber of Commerce; by *Robert A. Hillstrom* for the Metropolitan Waste Control Commission; and by *Ross D. Davis, John J. Gunther,* and *Stephen C. Chapple* for the National League of Cities et al.

tiorari to consider the effect of this legislation on the previously recognized cause of action. 445 U. S. 926.

I

Petitioners, the city of Milwaukee, the Sewerage Commission of the city of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee, are municipal corporations organized under the laws of Wisconsin. Together they construct, operate, and maintain sewer facilities serving Milwaukee County, an area of some 420 square miles with a population of over one million people.[1] The facilities consist of a series of sewer systems and two sewage treatment plants located on the shores of Lake Michigan 25 and 39 miles from the Illinois border, respectively. The sewer systems are of both the "separated" and "combined" variety. A separated sewer system carries only sewage for treatment; a combined sewer system gathers both sewage and storm water runoff and transports them in the same conduits for treatment. On occasion, particularly after a spell of wet weather, overflows occur in the system which result in the discharge of sewage

[1] It is the statutory responsibility of the city Commission to "project, plan, construct, maintain and establish a sewerage system for the collection, transmission, and disposal of all sewage and drainage of the city." Wis. Stat. Ann. § 62.61 (1) (West Supp. 1980–1981). The city Commission is specifically given the authority to "plan, construct, and establish all local, district, lateral, intercepting, outfall or other sewers, and all conduits, drains and pumping or other plants, and all buildings, structures, works, apparatus, or agencies, and to lay all mains and pipes, and to create or use all such instrumentalities and means . . . as it deems expedient or necessary for carrying the sewerage system . . . into full effect." § 62.61 (1)(d). The county Commission is responsible for the construction of sewers within the metropolitan area but outside city limits. § 59.96 (6)(a). The city operates some sewers within the city, although the powers of the city Commission include the use and alteration, in its discretion, of "any or all existing public sewers or drains, including storm-water sewers and drains, in the city." § 62.61 (1)(e). Any construction by the city of local or sanitary sewers is subject to the prior written approval of the city Commission. § 62.67.

directly into Lake Michigan or tributaries leading into Lake Michigan.[2] The overflows occur at discrete discharge points throughout the system.

Respondent Illinois complains that these discharges, as well as the inadequate treatment of sewage at the two treatment plants, constitute a threat to the health of its citizens. Pathogens, disease-causing viruses and bacteria, are allegedly discharged into the lake with the overflows and inadequately treated sewage and then transported by lake currents to Illinois waters. Illinois also alleges that nutrients in the sewage accelerate the eutrophication, or aging, of the lake.[3] Respondent Michigan intervened on this issue only.

Illinois' claim was first brought to this Court when Illinois sought leave to file a complaint under our original jurisdiction. *Illinois* v. *Milwaukee, supra.* We declined to exercise original jurisdiction because the dispute was not between two States, and Illinois had available an action in federal district court. The Court reasoned that federal law applied to the dispute, one between a sovereign State and political subdivisions of another State concerning pollution of interstate waters, but that the various laws which Congress had enacted "touching interstate waters" were "not necessarily the only federal remedies available." *Id.,* at 101, 103. Illinois could appeal to federal common law to abate a public nuisance in

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[2] Combined sewers are obviously more susceptible to overflows after storms because the storm water is transported in the same conduits as the sewage. Since ground water and water from storm sewers occasionally enter separated sewers, overflows in those systems are also more likely during wet weather. When the system is about to exceed its inherent capacity at given points, overflow devices, either mechanical or gravity, are activated, resulting in the discharge of the effluent. See 599 F. 2d 151, 167–168.

[3] Eutrophication is the natural process by which the nutrient concentration in a body of water gradually increases. The process is allegedly accelerated when nutrients in sewage, particularly phosphorus, are discharged into the water. See *id.,* at 169, n. 39.

interstate or navigable waters. The Court recognized, however, that:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." *Id.*, at 107.

On May 19, 1972, Illinois filed a complaint in the United States District Court for the Northern District of Illinois, seeking abatement, under federal common law, of the public nuisance petitioners were allegedly creating by their discharges.[4]

Five months later Congress, recognizing that "the Federal water pollution control program . . . has been inadequate in every vital aspect," S. Rep. No. 92–414, p. 7 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 1425 (1973) (hereinafter Leg. Hist.), passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92–500, 86 Stat. 816. The Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pur-

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[4] The complaint also sought relief, in counts II and III, under Illinois statutory and common law. See App. 29–32. The District Court stated that "the case should be decided under the principles of the federal common law of nuisance," App. to Pet. for Cert. F–2, but went on to find liability on all three counts of the complaint, *id.*, at F–24. The Court of Appeals ruled that "it is federal common law and not state statutory or common law that controls in this case, *Illinois* v. *Milwaukee, supra,* 406 U. S., at 107, & n. 9, . . . and therefore we do not address the state law claims." 599 F. 2d, at 177, n. 53. Although respondent Illinois argues this point in its brief, the issue before us is simply whether federal legislation has supplanted federal common law. The question whether state law is also available is the subject of Illinois' petition for certiorari, No. 79–571.

suant to a permit. §§ 301, 402 of the Act, 33 U. S. C. §§ 1311, 1342 (1976 ed. and Supp. III). To the extent that the Environmental Protection Agency, charged with administering the Act, has promulgated regulations establishing specific effluent limitations, those limitations are incorporated as conditions of the permit. See generally *EPA* v. *State Water Resources Control Board,* 426 U. S. 200 (1976). Permits are issued either by the EPA or a qualifying state agency. Petitioners operated their sewer systems and discharged effluent under permits issued by the Wisconsin Department of Natural Resources (DNR), which had duly qualified under § 402 (b) of the Act, 33 U. S. C. § 1342 (b) (1976 ed. and Supp. III), as a permit-granting agency under the superintendence of the EPA. See *EPA* v. *State Water Resources Control Board, supra,* at 208. Petitioners did not fully comply with the requirements of the permits and, as contemplated by the Act, § 402 (b)(7), 33 U. S. C. § 1342 (b)(7), see Wis. Stat. Ann. § 147.29 (West 1974), the state agency brought an enforcement action in state court. On May 25, 1977, the state court entered a judgment requiring discharges from the treatment plants to meet the effluent limitations set forth in the permits and establishing a detailed timetable for the completion of planning and additional construction to control sewage overflows.

Trial on Illinois' claim commenced on January 11, 1977. On July 29 the District Court rendered a decision finding that respondents had proved the existence of a nuisance under federal common law, both in the discharge of inadequately treated sewage from petitioners' plants and in the discharge of untreated sewage from sewer overflows. The court ordered petitioners to eliminate all overflows and to achieve specified effluent limitations on treated sewage. App. to Pet. for Cert. F–25—F–26. A judgment order entered on November 15 specified a construction timetable for the completion of detention facilities to eliminate overflows. Separated sewer overflows are to be completely eliminated by 1986; combined

sewer overflows by 1989. The detention facilities to be constructed must be large enough to permit full treatment of water from any storm up to the largest storm on record for the Milwaukee area. *Id.*, at D–1. Both the aspects of the decision concerning overflows and concerning effluent limitations, with the exception of the effluent limitation for phosphorus, went considerably beyond the terms of petitioners' previously issued permits and the enforcement order of the state court.

On appeal, the Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. 599 F. 2d 151. The court ruled that the 1972 Amendments had not pre-empted the federal common law of nuisance, but that "[i]n applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance." *Id.*, at 164. The court reversed the District Court insofar as the effluent limitations it imposed on treated sewage were more stringent than those in the permits and applicable EPA regulations. The order to eliminate all overflows, however, and the construction schedule designed to achieve this goal, were upheld.[5]

II

Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938); *United States* v. *Hudson & Goodwin*, 7 Cranch 32 (1812). The enactment of a federal rule in an

[5] The Court of Appeals also rejected petitioners' contentions that there was no *in personam* jurisdiction under the Illinois long-arm statute, that any exercise of *in personam* jurisdiction failed to meet the minimum-contacts test of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and that venue was improper. 599 F. 2d, at 155–157. We agree that, given the existence of a federal common-law claim at the commencement of the suit, prior to the enactment of the 1972 Amendments, personal jurisdiction was properly exercised and venue was also proper.

area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S. 63, 68 (1966).[6] *Erie* recognized as much in ruling that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress.

When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," *Wallis, supra,* at 68,[7] the Court has found it necessary, in a "few and restricted" instances, *Wheeldin* v. *Wheeler,* 373 U. S. 647, 651 (1963), to develop federal common law. See, *e. g., Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367 (1943). Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. See *TVA* v. *Hill,* 437 U. S. 153, 194 (1978); *Diamond* v. *Chakrabarty,* 447 U. S. 303, 317 (1980); *United States* v. *Gilman,* 347 U. S. 507, 511–513 (1954). We have always recognized that federal common law is "subject to the paramount authority of Congress." *New Jersey* v. *New*

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[6] See Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 497 (1954) ("[f]ederal intervention has been thought of as requiring special justification, and the decision that such justification has been shown, being essentially discretionary, has belonged in most cases to Congress") (footnote omitted).

[7] In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.

York, 283 U. S. 336, 348 (1931). It is resorted to "[i]n absence of an applicable Act of Congress," *Clearfield Trust, supra,* at 367, and because the Court is compelled to consider federal questions "which cannot be answered from federal statutes alone," *D'Oench, Duhme & Co.* v. *FDIC,* 315 U. S. 447, 469 (1942) (Jackson, J., concurring). See also *Board of Commissioners* v. *United States,* 308 U. S. 343, 349 (1939); *United States* v. *Little Lake Misere Land Co.,* 412 U. S. 580, 594 (1973); *Miree* v. *DeKalb County,* 433 U. S. 25, 35 (1977) (BURGER, C. J., concurring in judgment). Federal common law is a "necessary expedient," *Committee for Consideration of Jones Falls Sewage System* v. *Train,* 539 F. 2d 1006, 1008 (CA4 1976) (en banc), and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears. This was pointedly recognized in *Illinois* v. *Milwaukee* itself, 406 U. S., at 107 ("new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance"), and in the lower court decision extensively relied upon in that case, *Texas* v. *Pankey,* 441 F. 2d 236, 241 (CA10 1971) (federal common law applies "[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards") (quoted in *Illinois* v. *Milwaukee, supra,* at 107, n. 9).

In *Arizona* v. *California,* 373 U. S. 546 (1963), for example, the Court declined to apply the federal common-law doctrine of equitable apportionment it had developed in dealing with interstate water disputes because Congress, in the view of a majority, had addressed the question:

> "It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocat-

> ing among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress." *Id.*, at 565–566.

In *Mobil Oil Corp.* v. *Higginbotham,* 436 U. S. 618 (1978), the Court refused to provide damages for "loss of society" under the general maritime law when Congress had not provided such damages in the Death on the High Seas Act:

> "We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. . . . The Act does not address every issue of wrongful-death law, . . . but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.,* at 625.

Thus the question was whether the legislative scheme "spoke directly to a question"—in that case the question of damages—not whether Congress had affirmatively proscribed the use of federal common law. Our "commitment to the separation of powers is too fundamental" to continue to rely on federal common law "by judicially decreeing what accords with 'common sense and the public weal' " when Congress has addressed the problem. *TVA* v. *Hill, supra,* at 195.[8]

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[8] The dissent errs in labeling our approach "automatic displacement," *post,* at 334. As evident *infra,* at 317–323, the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law. Our "detailed review of

Contrary to the suggestions of respondents, the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question " 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). While we have not hesitated to find pre-emption of state law, whether express or implied, when Congress has so indicated, see *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157 (1978), or when enforcement of state regulations would impair "federal superintendence of the field," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963), our analysis has included "due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959). Such concerns are not implicated in the same fashion when the question is whether federal stat-

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respondents' claims," *post*, at 348, is such an assessment and not, as the dissent suggests, a consideration of whether the particular common law applied below was reasonable.

The dissent's reference to "the unique role federal common law plays in resolving disputes between one State and the citizens or government of another," *post*, at 334, does not advance its argument. Whether interstate in nature or not, if a dispute implicates "Commerce . . . among the several States" Congress is authorized to enact the substantive federal law governing the dispute. Although the Court has formulated "interstate common law," *Kansas* v. *Colorado*, 206 U. S. 46, 98 (1907), it has done so not because the usual separation-of-powers principles do not apply, but rather because interstate disputes frequently call for the application of a federal rule when Congress has not spoken. When Congress has spoken its decision controls, even in the context of interstate disputes. See *Arizona* v. *California*, 373 U. S. 546 (1963).

utory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present "we start with the assumption" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.[9]

III

We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law "touching interstate waters" of the sort surveyed in *Illinois* v. *Milwaukee*, 406 U. S., at 101–103, and found inadequate to supplant federal common law. Rather, the Amendments were viewed by Congress as a "total restructuring" and "complete rewriting" of the existing water pollution legislation considered in that case. 1 Leg. Hist. 350–351 (remarks of Chairman Blatnik of the House Committee which drafted the House version of the Amendments); *id.*, at 359–360 (remarks of Rep. Jones). See S. Rep. No. 92–414, p. 95 (1971), 2 Leg. Hist. 1511; *id.*, at 1271 (remarks of Chairman Randolph of the Senate Committee which drafted the Senate version of the Amendments); see also *EPA*

[9] Since the States are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding pre-emption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* common law. Simply because the opinion in *Illinois* v. *Milwaukee* used the term "pre-emption," usually employed in determining if federal law displaces state law, is no reason to assume the analysis used to decide the usual federal-state questions is appropriate here.

v. *State Water Resources Control Board*, 426 U. S., at 202–203.[10] Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge [11] is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The "major purpose" of the Amendments was "to establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92–414, at 95, 2 Leg. Hist. 1511 (emphasis supplied). No Congressman's remarks on the legislation were complete without reference to the "comprehensive" nature of the Amendments. A House sponsor described the bill as "the most comprehensive and far-reaching water pollution bill we have ever drafted," 1 Leg. Hist. 369 (Rep. Mizell), and Senator Randolph, Chairman of the responsible Committee in the Senate, stated: "It is perhaps the most comprehensive legislation ever developed in its field. It is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment." 2 *id.*, at 1269.[12] This Court was

[10] The dissent considers the Water Pollution Control Act of 1948 "broad and systematic," *post*, at 338, and emphasizes that the Court in *Illinois* v. *Milwaukee* did not view then-existing federal statutes as a barrier to the recognition of federal common law, *post*, at 337. The suggestion is that the present legislation similarly should be no barrier. This ignores Congress' view that the previous legislation was "inadequate in every vital aspect," 2 Leg. Hist. 1425, and Congress' clear intent, witnessed by the statements and citations in the text, to do something quite different with the 1972 Amendments.

[11] "Point source" is defined in § 502 (14) of the Act, 33 U. S. C. § 1362 (14) (1976 ed., Supp. III), as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." There is no question that all of the discharges involved in this case are point source discharges.

[12] The most casual perusal of the legislative history demonstrates that these views on the comprehensive nature of the legislation were practically universal. See, *e. g.*, 1 Leg. Hist. 343 (Rep. Young); *id.*, at 350 (Rep. Blatnik); *id.*, at 374 (Rep. Clausen); *id.*, at 380 (Rep. Roberts); *id.*, at

obviously correct when it described the 1972 Amendments as establishing "a comprehensive program for controlling and abating water pollution." *Train* v. *City of New York,* 420 U. S. 35, 37 (1975).[13] The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois* v. *Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law. See *Texas* v. *Pankey,* 441 F. 2d, at 241.[14]

Turning to the particular claims involved in this case, the action of Congress in supplanting the federal common law is perhaps clearest when the question of effluent limitations for discharges from the two treatment plants is considered. The duly issued permits under which the city Commission discharges treated sewage from the Jones Island and South Shore treatment plants incorporate, as required by the Act, see § 402 (b)(1), 33 U. S. C. § 1342 (b)(1) (1976 ed. and Supp.

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425 (Rep. Roe); *id.,* at 450 (Rep. Reuss); *id.,* at 467 (Rep. Dingell); *id.,* at 481 (Rep. Caffery); 2 *id.,* at 1302 (Sen. Cooper); *id.,* at 1408 (Sen. Hart).

[13] The Court of Appeals itself recognized that Congress in the 1972 Amendments "established a comprehensive and detailed system for the regulation and eventual elimination of pollutant discharges into the nation's waters." 599 F. 2d, at 162.

[14] This conclusion is not undermined by Congress' decision to permit States to establish more stringent standards, see § 510, 33 U. S. C. § 1370. While Congress recognized a role for the States, the comprehensive nature of its action suggests that it was the exclusive source of *federal* law. Cases recognizing that the comprehensive character of a federal program is an insufficient basis to find pre-emption of state law are not in point, since we are considering which branch of the Federal Government is the source of federal law, not whether that law pre-empts state law, see *supra,* at 316–317. Since federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law, see *supra,* at 312–315, the comprehensive character of a federal statute is quite relevant to the present question, while it would not be were the question whether state law, which of course does not depend upon the absence of an applicable Act of Congress, still applied.

III), the specific effluent limitations established by EPA regulations pursuant to § 301 of the Act, 33 U. S. C. § 1311 (1976 ed. and Supp. III). App. 371–394, 395–424; see 40 CFR § 133.102 (1980). There is thus no question that the problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to federal common law, as the District Court did in this case. The Court of Appeals, we believe, also erred in stating:

> "Neither the minimum effluent limitations prescribed by EPA pursuant to the provisions of the Act nor the effluent limitations imposed by the Wisconsin agency under the National Pollutant Discharge Elimination System limit a federal court's authority to require compliance with more stringent limitations under the federal common law." 599 F. 2d, at 173.

Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme.

The overflows do not present a different case. They are point source discharges and, under the Act, are prohibited unless subject to a duly issued permit. As with the discharge of treated sewage, the overflows, through the permit procedure of the Act, are referred to expert administrative agencies for control. All three of the permits issued to petitioners explicitly address the problem of overflows. The Jones Island and South Shore permits, in addition to covering discharges from the treatment plants, also cover overflows from various lines leading to the plants. As issued on December 24, 1974, these permits require the city Commission "to initiate a program leading to the elimination or control of all discharge overflow and/or bypass points in the [Jones Island or South

Shore, respectively] Collector System . . . to assure attainment of all applicable Water Quality Standards." App. 378–379, 416. The specific discharge points are identified. The Commission was required to submit a detailed plan to DNR designed to achieve these objectives, including alternative engineering solutions and cost estimates, file a report on an attached form for all overflows that do occur, install monitoring devices on selected overflows discharge points, and file more detailed quarterly reports on the overflows from those points. The Commission was also required to complete "facilities planning" for the combined sewer area. "The facilities planning elements include a feasibility study, cost-effectiveness analysis and environmental assessment for elimination or control of the discharges from the combined sewers." Quarterly progress reports on this planning are required. *Id.,* at 379. A permit issued to the city on December 18, 1974, covers discharges "from sanitary sewer crossovers, combined sewer crossovers and combined sewer overflows." *Id.,* at 425. Again the discharge points are specifically identified. As to separated sewers, the city "is required to initiate a program leading to the elimination of the sanitary sewer crossovers (gravity) and the electrically operated relief pumps . . . ." *Id.,* at 438. A detailed plan to achieve this objective must be submitted, again with alternative engineering solutions and cost estimates, any overflows must be reported to DNR on a specified form, and monitoring devices are required to be installed on selected points to provide more detailed quarterly reports. As to the combined sewers, the city "is required to initiate a program leading to the attainment of control of overflows from the city's combined sewer system . . . ." *Id.,* at 443. The city is required to cooperate with and assist the city Commission in facilities planning for combined sewers, see *supra,* this page, submit quarterly progress reports to DNR, file reports on all discharges, and install monitoring devices on selected discharge points to provide more detailed quar-

terly reports "until the discharges are eliminated or controlled." App. 444.[15]

The enforcement action brought by the DNR in state court resulted in a judgment requiring "[e]limination of any bypassing or overflowing which occurs within the sewerage systems under dry weather by not later than July 1, 1982." *Id.*, at 465. Wet weather overflows from separated sewers were to be subject to a coordinated effort by the Commissions resulting in correction of the problem by July 1, 1986, pursuant to a plan submitted to the DNR. *Id.*, at 469–471. As to the combined sewer overflows, the Commissions were required to accomplish an abatement project, with design work completed by July 1, 1981, and construction by July 1, 1993. Annual progress reports were required to be submitted to the DNR. *Id.*, at 471–472.

It is quite clear from the foregoing that the state agency

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[15] The regulatory approach of the DNR to overflows reflected in these permit conditions was not plucked out of thin air but rather followed the approach in EPA regulations, issued pursuant to the Act, governing the availability of federal funds for treatment works construction, including construction of facilities to control sewer overflows. The regulations provide, as do the permits, for detailed evaluation of feasibility, engineering alternatives, and costs prior to the commencement of a particular construction project. See 40 CFR §§ 35.903, 35.917 (1980). The "facilities planning" referred to in the permits for control of combined sewer overflows is a term of art defined in exhaustive detail in the EPA regulations, see §§ 35.917–35.917–9. Such facilities planning constitutes the first step in qualifying for federal financial assistance for construction projects. It was the statutorily articulated intent of Congress to make funds available, subject to certain conditions, for projects to control overflows, see §§ 201 (g)(1), 212 (2)(A), (B), 33 U. S. C. §§ 1281 (g)(1), 1292 (2)(A), (B) (1976 ed. and Supp. III); see also S. Rep. No. 92–414, pp. 40–41 (1971), 2 Leg. Hist. 1458–1459; 1 *id.*, at 165 (Sen. Muskie); 2 *id.*, at 1379 (Sen. Magnuson). We are not impressed with arguments that more in the way of immediate solutions should have been required of the dischargers when such requirements may have had the effect, under EPA regulations requiring exhaustive planning and examination of alternatives, of foreclosing recourse to funds Congress intended to be available.

duly authorized by the EPA to issue discharge permits under the Act has addressed the problem of overflows from petitioners' sewer system. The agency imposed the conditions it considered best suited to further the goals of the Act, and provided for detailed progress reports so that it could continually monitor the situation. Enforcement action considered appropriate by the state agency was brought, as contemplated by the Act, again specifically addressed to the overflow problem. There is no "interstice" here to be filled by federal common law: overflows are covered by the Act and have been addressed by the regulatory regime established by the Act. Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law.[16]

Respondents strenuously argue that federal common law continues to be available, stressing that neither in the permits nor the enforcement order are there any effluent limitations on overflows. This argument, we think, is something of a red herring. The difference in treatment between overflows and treated effluent by the agencies is due to differences in the *nature* of the problems, *not* the extent to which the problems have been addressed.[17] The relevant question with overflow discharges is not, as with discharges of treated sewage, what concentration of various pollutants will be permitted. Rather the question is what degree of control will be required in

[16] In light of this conclusion we need not consider petitioners' argument that, assuming the availability of a cause of action, the lower courts erred in concluding that respondents' evidence sufficed to establish the existence of a nuisance.

[17] See EPA, Benefit Analysis for Combined Sewer Overflow Control 4 (1979) ("regulations governing combined sewer overflows require permits for each outfall . . . they differ from the . . . permits for treatment plants, which specify effluent limitations based on technology or water quality standards. NPDES permits for combined sewer overflows contain no effluent limitations, though they do usually require monitoring and data collection").

preventing overflows and ensuring that the sewage undergoes treatment. This question is answered by construction plans designed to accommodate a certain amount of sewage that would otherwise be discharged on overflow occasions. The EPA has not promulgated regulations mandating specific control guidelines because of a recognition that the problem is "site specific." See, *e. g.*, EPA Program Requirements Memorandum PRM No. 75–34 (Dec. 16, 1975):

> "The costs and benefits of control of various portions of pollution due to combined sewer overflows and bypasses vary greatly with the characteristics of the sewer and treatment system, the duration, intensity, frequency, and aerial extent of precipitation, the type and extent of development in the service area, and the characteristics, uses and water quality standards of the receiving waters. Decisions on grants for control of combined sewer overflows, therefore, must be made on a case-by-case basis after detailed planning at the local level."

See also EPA, Report to Congress on Control of Combined Sewer Overflow in the United States 7–1, 7–13 (MCD–50, 1978). Decision is made on a case-by-case basis, through the permit procedure, as was done here. Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner.[18]

[18] The point is perhaps made most clear if one asks what inadequacy in the treatment by Congress the courts below rectified through creation of federal common law. In imposing stricter effluent limitations the District Court was not "filling a gap" in the regulatory scheme, it was simply providing a different regulatory scheme. The same is true with overflows. The District Court simply ordered planning and construction designed to achieve more stringent control of overflows than the planning and construction undertaken pursuant to the permits. The same point is evident in examining respondents' arguments. The basic complaint is that the

The invocation of federal common law by the District Court and the Court of Appeals in the face of congressional legislation supplanting it is peculiarly inappropriate in areas as complex as water pollution control. As the District Court noted:

> "It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would certainly be less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be . . . ." App. to Pet. for Cert. F–4.

Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution control as being "sporadic" and "ad hoc," S. Rep. No. 92–414, p. 95 (1971), 2 Leg. Hist. 1511, apt characterizations of any judicial approach applying federal common law, see *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 319 (1955).

It is also significant that Congress addressed in the 1972 Amendments one of the major concerns underlying the recognition of federal common law in *Illinois* v. *Milwaukee*. We were concerned in that case that Illinois did not have any forum in which to protect its interests unless federal common law were created. See 406 U. S., at 104, 107. In the 1972

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permits issued to petitioners under the Act do not control overflows or treated discharges in a sufficiently stringent manner, not that permits under the Act cannot deal with these subjects or that the instant permits do not do so. At most respondents argue not that the Act is inadequate, as was the legislation considered in *Illinois* v. *Milwaukee*, but that these *particular* permits issued under it are. This does not suffice to create an "interstice" to be filled by federal common law.

Amendments Congress provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress. Under § 402 (b)(3), 33 U. S. C. § 1342 (b)(3), a state permit-granting agency must ensure that any State whose waters may be affected by the issuance of a permit receives notice of the permit application and the opportunity to participate in a public hearing. Wisconsin law accordingly guarantees such notice and hearing, see Wis. Stat. Ann. §§ 147.11, 147.13 (West Supp. 1980–1981). Respondents received notice of each of the permits involved here, and public hearings were held, but they did not participate in them in any way. Section 402 (b)(5), 33 U. S. C. § 1342 (b)(5), provides that state permit-granting agencies must ensure that affected States have an opportunity to submit written recommendations concerning the permit applications to the issuing State and the EPA, and both the affected State and the EPA must receive notice and a statement of reasons if any part of the recommendations of the affected State are not accepted. Again respondents did not avail themselves of this statutory opportunity. Under § 402 (d)(2)(A), 33 U. S. C. § 1342 (d)(2)(A) (1976 ed., Supp. III), the EPA may veto any permit issued by a State when waters of another State may be affected. Respondents did not request such action. Under § 402 (d)(4) of the Act, 33 U. S. C. § 1342 (d)(4) (1976 ed., Supp. III), added in 1977, the EPA itself may issue permits if a stalemate between an issuing and objecting State develops. The basic grievance of respondents is that the permits issued to petitioners pursuant to the Act do not impose stringent enough controls on petitioners' discharges. The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to "write their own ticket" under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them.

Respondents argue that congressional intent to preserve the federal common-law remedy recognized in *Illinois* v. *Milwaukee* is evident in §§ 510 and 505 (e) of the statute, 33 U. S. C. §§ 1370, 1365 (e).[19] Section 510 provides that nothing in the Act shall preclude States from adopting and enforcing limitations on the discharge of pollutants more stringent than those adopted under the Act.[20] It is one thing, how-

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[19] It must be noted that the legislative activity resulting in the 1972 Amendments largely occurred prior to this Court's decision in *Illinois* v. *Milwaukee*. Drafting, filing of Committee Reports, and debate in both Houses took place prior to the decision. Only conference activity occurred after. It is therefore difficult to argue that particular provisions were designed to preserve a federal common-law remedy not yet recognized by this Court.

The dissent cites several cases for the proposition that the federal common-law nuisance remedy existed "[l]ong before" *Illinois* v. *Milwaukee*. *Post*, at 335. During the legislative activity resulting in the 1972 Amendments, however, this Court's decision in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971), indicated that *state* common law would control a claim such as Illinois'. *Wyandotte*, like the present suit, was brought by a State to abate a pollution nuisance created by out-of-state defendants. The Court ruled that "an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)." *Id.*, at 498–499, n. 3. The Court in *Illinois* v. *Milwaukee* found it necessary to overrule this statement, see 406 U. S., at 102, n. 3.

[20] In full, § 510, as set forth in 33 U. S. C. § 1370, provides:

"Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any

ever, to say that States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance law, and apply them to in-state dischargers. It is quite another to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers. Any standards established under federal common law are federal standards, and so the authority of States to impose more stringent standards under § 510 would not seem relevant. Section 510 clearly contemplates state authority to establish more stringent pollution limitations; nothing in it, however, suggests that this was to be done by federal-court actions premised on federal common law.

Subsection 505 (e) provides:

> "Nothing *in this section* shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)" (emphasis supplied).

Respondents argue that this evinces an intent to preserve the federal common law of nuisance. We, however, are inclined to view the quoted provision as meaning what it says: that nothing *in § 505,* the citizen-suit provision, should be read as limiting any other remedies which might exist.

Subsection 505 (e) is virtually identical to subsections in the citizen-suit provisions of several environmental statutes.[21]

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right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

[21] See, *e. g.,* § 304 (e) of the Clean Air Act, 42 U. S. C. § 7604 (e) (1976 ed., Supp. III); § 16 (e) of the Deepwater Port Act of 1974, 33 U. S. C. § 1515 (e); § 105 (g) (5) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U. S. C. § 1415 (g) (5); § 12 (e) of the Noise Control Act of 1972, 42 U. S. C. § 4911 (e); § 7002 (f) of the Solid Waste Disposal Act, 42 U. S. C. § 6972 (f); § 1449 (e) of the Safe Drinking Water Act, 42

The subsection is common language accompanying citizen-suit provisions and we think that it means only that the provision of such suit does not revoke other remedies. It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions but only that the particular section authorizing citizen suits does not do so. No one, however, maintains that the citizen-suit provision pre-empts federal common law.

We are thus not persuaded that § 505 (e) aids respondents in this case, even indulging the unlikely assumption that the reference to "common law" in § 505 (e) includes the limited *federal* common law as opposed to the more routine state common law. See *Committee for Consideration of Jones Falls Sewage System* v. *Train,* 539 F. 2d, at 1009, n. 9.[22]

The dissent considers "particularly revealing," *post,* at 343, a colloquy involving Senators Griffin, Muskie, and Hart, concerning the pendency of an action by the EPA against Reserve Mining Co. Senator Griffin expressed concern that "one provision in the conference agreement might adversely

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U. S. C. § 300j–8 (e) (1976 ed., Supp. III); § 520 (e) of the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1270 (e) (1976 ed., Supp. III); and § 20 (c)(3) of the Toxic Substances Control Act, 15 U. S. C. § 2619 (c)(3).

[22] The dissent's criticism of our reading of § 505 (e), *post,* at 341–342, is misplaced. There is nothing unusual about Congress enacting a particular provision, and taking care that this enactment by itself not disturb other remedies, without considering whether the rest of the Act does so or what other remedies may be available. The fact that the language of § 505 (e) is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation, see n. 21, *supra,* indicates that it does not reflect any considered judgment about what other remedies were previously available or continue to be available under any particular statute. The dissent refers to our reading as "extremely strained," but the dissent, in relying on § 505 (e) as evidence of Congress' intent to preserve the federal common-law nuisance remedy, must read "nothing in this section" to mean "nothing in this Act." We prefer to read the statute as written. Congress knows how to say "nothing in this Act" when it means to, see, *e. g.,* Pub. L. 96–510, § 114 (a), 94 Stat. 2795.

affect a number of pending lawsuits brought under the Refuse Act of 1899," including the Reserve Mining litigation. 1 Leg. Hist. 190. The provision which concerned Senator Griffin, enacted as § 402 (k), 86 Stat. 883, 33 U. S. C. § 1342 (k), provides, in pertinent part:

> "Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application."

Senator Griffin was concerned about the relation between this provision and § 4 (a) of the bill, which provided that "[n]o suit, action or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of the Act shall abate by reason of the taking effect of the amendment made by section 2 of this Act." Senator Griffin stated that "when these provisions are read together, it is not altogether clear what effect is intended with respect to pending Federal court suits against pollutors violating the Refuse Act of 1899."

Senator Muskie responded to Senator Griffin's concerns *by quoting* § 4 (a) and stating that "[w]ithout any question it was the intent of the conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, and any other acts of Congress." 1 Leg. Hist. 193. Later Senator Hart stated: "It is

my understanding, . . . after the explanation of the Senator from Maine, that the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899 will in no way be affected nor will any of the other counts under the existing Federal Water Pollution Control Act or other law." *Id.*, at 211.[23] When Senator Muskie's and Hart's remarks are viewed in this context it is clear that they do not bear on the issue now before the Court. In the first place, although there was a federal common-law claim in the Reserve Mining litigation, Senator Griffin focused on the Refuse Act of 1899—not federal common law. Senator Muskie, with his reference to "other acts of Congress," rather clearly was not discussing federal *common* law. Most importantly, however, Senator Muskie based his response to Senator Griffin—that the Reserve Mining suit would not be affected—on a specific section of the bill, § 4 (a), which is not applicable to suits other than those brought by or against the Federal Government and pending when the Amendments were enacted. Senator Hart based his response on the explanation given by Senator Muskie. Even if we assumed that the legislators were focusing on the federal common-law aspects of the Reserve Mining litigation (and we do not think they were), Senators Muskie and Hart informed Senator Griffin that the Reserve Mining suit was not affected *because of* § 4 (a), and not at all because the Act did not displace the federal common law of nuisance. Senator Griffin's question focused on § 4 (a); understandably, so did the assurances he received. Nothing

[23] The dissent states that "Senators Muskie and Hart each responded" as Senator Hart is quoted in the text. *Post,* at 344. This is not strictly accurate. Senator Muskie never responded as Senator Hart did, but rather as quoted in the text above, with the clear reference to § 4 (a). He did not, like Senator Hart, use the phrase "other law" but rather, and of particular significance in the present context, the phrase *"any other acts of Congress."* This inaccuracy in the dissent appears to be of no little importance, since the dissent attaches great weight to the views of Senator Muskie, see *post,* at 344, n. 16.

about the colloquy suggests any intent concerning the continued validity of federal common law. The issue simply did not come up because Senator Griffin's concerns were fully answered by a particular section not applicable in the case before us.[24]

We therefore conclude that no federal common-law remedy was available to respondents in this case. The judgment of the Court of Appeals is therefore vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

Nine years ago, in *Illinois* v. *Milwaukee,* 406 U. S. 91 (1972), this Court unanimously determined that Illinois could bring a federal common-law action against the city of

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[24] In the similar colloquy in the House, also relied upon by the dissent, Representative Wright responded to a question from Representative Dingell in precisely the same manner as Senator Muskie responded to Senator Griffin, relying on § 4 (a), and referring to "other acts of Congress." 1 Leg. Hist. 248. Representative Dingell never mentioned federal common law in his question.

The dissent also relies on the failure of Congress to enact, in 1977, an amendment "proposed" by Representative Aspin. *Post,* at 345–346. This reliance ignores not only the fact that "unsuccessful attempts at legislation are not the best of guides to legislative intent," *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381–382, n. 11 (1969), but also, even assuming the failure to enact the Aspin "proposal" is some indication of Congress' intent in 1977, the "oft-repeated warning" that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U. S. 102, 117–118 (1980). These admonitions do not even come into play, however, since the Aspin proposal was never introduced in either House of Congress; it does not even appear in the Congressional Record. The fate of the Aspin "proposal" has under our precedents dealing with statutory interpretation nothing whatever to do with Congress' intent concerning federal common law when it enacted the 1972 Amendments.

Milwaukee, three other Wisconsin cities, and two sewerage commissions. At that time, Illinois alleged that the discharge of raw and untreated sewage by these Wisconsin entities into Lake Michigan created a public nuisance for the citizens of Illinois. The Court remitted the parties to an appropriate federal district court, "whose powers are adequate to resolve the issues." *Id.*, at 108.

Illinois promptly initiated the present litigation,[1] and pursued it through more than three years of pretrial discovery, a 6-month trial that entailed hundreds of exhibits and scores of witnesses, extensive factual findings by the District Court, App. F to Pet. for Cert., and an exhaustive review of the evidence by the Court of Appeals. 599 F. 2d 151, 167–177 (CA7 1979). Today, the Court decides that this 9-year judicial exercise has been just a meaningless charade, cf. *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U. S. 363, 389, 390 (1973) (dissenting opinion), inasmuch as, it says, the federal common-law remedy approved in *Illinois* v. *Milwaukee* was implicitly extinguished by Congress just six months after the 1972 decision. Because I believe that Congress intended no such extinction, and surely did not contemplate the result reached by the Court today, I respectfully dissent.

I

The Court's analysis of federal common-law displacement rests, I am convinced, on a faulty assumption. In contrasting congressional displacement of the common law with federal pre-emption of state law,[2] the Court assumes that as

[1] This Court's decision was issued April 24, 1972. The complaint was filed in the United States District Court for the Northern District of Illinois on May 19, 1972.

[2] I have no quarrel with the Court's distinction between the issues of federalism at stake in assessing congressional pre-emption of state law and the separation-of-powers concerns that are implicated here. But there is more to this distinction than the Court suggests. In deciding whether federal law pre-empts state law, the Court must be sensitive to the

soon as Congress "addresses a question previously governed" by federal common law, "the need for such an unusual exercise of lawmaking by federal courts disappears." *Ante*, at 314. This "automatic displacement" approach is inadequate in two respects. It fails to reflect the unique role federal common law plays in resolving disputes between one State and the citizens or government of another. In addition, it ignores this Court's frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies.

It is well settled that a body of federal common law has survived the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). *Erie* made clear that federal courts, as courts of limited jurisdiction, lack general power to formulate and impose their own rules of decision. *Id.*, at 78. The Court, however, did not there upset, nor has it since disturbed, a deeply rooted, more specialized federal common law that has arisen to effectuate federal interests embodied either in the Constitution or an Act of Congress.[3] Chief among the fed-

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potential frustration of national purposes if the States are permitted to control conduct that is the subject of federal regulation. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244 (1959). See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963). For this reason, in pre-emption analysis the role of federal law is often determined on an "all or nothing" basis. On the other hand, where federal interests alone are at stake, participation by the federal courts is often desirable, and indeed necessary, if federal policies developed by Congress are to be fully effectuated. See, *e. g.*, *Miree* v. *DeKalb County*, 433 U. S. 25, 35 (1977) (opinion concurring in judgment); *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 592–593 (1973). The whole concept of interstitial federal lawmaking suggests a cooperative interaction between courts and Congress that is less attainable where federal-state questions are involved.

[3] See generally Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024, 1026–1042 (1967); Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 405–422 (1964). See also Leybold, Federal Com-

eral interests served by this common law are the resolution of interstate disputes and the implementation of national statutory or regulatory policies.

Both before and after *Erie,* the Court has fashioned federal law where the interstate nature of a controversy renders inappropriate the law of either State. See, *e. g., Nebraska* v. *Wyoming,* 325 U. S. 589 (1945); *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 110 (1938); *Kansas* v. *Colorado,* 206 U. S. 46, 95, 97–98 (1907) (apportioning waters of interstate stream). See also *Cissna* v. *Tennessee,* 246 U. S. 289, 296 (1918); *Howard* v. *Ingersoll,* 13 How. 381 (1852) (resolving interstate boundary conflict). When such disputes arise, it is clear under our federal system that laws of one State cannot impose upon the sovereign rights and interests of another. The Constitution, by Art. III, § 2, explicitly extends the judicial power of the United States to controversies between a State and another State or its citizens, and this Court, in equitably resolving such disputes, has developed a body of "what may not improperly be called interstate common law." *Kansas* v. *Colorado,* 206 U. S., at 98.

Long before the 1972 decision in *Illinois* v. *Milwaukee,* federal common law enunicated by this Court assured each State the right to be free from unreasonable interference with its natural environment and resources when the interference stems from another State or its citizens. *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237–239 (1907); *Missouri* v. *Illinois,* 200 U. S. 496, 520, 526 (1906). See *New Jersey* v. *City of New York,* 283 U. S. 473 (1931); *New York* v. *New Jersey,* 256 U. S. 296 (1921). The right to such federal protection is a consequence of each State's entry into the Union and its commitment to the Constitution. In the words of Justice Holmes, speaking for the Court:

"When the States by their union made the forcible

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mon Law: Judicially Established Effluent Standards as a Remedy in Federal Nuisance Actions, 7 B. C. Env. Aff. L. Rev. 293 (1978).

abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court." *Georgia* v. *Tennessee Copper Co.*, 206 U. S., at 237.

This Court also has applied federal common law where federally created substantive rights and obligations are at stake. Thus, the Court has been called upon to pronounce common law that will fill the interstices of a pervasively federal framework, or avoid subjecting relevant federal interests to the inconsistencies in the laws of several States. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 456–457 (1957); *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305 (1947); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367 (1943); *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447 (1942). If the federal interest is sufficiently strong, federal common law may be drawn upon in settling disputes even though the statute or Constitution alone provides no precise answer to the question posed. See, *e. g.*, *Textile Workers* v. *Lincoln Mills*, 353 U. S., at 458; *Clearfield Trust Co.* v. *United States*, 318 U. S., at 368–370. See generally *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 593 (1973) ("the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts").

Each of these sources of federal common law was recognized in *Illinois* v. *Milwaukee*. The Court there concluded that the common law of interstate nuisance supplied the requisite federal-question jurisdiction to bring an action in District Court. In so deciding, the Court reasoned that it was appropriate for federal courts to fashion federal common law "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy

touches basic interests of federalism." 406 U. S., at 105, n. 6. The Court relied heavily upon interstate air pollution and water allocation cases where the complaining party was a State invoking the Court's original jurisdiction. *Id.*, at 104–106. In addition, it recounted the history of federal interstate water quality legislation and suggested that the abiding federal interest in the purity of interstate waters justified application of federal common law. *Id.*, at 101–103. Significantly, the Court found no barrier to federal common law despite the number of federal statutes and regulations that already provided remedies to abate pollution in interstate waters. *Id.*, at 103.

Thus, quite contrary to the statements and intimations of the Court today, *ante*, at 323, 325, 327, n. 19, *Illinois* v. *Milwaukee* did not create the federal common law of nuisance. Well before this Court and Congress acted in 1972, there was ample recognition of and foundation for a federal common law of nuisance applicable to Illinois' situation.[4] Congress cannot be presumed to have been unaware of the relevant common-law history, any more than it can be deemed to have been oblivious to the decision in *Illinois* v.

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[4] This Court had not previously indicated that the federal common law of nuisance provided a basis for federal-question jurisdiction under 28 U. S. C. § 1331. But see *Texas* v. *Pankey*, 441 F. 2d 236 (CA10 1971). As recently as 1971, however, the Court had confirmed the existence of its original jurisdiction to consider a nuisance action brought by one State to vindicate its own sovereign interests or the interests of its citizens as a whole. See *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 496 (citing cases discussed *supra*, at 335). The significance of *Wyandotte* was the Court's refusal for prudential reasons to exercise the original jurisdiction that concededly obtained. 401 U. S., at 499–505. The additional observation that "[*s*]*o far as it appears from the present record*, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law," *id.*, at 498–499, n. 3 (emphasis added), was explained by the Court one year later as "based on the preoccupation of that litigation with public nuisance under Ohio law." *Illinois* v. *Milwaukee*, 406 U. S., at 102, n. 3.

Milwaukee, announced six months prior to the passage of the Federal Water Pollution Control Act Amendments of 1972 (Act or Amendments), 86 Stat. 816. The central question is whether, given its presumed awareness, Congress, in passing these Amendments, intended to prevent recourse to the federal common law of nuisance.

The answer to this question, it seems to me, requires a more thorough exploration of congressional intent than is offered by the Court. Congress had "spoken to" the particular problem of interstate water pollution as far back as 1888,[5] and in 1948 did so in a broad and systematic fashion with the enactment of the Water Pollution Control Act (also known as the Clean Water Act).[6] In *Illinois* v. *Milwaukee,* the Court properly regarded such expressions of congressional intent as not an obstacle but an incentive to application of the federal common law. 406 U. S., at 102–103. The fact that Congress in 1972 once again addressed the complicated and difficult problem of purifying our Nation's waters should not be taken as presumptive evidence, let alone conclusive proof, that Congress meant to foreclose pre-existing approaches to controlling interstate water pollution.[7] Where the possi-

[5] See Act of June 29, 1888, 25 Stat. 209. See also Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1121.

[6] Ch. 758, 62 Stat. 1155.

[7] The Court at this point, *ante,* at 314–315, would rely on *Arizona* v. *California,* 373 U. S. 546 (1963), and *Mobil Oil Corp.* v. *Higginbotham,* 436 U. S. 618 (1978). But those cases do not stand for the broad proposition announced today. In *Arizona* v. *California,* Congress had developed a formula for apportioning the limited waters of the Colorado River and directed the federal agency to implement the formula. In the face of this express congressional allocation, the Court declined to substitute its own notions of an equitable apportionment. 373 U. S., at 565. In *Mobil Oil Corp.* v. *Higginbotham,* the Court confronted a statute that had created a precise federal remedy where before there had been none. Since federal law, when the statute was passed, did not address wrongful death on the high seas, and the statute itself expressed no intent to preserve or create federal remedies, the Court acceded to the particularized judgment of Congress. 436 U. S., at 625. Unlike the statutes at issue in

ble extinction of federal common law is at issue, a reviewing court is obligated to look not only to the magnitude of the legislative action but also with some care to the evidence of specific congressional intent.[8]

II

In my view, the language and structure of the Clean Water Act leave no doubt that Congress intended to preserve the federal common law of nuisance. Section 505 (e) of the Act reads:

> "Nothing in this section shall restrict any right which *any person* (or class of persons) may have under *any statute or common law* to seek enforcement of any effluent standard or limitation *or to seek any other relief* (including relief against the Administrator or a State agency)." 33 U. S. C. § 1365 (e) (emphasis added).

The Act specifically defines "person" to include States, and thus embraces respondents Illinois and Michigan. § 502 (5),

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those two cases, the 1972 Act addressed a broad and complex subject to which state and federal law had previously spoken, and in doing so recognized and encouraged many different approaches to controlling water pollution. See discussion in Part II, *infra*.

[8] Inevitably, a federal court must acknowledge the tension between its obligation to apply the federal common law in implementing an important federal interest, and its need to exercise judicial self-restraint and defer to the will of Congress. Congress, of course, may resolve this tension by making it known that flexible and creative judicial response on a case-by-case basis must yield to an interest in certainty under a comprehensive legislative scheme. At the same time, the fact that Congress *can* properly check the courts' exercise of federal common law does not mean that it has done so in a specific case. This Court is no more free to disregard expressions of legislative desire to preserve federal common law than it is to overlook congressional intent to curtail it. Indeed, the Court has admonished that statutes will not be construed in derogation of the common law unless such an intent is clear. *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952) (citing cases). To say that Congress "has spoken," *ante*, at 316, n. 8, is only to begin the inquiry; the critical question is what Congress has said.

33 U. S. C. § 1362 (5). It preserves their right to bring an action against the governmental entities who are charged with enforcing the statute. Most important, as succinctly stated by the Court of Appeals in this case: "There is nothing in the phrase 'any statute or common law' that suggests that this provision is limited to state common law." 599 F. 2d, at 163. To the best of my knowledge, every federal court that has considered the issue has concluded that, in enacting § 505 (e), Congress meant to preserve federal as well as state common law.[9]

Other sections of the Clean Water Act also support the conclusion that Congress in 1972 had no intention of extinguishing the federal common law of nuisance. Although the Act established a detailed and comprehensive regulatory system aimed at eliminating the discharge of pollutants into all navigable waters, it did not purport to impose a unitary enforcement structure for abating water pollution. In par-

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[9] *E. g., National Sea Clammers Assn.* v. *City of New York*, 616 F. 2d 1222, 1233, n. 31 (CA3), cert. granted, 449 U. S. 917 (1980); *California Tahoe Regional Planning Agency* v. *Jennings*, 594 F. 2d 181, 193 (CA9), cert. denied, 444 U. S. 864 (1979). See also *Illinois* v. *Outboard Marine Corp.*, 619 F. 2d 623, 626 (CA7 1980), cert. pending, No. 80–126; *United States* v. *Atlantic-Richfield Co.*, 478 F. Supp. 1215, 1218–1220 (Mont. 1979); *United States ex rel. Scott* v. *United States Steel Corp.*, 356 F. Supp. 556, 559 (ND Ill. 1973); *United States* v. *Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 149 (Vt. 1972), aff'd, 487 F. 2d 1393 (CA2 1973), cert. denied, 417 U. S. 976 (1974).

The Court relies on *Committee for Consideration of Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006, 1009, n. 9 (CA4 1976), in criticizing the "unlikely assumption" that § 505 (e) preserved anything other than "the more routine state common law." *Ante*, at 329. *Jones Falls* offers no support for this criticism, since it concerned only *intra*state pollution of navigable waters. Indeed, the court there assumed the continued applicability of federal common law where a State sought to vindicate its rights in an interstate controversy, 539 F. 2d, at 1010, but concluded that because the controversy was entirely local, the state common law of nuisance preserved by § 505 (e) furnished the relevant common-law remedy.

ticular, Congress expressly provided that the effluent limitations promulgated under the Act do not preclude any State from establishing more stringent limitations. § 510, 33 U. S. C. § 1370. It also made clear that federal officers or agencies are not foreclosed from adopting or enforcing stricter pollution controls and standards than those required by the Act. § 511 (a), 33 U. S. C. § 1371 (a).

Thus, under the statutory scheme, any permit issued by the EPA or a qualifying state agency does not insulate a discharger from liability under other federal or state law.[10] To the contrary, the permit granted pursuant to § 402 (k), 33 U. S. C. § 1342 (k), confers assurances with respect to certain specified sections of the Act, but the requirements under other provisions as well as separate legal obligations remain unaffected. See *EPA* v. *State Water Resources Control Board,* 426 U. S. 200, 205 (1976). Congress plainly anticipated that dischargers might be required to meet standards more stringent than the minimum effluent levels approved by the EPA. Those more stringent standards would necessarily be established by other statutes or by common law. Because the Act contemplates a shared authority between the Federal Government and the individual States, see, *e. g.,* § 101 (b), 33 U. S. C. § 1251 (b) (1976 ed., Supp. III), it is entirely understandable that Congress thought it neither imperative nor desirable to insist upon an exclusive approach to the improvement of water quality.[11]

The Court offers three responses to this view of congressional intent. With regard to the language of § 505 (e), it attributes critical significance to the words "this section,"

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[10] Cf. *New Jersey* v. *City of New York,* 283 U. S. 473, 477, 482–483 (1931) (compliance with permit requirements of federal statute does not bar injunctive relief in federal nuisance action).

[11] It is significant that elsewhere in the statute, Congress expressly manifested an intention to foreclose the applicability of other laws. See § 312 (f)(1), 33 U. S. C. § 1322 (f)(1). Congress thus demonstrated that it was capable of pre-empting a particular area when it chose to do so.

and concludes that Congress meant only to assure that the *citizen-suit provision* did not extinguish formerly available federal common-law actions. *Ante,* at 328–330. The Court thus reads § 505 (e) as though Congress had said that " 'this section' does not take away any pre-existing remedies, but the remainder of the statute does." This is an extremely strained reading of the statutory language,[12] and one that is at odds with the manifest intent of Congress to permit more stringent remedies under both federal and state law. See §§ 510, 511, 33 U. S. C. §§ 1370, 1371. If § 505 (e) is to be construed as the Court suggests, then it authorizes the abrogation of *all* pre-existing rights, both statutory and common law, in the area of water pollution control. The Court's construction therefore, would render suspect, if not meaningless, the Act's other provisions. Rather than interpreting § 505 (e) as a license to supplant all legal remedies outside the Act itself, I would construe the reference to "this section" as simply preventing pre-existing rights of action from being subjected to the procedural and jurisdictional limitations imposed by § 505 on persons who would sue under the Act.

The Court also relies on certain language contained in the legislative history of the 1972 Amendments. *Ante,* at 317–319. Based on the remarks of several of the Act's proponents that this was the most comprehensive water pollution bill prepared to date, the Court finds a strong congressional suggestion that there is no room for improvement through the federal common law. But there is nothing talismanic about such generalized references. The fact that legislators may characterize their efforts as more "comprehensive" than prior legislation hardly prevents them from authorizing the continued existence of supplemental legal and equitable solutions to the broad and serious problem addressed.[13] More-

[12] The Court points to no other judicial decision that has construed the language of § 505 (e) in this fashion. See n. 9, *supra.*

[13] There is nothing new about federal law in this area being characterized by its proponents as comprehensive. Similar claims were made in

over, the Court ignores express statements of legislative intent that contradict its position. The Senate Report accompanying the 1972 legislation explicitly describes the congressional intent informing § 505 (e):

> "It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 92–414, p. 81 (1971), reprinted in 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 1499 (1973) (Leg. Hist.).[14]

This deliberate preservation of all remedies previously available at common law makes no distinction between the common law of individual States and federal common law. Indeed, the legislative debates indicate that Congress was specifically aware of the presence of federal common law, and intended that it would survive passage of the 1972 Amendments. In one particularly revealing colloquy on the Senate floor, Senator Griffin noted the pendency of a suit challenging the dumping of iron ore pollutants into Lake

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advancing the legislation in place when *Illinois* v. *Milwaukee* was decided. See, *e. g.*, S. Rep. No. 462, 80th Cong., 1st Sess., 1 (1947) ("The purpose of the bill (S. 418) is to provide a comprehensive program for preventing, abating, and controlling water pollution . . ."); 94 Cong. Rec. 8195 (1948) ("The bill provides that the Surgeon General shall encourage a comprehensive program for the control of stream pollution between the States and to secure their cooperation in combating this evil." (Rep. Auchincloss)). That a different Congress, 24 years later, deemed this legislation inadequate (see *ante*, at 318, n. 10), carries no more significance than the postmortems one may expect from the 104th Congress concerning the 1972 Act.

[14] See also H. R. Rep. No. 92–911, pp. 132, 134 (1972), reprinted in 1 Leg. Hist. 819, 821.

Superior. 1 Leg. Hist. 191. See *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492 (CA8 1975) (en banc). The Senator inquired whether the suit, which was based in part on the federal common law of nuisance,[15] would be affected by passage of the 1972 Amendments. Senators Muskie [16] and Hart each responded that the new legislation would not affect or hinder "the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899 . . . [,] the existing Federal Water Pollution Control Act or *other law.*" 1 Leg. Hist. 211 (Sen. Hart) (emphasis added).[17]

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[15] *Id.*, at 191. See *Reserve Mining Co.* v. *EPA*, 514 F. 2d, at 501.

[16] The Court previously has observed that Senator Muskie was perhaps the Act's primary author, and has credited his views accordingly. See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 129 (1977); *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, 71, n. 10 (1980).

[17] See 1 Leg. Hist. 191–194. See also *id.*, at 248 (colloquy between Reps. Dingell and Wright); *id.*, at 252 (Rep. Dingell). The Court, *ante*, at 329–332, elaborately attempts to minimize the fact, recognized by all participants in the Senate colloquy, that the *Reserve Mining* case involved a common-law nuisance count. In seeking assurances that the pending litigation would not be "adversely affect[ed]," Senator Griffin stated explicitly that the lawsuit was based on two pre-existing federal statutes and the common law of public nuisance. 1 Leg. Hist. 190–191. Senator Muskie's final response to Senator Griffin indicated his understanding that the suit as a whole would not be affected by the Act. *Id.*, at 194. Moreover, Senator Hart's reference to "other law" in the *Reserve Mining* case could have pertained only to the common-law counts he had not already mentioned.

This entire discussion of the *Reserve Mining* case was initiated due to Senator Griffin's concern over the possible retroactive effect of § 402 (k) on litigation already commenced. Senators Muskie and Hart, as well as the EPA, took the position that there would be no disruption of the pending action, which had been commenced in February 1972, three months prior to this action. In his letter to Senator Griffin, the EPA General Counsel added a caveat that has obvious significance here:

"[I]t is reasonable to conclude that the courts will not interpret any legislation to deprive them of jurisdiction of pending litigation in the absence of clear and explicit language. There is no such clear and explicit language to this effect in the pending bill." 1 Leg. Hist. 193.

Finally, the Court attaches significance to the fact that the 1972 Amendments provided a more rigorous administrative mechanism for addressing interstate controversies. *Ante,* at 325–326. The Court evidently regards the provision of a new administrative abatement process as a type of jurisdictional requirement, for it criticizes Illinois' failure to invoke the mechanism before seeking any form of judicial relief. *Ante,* at 326. Even if this were the case, the new notice and hearing procedure became available only two years after Illinois commenced this action. There is no suggestion that Illinois failed to pursue administrative abatement under the *then*-applicable federal statute. Indeed, it is undisputed that Illinois made prolonged and diligent efforts to secure administrative relief.[18] Nonetheless, the Court in effect concludes that it is not enough to exhaust administrative remedies that existed at the time a common-law action was initiated; a complainant must also be prepared to pursue new and wholly unforeseen administrative avenues even as it seeks a final judgment in federal court. I am aware of no case that adopts so harsh an approach to the pursuit of administrative remedies, and I see no basis for imposing such a requirement in this context.

Moreover, contrary to what the Court implies, Congress never intended that failure to participate in the § 402 administrative process would serve as a jurisdictional bar. Nothing in the language of § 402 suggests that a neighboring State's participation in the permit-granting process is anything other than voluntary and optional.[19] Indeed, the Con-

[18] Brief for Respondent Illinois 8–9 (describing unsuccessful pursuit of administrative remedies); see 599 F. 2d 151, 158 (CA7 1979) (describing administrative processes under statute before 1972).

[19] As the Court observes, the scheme established by § 402 "provides *a forum* for the pursuit" of a neighboring State's claim that the controls to be imposed are not sufficiently stringent. *Ante,* at 326 (emphasis added). There is nothing inconsistent about making this forum available, and encouraging its use, while at the same time permitting the pursuit of other

ference Committee considering the 1977 amendments to the Act was presented with a proposal that *would* have made such participation a jurisdictional prerequisite.[20] This proposal was not adopted by the Conference Committee, and among its opponents was the Department of Justice. In a letter sent to all conferees, the Department made clear its understanding that, absent such an amendment, the federal common law would continue to be relied upon in the national effort to control water pollution.[21]

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remedies. If there are problems with the efficiency of such an approach, Congress of course is free to modify the statutory scheme.

[20] Following the District Court's ruling in this case, Congressman Aspin of Wisconsin proposed an amendment to § 402:

"Sec. (a) Section 402 of the Federal Water Pollution Control Act is amended by adding at the end thereof the following new subsection:

"'(1) In any case where a State whose waters may be affected by the issuance of a permit under this section fails to submit any recommendations to the permitting State as authorized in subsection (b)(5) of this section, the State failing to make such a submission (and its persons) shall not have standing to bring any action to abate (in whole or in part) as a nuisance under common law in any court of the United States any discharge which would have been the subject of such recommendations.'

"(b) The amendment made by subsection (a) of this section shall be applicable to any action brought to abate (in whole or in part) as a nuisance under common law in any court of the United States any discharge of pollutants, unless a final decision has been rendered prior to the effective date of this amendment." App. to Brief for Respondent Illinois 98a.

The proposal was made after both Houses had debated and passed the 1977 amendments to the Act but before the Conference Committee had met. In his testimony before a House Committee considering the pending bill, Congressman Aspin voiced concern over the recent District Court decision, and suggested that Congress "explicitly express its belief that federal common law has been pre-empted." Hearings before the House Committee on Public Works and Transportation on H. R. 3199, 95th Cong., 1st Sess., 328 (1977).

[21] Letter to Senator Muskie from James Moorman, Assistant Attorney General, Land and Natural Resources Division, Oct. 18, 1977:

"The common law serves to give an injured party who may have been neglected by the statute or by an overburdened enforcing agency a form

The Justice Department's position on the survival of federal common law is consistent with the stance taken by the EPA both in this litigation and throughout the period since the 1972 Amendments were enacted. The EPA in fact has relied upon the federal common law of nuisance in addition to the remedies available under the statute in seeking to protect water quality.[22] As the agency charged with enforcing and implementing the Act, EPA's interpretation of the scope and limits of that statute is entitled to considerable deference. See *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965). Where, as here, the agency has publicly and consistently acted upon its interpretation, congressional silence is not without significance, particularly since this area has been a subject of frequent and intense legislative attention. And where, as here, the agency's continued reliance on federal common law is firmly grounded in the language and structure of the statute, I fail to see how the Court can so lightly disregard its interpretation.

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of redress. *There is no good argument for removing this opportunity for remedy.* The basic principle of the common law of public nuisance is that one is liable for damages caused to another where the benefit of one's action does not outweigh the harm. This is a sound principle. Where it can be shown that pollution has injured someone it should not be a sufficient defense to claim that the generalized standards of a statute have been complied with. Polluters should properly be held to a standard that holds them liable for unnecessarily injuring others and not simply for violating the statutory law. The number of cases under the common law will inevitably be small but where they are meritorious there is no basis for abolishing this cause of action." (Emphasis added.) App. to Brief for Respondent Illinois 101a–103a.

[22] See, *e. g., Illinois* v. *Outboard Marine Corp.,* 619 F. 2d 623 (CA7 1980), cert. pending, No. 80–126; *United States* v. *Hooker Chemicals & Plastic Corp.,* (WDNY No. 79–990, filed Dec. 20, 1979). Several courts have held that the United States can state a claim for relief under the federal common law of nuisance. See, *e. g., United States* v. *Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145 (Vt. 1972), aff'd, 487 F. 2d 1393 (CA2 1973), cert. denied, 417 U. S. 976 (1974); *United States* v. *Solvents Recovery Serv.,* 496 F. Supp. 1127 (Conn. 1980).

III

Assuming that Congress did preserve a federal common law of nuisance, and that respondents properly stated federal common-law claims for relief, there remains the question whether the particular common law applied here was reasonable. Because of its ruling, the Court does not explicitly address this question. Nonetheless, in its detailed review of respondents' claims, the Court in effect concludes that the federal common law applied by the District Court and the Court of Appeals was defective. In particular, the Court asserts that federal courts may not exceed the statutory minimum approach sanctioned by Congress, see *ante,* at 323, and may not use federal power to impose a State's more stringent pollution limitation standards upon out-of-state polluters. See *ante,* at 327–328. In contrast, I believe the courts below acted correctly in both respects.

As the Court of Appeals properly recognized, 599 F. 2d, at 164, the determination by Congress to preserve rights of action at federal common law did not grant federal courts the freedom to disregard the statutory and regulatory structure approved by Congress. We noted in *Illinois* v. *Milwaukee* that "the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, [but] they may provide useful guidelines in fashioning such rules of decision." 406 U. S., at 103, n. 5. These guidelines, however, bear primarily on the problems of proof faced by the parties; they do not determine the exclusive source of the law to be applied.

In this instance, problems of proof arise under a familiar form of common-law action. A public nuisance involves unreasonable interference with a right common to the general public.[23] Drawing on the Court's decision in *Georgia* v. *Ten-*

[23] Restatement (Second) of Torts § 821B (Tent. Draft No. 16, 1970). See generally W. Prosser, Law of Torts 583–591 (4th ed. 1971); W. Rodgers, Environmental Law 102–107 (1977).

nessee Copper Co., 206 U. S., at 238–239, the Court of Appeals concluded that nuisance is established at federal common law only if "the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant." 599 F. 2d, at 165. Whether a particular interference qualifies as unreasonable, whether the injury is sufficiently substantial to warrant injunctive relief, and what form that relief should take are questions to be decided on the basis of particular facts and circumstances.[24] The judgments at times are difficult, but they do not require courts to perform functions beyond their traditional capacities or experience.[25]

When choosing the precise legal principles to apply, common-law courts draw upon relevant standards of conduct available in their communities. Where federal common law is concerned, "th[is] choice-of-law task is a federal task for federal courts." *United States* v. *Little Lake Misere Land Co.*, 412 U. S., at 592. At the same time, while federal law

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[24] See Restatement (Second) of Torts § 821B; Prosser, at 602–606; Note, Federal Common Law in Interstate Water Pollution Disputes, 1973 U. Ill. Law Forum 141, 154–158.

[25] See, *e. g.*, *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492, 506–540 (CA8 1975) (en banc); *United States* v. *Armco Steel Corp.*, 333 F. Supp. 1073, 1079–1084 (SD Tex. 1971); *Commonwealth* v. *Barnes & Tucker Co.*, 455 Pa. 392, 319 A. 2d 871 (1974); *Boomer* v. *Atlantic Cement Co.*, 26 N. Y. 2d 219, 257 N. E. 2d 870 (1970); *People ex rel. Stream Control Comm'n* v. *Port Huron*, 305 Mich. 153, 9 N. W. 2d 41 (1943); *Board of Comm'rs* v. *Elm Grove Mining Co.*, 122 W. Va. 442, 9 S. E. 2d 813 (1940); *Fink* v. *Board of Trustees*, 71 Ill. App. 2d 276, 218 N. E. 2d 240 (1966); *Murphysboro* v. *Sanitary Water Board*, 10 Ill. App. 2d 111, 134 N. E. 2d 522 (1956). Thus, there can be no merit to the Court's suggestion, *ante*, at 325, that the technical difficulty of the subject matter renders inappropriate any recourse to the common law. The complexity of a properly presented federal question is hardly a suitable basis for denying federal courts the power to adjudicate. Indeed, the expert agency charged with administering the Act has not hesitated to invoke this common-law jurisdiction where appropriate.

controls a particular question or problem, state law may furnish an appropriate measure of the content of this federal law. See, *e. g., Board of Comm'rs* v. *United States,* 308 U. S. 343, 349–352 (1939). See also *Textile Workers* v. *Lincoln Mills,* 353 U. S., at 457; *Clearfield Trust Co.* v. *United States,* 318 U. S., at 367. What the Court today characterizes as the inappropriate application of more stringent standards from Illinois state law in fact reflects a federal common-law court's proper exercise of choice-of-law discretion.[26]

The Act sets forth certain effluent limitations. As did the Court of Appeals,[27] a court applying federal common law in a given instance may well decline to impose effluent limitations more stringent than those required by Congress, because the complainant has failed to show that stricter standards will abate the nuisance or appreciably diminish the threat of injury. But it is a far different proposition to pronounce, as does the Court today, that federal courts *"lack authority* to impose more stringent effluent limitations under federal common law than those imposed" under the statutory scheme. *Ante,* at 320 (emphasis added). The authority of the federal courts in this area was firmly established by the decision in *Illinois* v. *Milwaukee.* In delineating the legitimate scope of the federal common law, the Court there expressly noted the relevance of state standards, adding that "a State with high water-quality standards *may well ask that its strict standards be honored and that it not be compelled to lower itself* to the more degrading standards of a neighbor." (Emphasis added.) 406 U. S., at 107. The Act attributes comparable respect to the stricter effluent limita-

[26] Moreover, that the District Court may have abused its discretion is no basis for concluding that state-law standards are irrelevant to the federal common law.

[27] 599 F. 2d, at 167–168. See also unpublished order of the Court of Appeals, App. to Pet. for Cert. B–2 to B–4; unpublished findings of fact and conclusions of law of the District Court, *id.,* at F–1 to F–30.

tion levels imposed by individual States. § 510, 33 U. S. C. § 1370. Since both the Court and Congress fully expected that neighboring States might differ in their approaches to the regulation of the discharge of pollutants into their navigable waters, it is odd, to say the least, that federal courts should now be deprived of the common-law power to effect a reconciliation of these differences.

The problem of controlling overflows is particularly amenable to application of this common-law authority. As the courts below found, see 599 F. 2d, at 167–168, the sewer systems operated by petitioners include some 239 bypass or overflow points from which raw sewage is discharged directly into Lake Michigan or into rivers that flow into the lake. In a single month in 1976, discharge from 11 of the 239 discrete overflow points amounted to some 646 million gallons of untreated sewage. *Ibid.* The trial court determined that these untreated fecal wastes, containing billions of pathogenic bacteria and viruses, are periodically transported by prevailing currents into the Illinois waters of Lake Michigan. The court further found that the presence of these pathogens in Illinois waters poses a significant risk of injury to Illinois residents, threatening to contaminate drinking water supplies and infect swimmers.[28]

Pursuant to the Act, publicly owned treatment works then in existence must apply "secondary treatment as defined by the Administrator" as of July 1, 1977. §§ 301 (b)(1)(B), 304 (d)(1), 33 U. S. C. §§ 1311 (b)(1)(B), 1314 (d)(1).[29]

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[28] There is little to be gained by undertaking an extensive review of the record evidence on these points. The Court of Appeals did this and concluded that the findings at trial were not clearly erroneous. I see no reason to disturb the Court of Appeals' view of the evidence.

[29] Congress in 1977 amended the Act to permit the Administrator to grant extensions of the 1977 deadline under certain conditions. See Pub. L. 95–217, §§ 44, 45, 91 Stat. 1584, 33 U. S. C. §§ 1311 (h) and (i) (1976 ed., Supp. III).

No provision of the Act explicitly addresses the discharge of raw sewage into public waters from overflow points. Indeed, Congress in 1977 expressed concern that combined sewer overflows were a significant source of untreated sewage polluting the Nation's waters, and it commissioned a study of the problem with a view toward possible further legislation.[30] While the Administrator has issued regulations that define secondary treatment in terms of certain minimum levels of effluent quality, he also has acknowledged that combined sewer overflows raise special concerns that must be resolved on a case-by-case basis.[31] This record demonstrates that both Congress and the Administrator recognized the inadequacy of the statutory scheme. It surely does not show that these responsible parties intended no role for the federal common law.

The lower courts in this case carefully evaluated the regulatory systems developed by each State to deal with the overflow problem. It was determined that the standards promulgated under the Illinois regulatory scheme were more stringent than those developed by the Wisconsin agency or imposed on petitioners under the Wisconsin state-court judgment. See 599 F. 2d, at 171–173. The District Court's order imposed standards that reflected the more rigorous approach adopted in Illinois to restore and protect Illinois

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[30] Pub. L. 95–217, § 70, 91 Stat. 1608. See S. Rep. No. 95–370, p. 81 (1977). The study was issued in October 1978. See EPA, Report to Congress on Control of Combined Sewer Overflow in the United States (MCD–50, 1978).

[31] See 40 CFR §§ 133.102 and 133.103 (1980). In addition, sewers and pipes that do not lead to a treatment facility are not considered "publicly owned treatment works" for purposes of § 301, 33 U. S. C. § 1311. See 40 CFR § 122.3, p. 70 (1980). In the absence of technology-based treatment requirements for combined sewer overflows, the Administrator mandates an individualized analysis by each system that seeks federal assistance. See EPA, Benefit Analysis for Combined Sewer Overflow Control 3 (1979).

waters.[32] The Court of Appeals noted that Wisconsin had allowed petitioners more time in which to eliminate or "correct" the overflow problem, but that petitioners conceded the feasibility of complying with the District Court's deadlines. *Id.*, at 172, 177. In my view, the Court of Appeals acted responsibly and in a manner wholly consistent with the common-law jurisdiction envisioned by the Court in *Illinois* v. *Milwaukee.*

IV

There is one final disturbing aspect to the Court's decision. By eliminating the federal common law of nuisance in this area, the Court in effect is encouraging recourse to state law wherever the federal statutory scheme is perceived to offer inadequate protection against pollution from outside the State, either in its enforcement standards or in the remedies afforded. This recourse is now inevitable under a statutory scheme that accords a significant role to state as well as federal law. But in the present context it is also unfortunate, since it undermines the Court's prior conclusion that it is federal rather than state law that should govern the regulation of *inter*state water pollution. *Illinois* v. *Milwaukee,* 406 U. S., at 102. Instead of promoting a more uniform federal approach to the problem of alleviating interstate pollution, I fear that today's decision will lead States to turn to their

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[32] While the Wisconsin permit-granting agency and the Wisconsin state courts devised one approach to regulating combined sewer overflows in the Milwaukee system, this alone does not establish that the applicable legal standard under federal common law is the one adopted by Wisconsin. To hold otherwise would in effect nullify a neighboring State's more stringent pollution control standards even in circumstances where, as here, a significant risk of harm to the neighboring State's citizenry has been established; if a polluting State is not violating its own approved standards, a neighboring State with higher standards then has no recourse under the Act. It is in precisely this context that the Court recognized the significance of federal common law. *Illinois* v. *Milwaukee,* 406 U. S., at 107–108.

own courts for statutory or common-law assistance in filling the interstices of the federal statute. Rather than encourage such a prospect, I would adhere to the principles clearly enunciated in *Illinois* v. *Milwaukee*, and affirm the judgment of the Court of Appeals.

Syllabus

BALL ET AL. *v.* JAMES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–1740. Argued February 23, 1981—Decided April 29, 1981

The Salt River Project Agricultural Improvement and Power District (District), a governmental entity, stores and delivers untreated water to the owners of 236,000 acres of land in central Arizona, and, to subsidize its water operations, sells electricity to hundreds of thousands of people in an area including a large part of metropolitan Phoenix. Under state law, the system for electing the District's directors limits voting eligibility to landowners and apportions voting power according to the number of acres owned. A class of registered voters living within the District but owning either no land or less than an acre of land there, filed suit, claiming that the election scheme violated the Equal Protection Clause of the Fourteenth Amendment. They alleged that because the District has such governmental powers as the authority to condemn land and sell tax-exempt bonds, and because it sells electricity to virtually half the State's population and exercises significant influence on flood control and environmental management, its policies and actions substantially affect all District residents, regardless of property ownership. The District Court upheld the constitutionality of the voting scheme, but the Court of Appeals reversed. It held that the case was governed by the one-person, one-vote principle established in *Reynolds* v. *Sims,* 377 U. S. 533, rather than by the exception to that principle established in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.,* 410 U. S. 719, which upheld a state law permitting only landowners to vote for directors of a water district because of its special limited purpose and the disproportionate effect of its activities on landowners as a group.

Held: The District's purpose is sufficiently specialized and narrow and its activities bear on landowners so disproportionately as to release it from the strict demands of the *Reynolds* principle. As in *Salyer, supra,* the voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives. Pp. 362–371.

(a) The distinctions between the more diverse and extensive services furnished by the District here and those furnished by the water district involved in *Salyer, supra,* do not amount to a constitutional difference. The District does not exercise the sort of governmental

powers that invoke the strict demands of *Reynolds*. It cannot impose ad valorem property taxes or sales taxes or enact laws governing citizens' conduct. Nor does it administer normal government functions such as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services. Pp. 365–366.

(b) The District's water functions, which constitute its primary and originating purpose, are relatively narrow. Although unlike in *Salyer*, as much as 40% of the water delivered by the District goes for nonagricultural, urban purposes, the constitutionally relevant fact is that all water is distributed according to land ownership and the District cannot control the use to which the water is put by the landowners. Pp. 367–368.

(c) Nor is the legality of the District's property-based voting scheme affected by the fact that as one of the largest suppliers of electric power in the State it meets most of its capital and operating costs by the selling of such power. The provision of electricity is not in itself the sort of general or important governmental function that would make the government provider subject to the *Reynolds* doctrine. And, in any event, the District's electric power functions are only incidental to, and thus cannot change the character of, its water functions. Pp. 368–370.

(d) And the District's functions bear a disproportionate relationship to the specific class of people whom the system makes eligible to vote. Voting landowners are the only residents of the District whose lands are subject to liens to secure District bonds, who are subject to the District's acreage-based taxing power, and who committed capital to the District. Pp. 370–371.

613 F. 2d 180, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 372. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 374.

Rex E. Lee argued the cause for appellants. With him on the briefs were *Jon L. Kyl* and *Neil Vincent Wake*.

Bruce Meyerson argued the cause for appellees. With him on the brief was *Amy J. Gittler*.*

**Noel Fidel* filed a brief for the Arizona Civil Liberties Union et al. as *amici curiae* urging affirmance.

JUSTICE STEWART delivered the opinion of the Court.

This appeal concerns the constitutionality of the system for electing the directors of a large water reclamation district in Arizona, a system which, in essence, limits voting eligibility to landowners and apportions voting power according to the amount of land a voter owns. The case requires us to consider whether the peculiarly narrow function of this local governmental body and the special relationship of one class of citizens to that body releases it from the strict demands of the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment.

I

The public entity at issue here is the Salt River Project Agricultural Improvement and Power District, which stores and delivers untreated water to the owners of land comprising 236,000 acres in central Arizona.[1] The District, formed as a governmental entity in 1937, subsidizes its water operations by selling electricity, and has become the supplier of electric power for hundreds of thousands of people in an area including a large part of metropolitan Phoenix. Nevertheless, the history of the District began in the efforts of Arizona farmers in the 19th century to irrigate the arid lands of the Salt River Valley, and, as the parties have stipulated, the primary purposes of the District have always been the storage, delivery, and conservation of water.

As early as 1867, farmers in the Salt River Valley attempted to irrigate their lands with water from the Salt River. In 1895, concerned with the erratic and unreliable flow of the river, they formed a "Farmers Protective Association," which helped persuade Congress to pass the Reclamation Act of 1902, 32 Stat. 388, 43 U. S. C. § 371 *et seq.* Under

[1] The review in this opinion of the history, organization, functions, and financing of the District is drawn from the stipulation of facts in the District Court.

that Act, the United States gave interest-free loans to help landowners build reclamation projects. The Salt River Project, from which the District developed, was created in 1903 as a result of this legislation. In 1906, Congress authorized projects created under the Act to generate and sell hydroelectric power, 43 U. S. C. § 522, and the Salt River Project has supported its water operations by this means almost since its creation. The 1902 Act provided that the water users who benefited from the reclamation project had to agree to repay to the United States the costs of constructing the project, and the Salt River Valley Water Users Association was organized as an Arizona corporation in 1903 to serve as the contracting agent for the landowners. The Association's Articles, drafted in cooperation with the Federal Reclamation Service, gave subscribing landowners the right to reclamation water and the power to vote in Association decisions in proportion to the number of acres the subscribers owned. The Articles also authorized acreage-proportionate stock assessments to raise income for the Association, the assessments becoming a lien on the subscribing owners' land until paid. For almost 15 years, the Federal Reclamation Service operated and maintained the project's irrigation system for the landowners; under a 1917 contract with the United States, however, the Association itself took on these tasks, proceeding to manage the project for the next 20 years.

The Association faced serious financial difficulties during the Depression as it built new dams and other works for the project, and it sought a means of borrowing money that would not overly encumber the subscribers' lands. The means seemed to be available in Arizona's Agricultural Improvement District Act of 1922, which authorized the creation of special public water districts within federal reclamation projects. Ariz. Rev. Code of 1928, § 3467 *et seq.* Such districts, as political subdivisions of the State, could issue bonds exempt from federal income tax. Nevertheless, many Association members opposed creating a special district for

the project, in part because the state statute would have required that voting power in elections for directors of the district be distributed per capita among landowners, and not according to the acreage formula for stock assessments and water rights. In 1936, in response to a request from the Association, the state legislature amended the 1922 statute. Under the new statutory scheme, which is essentially the one at issue in this case, the legislature allowed the district to limit voting for its directors to voters, otherwise regularly qualified under state law, who own land within the district, and to apportion voting power among those landowners according to the number of acres owned. Ariz. Rev. Stat. Ann. §§ 45–909, 45–983 (Supp. 1980–1981).[2] The Salt River Project Agricultural Improvement and Power District was then formed in 1937, its boundaries essentially the same as the Association's. Under the 1937 agreement, the Association made the District its contracting agent, and transferred to the District all its property, and the Association in turn agreed to continue to operate and maintain the Salt River Project. Under the current agreement, the District itself manages the power and water storage work of the project, and the Association, as agent for the District, manages water delivery. As for financing, the statute now permits the special districts to

[2] In recent years, the method of electing the Board of Directors has departed somewhat from the strict one-acre, one-vote system originally used by the Association and the District. In 1969 the state legislature amended the Agricultural Improvement Act to permit owners of less than one acre to cast fractional votes in proportion to their acreage. Ariz. Rev. Stat. Ann. § 45–983C (Supp. 1980–1981). A second change had to do with the membership of the Board of Directors itself. Before 1976, there were 10 directors, each elected from a designated geographical part of the District. In 1976, after the District Court had dismissed the complaint in this case, the state legislature enlarged the Board to 14 members and provided that the 4 new members were to be elected at large, with each landowner in the District having one vote in the at-large election. Ariz. Rev. Stat. Ann. §§ 45–961B, 45–963 (Supp. 1980–1981). Each special water district also has a President and Vice President, elected at large on an acreage-weighted basis. § 45–963.

raise money through an acreage-proportionate taxing power that mirrors the Association's stock assessment scheme, Ariz. Rev. Stat. Ann. §§ 45–1014, 45–1015 (1956), or through bonds secured by liens on the real property within the District, though the bonds can simultaneously be secured by District revenues, Ariz. Rev. Stat. Ann. § 45–936 (Supp. 1980–1981).

II

This lawsuit was brought by a class of registered voters who live within the geographic boundaries of the District, and who own either no land or less than an acre of land within the District. The complaint alleged that the District enjoys such governmental powers as the power to condemn land, to sell tax-exempt bonds, and to levy taxes on real property. It also alleged that because the District sells electricity to virtually half the population of Arizona, and because, through its water operations, it can exercise significant influence on flood control and environmental management within its boundaries, the District's policies and actions have a substantial effect on all people who live within the District, regardless of property ownership. Seeking declaratory and injunctive relief, the appellees claimed that the acreage-based scheme for electing directors of the District violates the Equal Protection Clause of the Fourteenth Amendment.

On cross-motions for summary judgment and on stipulated facts, the District Court for the District of Arizona held the District voting scheme constitutional and dismissed the complaint. A divided panel of the Court of Appeals for the Ninth Circuit reversed. 613 F. 2d 180. Noting this Court's repeated application of the one-person, one-vote principle established in *Reynolds* v. *Sims,* 377 U. S. 533, the Court of Appeals turned its attention to the case in which this Court marked a significant exception to that principle by upholding a state law permitting only landowners to vote in the election of directors of a water district: *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U. S. 719. The deci-

sion in *Salyer* resulted from this Court's examination of the nature of the services provided by the water district in that case, and its conclusion that "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group," the water district there was not subject to the strict one-person, one-vote demands of the *Reynolds* decision. 410 U. S., at 728. Accordingly, the Court of Appeals considered the constitutionality of the Salt River District's electoral system by comparing the purposes and effects of the activities of the Salt River District with those of the Tulare Lake Basin Water Storage District.

The Court of Appeals stressed that the water district in *Salyer* covered a sparsely populated area of wholly agricultural land. 613 F. 2d, at 183. It also noted that the primary function of the Tulare Lake Basin Water Storage District had remained the storage and delivery of water for agriculture, and that the district did not provide such other general public services as utilities. *Ibid.* Finally, the Court of Appeals pointed out that the income for the district in *Salyer* came completely from assessments against the landowners. 613 F. 2d, at 183. The Court of Appeals found the Salt River District, at least in its modern form, very different. It pointed out that the Salt River District is a major generator and supplier of hydroelectric power in the State, and that roughly 40% of the water it delivers goes to urban areas for nonagricultural uses. *Id.*, at 183–184. The court therefore concluded that the Salt River District does not serve the sort of special, narrow purpose that proved decisive in *Salyer*. 613 F. 2d, at 183–184. Moreover, though it recognized that the District has $290 million of general obligation bonds outstanding that are secured by a lien on lands owned by the voting members, the Court of Appeals found it significant that all the general obligation bonds have so far been serviced out of the District's electricity revenues, and that all capital improvements have been financed by revenue bonds, which have been issued in the amount of $600 million, and

which are junior to the general obligation bonds. *Id.*, at 184. The court thus concluded that the actual financial burden of running the District has not fallen primarily on the voting landowners, and therefore that the activities of this water district, unlike those of the district in *Salyer*, do not disproportionately affect landowners as such. 613 F. 2d, at 184–185.[3]

The Court of Appeals was correct in conceiving the question in this case to be whether the purpose of the District is sufficiently specialized and narrow and whether its activities bear on landowners so disproportionately as to distinguish the District from those public entities whose more general governmental functions demand application of the *Reynolds* principle. We conclude, however, that, in its efforts to distinguish *Salyer* the Court of Appeals did not apply these criteria correctly to the facts of this case.

III

Reynolds v. *Sims, supra,* held that the Equal Protection Clause requires adherence to the principle of one-person, one-vote in elections of state legislators. *Avery* v. *Midland County,* 390 U. S. 474, extended the *Reynolds* rule to the election of officials of a county government, holding that the elected officials exercised "general governmental powers over

[3] In holding that the one-person, one-vote principle of *Reynolds* applies to the Salt River District, the Court of Appeals stressed the scope of the District's power operations and the diversity of its water operations, and rejected the appellees' argument that the power operations are essentially business activities incidental to the District's narrow primary purpose of storing and delivering water: "[T]he scale of the District's operations simply does not permit the interpretation that the electric utility is a side venture that the District dabbles in to pick up a little extra money in order to benefit the landowners. The operation of the utility has taken on independent significance. . . . The electric utility operations of the District are so substantial in scope and are so closely interwoven with the water delivery functions of the District that it is not a special limited purpose district whose operations have a disproportionate effect on landowners as a class." 613 F. 2d, at 184–185.

the entire geographic area served by the body." 390 U. S., at 485.[4] The Court, however, reserved any decision on the application of *Reynolds* to "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents." 390 U. S., at 483–484.[5] In *Hadley* v. *Junior College District,* 397 U. S. 50, the Court extended *Reynolds* to the election of trustees of a community college district because those trustees "exercised general governmental powers" and "perform[ed] important governmental functions" that had significant effect on all citizens residing within the district. 397 U. S., at 53–54. But in that case the Court stated: "It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required . . . ." *Id.,* at 56.[6]

The Court found such a case in *Salyer.* The Tulare Lake Basin Water Storage District involved there encompassed 193,000 acres, 85% of which were farmed by one or another of four corporations. *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U. S., at 723. Under California law, public water districts could acquire, store, conserve, and distribute water, and though the Tulare Lake Basin Water

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[4] Among the duties of the County Commissioners Court in *Avery* were establishing courthouses and jails, appointing health officials, building roads and bridges, administering welfare, setting the county tax rate, adopting the county budget, and equalizing tax assessments. 390 U. S. at 476.

[5] "[T]he Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Id.,* at 485.

[6] The Court held that the Junior College District in *Hadley* did not fall within this exception because "[e]ducation has traditionally been a vital governmental function, and these . . . are governmental officials in every relevant sense of that term." 397 U. S., at 56.

Storage District had never chosen to do so, could generate and sell any form of power it saw fit to support its water operations. *Id.*, at 723–724. The costs of the project were assessed against each landowner according to the water benefits the landowner received. *Id.*, at 724. At issue in the case was the constitutionality of the scheme for electing the directors of the district, under which only landowners could vote, and voting power was apportioned according to the assessed valuation of the voting landowner's property. The Court recognized that the Tulare Lake Basin Water Storage District did exercise "some typical governmental powers," including the power to hire and fire workers, contract for construction of projects, condemn private property, and issue general obligation bonds. *Id.*, at 728, and n. 7. Nevertheless, the Court concluded that the district had "relatively limited authority," because "its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin." *Id.*, at 728 (footnote omitted). The Court also noted that the financial burdens of the district could not but fall on the landowners, in proportion to the benefits they received from the district, and that the district's actions therefore disproportionately affected the voting landowners. *Id.*, at 729.[7] The *Salyer* Court thus held that the strictures of *Reynolds* did not apply to the Tulare District, and proceeded to inquire simply whether the statutory voting scheme based on land valuation at least bore some relevancy to the statute's objectives.[8]

[7] On the same day it decided *Salyer*, the Court upheld a similar scheme in Wyoming, under which the voters in a referendum on the creation of a water district had to be landowners, and in which the decision to create the district required the votes of landowners representing a majority of the acreage of the lands within the proposed district. *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement Dist.*, 410 U. S. 743 (*per curiam*).

[8] In *Kramer* v. *Union Free School District No. 15*, 395 U. S. 621, 627, the Court stated that the exclusion of otherwise qualified voters from a par-

The Court concluded that the California Legislature could have reasonably assumed that without voting power apportioned according to the value of their land, the landowners might not have been willing to subject their lands to the lien of the very assessments which made the creation of the district possible. 410 U. S., at 731.

As noted by the Court of Appeals, the services currently provided by the Salt River District are more diverse and affect far more people than those of the Tulare Lake Basin Water Storage District. Whereas the Tulare District included an area entirely devoted to agriculture and populated by only 77 persons, the Salt River District includes almost half the population of the State, including large parts of Phoenix and other cities. Moreover, the Salt River District, unlike the Tulare District, has exercised its statutory power to generate and sell electric power, and has become one of the largest suppliers of such power in the State. Further, whereas all the water delivered by the Tulare District went for agriculture, roughly 40% of the water delivered by the Salt River District goes to urban areas or is used for nonagricultural purposes in farming areas.[9] Finally whereas all operating costs of the Tulare District were born by the voting landowners through assessments apportioned according to land value, most of the capital and operating costs of the Salt River District have been met through the revenues gen-

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ticular election must be justified by some compelling state interest. But in considering whether the voting scheme for the Tulare Lake Basin Water Storage District bore some relevancy to the purpose for which the scheme was adopted, *Salyer* imposed no such requirement.

[9] Approximately 15% of the water delivered by the District is used in farming areas for nonagricultural irrigation purposes such as schools, playgrounds, and parks. Another 25% is delivered to municipalities. Of the latter, some belongs to the municipalities themselves as landowners, and some belongs to landowning city residents who have chosen the cities as their receiving agents.

erated by the selling of electric power.[10] Nevertheless, a careful examination of the Salt River District reveals that, under the principles of the *Avery, Hadley,* and *Salyer* cases, these distinctions do not amount to a constitutional difference.

First, the District simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds.* The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.[11]

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[10] As the Court of Appeals noted, the District has $290 million of general obligation bonds outstanding that are secured by the statutory lien on District lands, but the bonds have been serviced entirely out of the District's power earnings, and since 1973 all borrowing for capital improvements has been secured by pledges of revenues. The District now has outstanding $600 million of these revenue bonds, which are junior to the general obligation bonds. The voting landowners have also committed some capital to the Salt River Project, through stock assessments charged by the Association, but the Association last exercised its assessment power in 1951.

[11] In *Salyer,* we recognized that the powers to contract for and staff projects, to condemn property, and to issue bonds do not amount to such general governmental authority. 410 U. S., at 728, n. 8. And as recognized by the dissenting opinion in the companion case to *Salyer,* the power to levy and collect special assessments also does not create such general governmental authority. *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement Dist., supra,* at 749 (Douglas, J.).

In other cases, the Court has found invalid state laws tying voting eligibility to property ownership in elections to approve issuance of bonds to finance a city library, *Hill* v. *Stone,* 421 U. S. 289, and a municipal utility, *Cipriano* v. *City of Houma,* 395 U. S. 701 (*per curiam*), and to issue general obligation bonds secured by a lien on real property, *Phoenix* v. *Kolodziejski,* 399 U. S. 204. In those cases, however, the elections concerned the operations of traditional municipalities exercising the full range of normal governmental powers, and so the cases do not bear on the question of a special-purpose governmental entity like the

Second, though they were characterized broadly by the Court of Appeals, even the District's water functions, which constitute the primary and originating purpose of the District, are relatively narrow. The District and Association do not own, sell, or buy water, nor do they control the use of any water they have delivered. The District simply stores water behind its dams, conserves it from loss, and delivers it through project canals.[12] It is true, as the Court of Appeals noted, that as much as 40% of the water delivered by the District goes for nonagricultural purposes. But the distinction between agricultural and urban land is of no special constitutional significance in this context. The constitutionally relevant fact is that all water delivered by the Salt River District, like the water delivered by the Tulare Lake Basin Water Storage District, is distributed according to land ownership,[13] and the District does not and cannot control the use to

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Salt River District. See *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U. S., at 727.

[12] The appellees have alleged that the District's power over flood control affects all residents within District boundaries and therefore represents the sort of important governmental function that invokes the *Reynolds* one-person, one-vote doctrine. However, as we held in *Salyer,* where such a power over flood control is incidental to a District's primary water functions, it is not of decisive constitutional significance. 410 U. S., at 728, n. 8. Indeed, in both the *Salyer* and *Associated Enterprises, Inc.,* cases, control of erosion and flooding was one of the express statutory purposes of the water districts; the Salt River District has no such express statutory power, and so any influence it exerts over flood control is simply an effect of the exercise of its more limited statutory water functions.

[13] The Court of Appeals slightly misconstrued the facts in stating that a significant portion of water delivered by the District "is used and paid for in a manner unrelated to agriculture *or land ownership.*" 613 F. 2d, at 184 (emphasis added). Though some landowning city residents have designated their cities as contracting agents to receive their water allotments, see n. 9, *supra,* the stipulated facts show that all entitlement to water in the District derives from land ownership, whether rights to surface water appurtenant to land or acreage-based entitlements to stored water.

which the landowners who are entitled to the water choose to put it. As repeatedly recognized by the Arizona courts, though the state legislature has allowed water districts to become nominal public entities in order to obtain inexpensive bond financing, the districts remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners. *Niedner* v. *Salt River Project Agricultural Improvement and Power Dist.*, 121 Ariz. 331, 590 P. 2d 447; *Uhlmann* v. *Wren*, 97 Ariz. 366, 374, 401 P. 2d 113, 124; *Local 266, I. B. E. W.* v. *Salt River Project Agricultural Improvement and Power Dist.*, 78 Ariz. 30, 41–42, 275 P. 2d 393, 402. As in *Salyer*, the nominal public character of such an entity cannot transform it into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election.[14]

Finally, neither the existence nor size of the District's power business affects the legality of its property-based voting scheme. As this Court has noted in a different context, the provision of electricity is not a traditional element of governmental sovereignty, *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 353, and so is not in itself the sort of general or important governmental function that would make the government provider subject to the doctrine of the *Reynolds* case.[15] In any event, since the electric power functions were stipulated to be incidental to the water functions which are the District's primary purpose, they cannot change

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[14] Significantly, though the District's nominal status as a governmental body technically exempts it from state taxes, it makes ad valorem contributions to the state treasury according to the same formula by which the State's private utilities pay property taxes. Ariz. Rev. Stat. Ann. § 45–2201 *et seq.* (Supp. 1980–1981).

[15] The Tulare Lake Basin Water Storage District in *Salyer* had the statutory power to generate and sell electricity at any time and in any manner, 410 U. S., at 724, but that fact did not alter the Court's view that the district's purpose was too narrow to invoke the *Reynolds* principle.

the character of that enterprise.[16] The Arizona Legislature permitted the District to generate and sell electricity to subsidize the water operations, which were the beneficiaries intended by the statute.[17] A key part of the *Salyer* decision was that the voting scheme for a public entity like a water district may constitutionally reflect the narrow primary purpose for which the district is created. In this case, the parties have stipulated that the primary legislative purpose of the District is to store, conserve, and deliver water for use by District landowners, that the sole legislative reason for making water projects public entities was to enable them to raise revenue through interest-free bonds, and that the development and sale of electric power was undertaken not for the primary purpose of providing electricity to the public, but "to support the primary irrigation functions by supplying power for reclamation uses and by providing revenues which could be applied to increase the amount and reduce the cost of water to Association subscribed lands."

The appellees claim, and the Court of Appeals agreed, that the sheer size of the power operations and the great

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[16] The stipulated facts show that, measured as a percentage of gross-power revenues, the amount of District revenues used to support the water operations is roughly equal to the sum of the dividends paid to common stockholders in a comparable private electric utility.

[17] As stated by the Arizona Supreme Court:

"Most municipal corporations are owned by the public and managed by public officials. . . . Such is not the case here. . . . The public does not own the District. The governmental entity such as a city or town does not manage or benefit from the profits of this District. Instead, the owners are private landholders. The profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit. The public interest is merely that of consumers of its product, for which they pay. . . . The District does not function to 'serve the whole people' but rather the District operates for the benefit of these 'inhabitants of the district' who are private owners." *Local 266, I. B. E. W.* v. *Salt River Agricultural Improvement and Power Dist.*, 78 Ariz. 30, 44, 275 P. 2d 393, 402–403.

number of people they affect serve to transform the District into an entity of general governmental power. But no matter how great the number of nonvoting residents buying electricity from the District, the relationship between them and the District's power operations is essentially that between consumers and a business enterprise from which they buy.[18] Nothing in the *Avery, Hadley,* or *Salyer* cases suggests that the volume of business or the breadth of economic effect of a venture undertaken by a government entity as an incident of its narrow and primary governmental public function can, of its own weight, subject the entity to the one-person, one-vote requirements of the *Reynolds* case.

The functions of the Salt River District are therefore of the narrow, special sort which justifies a departure from the popular-election requirement of the *Reynolds* case. And as in *Salyer,* an aspect of that limited purpose is the disproportionate relationship the District's functions bear to the specific class of people whom the system makes eligible to vote. The voting landowners are the only residents of the District whose lands are subject to liens to secure District bonds. Only these landowners are subject to the acreage-based taxing power of the District, and voting landowners are the only residents who have ever committed capital to the District through stock assessments charged by the Association.[19]

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[18] Indeed, this consumer-business relationship is somewhat obscured by the appellees' claim of standing. The stipulated facts show that the District delivers 15% of its electric power to customers outside the District boundaries, and that 15% of lands within the District receive electricity from a private utility, rather than the District. Thus, if the appellees' claim of a constitutional right to vote for directors of the District rests on their relationship to the power functions of the District, they represent the wrong class of putative voters.

[19] The Court of Appeals found it significant that 98% of the District's revenues come from sales of electricity, and only 2% from charges assessed for water deliveries. 613 F. 2d., at 184. This fact in no way affects the constitutionality of the voting scheme. When the consumers of electricity

The *Salyer* opinion did not say that the selected class of voters for a special public entity must be the only parties at all affected by the operations of the entity, or that their entire economic well-being must depend on that entity. Rather, the question was whether the effect of the entity's operations on them was disproportionately greater than the effect on those seeking the vote.[20]

As in the *Salyer* case, we conclude that the voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives. Here, according to the stipulation of the parties, the subscriptions of land which made the Association and then the District possible might well have never occurred had not the subscribing landowners been assured a special voice in the conduct of the District's business. Therefore, as in *Salyer,* the State could rationally limit the vote to landowners. Moreover, Arizona could rationally make the weight of their vote dependent upon the number of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District's water operations.[21]

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supply those power revenues, they are simply buying electricity; they are neither committing capital to the District nor committing any of their property as security for the credit of the District.

[20] The appellees, of course, are qualified voters in Arizona and so remain equal participants in the election of the state legislators who created and have the power to change the District.

[21] It in no way upsets the rationality of this scheme that the 40% of District acreage owned by corporations and municipalities is not voted at all. The lands owned by the corporations and cities are exclusively streets, alleys, canal rights of way, and the bed of the Salt River. Moreover, those lands are not subject to the District's acreage-based taxing power. Finally, it can hardly be said that the legislature acted irrationally in limiting voting eligibility to landowners who were otherwise qualified electors under state law.

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

It is so ordered.

JUSTICE POWELL, concurring.

I concur fully in the Court's opinion, and write separately only to emphasize the importance to my decision of the Arizona Legislature's control over voting requirements for the Salt River District.

The Court previously has held that when a governmental entity exercises functions that are removed from the core duties of government and disproportionately affect a particular group of citizens, that group may exercise more immediate control over the management of the entity than their numbers would dictate. *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U. S. 719 (1973). See *Hadley* v. *Junior College District,* 397 U. S. 50, 56 (1970); *Avery* v. *Midland County,* 390 U. S. 474, 483–484 (1968). This rule is consistent with the principle of "one person, one vote" applicable to the elections of bodies that exercise general governmental powers. *Reynolds* v. *Sims,* 377 U. S. 533 (1964). The Salt River District is a governmental entity only in the limited sense that the State has empowered it to deal with particular problems of resource and service management. The District does not exercise the crucial powers of sovereignty typical of a general purpose unit of government, such as a State, county, or municipality.[1]

[1] The Court has held that school boards must be elected on a strictly majoritarian basis. *Hadley* v. *Junior College District,* 397 U. S. 50 (1970); *Kramer* v. *Union Free School District No. 15,* 395 U. S. 621 (1969). These cases reflect the Court's judgment as to the unique importance of education among the functions of modern local government. See *Brown* v. *Board of Education,* 347 U. S. 483, 493 (1954). Cf. *Holt Civic Club* v. *Tuscaloosa,* 439 U. S. 60 (1978) (nonresidents may be subject to

Our cases have recognized the necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities. *E. g., Holt Civic Club* v. *Tuscaloosa,* 439 U. S. 60, 71–72 (1978). As this case illustrates, it may be difficult to decide when experimentation and political compromise have resulted in an impermissible delegation of those governmental powers that generally affect all of the people to a body with a selective electorate. But state legislatures, responsive to the interests of all the people, normally are better qualified to make this judgment than federal courts.[2] Given the broad reforms effected by *Reynolds* v. *Sims,* we should expect that a legislature elected on the rule of one person, one vote will be vigilant to prevent undue concentration of power in the hands of undemocratic bodies. The absence of just such a political safeguard was a major justification for the Court's role in requiring legislative reapportionment. See *Baker* v. *Carr,* 369 U. S. 186, 258–259 (1962) (Clark, J., concurring).

The Court's opinion convincingly demonstrates that the powers exercised by the Salt River District are not powers that always must be exercised by a popularly elected body. *Ante,* at 366–371. Both storage and delivery of water are functions that in other areas of the Nation are performed by private or administrative bodies. These tasks sometimes are performed by an elected government entity, because of the aridity of the Southwest, federal water policy, and the his-

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"police jurisdiction" of neighboring city without being constitutionally entitled to vote in the city).

[2] The Court deprecated the significance of control of voting requirements for a special-purpose election by a fairly elected legislature in *Kramer, supra,* at 628. See also *Avery* v. *Midland County,* 390 U. S. 474, 481, n. 6 (1968). The holding in *Kramer* is affected neither by *Salyer* nor by the decision of the Court today, see n. 1, *supra,* but it must be evident that some of the reasoning in that case has been questioned. See, *e. g., ante,* at 364–365, n. 8.

torical interest of Arizona landowners in irrigation, not because of their inherent character nor an insistent demand that the people as a whole decide how much water each will receive or how much each will pay for electricity.

Appellees argue that control of water is of prime importance in the Southwest and that many people purchase electricity from the District. These observations raise the question whether this Court should interfere with the constitution of the District, but do not answer it. The Arizona Legislature recently has demonstrated its control over the electoral processes of the District. It has reformed the District to increase the political voice of the small householder at the expense of the large landholder. *Ante,* at 359, n. 2. This reform no doubt reflects political and demographic changes in Arizona since the District was established.

The authority and will of the Arizona Legislature to control the electoral composition of the District are decisive for me in this case. The District is large enough and the resources it manages are basic enough that the people will act through their elected legislature when further changes in the governance of the District are warranted. We should allow the political process to operate. For this Court to dictate how the Board of the District must be elected would detract from the democratic process we profess to protect.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

In concluding that the District's "one-acre, one-vote" scheme is constitutional, the Court misapplies the limited exception recognized in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U. S. 719 (1973), on the strained logic that the provision of water and electricity to several hundred thousand citizens is a "peculiarly narrow function." Because the Court misreads our prior cases and its opinion is conceptually unsound, I dissent.

I

The right to vote is of special importance because the franchise acts to preserve "other basic civil . . . rights." *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964). It is presumed that "when all citizens are affected in important ways by a governmental decision," the Fourteenth Amendment "does not permit . . . the exclusion of otherwise qualified citizens from the franchise." *Phoenix* v. *Kolodziejski,* 399 U. S. 204, 209 (1970). Any state statute granting the franchise to residents on a selective basis poses the "danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Kramer* v. *Union Free School District No. 15,* 395 U. S. 621, 627 (1969).[1] See *Avery* v. *Midland County,* 390 U. S. 474 (1968). As a result, any classification restricting the franchise, except those involving residence, age, or citizenship, is unconstitutional "unless the district or State can demonstrate that the classification serves a compelling state interest." *Hill* v. *Stone,* 421 U. S. 289, 297 (1975). See *Kramer, supra,* at 626–627; *Phoenix, supra,* at 209 (giving power to property owners alone "can be justified only by some overriding interest of those owners that the State is entitled to recognize").

This fundamental principle has been applied in a variety of contexts to invalidate discriminatory election schemes limiting the franchise, in whole or in part, to property owners. In *Kramer,* the Court found invidious a system for local school district elections which limited eligibility to those who either (1) owned or leased taxable realty in the locality; or (2) were parents or custodians of children enrolled in the local public

[1] States, of course, have substantial latitude in structuring local government, and nonlegislative positions need not be elected at all. *Kramer* v. *Union Free School District No. 15,* 395 U. S., at 629. But once a State provides for elections, the Fourteenth Amendment requires that any discriminations be scrutinized under the principles enunciated in *Kramer* and its progeny.

schools. In *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), a case with particular relevance to the present action, the Court invalidated a state law which limited participation in a bond election for the support of a municipal utility system to property holders. The revenue bonds, secured by funds generated by the utility system itself, did not create any enforceable lien against any property in the city. *Id.,* at 705. Noting that the impact fell on property and nonproperty owners alike since all persons "use the utilities and pay the rates," the Court rejected the voting classification scheme disenfranchising nonproperty owners. Nor may the vote be limited to property owners in bond issuance elections with respect to general obligation bonds secured by property tax revenues. *Phoenix, supra,* at 209–213. See also *Police Jury of Parish of Vermilion* v. *Hebert,* 404 U. S. 807 (1971), summarily rev'g 258 La. 41, 245 So. 2d 349 (cannot limit vote for road improvement bonds to property holders). The Court has thus rejected the view that simply because property is directly burdened because of some governmental action, that fact alone justifies limiting the franchise to property owners where nonowners are also substantially affected. *Hill, supra,* at 299.

To be sure, the Court approved limiting the vote to landowners in electing the board of directors of a Water Storage District in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District.*[2] See *Associated Enterprises, Inc.* v. *Toltec*

[2] The possibility of departing from the one-person, one-vote logic of *Reynolds* in the case of special-purpose districts was suggested in *Avery* v. *Midland County,* 390 U. S. 474 (1968). But the Court left open the question whether a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents "may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions." *Id.,* at 483–484. Thus, even assuming that the landowners are more directly affected, *Avery* suggests that there may be situations where total exclusion is unconstitutional, but where the exact one-person, one-

Watershed Improvement District, 410 U. S. 743 (1973). But nothing in *Salyer* changed the relevant constitutional inquiry. Rather, the Court held the *Reynolds-Avery-Kramer* line of cases inapplicable to the water district because of its "special limited purpose *and* the disproportionate effect of its activities on landowners as a group . . . ." 410 U. S., at 728 (emphasis supplied). Although the water district there involved exercised certain governmental authorities, its purposes were quite narrow. The Water Storage District was also found to have only an insubstantial effect on nonvoters. Only 77 persons lived within its boundaries and most worked for one of the four corporations which owned 85% of the land within the District. On the other hand, the burdens of the District fell entirely on landowners since all of the costs associated with the District's projects were assessed against landowners in proportion to the benefits received. There was "no way that the economic burdens of district operations can fall on residents *qua* residents . . . ." *Id.*, at 729.

An analysis of the two relevant factors required by *Salyer* demonstrates that the Salt River District possesses significant governmental authority and has a sufficiently wide effect on nonvoters to require application of the strict scrutiny mandated by *Kramer*.

II

The District involved here clearly exercises substantial governmental powers. The District is a municipal corporation organized under the laws of Arizona and is not, in any sense of the word, a private corporation. Pursuant to the Arizona Constitution, such districts are "political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this

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vote rule does not apply. The Court's decision today ignores the possibility of some alternative plan and instead sanctions an unjustifiable total exclusion.

Constitution or any law of the State or of the United States." Ariz. Const., Art. 13, § 7. Under the relevant statute controlling agricultural improvement districts, the District is "a public, political, taxing subdivision of the state, and a municipal corporation to the extent of the powers and privileges conferred by this chapter or granted generally to municipal corporations by the constitution and statutes of the state, including immunity of its property and bonds from taxation." Ariz. Rev. Stat. Ann. § 45–902 (1956).[3] The District's bonds are tax exempt, and its property is not subject to state or local property taxation. This attribute clearly indicates the governmental nature of the District's function. The District also has the power of eminent domain, a matter of some import. The District has also been given the power to enter into a wide range of contractual arrangements to secure energy sources.[4] Inherent in this authorization is the power to control the use and source of energy generated by the Dis-

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[3] Arizona state-court decisions have described such agricultural improvement districts as primarily business-oriented. See *ante*, at 368. See also *Local 266, International Brotherhood of Electrical Workers* v. *Salt River Project Agricultural Improvement & Power Dist.*, 78 Ariz. 30, 275 P. 2d 393 (1954); *Mesa* v. *Salt River Project Agricultural Improvement & Power Dist.*, 92 Ariz. 91, 373 P. 2d 722 (1962), appeal dism'd, 372 U. S. 704 (1963). Of course, these state-court descriptions do not control the question whether the municipal corporation possesses sufficient authority or function to require application of the voting procedures mandated by the Fourteenth Amendment. That inquiry is a constitutional question to be resolved by the courts.

[4] Arizona Rev. Stat. Ann. § 45–935.B (Supp. 1980–1981) provides:

"For the purpose of acquiring or assuring a supply of electric power and energy to serve the district's customers, the board, for the and in the name of the district may, without the boundaries of the state, acquire, develop, own, lease, purchase, construct, operate, equip, maintain, repair and replace, and contract for . . . any form of energy or energy resources including but not limited to coal, oil, gas, oil shale, uranium and other nuclear materials, hot water, steam, and other geothermal materials or minerals, solar energy, wind, water, and water power and compressed air . . . ."

trict, including the possible use of nuclear power. Obviously, this broad authorization over the field of energy transcends the limited functions of the agricultural water storage district involved in *Salyer*.

The District here also has authority to allocate water within its service area. It has veto power over all transfers of surface water from one place or type of use to another, and this power extends to any "watershed or drainage area which supplies or contributes water for the irrigation of lands within [the] district . . . ." Ariz. Rev. Stat. Ann. § 45–172.5 (Supp. 1980–1981).

Like most "private" utilities, which are often "natural monopolies," see *Otter Tail Power Co.* v. *United States,* 410 U. S. 366 (1973), private utilities in Arizona are subject to regulation by public authority. The Arizona Corporation Commission is empowered to prescribe "just and reasonable rates" as well as to regulate other aspects of the business operations of private utilities. See Ariz. Rev. Stat. Ann. § 40–321 (1974). The rate structure of the District now before us, however, is not subject to control by another state agency because the District is a municipal corporation and itself purports to perform the public function of protecting the public interest that the Corporation Commission would otherwise perform. See Ariz. Const., Art. 13, § 7, Art. 15, § 2. See also *Rubenstein Construction Co.* v. *Salt River Project Agricultural Improvement & Power Dist.,* 76 Ariz. 402, 265 P. 2d 455 (1953) (Salt River Project is not a public service corporation and therefore statute forbidding certain business practices did not apply). Its power to set its own rates and other conditions of service constitutes important attributes of sovereignty. When combined with a consideration of the District's wide-ranging operations which encompass water for agricultural and personal uses, and electrical generation for the needs of hundreds of thousands of customers, it is clear that the District exercises broad governmental power. With respect to energy management and the provision of water

and electricity, the District's power is immense and its authority complete.

It is not relevant that the District does not do more—what is detailed above is substantially more than that involved in the Water Storage District in *Salyer,* and certainly enough to trigger application of the strict standard of the Fourteenth Amendment under our prior cases. Previous cases have expressly upheld application of the strict requirements of the Fourteenth Amendment in situations where somewhat limited functions were involved. *Salyer* itself suggested that it would be a different case if a water district like the one involved in that case generated and sold electricity. In concluding that the Tulare District did not exercise normal governmental authority, the Court specifically noted that the District provided "no other general public services such as schools, housing, transportation, *utilities,* roads, or anything else of the type ordinarily financed by a municipal body." 410 U. S., at 728–729 (emphasis supplied). In *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), we held that a bond election which concerned only a city's provision of utilities involved a sufficiently broad governmental function. In *Kramer,* the Court noted that the "need for close judicial examination" did not change "because the district meetings and the school board do not have 'general' legislative powers. Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." 395 U. S., at 629. In *Hadley* v. *Junior College District,* 397 U. S. 50 (1970), the Court applied *Kramer* despite the fact that the powers exercised by the trustees of a Junior College District were substantially less significant than those exercised in *Avery* v. *Midland County,* 390 U. S. 474 (1968). It was sufficient that the trustees performed important governmental functions with sufficient impact throughout the District.

I therefore cannot agree that this line of cases is not applicable here. The authority and power of the District are sufficient to require application of the strict scrutiny required by our cases. This is not a single-purpose water irrigation district, but a large and vital municipal corporation exercising a broad range of initiatives across a spectrum of operations. Moreover, by the nature of the state law, it is presently exercising that authority without direct regulation by state authorities charged with supervising privately owned corporations involved in the same business. The functions and purposes of the Salt River District represent important governmental responsibilities that distinguish this case from *Salyer*.

III

In terms of the relative impact of the Salt River District's operations on the favored landowner voters and those who may not vote for the officers of this municipal corporation, the contrast with the Water District in *Salyer* is even more pronounced. A bird's-eye view of the District's operations will be helpful. Historically, the Salt River District was concerned only with storing water and delivering it for agricultural uses within the District. This was a crucial service, but it proved too expensive for a wholly private concern to maintain. It needed public help, which it received. It became a municipal corporation, a transformation which rendered its bonds and property tax exempt. It also needed a public subsidy, which was provided by authorizing it to engage in the generation and sale of electricity. It was also authorized to supply water for municipal and other nonagricultural uses.

The area within the District, once primarily rural, now encompasses eight municipalities and a major part of the city of Phoenix. Its original purpose, the supply of irrigation water, now provides only a tiny fraction of its gross income. For the fiscal year ending April 30, 1980, the Dis-

trict had a total operating income of approximately $450 million, 98% of which was derived from the generation of electricity and its sale to approximately 240,000 consumers. See Salt River Project, 1979–1980 Annual Report, p. 25. The District is now the second largest utility in Arizona. Furthermore, as of April 30, 1980, the District had outstanding long-term debt of slightly over $2 billion. Approximately $1.78 billion, or about 88%, of that debt are in the form of revenue bonds secured solely by the revenues from the District's electrical operations. All of the District's capital improvements since 1972 have been financed by revenue bonds, and the general obligation bonds, now representing a small fraction of the District's long-term debt, are being steadily retired from the District's general revenues. It must also be noted that at the present time, 40% of the water delivered by the District is used for nonagricultural purposes—25% for municipal purposes and 15% to schools, playgrounds, parks, and the like.

With these facts in mind, it is indeed curious that the Court would attempt to characterize the District's electrical operations as "incidental" to its water operations, or would consider the power operations to be irrelevant to the legality of the voting scheme.[5] The facts are that in *Salyer* the bur-

[5] The parties did not stipulate that the electrical services were unimportant or legally insignificant. In the context of the historical development of the District's power and authority, it was stipulated that the electrical generating function was "incident" to the primary purpose of providing water to District members. Stipulated Statement of Facts, Nos. 12, 17. This historical view, however, in no way undercuts the present inquiry. Even acknowledging that water service remains the "primary" function of the District in some legal sense, the relevant question here is whether the other services are of such a nature to require application of the strict standards of the Fourteenth Amendment. The fact that the generation of electricity is an incident of the water function of the District is not the same as concluding that the provision of electricity is "incidental" in the sense that it is insignificant. Indeed the parties also stipulated that the "District provides a reliable supply of essential electric

dens of the Water District fell entirely on the landowners who were served by the District. Here the landowners could not themselves afford to finance their own project and turned to a public agency to help them. That agency now subsidizes the storage and delivery of irrigation water for agricultural purposes by selling electricity to the public at prices that neither the voters nor any representative public agency has any right to control. Unlike the situation in *Salyer,* the financial burden of supplying irrigation water has been shifted from the landowners to the consumers of electricity.[6] At the very least, the structure of the District's indebtedness together with the history of the District's operations compels a finding that the burdens placed upon the lands within the District are so minimal that they cannot possibly serve as a basis for limiting the franchise to property owners.

Like the Court of Appeals, I cannot help but conclude as follows:

> "[T]he operation of the utility has taken on independent significance. In view of the magnitude of the electric utility operations and the large percentage of the water services which are used and paid for in a manner unrelated to land ownership, it would elevate form over sub-

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energy and water in substantial portions of the Salt River Valley; thus, the District operation is important to the development of the Salt River Valley." *Id.,* No. 46.

[6] The extent of the subsidy is substantial. The parties stipulated that:

"During the last ten years about 83% of the water system costs have been financed with power revenues. In 1974, revenues from water and irrigation activities were $2,613,184. The expenses, including depreciation, for irrigation and water operations exceeded revenues by about $14,000,000, and that deficit was met from power revenues. Water support has averaged approximately $10,000,000 annually since 1965. These amounts do not include expenditures for additions and improvements to the irrigation plant and for repayment of long-term debt, which must also be met from power revenues. Any decrease in support from power revenues would have to be met from increased water delivery charges." *Id.,* No. 45.

stance to characterize the District as functioning solely for the benefit of the landowners." 613 F. 2d, at 184.

In *Cipriano,* the only item at issue was an election concerning bonds to be used solely for the improvement of the municipally owned utility system. Of substantial importance to the resolution of this case, the Court said:

> "Of course, the operation of the utility systems—gas, water, and electricity—affects virtually every resident of the city, nonproperty owners as well as property owners. All users pay utility bills, and the rates may be affected substantially by the amount of revenue bonds outstanding. Certainly property owners are not alone in feeling the impact of bad utility service or high rates, or in reaping the benefits of good service and low rates." 395 U. S., at 705.[7]

It is apparent in this case that landowning irrigators are getting a free ride at the expense of the users of electricity. It would also seem apparent that except for the subsidy, utility rates would be lower. Of course, subsidizing agricultural operations may well be in the public interest in Arizona, but it does not follow that the amount of the subsidy and the manner in which it is provided should be totally in the hands of a select few.[8]

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[7] The Salt River District authorities thought the issue in *Cipriano* to be so substantially akin to the issue with respect to its operations that it decided to file an *amicus* brief in that case. See Brief for the Salt River Project Agricultural Improvement and Power District as *Amicus Curiae,* O. T. 1968, No. 705. The District argued that the bonds at issue in *Cipriano* went only to the city's conduct of its utility function and thus affected "only a particular segment of those general governmental powers," *id.,* at 5, so that *Kramer* should not be applied. We necessarily rejected the District's arguments on the merits in *Cipriano.*

[8] It may well be that if given a chance to participate, nonproperty owners will seek to lessen the subsidy. But this is no excuse for denying them the vote. A State is constitutionally prohibited from disenfranchis-

To conclude that the effect of the District's operations in this case is substantially akin to that in *Salyer* ignores reality. As recognized in *Salyer*, there were "no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains." 410 U. S., at 729. In short, there was nothing in the Water Storage District for its operations to affect except the land itself. The relationship between the burdens of the District and the land within the District's boundaries was strong. Here, the District encompasses one of the major metropolitan areas in the country. The effects of the provision of water and electricity on the citizens of the city are as major as they are obvious. There is no strong relationship between the District's operation and the land *qua* land. The District's revenues and bonds are tied directly to the electrical operation. Any encumbrance on the land is at best speculative. Certainly, any direct impact on the land is no greater than in *Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970), where we rejected the same argument presented today. Simply put, the District is an integral governmental actor providing important governmental services to residents of the District. To conclude otherwise is to ignore the urban reality of the District's operations.[9]

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ing any "sector of the population because of the way they may vote . . . ." *Carrington* v. *Rash*, 380 U. S. 89, 94 (1965).

[9] Nothing in *Cipriano* turned on the fact that the city's utility activities were connected with its broader grants of police power and were not conducted by a separately elected board or commission. While the Court noted that any profits from the utility operations would go into the city's general fund, this fact did not contribute to the Court's decision to extend the franchise. Rather, the Court noted that property and nonproperty taxpayers may have different views concerning provision of city funds for utilities, and that it was this concern with the utility services which required application of *Kramer*.

It is also significant that the Court's decision today is inconsistent with the narrow, and correct, reading given *Salyer* in various other courts in

IV

Underlying the Court's conclusion in this case is the view that the provision of electricity and water is essentially private enterprise and not sufficiently governmental—that the District "simply does not exercise the sort of governmental powers that invoke the strict demands" of the Fourteenth Amendment because it does not administer "such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services." *Ante,* at 366. This is a distinctly odd view of the reach of municipal services in this day and age. Supplying water for domestic and industrial uses is almost everywhere the responsibility of local government, and this function is intimately connected with sanitation and health. Nor is it any more accurate to consider the supplying of electricity as essentially a private function. The United States Government and its agencies generate and sell substantial amounts of power; and in view of the widespread existence of municipal utility systems, it is facetious to suggest that the operation of such utility systems should be considered as an incidental aspect of municipal government. Nor will it do, it seems to me, to return to the proprietary-governmental dichotomy in order to deliver into wholly private hands the control of a major municipal activity which acts to subsidize a limited number of landowners.[10]

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circumstances akin to those in the present case. See, *e. g., Choudhry* v. *Free,* 17 Cal. 3d 660, 552 P. 2d 438 (1976); *Johnson* v. *Lewiston Orchards Irrigation Dist.,* 99 Idaho 501, 584 P. 2d 646 (1978).

[10] In this regard, the Court's citation of *Jackson* v. *Metropolitan Edison Co.,* 419 U. S. 345 (1974), is totally misplaced. In that case, the Court held that actions of a privately owned utility do not constitute state action for purposes of the Fourteenth Amendment. The Court noted that the provision of utility services is "not traditionally the exclusive prerogative of the State." *Id.,* at 353. But this observation necessarily implies that the provision of utilities if actually provided by the State is a valid government activity. Thus, the question whether the Fourteenth Amend-

In *Indian Towing Co.* v. *United States,* 350 U. S. 61, 67–68 (1955), the Court remarked:

> " 'Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.' *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380, 383–384. On the other hand, it is hard to think of any governmental activity on the 'operational level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.' "

In *Lafayette* v. *Louisiana Power & Light Co.,* 435 U. S. 389 (1978), JUSTICE STEWART, after quoting the above passage from *Indian Towing Co.,* described the distinction between "proprietary" and "governmental" activities as a "quagmire" involving a distinction " 'so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.' " *Id.,* at 433 (dissenting opinion) (quoting *Indian Towing Co., supra,* at 68). JUSTICE STEWART went on to conclude that whether proprietary or not, the action of providing electrical utility services "is surely an act of government." 435 U. S., at 434.

In *Salyer,* the Court nowhere suggested that the provision of water for agricultural purposes was anything but governmental action for a public purpose. The Court expressly recognized that the Water District was a public entity. The question presented, in part, was whether its operations and authority were so narrow as not to require application of the *Kramer* rule. In *Cipriano,* the Court necessarily held

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ment may require certain safeguards *if the State in fact does itself* provide utility services is in no way reached by *Jackson.* See *Id.,* at 354, n. 9 (States may not segregate public schools so as to exclude any religious group while private religious schools may so exclude). Once a State provides such services, constitutional safeguards necessarily apply.

that the provision of electrical, water, and gas utility services was a sufficiently important governmental service to require application of the Fourteenth Amendment's strict scrutiny safeguards. 395 U. S., at 705. If the provision of electrical and other utility services by a municipal corporation was so "proprietary" or "private" as not to require application of the stricter standards of the Fourteenth Amendment, *Cipriano* could not have been decided as it was. The Court's facile characterization of the electrical service provided by the municipal corporation in this case as essentially a private function is a misreading of our prior holdings.

V

The purpose and authority of the Salt River District are of extreme *public* importance. The District affects the daily lives of thousands of citizens who because of the present voting scheme and the powers vested in the District by the State are unable to participate in any meaningful way in the conduct of the District's operations.[11] In my view, the Court of Appeals properly reasoned that the limited exception rec-

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[11] It is suggested by the Court in a footnote, see *ante*, at 371, n. 20, and by JUSTICE POWELL in his concurring opinion that since the nonvoters living in the District may, of course, vote in the state legislature elections, their interests are sufficiently represented since the state legislature maintains ultimate control over the operation and authority of the District. This suggestion lacks merit and has been specifically rejected in past decisions of this Court. *Avery* v. *Midland County*, 390 U. S., at 481. See *Kramer*, 395 U. S., at 628, n. 10. In most situations involving a state agency or even a city, the state legislature and ultimately the people could exercise control since any municipal corporation is a creature of the State. The Fourteenth Amendment requires a far more direct sense of democratic participation in elective schemes which is not satisfied by the indirect and imprecise voter control suggested by the Court and by JUSTICE POWELL. Cf. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 406 (1978) (rejecting argument that Sherman Act should not apply to municipally owned utility because dissatisfied consumers had recourse in state legislature).

ognized in *Salyer* does not save this voting arrangement. I cannot agree with the Court's extension of *Salyer* to the facts of the case, and its unwise suggestion that the provision of electrical and water services are somehow too private to warrant the Fourteenth Amendment's safeguards. Accordingly, I dissent.

UNIVERSITY OF TEXAS ET AL. *v.* CAMENISCH

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

No. 80–317. Argued March 31, 1981—Decided April 29, 1981

Respondent, a deaf graduate student at petitioner University, filed a complaint in Federal District Court, alleging that the University had violated § 504 of the Rehabilitation Act of 1973 by discriminatorily refusing to pay for a sign-language interpreter for respondent, and declaratory and injunctive relief was sought. Finding a possibility that respondent would be irreparably harmed in the absence of an injunction and that he was likely to prevail on the merits, the District Court, *inter alia,* granted a preliminary injunction on the condition that respondent post a security bond pending the outcome of the litigation. The Court of Appeals affirmed the grant of the injunction. In the meantime, the University had obeyed the injunction by paying for respondent's interpreter and respondent had been graduated, but the Court of Appeals rejected a suggestion that the case was moot, noting that the issue of who should bear the cost of the interpreter remained to be decided.

Held: The question whether a preliminary injunction should have been issued is moot because the terms of the injunction have been fully and irrevocably carried out, but, as the Court of Appeals correctly noted, the question whether the University must pay for the interpreter remains for trial on the merits. Pp. 393–398.

(a) To suggest that the decisions of the courts below, to the extent that they considered respondent's likelihood of success on the merits in granting a preliminary injunction, were tantamount to decisions on the underlying merits and thus that the preliminary-injunction issue is not truly moot, improperly equates "likelihood of success" with "success" and ignores the significant procedural differences between preliminary and permanent injunctions. P. 394.

(b) Where a federal district court has granted a preliminary injunction, the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy. Thus, when the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits. By contrast, where a federal district court has granted a permanent injunction, the

parties will already have had their trial on the merits, and, even if the case would otherwise be moot, a determination can be had on appeal of the correctness of the trial court's decision on the merits, since the case has been saved from mootness by the injunction bond. Pp. 395–398.
616 F. 2d 127, vacated and remanded.

STEWART, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post,* p. 398.

Lonny F. Zwiener, Assistant Attorney General of Texas, argued the cause for petitioners. With him on the brief were *Mark White,* Attorney General, *John W. Fainter, Jr.,* First Assistant Attorney General, and *Richard E. Gray III,* Executive Assistant Attorney General.

Stephen J. Pollak, argued the cause for respondent. With him on the brief were *Ralph J. Moore, Jr., John Townsend Rich, Marc P. Charmatz, Seymour DuBow, Paul R. Friedman,* and *Charles Smith.*

Peter Buscemi argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Turner,* and *Jessica Dunsay Silver.**

JUSTICE STEWART delivered the opinion of the Court.

On March 1, 1978, Walter Camenisch, a deaf graduate student at the University of Texas, filed a complaint alleg-

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**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Robert L. Burgdorf, Jr.,* and *Susan Hirsch* for the American Coalition of Citizens with Disabilities et al.; by *Therese M. Wandling* for the Deaf Counseling, Advocacy and Referral Agency, Inc., et al.; by *Margaret K. Brooks* for the Legal Action Center of the City of New York, Inc.; and by *Kent Hull* and *Ronald M. Soskin* for the Michigan Rehabilitation Association et al.

Briefs of *amici curiae* were filed by *Marcia Robinson Lowry* and *Robert Levy* for the American Civil Liberties Union et al.; and by *R. Claire Guthrie* and *Sheldon Elliot Steinbach* for the American Council on Education et al.

ing that the University had violated § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794 (1976 ed., Supp. III), which provides that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The complaint alleged that the University received federal funds and that the University had discriminatorily refused to pay for a sign-language interpreter for Camenisch. The complaint asked the United States District Court for the Western District of Texas to grant declaratory relief and to "[p]reliminarily and permanently order defendants to appoint an interpreter for the plaintiff while he is a student in good standing at the defendant University."

The District Court applied the "Fifth Circuit standard for temporary relief to see if the injunction sought is appropriate." That standard, which was enunciated in *Canal Authority of Florida* v. *Callaway*, 489 F. 2d 567 (1974), requires that a federal district court consider four factors when deciding whether to grant a preliminary injunction: whether the plaintiff will be irreparably harmed if the injunction does not issue; whether the defendant will be harmed if the injunction does issue; whether the public interest will be served by the injunction; and whether the plaintiff is likely to prevail on the merits. Finding a possibility that Camenisch would be irreparably harmed in the absence of an injunction, and finding a substantial likelihood that Camenisch would prevail on the merits, the District Court granted a preliminary injunction requiring that the University pay for Camenisch's interpreter, but the court did so on the condition that Camenisch "post a security bond in the amount of *$3,000.00* pending the outcome of this litigation pursuant to Rule 65 (c), F. R. C. P." The District Court also ordered that the action be stayed "pending a final administrative determination on the merits, and that as a condition of preliminary injunctive relief, Plain-

tiff be required to initiate a complaint with HEW requesting the relief sought herein."

The Court of Appeals for the Fifth Circuit likewise applied the *Canal Authority* test, and found that the balance of hardships weighed in favor of granting an injunction and that Camenisch's claim would be successful on the merits. The Court of Appeals therefore affirmed the grant of the preliminary injunction. 616 F. 2d 127. The appellate court ruled, however, that Camenisch was not obligated to pursue any administrative remedy that the Department of Health, Education, and Welfare might provide, and it therefore vacated that part of the District Court's order staying the litigation pending administrative action.

By the time the Court of Appeals had acted, the University had obeyed the injunction by paying for Camenisch's interpreter, and Camenisch had been graduated. The Court of Appeals, however, rejected a suggestion that the case was therefore moot. The court said: "[A] justiciable issue remains: whose responsibility is it to pay for this interpreter?" *Id.*, at 130–131. We granted certiorari, 449 U. S. 950, and Camenisch has now raised the mootness issue before this Court.

The Court of Appeals correctly held that the case as a whole is not moot, since, as that court noted, it remains to be decided who should ultimately bear the cost of the interpreter. However, the issue before the Court of Appeals was not who should pay for the interpreter, but rather whether the District Court had abused its discretion in issuing a preliminary injunction requiring the University to pay for him. *Brown* v. *Chote,* 411 U. S. 452, 457; *Alabama* v. *United States,* 279 U. S. 229. The two issues are significantly different, since whether the preliminary injunction should have issued depended on the balance of factors listed in *Canal Authority,* while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case.

This, then, is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot. See, *e. g.*, *Powell* v. *McCormack,* 395 U. S. 486. In *Ammond* v. *McGahn,* 532 F. 2d 325 (CA3 1976), for instance, the issue of preliminary injunctive relief became moot, but an issue of damages remained. The court said: "Though the entire case is not moot, the question remains whether the issue of the appropriateness of injunctive relief is moot. If the parties lack a legally cognizable interest in the determination whether the preliminary injunction was properly granted, the sole question before us on this appeal, then we must vacate the district court's order and remand the case for consideration of the remaining issues." *Id.,* at 328. Because the only issue presently before us—the correctness of the decision to grant a preliminary injunction—is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits. See *Brown* v. *Chote, supra.*

Since Camenisch's likelihood of success on the merits was one of the factors the District Court and the Court of Appeals considered in granting Camenisch a preliminary injunction, it might be suggested that their decisions were tantamount to decisions on the underlying merits and thus that the preliminary-injunction issue is not truly moot. It may be that this was the reasoning of the Court of Appeals when it described its conclusion that the case was not moot as "simply another way of stating the traditional rule that issues raised by an expired injunction are not moot if one party was required to post an injunction bond." 616 F. 2d, at 131. This reasoning fails, however, because it improperly equates "likelihood of success" with "success," and what is more important, because it ignores the significant procedural differences between preliminary and permanent injunctions.

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, *Progress Development Corp.* v. *Mitchell,* 286 F. 2d 222 (CA7 1961), and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits, *Industrial Bank of Washington* v. *Tobriner,* 132 U. S. App. D. C. 51, 54, 405 F. 2d 1321, 1324 (1968); *Hamilton Watch Co.* v. *Benrus Watch Co.,* 206 F. 2d 738, 742 (CA2 1953). In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits. *E. g., Brown* v. *Chote, supra; Gellman* v. *Maryland,* 538 F. 2d 603 (CA4 1976); *Santiago* v. *Corporacion de Renovacion Urbana y Vivienda de Puerto Rico,* 453 F. 2d 794 (CA1 1972).

Should an expedited decision on the merits be appropriate, Rule 65 (a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Pughsley* v. *3750 Lake Shore Drive Cooperative Bldg.,* 463 F. 2d 1055, 1057 (CA7 1972); *Nationwide Amusements, Inc.* v. *Nattin,* 452 F. 2d 651 (CA4 1971). This procedure was not followed here.

In short, where a federal district court has granted a preliminary injunction, the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy. Thus when the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits. Where, by contrast, a federal district court has granted a permanent injunction, the parties will already have had their trial on the merits, and, even if the case would otherwise be moot, a determination can be had on appeal of the correctness of the trial court's decision on the merits, since the case has been saved from mootness by the injunction bond.

The principle underlying this basic distinction, although sometimes honored in the breach,[1] is reflected in the relevant precedents. For instance, in this Court's decision in *Liner* v. *Jafco, Inc.*, 375 U. S. 301, a decision often cited for the proposition that an injunction bond prevents a case from becoming moot, the injunction was permanent, not preliminary. The District Court there had thus reached a final decision on the merits.

American Bible Society v. *Blount*, 446 F. 2d 588 (CA3 1971), illuminates the distinction from a different angle. In that case, the plaintiffs had secured a preliminary injunction and had posted an injunction bond. When the issue of injunctive relief became moot, the Court of Appeals held that the case as a whole was not moot, since the defendant would "in all likelihood institute suit against the sureties at some future time and, in any such action, the court [would] be faced with deciding the same issues that are in contention

[1] See, *e. g.*, *Bright* v. *Nunn*, 448 F. 2d 245, 247, n. 1 (CA6 1971); but see 11 C. Wright & A. Miller, Federal Practice and Procedure § 2950, pp. 492–493 (1973).

here." *Id.*, at 594. The appellate court ruled that liability on the injunction bond could not arise until there was a final judgment in favor of the defendant: "This rule is consistent with the policy considerations behind the injunction bond. The requirement of security is rooted in the belief that a defendant deserves protection against a court order granted without the full deliberation a trial offers." *Id.*, at 595, n. 12. The court therefore remanded the case to the trial court, where such "full deliberation" could take place.

In *Klein* v. *Califano*, 586 F. 2d 250 (CA3 1978), the same United States Court of Appeals, sitting en banc, was confronted with a different situation involving a moot injunction which was survived by a possible claim for recoupment on a bond. The court "recognize[d] that part of the rationale of *American Bible Society* was the policy of the Rule 65 security bond to protect defendants from the consequences of temporary restraining orders granted without opportunity for full deliberation of the merits of a dispute." *Id.*, at 256. Because the District Court in *Klein* had "had such an opportunity to assess the merits of the complaint and [had] granted summary judgment and a permanent injunction," *ibid.*, the Court of Appeals reached the merits of the case.[2]

The present case is replete with circumstances indicating the necessity for a full trial on the merits in the *nisi prius*

[2] The Court of Appeals in the present case mistakenly believed that *Kinnett Dairies* v. *Farrow*, 580 F. 2d 1260 (CA5 1978), stands for a contrary principle. In that case, the question of mootness arose because the defendant's solicitation of bids—which had been the subject of the District Court's preliminary injunction—had run its course. The Court of Appeals said: "[T]he history of this controversy reveals the reasonable expectation—indeed, the near certainty—that the act complained of will be repeated. This case is a paradigm of the situation 'capable of repetition yet evading review.'" *Id.*, at 1266 (footnote omitted). The court determined that the plaintiff could not win on the merits, and that the issuance of a preliminary injunction had, therefore, been erroneous. But the court did not say what it would have done had it not concluded that the case was capable of repetition yet avoiding review.

court, where a preliminary injunction has become moot and an injunction bond has been issued. The proceedings here bear the marks of the haste characteristic of a request for a preliminary injunction: the parties have relied on a short stipulation of facts, and even the legal theories on which the University has relied have seemed to change from one level of the proceeding to another. The District Court and the Court of Appeals both properly based their decisions not on the ultimate merits of Camenisch's case but rather on the balance of the *Canal Authority* factors. While it is true that some of the Court of Appeals' language suggests a conclusion that Camenisch would win on the merits, the court certainly did not hold that the standards for a summary judgment had been met.

In sum, the question whether a preliminary injunction should have been issued here is moot, because the terms of the injunction, as modified by the Court of Appeals, have been fully and irrevocably carried out. The question whether the University must pay for the interpreter remains for trial on the merits. Until such a trial has taken place, it would be inappropriate for this Court to intimate any view on the merits of the lawsuit.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I consider it important to emphasize several aspects of the case, especially as to the regulations.

It is undisputed that the University stood willing to permit respondent to have a sign-language interpreter present in the classroom at respondent's expense, and in fact had allowed that for some time prior to the filing of this lawsuit. It is also undisputed that the University's refusal to pay for an

interpreter was based solely on the fact that respondent did not meet the University's established income criteria for financial assistance to graduate students.*

The Court's opinion, of course, is not to be read as intimating that respondent has any likelihood of success on the merits of his claim. The Court holds no more than that, since there has been no trial, respondent has a right to present evidence in support of his claim. The trial court must, among other things, decide whether the federal regulations at issue, which go beyond the carefully worded *nondiscrimination* provision of § 504, exceed the powers of the Secretary under § 504. The Secretary has no authority to rewrite the statutory scheme by means of regulations. *Southeastern Community College* v. *Davis,* 442 U. S. 397, 410 (1979); see also *Pennhurst State School & Hospital* v. *Halderman, ante,* at 17 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").

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*Respondent and his wife, who have no children, had a combined gross income in excess of $23,000 per year while he was enrolled as a student. Stipulation of Facts, App. 31. At oral argument, respondent asserted that even a $100,000 annual income would not affect his right to an interpreter at public expense.

The University advised respondent that its policy was to pay for interpreter services when the services were not available from other agencies such as the Texas Rehabilitation Commission and the Texas Commission for the Deaf, provided that "such assistance will be based on a reasonable interpretation of financial need on an individual basis, using guidelines already in effect for Federal and other financial assistance." According to those guidelines, respondent had zero financial need. *Id.,* at 33.

STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS CO.

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

No. 80-264. Argued March 24, 1981—Decided April 29, 1981

620 F. 2d 17, affirmed by an equally divided Court.

Mark I. Levy argued the cause for petitioners. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Martin, Deputy Solicitor General Geller, Michael Kimmel, Robert Kaplan,* and *Milton J. Socolar.*

Gilbert H. Weil argued the cause for respondent. With him on the brief was *Robert L. Sherman.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

**Philip Lacovara, Ronald A. Stern, Stanley L. Temko, Charles Lister,* and *Clare Dalton* filed a brief for Merck & Co., Inc., et al. as *amici curiae* urging affirmance.

Syllabus

COMPLETE AUTO TRANSIT, INC., ET AL. *v.* REIS ET AL.

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

No. 79–1777. Argued February 24, 1981—Decided May 4, 1981

Petitioner trucking companies are parties to a collective-bargaining agreement with the Teamsters Union that contains a no-strike clause. Respondent employees of petitioners commenced a wildcat strike because they believed the union was not properly representing them in negotiations to amend the collective-bargaining agreement. Thereafter, petitioners brought an action against respondents in Federal District Court under § 301 (a) of the Labor Management Relations Act, which confers jurisdiction on federal district courts to decide suits alleging violations of collective-bargaining agreements. Petitioners sought, *inter alia,* damages against respondents in their individual capacities for all losses arising out of the wildcat strike. The District Court dismissed the damages claim, and the Court of Appeals affirmed, holding that Congress had not intended through § 301 to create a cause of action for damages against individual union members for breach of a no-strike agreement.

Held: Section 301 (a) does not sanction damages actions by employers against individual employees for violating the no-strike provision of a collective-bargaining agreement, whether or not the union participated in or authorized the strike. The legislative history of § 301 clearly reveals Congress' intent to shield individual employees from liability for such damages, even though this results in leaving the employer unable to recover for his losses. While § 301 (b), which provides that any money judgment against a union for violation of a collective-bargaining agreement shall be enforceable only against the union and not against any individual member, explicitly addresses only union-authorized violations, the "penumbra" of § 301 (b), as informed by its legislative history, establishes that Congress meant to exclude individual strikers from damages liability, whether or not they were authorized by their union to strike. The history demonstrates that Congress deliberately chose to allow a damages remedy for breach of a no-strike provision only against *unions,* not *individuals,* and, as to unions, only when they participated in or authorized the illegal strike. Pp. 405–417.

614 F. 2d 1110, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 417. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 424.

R. Ian Hunter argued the cause for petitioners. With him on the briefs was *C. John Holmquist, Jr.*

Hiram S. Grossman argued the cause and filed a brief for respondents.*

JUSTICE BRENNAN delivered the opinion of the Court.

In *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), the Court held that § 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (a), does not authorize a damages action against individual union officers and members when their union is liable for violating a no-strike clause in a collective-bargaining agreement. We expressly reserved the question whether an employer might maintain a suit for damages against "individual defendants acting not in behalf of the union but in their personal and nonunion capacity" where their "unauthorized, individual action" violated the no-strike provision of the collective-bargaining agreement. 370 U. S., at 249, n. 7. We granted certiorari to decide this important question of federal labor law. 449 U. S. 898 (1980).

I

Petitioners are three companies engaged in the transportation by truck of motor vehicles. All three are parties to a collective-bargaining agreement with the Teamsters Union that covers operations at their respective facilities in Flint,

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**J. Albert Woll, Laurence Gold,* and *George Kaufmann* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Mich. Respondents are employees of petitioners and members of Teamsters Local Union No. 332. The collective-bargaining agreement contains a no-strike clause [1] and subjects all disputes to a binding grievance and arbitration procedure.

On June 8, 1976, respondents commenced a wildcat strike, because they believed that "the union was not properly representing them in . . . negotiations for amendments to the collective bargaining agreement." 614 F. 2d 1110, 1111 (CA6 1980). Soon thereafter, petitioners brought this § 301 (a) action in the United States District Court for the Eastern District of Michigan, seeking injunctive relief and "damages against the [employees], in their individual capacity, for all losses arising out of the unlawful work stoppage and for attorneys fees." App. 21. Petitioners alleged that the strike was neither authorized nor approved by the union and, therefore, sought no damages from the union. See 614 F. 2d, at 1115; App. 18, 20–21. After a hearing, the District Court found that "the issue which had caused the work stoppage was not arbitrable" because it was "an internal dispute between factions in the Local," App. to Pet. for Cert. 15a–16a, and accordingly denied preliminary injunctive relief, citing *Boys Markets, Inc.* v. *Retail Clerks,* 398 U. S. 235 (1970).[2]

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[1] The no-strike clause provides that "[t]he Unions and the Employers agree that there shall be no strike, tie-up of equipment, slowdowns or walkouts on the part of the employees, nor shall the Employer use any method of lockout or legal proceeding without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." See Exhibit A to Complaint of Complete Auto Transit, Inc., 24–25.

[2] In *Boys Markets, Inc.* v. *Retail Clerks,* 398 U. S., at 253–254, this Court held that the Norris-LaGuardia Act's prohibition against enjoining strikes does not apply where the "collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure," where the grievance is subject to arbitration, and where the usual requirements for obtaining equitable relief have been satisfied.

Following additional hearings and settlement of the "internal dispute," the District Court concluded that "the work stoppage continued only because of a dispute between the Local and [petitioners] over amnesty for the strikers [and that] this issue was arbitrable." App. to Pet. for Cert. 16a. The court, therefore, issued a preliminary injunction, enjoining continuation of the strike. Respondents obeyed the order and returned to work on June 21, 1976.

Nine months later, respondents moved to dissolve the preliminary injunction and to dismiss the complaint for damages. Relying on this Court's intervening decision in *Buffalo Forge Co.* v. *Steelworkers,* 428 U. S. 397 (1976),[3] the District Court dissolved the injunction on the ground that the work stoppage was not precipitated by an arbitrable issue. App. to Pet. for Cert. 18a. The court also dismissed petitioners' claim for damages, holding that "an employer may not sue his employees for monetary relief for breach of the collective bargaining agreement . . . whether or not the union may also be liable." *Id.,* at 16a.

The United States Court of Appeals for the Sixth Circuit reversed the District Court's dissolution of the injunction, holding that an injunction may be granted even where the issue which precipitated the strike was nonarbitrable provided an arbitrable issue, other than the simple legality of the strike itself, caused the continuation of the strike with

[3] In *Buffalo Forge Co.* v. *Steelworkers,* 428 U. S., at 407 (emphasis in original), this Court held that the Federal District Court properly refused to enjoin a sympathy strike because "the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." The Court further held that, even though the "dispute whether the sympathy strike violated the Union's no-strike undertaking . . . was arbitrable," injunctive relief was not warranted, since to hold otherwise "would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes." *Id.,* at 410.

the purpose of "compel[ling] the employer to concede on the arbitrable issue." 614 F. 2d, at 1114. Petitioners do not seek review of this part of the Court of Appeals' ruling.[4]

The Court of Appeals affirmed the District Court's dismissal of petitioners' claim for damages from the individual union members. Relying principally on the legislative history of § 301, the Court of Appeals concluded that Congress had not intended through § 301 to "create a cause of action for damages against individual union members for breach of a no-strike agreement." 614 F. 2d, at 1116. We agree.

II

Since *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957), it has been settled that § 301(a)[5] does more than confer jurisdiction on federal courts to decide lawsuits alleging violations of collective-bargaining agreements. Section 301 (a) also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers* v. *Lincoln Mills,* 353 U. S., at

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[4] We express no view on whether the Court of Appeals' ruling was correct.

[5] Section 301, as set forth in 29 U. S. C. § 185, states in pertinent part:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

451. *Lincoln Mills* defined the mode of analysis for fashioning this body of federal law as follows:

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." *Id.*, at 457.

Of course, "*Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements." *Howard Johnson Co.* v. *Hotel & Restaurant Employees,* 417 U. S. 249, 255 (1974). Rather, it is clear that in fashioning federal law under § 301 (a) substantial deference should be paid to revealed congressional intention. See *Atkinson* v. *Sinclair Refining Co.,* 370 U. S., at 248–249.

In *Atkinson,* the Court relied on the intent of Congress in passing § 301 (b) to hold that individual union members may not be sued for damages where the union has breached the no-strike provision of its collective-bargaining agreement. Section 301 (b) states in pertinent part that "[a]ny money judgment against a labor organization . . . shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." Thus, in *Atkinson,* we noted that "in discharging the duty Congress imposed on us to formulate the federal law to govern § 301 (a) suits, we are strongly guided by and do not give a niggardly reading to § 301 (b)." *Ibid.* Accordingly, we consulted and relied on the legislative history of § 301 (b) which made it "clear that th[e] third clause [of § 301 (b)] was a deeply felt congressional reaction against the *Danbury Hatters* case . . . and an expression

of legislative determination that the aftermath . . . of that decision was not to be permitted to recur." *Id.*, at 248.[6] Similarly, in deciding the question presented in this case, we "discharg[e] the duty Congress imposed on us to formulate the federal law to govern § 301 (a) suits," *id.*, at 248–249, by looking to the "penumbra" of § 301 (b), 353 U. S., at 457, as informed by its legislative history. See *Howard Johnson Co.* v. *Hotel & Restaurant Employees, supra,* at 255.

Section 301 (b) by its terms prohibits a money judgment entered against a union from being enforced against individual union members. See *Atkinson* v. *Sinclair Refining Co., supra.* It is a mistake to suppose that Congress thereby suggested by negative implication that employees *should* be held liable where their union is not liable for the strike. See *Sinclair Oil Corp.* v. *Oil, Chemical & Atomic Workers,* 452 F. 2d 49, 52 (CA7 1971). Although lengthy and complex, the legislative history of § 301 clearly reveals Congress' intent to shield individual employees from liability for damages arising from their breach of the no-strike clause of a collective-bargaining agreement, whether or not the union participated in or authorized the illegality. Indeed, Congress intended this result even though it might leave the employer unable

[6] In the *Danbury Hatters* case, "an antitrust treble damage action was brought against a large number of union members, including union officers and agents, to recover from them the employer's losses in a nationwide, union-directed boycott of his hats. The union was not named as a party, nor was judgment entered against it. A large money judgment was entered, instead, against the individual defendants for participating in the plan 'emanating from headquarters' . . . , by knowingly authorizing and delegating authority to the union officers to do the acts involved. In the debates, Senator Ball, one of the Act's sponsors, declared that § 301, 'by providing that the union may sue and be sued as a legal entity, for a violation of contract, and the liability for damages will lie against union assets only, will prevent a repetition of the *Danbury Hatters* case, in which many members lost their homes.'" *Atkinson* v. *Sinclair Refining Co.*, 370 U. S., at 248. See *Savings Bank of Danbury* v. *Loewe,* 242 U. S. 357 (1917); *Lawlor* v. *Loewe,* 235 U. S. 522 (1915); *Loewe* v. *Lawlor,* 208 U. S. 274 (1908).

to recover for his losses. See *Atkinson* v. *Sinclair Refining Co., supra,* at 248.

The legislative history of § 301 begins with a review of congressional efforts in the year prior to adoption of the Labor Management Relations Act. Section 10 of the Case bill, H. R. 4908, 79th Cong., 2d Sess. (1946), passed by both Houses of Congress, but vetoed by the President in 1946, was "the direct antecedent of § 301." *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502, 509 (1962). Since § 10 "contained provisions substantially the same . . . as the provisions of § 301," *ibid.,* its legislative history is highly relevant in ascertaining congressional intent with respect to § 301, see *id.,* at 511–512.

The purpose of § 10 was "to establish a mutual responsibility when the collective-bargaining process has resulted in a contract." 92 Cong. Rec. 838 (1946) (remarks of Rep. Case). As introduced in the House, § 10 provided for collective-bargaining agreements to be enforceable "against each of the parties thereto."[7] The Senate adopted a bill which

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[7] Section 10 of the Case bill provided:

"All collective-bargaining contracts shall be mutually and equally binding and enforceable either at law or in equity against each of the parties thereto, any other law to the contrary notwithstanding. In the event of a breach of any such contract or of any agreement contained in such contract by either party thereto, then, in addition to any other remedy or remedies existing either in law or equity, a suit for damages for such breach or for injunctive relief in equity may be maintained by the other party or parties in any United States district court having jurisdiction of the parties. If the defendant against whom action is sought to be commenced and maintained is a labor organization, such action may be filed in the United States district court of any district wherein any officer of such labor organization resides or may be found." H. R. 5262, 79th Cong., 2d Sess. (1946).

Representative Case explained that the "parties" against whom a "suit for damages" would lie were limited to the employer and to "the recognized bargaining agent rather than an individual." 92 Cong. Rec. 765 (1946).

encompassed the purposes of § 10 of the House version and which, in addition, explicitly permitted an employer to discharge an employee who participated in a strike which was not authorized by the union.[8] Senator Taft, principal proponent of the provision, explained:

> "If the union violates its collective bargaining-agreement, it is responsible, but no individual member is responsible, and he can in no way be deprived of his rights. But if the union tries to keep its contract and, in violation of its undertaking, some of its members proceed to strike, then the employer may fire those members and they do not have the protection of the Wagner Act." 92 Cong. Rec. 5705–5706 (1946).

Thus the Senator stopped short of proposing that individual

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[8] Senate Amendment No. 3 to H. R. 4908, passed by the Senate, stated in pertinent part:

"(a) Suits for violation of a contract concluded as the result of collective bargaining between an employer and a labor organization if such contract affects commerce as defined in this act may be brought in any district court of the United States having jurisdiction of the parties.

"(b) Any labor organization whose activities affect commerce as defined in this act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States: *Provided,* That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

. . . . .

"(d) Any employee who participates in a strike or other stoppage of work in violation of an existing collective-bargaining agreement, if such strike or stoppage is not ratified or approved by the labor organization party to such agreement and having exclusive bargaining rights for such employee, shall lose his status as an employee of the employer party to such agreement for the purposes of sections 8, 9, and 10 of the National Labor Relations Act: *Provided,* That such loss of status for such employee shall cease if and when he is reemployed by such employer." 92 Cong. Rec. 5705 (1946).

employees be held liable in damages for engaging in unauthorized strikes.

The House's subsequent consideration of the Senate's version reflected its clear understanding of the Senate's limitation on employers' remedies. Representative Case explained the Senate amendment on the floor of the House:

> "Individual members of a union are not made liable for any money judgment, I might point out, but only the union as an entity. If employees strike in violation of their agreement, the *only* individual penalty that can be employed is the forfeiture of their right to employment under that contract which is cured when the employer reemploys them." *Id.*, at 5930–5931 (emphasis added).[9]

The House then passed the Senate version. In doing so, the House, like the Senate, clearly intended to protect employees from the sanction of a suit for damages for a strike in breach of the collective-bargaining agreement, whether or not the union participated in or authorized the strike. It is true that the President vetoed this bill and that his veto was sustained. Nevertheless, the substantial similarity between the pertinent language of the Case bill as passed by Congress and of § 301 as it reads today makes the legislative history of the Case bill vitally significant to a full understanding of the policy behind § 301 (b).

Six months after the veto, Congress began work on the legislation which became § 301.[10] The bill ultimately passed

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[9] Representative Halleck echoed Representative Case:

"Mr. Speaker, there is substituted for that [the provision] which has to do with the responsibility of the individual who goes out on a wildcat strike in violation of a contract and in violation of the wishes of his organization. All we say is that if he breaches his contract as an individual in that manner, his employer does not have to take him back unless he wants to. What is the matter with that[?]" *Id.*, at 5932.

[10] In the House, Representative Case introduced a bill containing a provision establishing federal-court jurisdiction over actions for breaches

by the House created a federal cause of action for breach of a collective-bargaining agreement.[11] The Committee Report explained that "actions and proceedings involving violations of contracts between employers and labor organizations may be brought by either party." H. R. Rep. No. 245, 80th Cong., 1st Sess., 45–46 (1947). Section 302 (b) also contained express language precluding enforcement against in-

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of collective-bargaining agreements. Subsections (a) and (b) were virtually identical to their counterparts in the bill passed in the previous session of Congress. As Representative Case explained the bill before the House Committee on Education and Labor, "there is no provision for suing individual workers, as such, or rendering any judgment against them." Hearings before the House Committee on Education and Labor on Amendments to the National Labor Relations Act, 80th Cong., 1st Sess., 125 (1947). Instead, wildcat strikers would be subject to discharge. *Ibid.*

Representative Case's testimony before the House Committee is also instructive:

"Mr. LANDIS. I agree that you can deny the members the rights of the Wagner Act, but say there is one coal mine—we had an instance in Indiana where one coal mine went out on a wildcat strike, and the United Mineworkers organization did not like it, and they tried to get the men to go back to work, and they would not go back to work, and still refused to go back to work for several days.

"Who would you sue in that case?

"Mr. CASE. Of course, I would think the United Mine Workers, as an organization, would have a pretty good defense to any suit for damages against them, if they ordered the men back to work.

"It would seem to me, if you had a local that went out on strike, and they were parties to a contract, the local would be liable for damages." *Id.*, at 126.

[11] Section 302 (a) stated:

"(a) Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause." H. R. 3020, 80th Cong., 1st Sess. (as passed by the House) (1947).

dividuals of judgments entered against unions.[12] In addition, the bill included an amendment to § 7 of the National Labor Relations Act providing that "violations of collective bargaining-agreements" would not be protected under the Act, H. R. 3020, 80th Cong., 1st Sess. (1947), § 7 (a), thereby allowing employers to discharge wildcat strikers.[13] The House bill also included a provision, however, which *allowed* an employer to recover damages from individual employees. Section 12 created a damages action against *any person* engaging in an unlawful concerted activity. The bill defined "unlawful concerted activities" to include, *inter alia,* jurisdictional strikes, sympathy strikes, and certain picketing activities.

Significantly, however, the Senate *rejected* the House's imposition in § 12 of damages liability against individuals for unlawful concerted activity, and a Conference Committee adopted the Senate version.[14] The Senate counterpart to

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[12] Section 302 (b) stated:

"(b) Any labor organization whose activities affect commerce shall be bound by the acts of its agents, and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." H. R. 3020, *supra.*

[13] The Committee Report stated that "[t]he committee has revised this section by writing into it in express terms that employees who strike or engage in similar activities in violation of collective-bargaining agreements . . . forfeit the protection of the Labor Act." H. R. Rep. No. 245, 80th Cong., 1st Sess., 27 (1947).

[14] The Senate Committee on Labor and Public Welfare had earlier reported a bill creating a federal cause of action for breach of a collective-bargaining agreement. It stated in pertinent part:

"Sec. 301 (a) Suits for violation of contracts concluded as the result of collective bargaining between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act may be brought in any district court of the United States

§ 12 of the House bill was § 303. Senator Taft offered a floor amendment to § 303 which would have established a damages action against *individuals* who engage in certain types of unlawful concerted activity such as secondary boycotts and jurisdictional strikes. 93 Cong. Rec. 4900 (1947). In a critical exchange during the debate on the proposed amendment, Senator Taft altered the language to limit damages actions to claims against *unions,* in order to conform with § 301 (b) and bar imposition of individual damages liability against employees:

> "Mr. MORSE: [T]he proposal of the Senator from Ohio would open wide the doors of the Federal courts to damage suits against any person who engaged in a strike or attempted to persuade other employees to engage in a strike for one of the prohibited objectives.
>
> "The proposal would very definitely take us back at least 40 years and we would again have the spectacle of mass suits against employees, similar to the infamous Danbury Hatters case. Senators will recall that in that case some 150 members of the union were sued by their employer and the Supreme Court of the United States sustained a judgment against them in the neighborhood of a quarter million dollars. . . .
>
> "It also should be pointed out that the substitute proposal is inconsistent with the present provision in the bill allowing a union to be sued for breach of contract. Section 301 of the bill permits suits against labor orga-

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having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act may sue or be sued in its common name in the courts of the United States: Provided, That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." H. R. 3020, *supra.*

> nizations only, whereas the substitute proposal allows damage suits against 'any person.' Also, section 301 limits recovery to the assets of the union. The substitute allows the attachment of employees' bank accounts and all their property.
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> . . . . . .
>
> "Mr. TAFT: On request by . . . Senator [Ives] from New York and others who raised the point, I am amending the proposal, by striking out the word 'person,' in the second line, and inserting in lieu thereof 'labor organization,' so the action will be open only against labor organizations promoting this type of strike." *Id.*, at 4839–4841.[15]

The Senate passed this version of the bill, foreclosing individual damages liability in *both* § 301 and § 303 lawsuits.

At conference, the Conference Committee squarely rejected § 12 of the House bill in favor of § 303 of the Senate bill, thereby refusing to create a damages action against individual employees for the conduct prohibited in that section. In addition, the Committee deleted the provision in the House bill which had removed protection under § 7 of the National Labor Relations Act for concerted activity in breach of a collective-bargaining agreement for the stated reason that the provision was unnecessary in light of recent decisions of the National Labor Relations Board. Those provisions had held that "strikes in violation of collective bargaining contracts were not concerted activities protected by the act and [the NLRB had] refused to reinstate employees discharged for engaging in such activities." H. R. Conf. Rep. No. 510, 80th

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[15] During the floor debate, proponents of the Committee bill emphasized the limited nature of the damages remedy in the proposed legislation. For example, Senator Ball stated: "[W]e give to employers the right to sue a *union* in interstate commerce, in a Federal court, for violation of contract. It does not *go beyond that*." 93 Cong. Rec. 5014 (1947) (emphasis added).

Cong., 1st Sess., 39 (1947). The Committee, therefore, opted for a discharge remedy for violations of § 303 by individuals, rather than for the damages remedy that had been proposed by the House. At the same time, it preferred discharge as the employer's remedy under § 301 where employees violate the no-strike provision of their collective-bargaining agreement.[16]

Thus, while § 301 (b) explicitly addresses only union-authorized violations of a collective-bargaining agreement, the "penumbra" of § 301 (b), *Textile Workers* v. *Lincoln Mills*, 353 U. S., at 457, as informed by its legislative history, establishes that Congress meant to exclude individual strikers from damages liability, whether or not they were authorized by their union to strike.[17] The legislative debates and the process of legislative amendment demonstrate that Congress deliberately chose to allow a damages remedy for breach of the

[16] "Many of the matters covered in section 12 of the House bill are also covered in the conference agreement in different form, as has been pointed out above in the discussion of section 7 and section 8 (b) (1) of the conference agreement. Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10 (c). Furthermore, under section 10 (k) of the conference agreement, the Board is given authority to apply to the district courts for temporary injunctions restraining alleged unfair labor practices temporarily pending the decision of the Board on the merits." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 59 (1947).

[17] Petitioners' reliance on the statement in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 562 (1976) (emphasis added), that "Section 301 contemplates suits by and *against individual employees*" is misplaced. We decide a much narrower question not before the Court in *Hines:* that § 301 does not contemplate recovery of *damages* from individual employees as a result of a breach of the no-strike provision of a collective-bargaining agreement. Whether *Hines* contemplated injunctive suits against individuals was not decided by the Court in *Hines* and we have no occasion to decide that issue now. See n. 18, *infra.*

no-strike provision of a collective-bargaining agreement only against *unions,* not *individuals,* and, as to unions, only when they participated in or authorized the strike. See *Carbon Fuel Co.* v. *Mine Workers,* 444 U. S. 212, 216 (1979). Congress itself balanced the competing advantages and disadvantages inherent in the possible remedies to combat wildcat strikes, and "we are strongly guided by" its choice.[18] *Atkin-*

[18] Petitioners argue that a damages remedy against individual employees is *indispensable* to preserve the integrity of the collective-bargaining agreement and thereby to further the national labor policy of promoting industrial peace. This proposition is questionable on its own terms, overlooks an array of potential remedies that are available to the employer apart from a damages remedy against individuals, and in any event was rejected by Congress.

It is by no means certain that an individual damages remedy will meaningfully increase deterrence of wildcat strikes above that resulting from use of other available remedies. It is just as likely that damages actions against individuals would exacerbate industrial strife: "an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." *Boys Markets, Inc.* v. *Retail Clerks,* 398 U. S., at 248 (footnote omitted); see *Gateway Coal Co.* v. *Mine Workers,* 414 U. S. 368, 381, n. 14 (1974).

The significant array of other remedies available to employers to achieve adherence to collective-bargaining agreements casts further doubt on petitioners' proposition. First, an employer may seek damages against the union where responsibility may be traced to the union for the contract breach. See 29 U. S. C. § 185 (b); *Carbon Fuel Co.* v. *Mine Workers,* 444 U. S. 212, 216–218 (1979); *Atkinson* v. *Sinclair Refining Co.,* 370 U. S., at 247–249. Second, an employer may discharge, or otherwise discipline, an employee who unlawfully walks off the job. See *id.,* at 246; *NLRB* v. *Rockaway News Supply Co.,* 345 U. S. 71, 80 (1953); *Lakeshore Motor Freight Co.* v. *International Brotherhood of Teamsters,* 483 F. Supp. 1150, 1154, n. 2 (WD Pa. 1980) (wildcat strikers discharged, and those allowed to return were rehired as new employees). Third, the union itself may discipline its members. See *Carbon Fuel Co.* v. *Mine Workers, supra,* at 220; *Sinclair Oil Corp.* v. *Oil, Chemical & Atomic Workers,* 452 F. 2d 49, 54 (CA7 1971); see 92 Cong. Rec. 5706 (1946) (Sen. Capehart) (debate on Case bill). Finally, an employer may seek injunctive relief against unions for breach of a no-strike provision in a collective-bargaining

son v. *Sinclair Refining Co.*, 370 U. S., at 249. See *Howard Johnson Co.* v. *Hotel & Restaurant Employees*, 417 U. S., at 255. Accordingly, we hold that § 301 (a) does not sanction damages actions against individual employees for violating the no-strike provision of the collective-bargaining agreement, whether or not their union participated in or authorized the strike.

Affirmed.

JUSTICE POWELL, concurring in part and concurring in the judgment.

The Court's opinion makes clear that Congress, in enacting the Taft-Hartley amendments to the National Labor Relations Act, did not intend to hold individuals liable in damages for wildcat strikes. I therefore join the Court's judgment and most of its opinion. I do not, however, share the Court's view that there remains to management a "significant array of other remedies," *ante*, at 416, n. 18, with which to deter or obtain compensation for illegal strikes. In fact, the "remedies" said to be available are largely chimerical.

I

Collective-bargaining agreements typically contain a promise by the union not to strike during the agreement's term. Unions agree to these no-strike clauses in exchange for the employer's promise to arbitrate disputes arising in contract

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agreement where the underlying dispute giving rise to the breach is subject to binding arbitration. See *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S., at 407; *Gateway Coal Co.* v. *Mine Workers*, *supra*, at 380–387; *Boys Markets, Inc.* v. *Retail Clerks*, *supra*. Whether a *Boys Markets-Buffalo Forge* injunction could have issued against individual union members engaged in the wildcat strike at issue here is not before us. It may be that an injunction would not issue against a participating or authorizing union in circumstances otherwise the same: in the instant case the District Judge found that the strike commenced over a nonarbitrable labor dispute, and that ruling was not disturbed by the Court of Appeals.

administration. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 449, 455 (1957). Each promise is the *"quid pro quo"* for the other, *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567 (1960), because the employer yields traditional managerial autonomy in exchange for industrial peace.

Despite the mutual benefits of the no-strike/grievance-arbitration pact, strikes in breach of contract occur with disturbing frequency. In some cases, these strikes are encouraged or even instigated by union leaders.[1] Often, however, they are true "wildcats"—strikes that arise spontaneously to protest grievances against the company and, occasionally, against the union leadership itself. Responsible unions disapprove of such strikes, but some officials, especially those at the local level, may acquiesce in them because of the fervor of intransigent members.

Whatever the cause, strikes in breach of contract frequently injure all concerned: the employer,[2] employees, and the public. Strikes and lockouts by their nature squander human working capacity, the full use of which is essential to the enjoyment of the Nation's productive potential. To be sure, the national labor policy recognizes that, in some circumstances, the use of weapons of strike and lockout is con-

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[1] Strike encouragement sometimes is explicit but more often is cryptic. A union may employ subtle signals to convey the message to strike. One court noted that unions sometimes employ "a nod or a wink or a code . . . in place of the word 'strike.'" *United States* v. *UMW*, 77 F. Supp. 563, 566 (DC 1948), aff'd, 85 U. S. App. D. C. 149, 177 F. 2d 29, cert. denied, 338 U. S. 871 (1949).

[2] Production disruptions have obvious short-term adverse consequences. And one commentator has pointed out that the long-term consequences of these strikes may be even more severe. A strike rends the "closely integrated supply and distribution systems" that the company has developed. M. Jay Whitman, Wildcat Strikes: The Unions' Narrowing Path to Rectitude?, 50 Ind. L. J. 472, 473 (1975). Such systems "presume predictability. A business with a reputation for labor problems, let alone wildcats, simply cannot provide its customers with that predictability," *ibid.*, leading once-regular customers to seek other sources of supply.

sistent with and protected by law. Labor, management, and the public nevertheless share a "common goal of uninterrupted production." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960). The essential tenet of our labor policy is that "a system of industrial self-government" based on consensual (albeit vigorously negotiated) labor contracts, see *Steelworkers* v. *American Mfg. Co., supra,* at 570 (BRENNAN, J., concurring), is preferable to "strikes, lockouts, or other self-help," *Boys Markets, Inc.* v. *Retail Clerks,* 398 U. S. 235, 249 (1970).

When the Taft-Hartley amendments were enacted in 1947, the Nation had experienced a wave of labor unrest.[3] Congress found that "the balance of power in collective-bargaining" had been destroyed because employers, who had promised to arbitrate disputes in exchange for no-strike promises, often failed to obtain the industrial peace for which they bargained. S. Rep. 14.[4]

II

It is increasingly clear that the 1947 Taft-Hartley amendments did not provide employers with an effective remedy for wildcat strikes. The Court today holds, properly I think, that Congress intended to foreclose a damages remedy against individual wildcat strikers. The Court states, however, that

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[3] The Senate Report accompanying the Taft-Hartley amendments observed that the Nation in 1945 experienced "the loss of approximately 38,000,000 man-days of labor through strikes. This total was trebled in 1946 when there were 116,000,000 man-days lost. . . ." S. Rep. No. 105, 80th Cong., 1st Sess., 2 (1947) (hereinafter S. Rep.).

[4] The Senate Report stated that if workers "can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of such an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." *Id.*, at 16.

there remains a number of legal weapons with which to deter or terminate illegal strikes, or to obtain compensation when they occur. *Ante,* at 416–417, n. 18. In support of its view, the Court contends that the employer may (i) obtain an injunction, (ii) discharge the strikers, (iii) request the union to use its internal disciplinary powers, or (iv) sue the union entity for damages. *Ibid.* In reality, more often than not, each of these remedies is illusory.

Injunctions in labor disputes are generally prohibited by the Norris-LaGuardia Act.[5] In *Boys Markets, Inc.* v. *Retail Clerks, supra,* the Court recognized a limited exception to the anti-injunction provisions of that Act. *Boys Markets* permits injunctions to terminate strikes pending arbitration if the grievance underlying the strike is arbitrable. However, *Boys Markets* offers only "narrow" relief, 398 U. S., at 253, because injunctions cannot be obtained in strikes of other kinds. *E. g., Buffalo Forge Co.* v. *Steelworkers,* 428 U. S. 397 (1976) (injunctions not available in sympathy strikes). Moreover, even when an injunction is available, workers on strike often are disinclined to obey it.[6] Courts may be reluctant to impose contempt penalties on individual workers; if ordered, such penalties are difficult to enforce.

Nor is discharge a realistic remedy in most cases. Because a strike in breach of contract is unprotected conduct under the National Labor Relations Act, see *NLRB* v. *Sands Mfg. Co.,* 306 U. S. 332 (1939), workers who strike illegally may be terminated. It therefore has been argued that discharge

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[5] Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 104, provides, in pertinent part:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . . ."

[6] Compare *Old Ben Coal Corp.* v. *Local 1487, UMW,* 457 F. 2d 162 (CA7 1972), with *Old Ben Coal Corp.* v. *Local 1487, UMW,* 500 F. 2d 950, 952 (CA7 1974). See Gould, On Labor Injunctions Pending Arbitration: Recasting *Buffalo Forge,* 30 Stan. L. Rev. 533, 541, and n. 47 (1978).

effectively deters strikes and punishes wrongdoers because discharge is "the industrial equivalent of capital punishment." M. Jay Whitman, Wildcat Strikes: The Union's Narrowing Path to Rectitude?, 50 Ind. L. J. 472, 481 (1975). There are at least three reasons why this remedy in practice often is not effective. First, in a large wildcat strike, wholesale discharges are not practical because an employer cannot terminate all or most of his labor force without crippling production. See *Boys Markets, supra,* at 248–249, n. 17.[7] Second, certain kinds of *selective* discharges arguably are illegal. The National Labor Relations Board takes the position that an employer may not discipline a union officer more severely than other strike participants, even where the union officer failed to fulfill a contractual undertaking to help terminate strikes.[8] In any event, discharging only selected strikers is unlikely to influence the rank and file to return to work. Such discharges actually may aggravate worker discontent and thereby prolong the strike. *Cedar Coal Co.* v. *United Mine Workers,* 560 F. 2d 1153, 1157 (CA4 1977), cert. denied, 434 U. S. 1047 (1978); see 86 Harv. L. Rev. 447, 454,

[7] Discharging the entire work force would "caus[e] mountainous personnel problems. Consider the sheer logistics of hiring, training and acclimating an entirely new work force with suitable skills. Even if a new labor force could be recruited, the time and expense of this process, from recruitment to full production, could very well sound the death knell of the business." Fishman & Brown, Union Responsibility for Wildcat Strikes, 21 Wayne L. Rev. 1017, 1021 (1975).

[8] *E. g., Miller Brewing Co.,* 254 N. L. R. B. 266 (1981); *South Central Bell Telephone Co.,* 254 N. L. R. B. 315 (1981); *Precision Casting Co.,* 233 N. L. R. B. 183 (1977). The Board's position is so clear that employers may be deterred from conducting selective discharges. This Court has not addressed the question, but some Courts of Appeals have not warmly received the Board's reasoning. See *Gould, Inc.* v. *NLRB,* 612 F. 2d 728 (CA3) (denying enforcement to 237 N. L. R. B. 881 (1978)), cert. denied *sub nom. Moran* v. *Gould Corp.,* 449 U. S. 890 (1980); *Indiana & Mich. Electric Co.* v. *NLRB,* 599 F. 2d 227 (CA7 1979) (denying enforcement to 237 N. L. R. B. 226 (1978)); see also *NLRB* v. *Armour-Dial, Inc.,* 638 F. 2d 51, 54–56 (CA8 1981).

n. 33 (1972). At a minimum, strikers may insist that their discharged colleagues be reinstated as a condition to returning to work. Fishman & Brown, Union Responsibility for Wildcat Strikes, 21 Wayne L. Rev. 1017, 1022 (1975). Third, arbitrators not infrequently refuse to sustain discharges of strikers. See Handsaker & Handsaker, Remedies and Penalties for Wildcat Strikes: How Arbitrators and Federal Courts Have Ruled, 22 Cath. U. L. Rev. 279, 284 (1973).

The union itself normally will not discipline its striking members. Most unions have the legal authority to take such action, see Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1065 (1951), but the power seldom is used. In a wildcat strike, worker recalcitrance sometimes is directed at the incumbent union leadership as much as at company management. In these circumstances, the union's attempt to discipline is unlikely to be effective and may be counterproductive. Moreover, under this Court's decision in *Carbon Fuel Co.* v. *Mine Workers,* 444 U. S. 212 (1979), a parent union normally is not obligated to take affirmative steps to prevent or terminate a wildcat strike. Absent such an obligation, there is little incentive for the union to intervene, even where intervention would be useful.

Finally, a suit for damages against the union entity rarely is feasible.[9] Last Term, in *Carbon Fuel, supra,* we largely

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[9] Sophisticated employers for tactical reasons may elect to forgo tenable poststrike suits for damages. As the Court points out, such suits may "exacerbate industrial strife," *ante,* at 416, n. 18, and thereby delay the dissipation of the acrimony engendered by the strike. Employers also may elect not to sue for damages because they do not want to subject themselves to the disclosure attendant to litigation. A damages suit

"necessarily involves detailed discussion of an employer's most intimate financial secrets. By making a damage claim, the employer puts its . . . finances . . . at issue in the litigation. The discovery rules of the *Federal Rules of Civil Procedure* give the union and its accountants the right to explore every corner of the employer's books. If the union conducts its case properly, it will know everything from per-unit profit to the finer

foreclosed this possibility when we held that liability normally may not be imposed on a parent union [10] absent proof that it authorized or ratified the strike.[11] It is a foolish union that would invite a damages suit by explicitly endorsing a strike in this manner. See n. 1, *supra.*

III

The Court plainly is unrealistic, therefore, when it suggests that employers have at their disposal a battery of alternative remedies for illegal strikes. *Ante,* at 416–417, n. 18. The result of the absence of remedies is a lawless vacuum. Despite a no-strike clause, a plant may be closed with adverse consequences that often are far-reaching. The strike injures the employer, other companies and their employees, and consumers in general. Frequently, the strike is harmful even to the majority of strikers, who feel obligated to honor the picket line of minority wildcatters.

It is, of course, the province of Congress to set the Nation's labor policy. I do not suggest that authorizing a damages remedy against individual wildcat strikers would be desirable. I do believe, however, that the absence of an effective

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details of [corporate] management." M. Jay Whitman, *supra* n. 2, at 474 (footnote omitted).

Finally, part of the price of settling the strike often is a promise that the company will waive its claim for damages. *Ransdell* v. *International Assn. of Machinists,* 97 LRRM 2738 (ED Wis. 1978); Gould, On Labor Injunctions, Unions, and the Judges: The *Boys Market* Case, 1970 S. Ct. Rev. 215, 231.

[10] *Carbon Fuel* did not consider the quantum of proof necessary to establish damages liability against a local union. Because of the local's proximity to workers, an inference of agency—and hence, liability—arguably may arise even without explicit proof of strike authorization or ratification. See § 301 (e) of the Act, 29 U. S. C. § 185 (e). The possibility that the local will be liable may be of little practical benefit, however, because the local often is judgment-proof.

[11] *Carbon Fuel* recognized, of course, that an explicit contractual undertaking by the parent to intervene to terminate wildcats could be the basis for damages liability. See 444 U. S., at 218–222.

remedy leaves such strikes undeterred and the public interest unprotected. The National Labor Relations Act, as amended in 1947, was intended to further broader national interests than those of either labor or management. It was conceived not only as a charter for labor rights but also as a framework of law to promote orderly labor relations. Wildcat strikes are at war with these objectives.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

The Court today holds that individual employees who, without the approval of their union, breach a covenant not to strike in the collective-bargaining agreement between their union and their employers may not be held liable for resulting damages to the employers. At stake is the fundamental principle that individuals are accountable when they breach a voluntarily executed contract.

The underlying facts in this case are not in dispute. The respondents are members of Local 332 of the International Brotherhood of Teamsters, which acts as their exclusive bargaining agent with petitioners, their employers. The union and the petitioners have entered into a collective-bargaining agreement that provides in part:

> "The Unions and Employers agree that there shall be no strike, tie-up of equipment, slowdowns or walkouts on the part of the employee . . . without first using all possible means of settlement, as provided in this Agreement, of any controversy which might arise." App. 14–15.

Despite this covenant, the respondents embarked on what is commonly called a "wildcat" strike; it is admitted that the local union "did not aid, assist or authorize the work stoppage or a tie-up of any equipment." *Id.*, at 25.

Section 301 (a) of the Labor Management Relations Act, 29 U. S. C. § 185 (a), makes collective-bargaining agreements enforceable in federal courts against both unions and em-

ployers. See H. R. Rep. No. 245, 80th Cong., 1st Sess., 46 (1947); S. Rep. No. 105, 80th Cong., 1st Sess., 15–16 (1947). Of course the union, acting on behalf of its members, may sue the employer for any breaches of the agreement, and the employer may sue the union for its breaches. This is no more than a corollary to the enforceability of the contract under § 301 (a). Moreover, the Court has had no problem in the past in holding the parties responsible for a breach accountable for their conduct. An employee may sue the employer directly for breach of the agreement even though the employee is not technically a party to the agreement, *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962), but the employer may not sue an individual worker for a union-sponsored breach, *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962) (applying Labor Management Relations Act § 301 (b), 29 U. S. C. § 185 (b)). Nor may the employer sue the union for members' breaches that the union has not condoned, *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212 (1979).[1] This case presents the final unresolved situation: May individual union members be held accountable in a suit by the employer for a plain violation of the agreement committed without the approval of the union?

On the basis of literally centuries of the common law of contracts, one would have thought that the traditional notions of accountability for one's voluntary actions would govern. Instead, the Court holds that individual workers, acting without union approval, are a special, privileged class who may with impunity violate an agreement voluntarily reached in arm's-length bargaining. This result finds no support in the statute, it significantly undermines the usefulness and

[1] Thus, the union is not an "insurer" of members' compliance with the collective-bargaining agreement, or vice versa. Had this been the case, I might have been willing to join in the Court's position, for the union would remain liable for failing to see that its members abided by the agreement.

reliability of the collective-bargaining process, and it will not advance the goals the Court claims for it.

In reaching this unusual conclusion, the Court mistakenly relies on the last sentence in § 301 (b) of the Labor Management Relations Act, which states:

> "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 29 U. S. C. § 185 (b).

On its face, this clause does no more than insulate union *members* from personal liability for *union* breaches of the contract; Congress intended this provision to give union members a protection analogous to that afforded stockholders in corporations against personal liability for corporate acts. S. Rep. No. 105, 80th Cong., 1st Sess., 16 (1947) ("members of the union would secure all the advantages of limited liability without incorporation"). It is acknowledged that Congress added this provision to the Act to prevent a recurrence of the Danbury Hatters situation, see *Lawlor* v. *Loewe,* 235 U. S. 522 (1915); *Loewe* v. *Lawlor,* 208 U. S. 274 (1908), where the participants in a strike were held personally liable for the union's actions on the theory that the union, as an unincorporated association, could not be sued. *Ante,* at 406–407, and n. 6; *Atkinson* v. *Sinclair Refining Co., supra,* at 248; 93 Cong. Rec. 5014 (1947) (remarks of Sen. Ball). But the language of § 301 (b) says nothing about holding union members harmless when they, without the approval of their union, individually breach the contract.

The special exemption in § 301 (b) affords individual union members protection against individual liability for collective action; this simultaneously encourages group action through the union—which is what unions are all about—and prevents potentially large damages awards against individual workers. But when Congress changed the law regarding *individual* lia-

bility for *union* conduct, it did not even hint at changing the common-law rule of contract law of *individual* liability for *individual* conduct, which does no more than articulate the basic idea of individual accountability essential to an organized society.[2] When an individual, either personally or, as here, through an agent, voluntarily enters into a binding agreement, that individual is liable in damages for breach. A provision whose language governs—and whose history indicates it was designed to govern—only situations of individual liability for collective action should not be construed to wipe out core principles of personal accountability for individual actions.

Curiously, the Court, *ante,* at 416, n. 18, and the respondents suggest that this anomaly will promote more harmonious relations between employers and striking workers by preventing a long and drawn-out fight in the courts. This argument is wholly specious, and it is contradicted by the views Congress expressed when it adopted § 301. Congress fully recognized that agreements, if breachable with impunity, "do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace." S. Rep. No. 105, 80th Cong., 1st Sess., 16 (1947). If workers can "have their cake and eat it too" by holding the employer liable for its breaches but receiving immunity for their own, employers will be less likely to enter into mutually satisfactory collective-bargaining agreements in the first place.

[2] The Court cites various comments by Members of Congress regarding immunity for union members when they act with union approval. Those remarks do not address the issue before us—individual liability for individual conduct undertaken *without* union involvement. The nearest the Court comes to finding support on that question is a remark by Senator Taft, made during debate on a predecessor bill subsequently vetoed by the President, that employers may fire "wildcat" strikers. *Ante,* at 409. Even Senator Taft's statement does not directly touch on individual liability for individual action, and, ironically, the Court's use of it follows on the heels of the Court's own admonition to avoid "suggest[ions] by negative implication." *Ante,* at 407.

"Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." *Ibid.* Indeed, the Court's logic would insulate unions from suit as well: an action against the union for a strike it had sponsored but that since has ended similarly tends to "reopen old wounds." Moreover, I have difficulty seriously entertaining an argument that the *employer* is responsible for jeopardizing industrial harmony by seeking damages for injuries it has sustained when it was the unlawfully striking employees themselves who broke the peace in the first place. One must resist the temptation to recall the youth who, having deliberately murdered both parents, pleads for the court's mercy as an orphan.

The respondents believe—and the Court accepts, *ante,* at 416, n. 18—that the threat of discharge by the employer or discipline by the union is sufficient to ensure that collective-bargaining agreements generally will be followed by the union and its members.[3] These measures, however, are no answer; they may be too little[4] and they surely come too late, after the employer has suffered substantial losses to its business due to a strike that, under the contract, never should have occurred. In theory, the employer might mitigate damages by hiring substitute workers, but this assumes qualified work-

[3] The Court also mentions the employer's suit against the union itself when the union is responsible. Obviously, that remedy is wholly irrelevant to this case. See *supra,* at 425.

[4] JUSTICE POWELL, in his separate opinion, thoroughly analyzes the inadequacy of these measures. The union's impotence is demonstrated by its failure to control its members in the first place. In addition, union officers in some instances may reject discipline in the hope of appeasing "wildcat" members and bringing them back under union control. As JUSTICE BRENNAN, writing for the Court in *NLRB* v. *Allis-Chalmers Manufacturing Co.,* 388 U. S. 175, 183 (1967), aptly noted:

"Where the union is weak, . . . the union faced with further depletion of its ranks may have no real choice except to condone the member's disobedience."

ers could be found who would be willing to cross even a "wildcat" picket line.

Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from "The King can do no wrong." This principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice. Today the Court penalizes the employer for the "wildcat" breaches of the employees and rewards those errant employees.

It seems to me that, by now, the American labor movement has matured sufficiently so that neither unions nor their members need this kind of artificial, excessively paternalistic protection for admittedly illegal acts—a protection contrary to fundamental, centuries-old concepts of individual accountability. The stability of unions and the harmony of industrial relations will be enhanced, not impaired, by applying to union members the same standards of accountability that govern all other individuals in society.[5]

This Court ought not to make two classes of contract breakers under collective-bargaining agreements, one liable and one immune. I submit that if union members understand that where they breach a contract without the approval of their union, individual liability will follow, we will very likely see fewer unauthorized strikes, for union authority will be enhanced and greater industrial harmony will likely result.

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[5] Cf. *United States* v. *Park,* 421 U. S. 658 (1975), in which the chief executive officer of a supermarket chain was held criminally liable for permitting food to be left in insanitary conditions after notice of those conditions.

BULLINGTON *v.* MISSOURI

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 79–6740. Argued January 14, 1981—Decided May 4, 1981

Missouri law provides only two possible sentences for a defendant convicted of capital murder: (a) death, or (b) life imprisonment without eligibility for probation or parole for 50 years. Under state statutes, a separate presentence hearing, at which additional evidence in mitigation and aggravation of punishment is heard, must be held before the same jury that found the defendant guilty; the prosecution must prove the existence of aggravating circumstances beyond a reasonable doubt before the death penalty may be imposed; and a jury that imposes the death penalty must designate in writing the aggravating circumstance or circumstances that it finds beyond a reasonable doubt. The guilt-or-innocence phase of petitioner's state-court trial resulted in a verdict of guilty of capital murder, and his presentence hearing resulted in the jury's additional verdict fixing petitioner's punishment at life imprisonment without eligibility for probation or parole for 50 years. After granting petitioner's post-trial motion for a new trial because of the intervening decision in *Duren* v. *Missouri,* 439 U. S. 357, which held that Missouri's allowing automatic exemption of women from jury service was unconstitutional, the trial court announced that it would grant petitioner's motion, based on double jeopardy grounds, to strike the prosecution's notice that it intended again to seek the death penalty on the basis of the same aggravating circumstances it had sought to prove at the first trial. The Missouri Court of Appeals denied the State's request for a writ of prohibition or mandamus, but the Missouri Supreme Court ultimately granted a writ of prohibition.

Held: Because under Missouri law the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is available to him, with respect to the death penalty, at his retrial. The reasoning of *Stroud* v. *United States,* 251 U. S. 15, is not controlling. Pp. 437–446.

(a) This Court generally has concluded that, because the imposition of a particular sentence usually is not regarded as an "acquittal" of any more severe sentence that could have been imposed, the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside. See *North Carolina* v. *Pearce,*

395 U. S. 711; *Chaffin* v. *Stynchcombe,* 412 U. S. 17; *Stroud* v. *United States, supra; United States* v. *DiFrancesco,* 449 U. S. 117. However, in those cases, unlike the present case, the sentencing procedures did not have the hallmarks of a trial on guilt or innocence. In the first three cases, there was no separate sentencing proceeding at which the prosecution was required to prove additional facts in order to justify the particular sentence, and the sentencer's discretion in determining punishment was essentially unfettered. Although *United States* v. *DiFrancesco, supra,* involved a separate sentencing procedure, the prosecution was required to prove an additional fact warranting a harsher penalty only by a preponderance of the evidence, and the sentencer's choice of punishment was far broader than the two choices available to petitioner's jury under Missouri law. Pp. 437–441.

(b) The rationale of *Burks* v. *United States,* 437 U. S. 1, which held that a defendant may not be retried if he obtains a reversal of his conviction on the ground that the evidence was insufficient to convict, is relevant here. In the usual sentencing proceeding, it is impossible, because of the absence of sentencing standards, to conclude that a sentence less than the statutory maximum constitutes a decision to the effect that the prosecution has failed to prove its case. But by enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, Missouri explicitly requires the jury to determine whether the prosecution has "proved its case." Petitioner's sentence of life imprisonment at his first trial meant that the jury has already acquitted him of whatever was necessary to impose the death sentence. Pp. 441–446.

594 S. W. 2d 908, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined, *post,* p. 447.

Richard H. Sindel argued the cause for petitioner. With him on the brief was *Gail Gaus.*

James J. Cook argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

Stroud v. *United States,* 251 U. S. 15 (1919), concerned a defendant who was convicted of first-degree murder and sen-

tenced to life imprisonment, and who then obtained, upon confession of error by the Solicitor General, a reversal of his conviction and a new trial. This Court, by a unanimous vote in that case, held that the Double Jeopardy Clause of the Fifth Amendment [1] did not bar the imposition of the death penalty when Stroud at his new trial was again convicted.

The issue in the present case is whether the reasoning of *Stroud* is also to apply under a system where a jury's sentencing decision is made at a bifurcated proceeding's second stage at which the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed.

I

Missouri law provides two, and only two, possible sentences for a defendant convicted of capital murder: [2] (a) death, or (b) life imprisonment without eligibility for probation or parole for 50 years. Mo. Rev. Stat. § 565.008.1 (1978).[3]

Like most death penalty legislation enacted after this Court's decision in *Furman* v. *Georgia,* 408 U. S. 238 (1972),

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[1] ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

[2] The definition of capital murder in Missouri is set forth in Mo. Rev. Stat. § 565.001 (1978):

"Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

[3] Section 565.008.1 reads:

"Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence."

the Missouri statutes contain substantive standards to guide the discretion of the sentencer. The statutes also afford procedural safeguards to the convicted defendant. Section 565.006 provides that the trial court shall conduct a separate presentence hearing for the defendant who is convicted by a jury of capital murder.[4] The hearing must be held before

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[4] At all relevant times, § 565.006 read in pertinent part:

"1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment, and by their verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. . . .

"2. Where the jury . . . returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury . . . at which time the only isssue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury . . . shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury . . . shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury . . . . Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury . . . the additional procedure provided in section 565.012 shall be followed. The jury . . . shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury . . . . If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

"3. If the trial court is reversed on appeal because of error only in the

the same jury [5] that found the defendant guilty, and "additional evidence in extenuation, mitigation, and aggravation of punishment" shall be heard. "Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible." The jury must consider whether the evidence shows that there exist any of the 10 [6] aggravating circumstances or the 7 mitigating circumstances specified by the statute, see §§ 565.012.2 and 565.012.3; whether any other mitigating or aggravating circumstances authorized by law exist; whether any aggravating circumstances that do exist are sufficient to warrant the imposition of the death penalty; and whether any mitigating circumstances that exist outweigh the aggravating circumstances. § 565.012.1. A jury that imposes the death penalty must designate in writing the aggravating circumstance or circumstances that it finds beyond a reasonable doubt. § 565.012.4. It also must be convinced beyond a reasonable doubt that any aggravating circumstance or circumstances that it finds to exist are sufficient to warrant the imposition of the death penalty. Missouri Approved Instructions—Criminal (MAI–Cr) § 15.42 (1979). A Missouri jury is instructed that it is not compelled to impose the death

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presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

The statute was amended by 1979 Mo. Laws H. B. 251, but the amendment does not affect the present case.

[5] Because the petitioner in this case was sentenced by a jury at his first trial, we describe only Missouri's procedure for imposition of the death penalty by a jury.

[6] Section 565.012.2 was amended in 1980 to provide two additional specified aggravating circumstances. Those added were:

"(11) The capital murder was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate the felony of rape or forcible rape or the felony of sodomy or forcible sodomy;

"(12) The capital murder was committed by the defendant for the purpose of preventing the person killed from testifying in any judicial proceeding." Mo. Rev. Stat. §§ 565.012.2 (11) and (12) (Supp. 1980).

penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances. MAI–Cr. § 15.46. A jury's decision to impose the death penalty must be unanimous. If the jury is unable to agree, the defendant receives the alternative sentence of life imprisonment described above. § 565.006.2; MAI–Cr. § 15.48.

II

In December 1977, petitioner Robert Bullington was indicted in St. Louis County, Mo., for capital murder and other crimes arising out of the abduction of a young woman and her subsequent death by drowning.[7]

The Circuit Court of St. Louis County granted petitioner's pretrial motion for a change of venue to Jackson County in the western part of the State. The prosecution, by letter, informed the defense that the State would seek the death penalty if the jury convicted the defendant of capital murder. App. 12. The letter-notice stated that the prosecution would present evidence of two aggravating circumstances specified by the statute: that "[t]he offense was committed by a person . . . who has a substantial history of serious assaultive criminal convictions," § 565.012.2 (1), and that "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind," § 565.012.2 (7).

At the guilt-or-innocence phase of petitioner's trial, the jury returned a verdict of guilty of capital murder. App. 21. On the following day, the trial court proceeded to hold the presentence hearing required by § 565.006.2. Evidence submitted by the prosecution was received. None was offered by the defense. After argument by counsel, instructions from the judge, and deliberation, the jury returned its

[7] Petitioner also was charged with the state crimes of kidnaping, armed criminal action, burglary, and flourishing a dangerous and deadly weapon. At his trial, petitioner was found guilty of all these charges.

additional verdict fixing petitioner's punishment not at death, but at imprisonment for life without eligibility for probation or parole for 50 years. App. 27.

Petitioner then moved, on various grounds, for judgment of acquittal or in the alternative for a new trial. While that motion was pending, *Duren* v. *Missouri,* 439 U. S. 357 (1979), was decided. In that case this Court held that Missouri's constitutional and statutory provisions allowing women to claim automatic exemption from jury service deprived a defendant of his Sixth and Fourteenth Amendments right to a jury drawn from a fair cross-section of the community. The trial court overruled petitioner's motion for acquittal but, relying upon *Duren,* granted his motion for a new trial. App. 44.

Soon thereafter, the prosecution served and filed a formal "Notice of Evidence in Aggravation," stating that it intended again to seek the death penalty. The notice specified the same aggravating circumstances the State sought to prove at the first trial, see also Tr. of Oral Arg. 36, and asserted that it would introduce the evidence that was previously disclosed to defense counsel. App. 45–46. The defense moved to strike the notice, *id.,* at 47, arguing that the Double Jeopardy Clause of the Fifth Amendment (as made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784, 794 (1969)) barred the imposition of the penalty of death when the first jury had declined to impose the death sentence.

The trial court announced that it would grant that motion and would not permit the State to seek the death penalty. Before the court issued a formal order to this effect, the prosecution sought a writ of prohibition or mandamus from the Missouri Court of Appeals for the Western District. After granting a temporary "stop order," App. 56, the Court of Appeals without opinion denied the State's request and dissolved the stop order. *Id.,* at 57. The Supreme Court of Missouri, however, granted the prosecution's motion for

transfer of the case to that court and issued a preliminary writ of prohibition. After argument, the court, sitting en banc and by a divided vote, sustained the State's position and made the writ absolute. *State ex rel. Westfall* v. *Mason,* 594 S. W. 2d 908 (1980). It held that neither the Double Jeopardy Clause, nor the Eighth Amendment, nor the Due Process Clause barred the imposition of the death penalty upon petitioner at his new trial, and that allowing the prosecution to seek capital punishment would not impermissibly chill a defendant's effort to seek redress for any constitutional violation committed at his initial trial.

We granted certiorari, 449 U. S. 819 (1980),[8] in order to consider the important issues raised by petitioner regarding the administration of the death penalty.[9]

III

It is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has been *acquitted* of the crime charged. *United States* v. *DiFrancesco,* 449 U. S. 117, 129–130 (1980); *Burks* v. *United States,* 437 U. S. 1, 16 (1978);

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[8] Although further proceedings are to take place in state court, the judgment rejecting petitioner's double jeopardy claim is "final" within the meaning of the jurisdictional statute, 28 U. S. C. § 1257. *Harris* v. *Washington,* 404 U. S. 55 (1971). See *Abney* v. *United States,* 431 U. S. 651 (1977).

[9] Subsequent to this Court's decisions in *Furman* v. *Georgia,* 408 U. S. 238 (1972), and *Gregg* v. *Georgia,* 428 U. S. 153 (1976), courts of at least two States have concluded that a defendant originally sentenced to life imprisonment may not be sentenced to death upon retrial after reversal of his original conviction. The Texas Court of Criminal Appeals has relied upon this Court's cases construing the Double Jeopardy Clause. *Sanne* v. *State,* 609 S. W. 2d 762, 766–767 (1980); *Brasfield* v. *State,* 600 S. W. 2d 288, 298 (1980). The Supreme Court of Georgia has concluded that the imposition of a death sentence in these circumstances would violate the state-law requirement, Ga. Code § 27–2537 (c)(3) (1979), that the sentence not be " 'excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.' " *Ward* v. *State,* 239 Ga. 205, 208–209, 236 S. E. 2d 365, 368 (1977).

United States v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977); *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962); *Green* v. *United States*, 355 U. S. 184 (1957). This Court, however, has resisted attempts to extend that principle to sentencing. The imposition of a particular sentence usually is not regarded as an "acquittal" of any more severe sentence that could have been imposed. The Court generally has concluded, therefore, that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside. See *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). See also *United States* v. *DiFrancesco*, 449 U. S., at 133, 137–138; *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 23–24 (1973); *Stroud* v. *United States*, 251 U. S. 15 (1919).

The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.[10]

[10] At the statutorily prescribed presentence hearing, counsel make opening statements, testimony is taken, evidence is introduced, the jury is instructed, and final arguments are made. The jury then deliberates and

In contrast, the sentencing procedures considered in the Court's previous cases did not have the hallmarks of the trial on guilt or innocence. In *Pearce, Chaffin,* and *Stroud,* there was no separate sentencing proceeding at which the prosecution was required to prove—beyond a reasonable doubt or otherwise—additional facts in order to justify the particular sentence. In each of those cases, moreover, the sentencer's discretion was essentially unfettered. In *Stroud,* no standards had been enacted to guide the jury's discretion.[11] In *Pearce,* the judge had a wide range of punishments from which to choose with no explicit standards imposed to guide him.[12] And in *Chaffin,* the discretion given to the jury was extremely broad. That defendant, convicted in Georgia of

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returns its formal punishment verdict. § 565.006.2. See n. 4, *supra.* All these steps were taken at petitioner's presentence hearing following his first trial.

We think it not without some significance that the pertinent Missouri statute itself speaks specifically of the presentence hearing in terms of a continuing "trial." Section 565.006.2 states that after the verdict of guilty of capital murder is returned, "the court shall *resume the trial* and conduct a presentence hearing." (Emphasis added.)

[11] In *Stroud,* the relevant statute provided: "Every person guilty of murder in the first degree shall suffer death," but "the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." Act of Mar. 4, 1909, §§ 275, 330, 35 Stat. 1143, 1152, codified currently as 18 U. S. C. § 1111 (b).

At Stroud's retrial, the court essentially repeated the language of this statute to the jury, giving it no further guidance as to the appropriate penalty. Record in *Stroud* v. *United States,* O. T. 1919, No. 276, p. 472. At the previous trial, the judge had told the jury that he would not "pretend to tell you the various considerations that come into determining that question [of the proper sentence]." Record in *Stroud* v. *United States,* O. T. 1917, No. 694, p. 177.

[12] Pearce was convicted of assault with intent to commit rape, a state crime punishable by a prison term of between 1 and 15 years. N. C. Gen. Stat. § 14–22 (1969), repealed by 1979 N. C. Sess. Laws, ch. 682, § 7, and replaced.

robbery, could have been sentenced to death, to life imprisonment, or to a prison term of between 4 and 20 years. 412 U. S., at 18, and n. 1. The statute contained no standards to guide the jury's exercise of its discretion.[13]

In only one prior case, *United States* v. *DiFrancesco,* has this Court considered a separate or bifurcated sentencing procedure at which it was necessary for the prosecution to prove additional facts. The federal statute under consideration there, the "dangerous special offender" provision of the Organized Crime Control Act of 1970, 18 U. S. C. §§ 3575 and 3576, requires a separate presentence hearing. The Government must prove the additional fact that the defendant is a "dangerous special offender," as defined in the statute, in order for the court to impose an enhanced sentence. But there are highly pertinent differences between the Missouri procedures controlling the present case and those found constitutional in *DiFrancesco.* The federal procedures at issue in *DiFrancesco* include appellate review of a sentence "on the record of the sentencing court," § 3576, not a *de novo* proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts.[14] Moreover, the choice presented to the federal judge under § 3575 is far broader than that faced by the state jury at the present petitioner's trial. Bullington's Missouri jury was given—and under the State's statutes could be given—only two choices, death or life imprisonment. On the other hand, if

[13] In discussing the usual attributes of jury sentencing, the Court in *Chaffin* observed: "Normally, there would be no way for a jury to place on the record the reasons for its collective sentencing determination, and ordinarily the resentencing jury would not be informed of any conduct of the accused unless relevant to the question of guilt." 412 U. S., at 28, n. 15. This starkly illustrates the significant difference between the sentencing procedure in that case and the procedure now required by Missouri in a capital murder case.

[14] The statute authorizes "review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused." 18 U. S. C. § 3576.

the Federal Government proves that a person convicted of a felony is a dangerous special offender, the judge may sentence that person to "an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony." § 3575 (b). Finally, although the statute requires the Government to prove the additional fact that the defendant is a "dangerous special offender," it need do so only by a preponderance of the evidence. *Ibid.* This stands in contrast to the reasonable-doubt standard of the Missouri statute, the same standard required to be used at the trial on the issue of guilt or innocence. *Jackson* v. *Virginia,* 443 U. S. 307 (1979); *In re Winship,* 397 U. S. 358 (1970). The State's use of this standard indicates that, as has been said generally of the criminal case, "the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. . . . [O]ur society imposes almost the entire risk of error upon itself." *Addington* v. *Texas,* 441 U. S. 418, 423–424 (1979).

IV

These procedural differences become important when the underlying rationale of the cases is considered. The State here relies principally upon *North Carolina* v. *Pearce.*[15] The

[15] The other cases that concern the application of the Double Jeopardy Clause to sentencing do not add significantly to the State's argument. *Chaffin* relies primarily upon *Pearce.* See 412 U. S., at 23–24. *Stroud* states only that "[t]he fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." 251 U. S., at 18. Stroud's jury was not required to find any facts in addition to those necessary for a conviction for first-degree murder in order to sentence him to death.

DiFrancesco relies upon "the history of sentencing practices, . . . the pertinent rulings of this Court, [and] considerations of double jeopardy policy . . . ." 449 U. S., at 132. The history of sentencing practices is of little assistance to Missouri in this case, since the sentencing pro-

Court's starting point in that case, 395 U. S., at 719–720, was the established rule that there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction. See, *e. g., United States* v. *Tateo,* 377 U. S. 463 (1964); *United States* v. *Ball,* 163 U. S. 662, 672 (1896). The Court stated that this rule rests on the premise that the original conviction has been nullified and "the slate wiped clean." 395 U. S., at 721. Therefore, if the defendant is convicted again, he constitutionally may be subjected to whatever punishment is lawful, subject only to the limitation that he receive credit for time served.

There is an important exception, however, to the rule recognized in *Pearce.* A defendant may not be retried if he obtains a reversal of his conviction on the ground that the evidence was insufficient to convict. *Burks* v. *United States,* 437 U. S. 1 (1978). The reasons for this exception are relevant here:

> "[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its cases. As such, it implies nothing with respect to the guilt or innocence of the defendant. . . .
>
> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it can assemble. . . . Since we necessarily accord absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest

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cedures for capital cases instituted after the decision in *Furman* are unique. As we see below, considerations of double jeopardy policy favor petitioner in this case, rather than the State. Missouri, therefore, can rely only upon *DiFrancesco*'s discussion of the Court's prior cases, a discussion that relies chiefly upon *Pearce.* See 449 U. S., at 134–136.

in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." *Id.*, at 15–16 (emphasis in original).

The decision in *Burks* was foreshadowed by *Green* v. *United States,* 355 U. S. 184 (1957). In that case, the defendant had been indicted for first-degree murder, and the trial court instructed the jury that it could convict him either of that crime or of the lesser included offense of second-degree murder. The jury convicted him of second-degree murder, but the conviction was reversed on appeal. The Court held that a retrial on the first-degree murder charge was barred by the Double Jeopardy Clause, because the defendant "was forced to run the gantlet once on that charge and the jury refused to convict him." *Id.,* at 190. See also *Price* v. *Georgia,* 398 U. S. 323 (1970).

Thus, the "clean slate" rationale recognized in *Pearce* is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case.

In the usual sentencing proceeding, however, it is impossible to conclude that a sentence less than the statutory maximum "constitute[s] a decision to the effect that the government has failed to prove its case." [16] In the normal

[16] "Sentencing and parole release decisions in this country have largely been left to the unfettered discretion of the officials involved. Legislatures have traditionally set high maximum penalties within which judges must choose specific sentences, but generally have provided little guidance for the exercise of this choice. Although the purposes of sentencing have often been defined as including deterrence, retribution, incapacitation, rehabilitation, and community condemnation to maintain respect for law, legislatures have been silent regarding which purposes are primary and how conflicts among the purposes are to be resolved. For example, federal law currently requires merely that in determining a sentence, the court consider 'in its opinion the ends of justice and best interest of the public.' [18 U. S. C. § 4205 (b).]

"In effect, sentencing policymaking has traditionally been delegated to a multitude of independent judges to be exercised in the context of individ-

process of sentencing, "there are virtually no rules or tests or standards—and thus no issues to resolve . . . ." M. Frankel, Criminal Sentences: Law Without Order 38 (1973). Thus, "[t]he discretion of the judge . . . in [sentencing] matters is virtually free of substantive control or guidance. Where the judge has power to select a term of imprisonment within a range the exercise of that authority is left fairly at large." Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 916 (1962).

The Court's cases that have considered the role of the Double Jeopardy Clause in sentencing have noted this absence of sentencing standards. In *DiFrancesco,* for example, we observed: "[A] sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature." 449 U. S., at 136–137. And even if it is the jury that imposes the sentence, "[n]ormally, there would be no way for the jury to place on the record the reasons for its collective sentencing determination . . . ." *Chaffin* v. *Stynchcombe,* 412 U. S., at 28, n. 15.

By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri *explicitly requires* the jury to determine whether the prosecution has "proved its case." Both *Burks* and *Green,* as has been noted, state an exception to the general rule relied upon

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ual cases. There has been no attempt to separate policymaking from individual sentencing determinations. Normally, some type of presentence investigation is available which attempts to provide an informational basis for an intelligent and 'individualized' sentencing decision. Yet, which factors should be considered, under what circumstances, and how they are to be weighted are decisions left solely to the unfettered discretion of the individual decisionmakers." Hoffman & Stover, Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function, 7 Hofstra L. Rev. 89, 96 (1978) (footnotes omitted).

in *North Carolina* v. *Pearce*. That exception is applicable here, and we therefore refrain from extending the rationale of *Pearce* to the very different facts of the present case. Chief Justice Bardgett, in his dissent from the ruling of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence." 594 S. W. 2d, at 922. We agree.

A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle, stated for the Court by Justice Black, are equally applicable when a jury has rejected the State's claim that the defendant deserves to die:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U. S., at 187–188.

See also *United States* v. *DiFrancesco,* 449 U. S., at 136. The "embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant," *id.,* at 130, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punish-

ment. Missouri's use of the reasonable-doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear "almost the entire risk of error." *Addington* v. *Texas,* 441 U. S., at 424. Given these considerations, our decision today does not at all depend upon the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that petitioner deserves the death penalty. Having received "one fair opportunity to offer whatever proof it could assemble," *Burks* v. *United States,* 437 U. S., at 16, the State is not entitled to another.

V

The Court already has held that many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing similar to that required by Missouri in a capital case. See, *e. g., Specht* v. *Patterson,* 386 U. S. 605 (1967) (due process protections such as right to counsel, right to confront witnesses, and right to present favorable evidence are available at hearing at which sentence may be imposed based upon "a new finding of fact . . . that was not an ingredient of the offense charged," *id.,* at 608). Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial.[17] We therefore refrain from extending the reasoning of *Stroud* v. *United States,* 251 U. S. 15 (1919), to this very different situation.

The judgment of the Supreme Court of Missouri is re-

[17] Because of our conclusion on the Double Jeopardy Clause issue, we have no occasion to address petitioner's claims under the Sixth, Eighth, and Fourteenth Amendments.

versed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST join, dissenting.

This case concerns the force of the Double Jeopardy Clause after a defendant convicted of a crime and sentenced has succeeded in having his conviction reversed. The Court holds that the jury's decision at petitioner's first trial to sentence him to life imprisonment precludes Missouri from asking the jury at petitioner's second trial to sentence him to death. I consider the Court's opinion irreconcilable in principle with the precedents of this Court.

I

It is well-established law that the Double Jeopardy Clause does not apply to sentencing decisions after retrial with the same force that it applies to redeterminations of guilt or innocence. Since *Stroud* v. *United States,* 251 U. S. 15 (1919), it has been settled that a defendant whose conviction is reversed may receive a more severe sentence upon retrial than he received at his first trial. The Court followed this principle in *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), where it held that a "corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Id.,* at 720. In contrast, where the question was whether a defendant could be retried for first-degree murder after the jury at his first trial had found him guilty only of second-degree murder, the Court "regarded the jury's verdict as an implicit acquittal on the charge of first degree murder" and held that the Double Jeopardy Clause therefore barred retrial

on that charge. *Green* v. *United States,* 355 U. S. 184, 190 (1957).

Although there is some tension between the *Green* and *Pearce* opinions, their holdings are not inconsistent. Both have become landmarks in the law of the Double Jeopardy Clause. The Court has cited each opinion time and time again, and more than once the Court has declined to reexamine *Pearce.* Indeed, its rationale has been reaffirmed in recent cases. *United States* v. *DiFrancesco,* 449 U. S. 117, 135–136, n. 14 (1980); *Chaffin* v. *Stynchcombe,* 412 U. S. 17, 24 (1973). Earlier this Term, the Court stated without qualification that "the difference in result reached in *Green* and *Pearce* can be explained only on the grounds that the imposition of sentence does not operate as an implied acquittal of any greater sentence." *United States* v. *DiFrancesco, supra,* at 136, n. 14.[1] Compare *ante,* at 438 ("The imposition of a particular sentence *usually* is not regarded as an 'acquittal' of any more severe sentence . . . ." (emphasis added)). But today the Court applies *Green*'s principle of "implicit acquittal" to sentencing, despite *Pearce* and the unqualified statement in *DiFrancesco.*

II

The Court justifies applying the implicit-acquittal principle to the sentencing in this case on the ground that Missouri's death penalty statute establishes certain procedures for the sentencing phase of a capital murder trial.[2] In the Court's

[1] In *Pearce,* the Court stated: "The Court's decision in *Green* v. *United States,* 355 U. S. 184, is of no applicability to the present problem. The *Green* decision was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was *acquitted.*" 395 U. S., at 720, n. 16 (emphasis in original).

[2] In the Court's view, these procedures distinguish this case from *United States* v. *DiFrancesco,* 449 U. S. 117 (1980), *Chaffin* v. *Stynchcombe,* 412 U. S. 17 (1973), *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), and *Stroud* v. *United States,* 251 U. S. 15 (1919), where the sentencing decisions were not made pursuant to similar procedures. No one questions

view, these procedures give the sentencing phase "the hallmarks of the trial on guilt or innocence," *ante,* at 439, and require the jury to decide whether the State has proved that the defendant deserves the penalty of death, *ante,* at 444. The decision at the first trial to impose life imprisonment, the Court reasons, reflects a decision that the State failed to prove that the defendant deserves capital punishment. According to the Court, that decision implies an "acquittal" of the harsher sentence.

Having characterized the jury's decision for life imprisonment as an "acquittal" of the death sentence, the Court recites the classic double jeopardy rationale applicable to retrying the issue of guilt or innocence, *Green* v. *United States, supra,* at 187–188, and applies it to the reconsideration of an appropriate sentence for one whose guilt is unquestioned. *Ante,* at 445–446. It states, without documentation in the record, that the expense, ordeal, and anxiety at a resentencing in a capital murder case are as great as would accompany a redetermination of guilt or innocence. *Ante,* at 445. It also states that Missouri's second attempt to obtain a death sentence might lead to an erroneously imposed death sentence. *Ante,* at 445–446. The Court therefore concludes that the Double Jeopardy Clause bars Missouri from again seeking the death penalty against petitioner.

This is the first time the Court has held that the Double Jeopardy Clause applies equally to sentencing and to determinations of guilt or innocence. It heretofore has been thought that there is a fundamental difference between the two. *Stroud* v. *United States, supra; North Carolina* v. *Pearce, supra; Chaffin* v. *Stynchcombe, supra; United States* v. *DiFrancesco, supra.* I would adhere to these precedents, and think they control this case.

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that these procedures, applicable in capital cases, are different. But analytically the difference is immaterial for purposes of the Double Jeopardy Clause. See *infra,* at 450.

Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accused is first suspected to the time the decision on guilt or innocence is made, our criminal justice system is designed to enable the trier of fact to discover that truth according to law. But triers of fact can err, and an innocent person can be pronounced guilty. In contrast, the law provides only limited standards for assessing the validity of a sentencing decision. The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them. Absent a mandatory sentence, there is no objective measure by which the sentencer's decision can be deemed correct or erroneous if it is duly made within the authority conferred by the legislature.[3]

In light of this difference in the nature of the decisions, the question in this case is not—as the Court would frame it—whether the procedures by which a sentencing decision is made are similar to the procedures by which a decision on guilt or innocence is made. Rather, the question is whether the *reasons* for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less than the most severe sentence authorized by law. I would have thought that the pertinence of this question was clear, and that the answer consistently given in the past could not have escaped the Court. Earlier this Term, in *United States* v. *DiFrancesco*, we stated that "[t]here are . . . fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." 449 U. S., at 133.

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[3] Of course, a sentence imposed upon one who did not commit the crime is "erroneous," but the error inheres in the decision on guilt or innocence, not in the sentencing decision. Also, a sentence may be called "erroneous" if it is grossly disproportionate to the severity of the crime committed. But in that event, the sentence is "cruel and unusual" in violation of the Eighth Amendment. *Weems* v. *United States*, 217 U. S. 349 (1910).

The reasons for considering an acquittal on guilt or innocence as absolutely final do not apply equally to a sentencing decision for less than the most severe sentence authorized by law. A retrial of a defendant once found to have been innocent "enhanc[es] the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U. S., at 188. But in *Chaffin* v. *Stynchcombe,* 412 U. S., at 25, we held that "[t]he possibility of a higher sentence was recognized and accepted [in *Pearce*] as a legitimate concomitant of the retrial process." The possibility of a higher sentence is acceptable under the Double Jeopardy Clause, whereas the possibility of error as to guilt or innocence is not, because the second jury's sentencing decision is as "correct" as the first jury's. Similarly, a defendant once found to have been innocent cannot be forced a second time through the ordeal of trial. But when a defendant is found guilty, he must bear the ordeal of being sentenced just as he does the ordeal of serving sentence.

In sum, I find wholly unpersuasive the Court's justification for applying the implicit-acquittal principle to sentencing. The Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is more of an ordeal in the legal sense than facing any other sentence a second time. The death sentence, of course, is unlike any other punishment. For that reason, this Court has read the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to require that States prescribe unique procedural safeguards to protect against capricious or discriminatory impositions of the death sentence. *Furman* v. *Georgia,* 408 U. S. 238 (1972); *Gregg* v. *Georgia,* 428 U. S. 153 (1976) (joint opinion). But a death sentence imposed in accord with the strictures of the Eighth Amendment and the Fourteenth Amendment is a lawful sentence, and Missouri provides the requisite procedures. I find no basis under the Double Jeopardy Clause for the Court to single out a sentence which is statutorily authorized, and

otherwise may be imposed constitutionally, as nonetheless one that a guilty defendant may not be required to face twice. Petitioner's ordeal upon retrial would not be different in kind from that of the defendants in *Chaffin* and *Stroud,* both of whom faced the possibility of the death sentence upon reconviction. *Chaffin* v. *Stynchcombe, supra,* at 18–19; *Stroud* v. *United States,* 251 U. S., at 17–18. The Court today simply disregards the principles established by prior cases.[4]

III

In the course of explaining why the Double Jeopardy Clause does not bar retrial after a reversal for trial error, the Court stated: "Corresponding to the right of an accused to be

[4] I would have trouble concurring in the Court's judgment even if I agreed with the Court that the procedures of the Missouri death penalty statute distinguish this case from *Pearce, Chaffin,* and *Stroud.* In the Court's view, the first jury's decision to sentence petitioner to life imprisonment rather than death reveals that the State failed to "prove its case" that petitioner deserved capital punishment. On this premise the Court concludes that the principle of *Green* and *Burks* v. *United States,* 437 U. S. 1 (1978), bars a second attempt by the State to secure a death sentence.

Under the Missouri statute, Mo. Rev. Stat. § 565.012 (1978), the "case" that the State had to prove was that petitioner committed the murder under circumstances defined as "aggravating" and that these circumstances warranted the imposition of the death penalty. But the trial court expressly instructed the jury that it could choose life imprisonment rather than death even if it found beyond a reasonable doubt that the State had proved the existence and gravity of such circumstances. See *ante,* at 434–435. Thus, the jury's decision for life imprisonment rather than death does not necessarily mean that the State adduced insufficient evidence. To be sure, an acquittal on the question of guilt or innocence does not necessarily mean that the State adduced insufficient evidence, and yet such acquittals are final. But juries instructed on the question of guilt or innocence are not told that they can ignore the State's evidence. Where the jury is so instructed, as in this case, there is significantly less reason to assume that the State failed to prove its case. Accordingly, there is less reason to consider a second attempt to obtain the death penalty an unfair " 'second bite at the apple.' " *Burks* v. *United States, supra,* at 17.

given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). Missouri has decided that death is an appropriate punishment for one whose guilt of murder with aggravating circumstances is made clear through special procedures. There is no justification in the Constitution for barring Missiouri from exacting that punishment unless Missouri's interest in doing so conflicts with constitutionally protected interests of the defendant. The Double Jeopardy Clause does not protect a guilty defendant's interest in avoiding a harsher sentence upon retrial, even the death sentence. I therefore dissent.

ESTELLE, CORRECTIONS DIRECTOR *v.* SMITH

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

No. 79–1127. Argued October 8, 1980—Decided May 18, 1981

After respondent was indicted in Texas for murder, the State announced its intention to seek the death penalty. At an ensuing psychiatric examination, ordered by the trial court to determine respondent's competency to stand trial and conducted in the jail where he was being held, the examining doctor determined that respondent was competent. Thereafter, respondent was tried by a jury and convicted. A separate sentencing proceeding was then held before the same jury as required by Texas law. At such a proceeding the jury must resolve three critical issues to determine whether or not the death sentence will be imposed. One of these issues involves the future dangerousness of the defendant, *i.e.*, whether there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. At the sentencing hearing, the doctor who had conducted the pretrial psychiatric examination was allowed to testify for the State over defense counsels' objection that his name did not appear on the list of witnesses the State planned to use at either the guilt or penalty stages of the proceedings. His testimony was based on the pretrial examination and stated in substance that respondent would be a danger to society. The jury then resolved the issue of future dangerousness, as well as the other two issues, against respondent, and thus under Texas law the death penalty was mandatory. The Texas Court of Criminal Appeals affirmed the conviction and death sentence. After unsuccessfully seeking a writ of habeas corpus in the state courts, respondent petitioned for such relief in Federal District Court. That court vacated the death sentence because it found constitutional error in admitting the doctor's testimony at the penalty phase. The United States Court of Appeals affirmed.

Held:

1. The admission of the doctor's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination, because he was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a capital sentencing proceeding. Pp. 461–469.

(a) There is no basis for distinguishing between the guilt and penalty

phases of respondent's trial so far as the protection of the Fifth Amendment privilege is concerned. The State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to the examining doctor infringed the Fifth Amendment just as much as would have any effort to compel respondent to testify against his will at the sentencing hearing. Pp. 462–463.

(b) The Fifth Amendment privilege is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination. The fact that respondent's statements were made in the context of such an examination does not automatically remove them from the reach of that Amendment. Pp. 463–466.

(c) The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. An accused who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. When faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to the doctor were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. *Miranda* v. *Arizona,* 384 U. S. 436, 478. Since these safeguards of the Fifth Amendment privilege were not afforded respondent, his death sentence cannot stand. Pp. 466–469.

2. Respondent's Sixth Amendment right to the assistance of counsel also was violated by the State's introduction of the doctor's testimony at the penalty phase. Such right already had attached when the doctor examined respondent in jail, and that interview proved to be a "critical stage" of the aggregate proceedings against respondent. Defense counsel were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his counsel in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed. Pp. 469–471.

602 F. 2d 694, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined, and in all but Part II–C of which MARSHALL, J., joined. BRENNAN, J., filed a concurring statement, *post,* p. 474. MARSHALL, J., filed a statement concurring in part,

post, p. 474. STEWART, J., filed an opinion concurring in the judgment, in which POWELL, J., joined, *post,* p. 474. REHNQUIST, J., filed an opinion concurring in the judgment, *post,* p. 474.

Anita Ashton, Assistant Attorney General of Texas, argued the cause for petitioner. With her on the brief were *Mark White,* Attorney General, *John W. Fainter, Jr.,* First Assistant Attorney General, *Ted L. Hartley,* Executive Assistant Attorney General, and *W. Barton Boling* and *Douglas M. Becker,* Assistant Attorneys General.

Joel Berger argued the cause for respondent. With him on the brief were *John F. Simmons, Jack Greenberg, James M. Nabrit III, John Charles Boger,* and *Anthony G. Amsterdam.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of respondent's capital murder trial to establish his future dangerousness violated his constitutional rights. 445 U. S. 926 (1980).

I

A

On December 28, 1973, respondent Ernest Benjamin Smith was indicted for murder arising from his participation in the armed robbery of a grocery store during which a clerk was fatally shot, not by Smith, but by his accomplice. In accordance with Art. 1257 (b)(2) of the Tex. Penal Code Ann. (Vernon 1974) concerning the punishment for murder with malice aforethought, the State of Texas announced its intention to seek the death penalty. Thereafter, a judge of the 195th Judicial District Court of Dallas County, Texas, informally ordered the State's attorney to arrange a psychiatric

**Joel I. Klein* filed a brief for the American Psychiatric Association as *amicus curiae* urging affirmance.

examination of Smith by Dr. James P. Grigson to determine Smith's competency to stand trial.[1] See n. 5, *infra.*

Dr. Grigson, who interviewed Smith in jail for approximately 90 minutes, concluded that he was competent to stand trial. In a letter to the trial judge, Dr. Grigson reported his findings: "[I]t is my opinion that Ernest Benjamin Smith, Jr., is aware of the difference between right and wrong and is able to aid an attorney in his defense." App. A–6. This letter was filed with the court's papers in the case. Smith was then tried by a jury and convicted of murder.

In Texas, capital cases require bifurcated proceedings—a guilt phase and a penalty phase.[2] If the defendant is found guilty, a separate proceeding before the same jury is held to fix the punishment. At the penalty phase, if the jury affirmatively answers three questions on which the State has the

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[1] This psychiatric evaluation was ordered even though defense counsel had not put into issue Smith's competency to stand trial or his sanity at the time of the offense. The trial judge later explained: "In all cases where the State has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial. I have done this for my benefit because I do not intend to be a participant in a case where the defendant receives the death penalty and his mental competency remains in doubt." App. A–117. See Tex. Code Crim. Proc. Ann., Art. 46.02 (Vernon 1979). No question as to the appropriateness of the trial judge's order for the examination has been raised by Smith.

[2] Article 37.071 (a) of the Tex. Code of Crim. Proc. Ann. (Vernon Supp. 1980) provides:

"Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

burden of proof beyond a reasonable doubt, the judge must impose the death sentence. See Tex. Code Crim. Proc. Ann., Arts. 37.071 (c) and (e) (Vernon Supp. 1980). One of the three critical issues to be resolved by the jury is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 (b)(2).[3] In other words, the jury must assess the defendant's future dangerousness.

At the commencement of Smith's sentencing hearing, the State rested "[s]ubject to the right to reopen." App. A–11. Defense counsel called three lay witnesses: Smith's stepmother, his aunt, and the man who owned the gun Smith carried during the robbery. Smith's relatives testified as to his good reputation and character.[4] The owner of the pistol testified as to Smith's knowledge that it would not fire because of a mechanical defect. The State then called Dr. Grigson as a witness.

Defense counsel were aware from the trial court's file of the case that Dr. Grigson had submitted a psychiatric report in the form of a letter advising the court that Smith was competent to stand trial.[5] This report termed Smith "a severe

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[3] The other two issues are "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and "if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Arts. 37.071 (b)(1) and (3) (Vernon Supp. 1980).

[4] It appears from the record that Smith's only prior criminal conviction was for the possession of marihuana. See App. A–64.

[5] Defense counsel discovered the letter at some time after jury selection began in the case on March 11, 1974. The trial judge later explained that Dr. Grigson was "appointed by oral communication," that "[a] letter of appointment was not prepared," and that "the court records do not reflect [the entry of] a written order." *Id.*, at A–118. The judge also stated: "As best I recall, I informed John Simmons, the attorney for the defendant, that I had appointed Dr. Grigson to examine the defendant and

sociopath," but it contained no more specific reference to his future dangerousness. *Id.*, at A–6. Before trial, defense counsel had obtained an order requiring the State to disclose the witnesses it planned to use both at the guilt stage and, if known, at the penalty stage. Subsequently, the trial court had granted a defense motion to bar the testimony during the State's case in chief of any witness whose name did not appear on that list. Dr. Grigson's name was not on the witness list, and defense counsel objected when he was called to the stand at the penalty phase.

In a hearing outside the presence of the jury, Dr. Grigson stated: (a) that he had not obtained permission from Smith's attorneys to examine him; (b) that he had discussed his conclusions and diagnosis with the State's attorney; and (c) that the prosecutor had requested him to testify and had told him, approximately five days before the sentencing hearing began, that his testimony probably would be needed within the week. *Id.*, at A–14—A–16. The trial judge denied a defense motion to exclude Dr. Grigson's testimony on the ground that his name was not on the State's list of witnesses. Although no continuance was requested, the court then recessed for one hour following an acknowledgment by defense counsel that an hour was "all right." *Id.*, at A–17.

After detailing his professional qualifications by way of foundation, Dr. Grigson testified before the jury on direct examination: (a) that Smith "is a very severe sociopath"; (b) that "he will continue his previous behavior"; (c) that his sociopathic condition will "only get worse"; (d) that he has no "regard for another human being's property or for their life, regardless of who it may be"; (e) that "[t]here is

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that a written report was to be mailed to me." *Ibid.* However, defense counsel assert that the discovery of Dr. Grigson's letter served as their first notice that he had examined Smith. *Id.*, at A–113, A–116.

On March 25, 1974, the day the trial began, defense counsel requested the issuance of a subpoena for the Dallas County Sheriff's records of Dr. Grigson's "visitation to . . . Smith." *Id.*, at A–8.

no treatment, no medicine . . . that in any way at all modifies or changes this behavior"; (f) that he "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so"; and (g) that he "has no remorse or sorrow for what he has done." *Id.*, at A–17—A–26. Dr. Grigson, whose testimony was based on information derived from his 90-minute "mental status examination" of Smith (*i. e.*, the examination ordered to determine Smith's competency to stand trial), was the State's only witness at the sentencing hearing.

The jury answered the three requisite questions in the affirmative, and, thus, under Texas law the death penalty for Smith was mandatory. The Texas Court of Criminal Appeals affirmed Smith's conviction and death sentence, *Smith* v. *State*, 540 S. W. 2d 693 (1976), and we denied certiorari, 430 U. S. 922 (1977).

B

After unsuccessfully seeking a writ of habeas corpus in the Texas state courts, Smith petitioned for such relief in the United States District Court for the Northern District of Texas pursuant to 28 U. S. C. § 2254. The District Court vacated Smith's death sentence because it found constitutional error in the admission of Dr. Grigson's testimony at the penalty phase. 445 F. Supp. 647 (1977). The court based its holding on the failure to advise Smith of his right to remain silent at the pretrial psychiatric examination and the failure to notify defense counsel in advance of the penalty phase that Dr. Grigson would testify. The court concluded that the death penalty had been imposed on Smith in violation of his Fifth and Fourteenth Amendment rights to due process and freedom from compelled self-incrimination, his Sixth Amendment right to the effective assistance of counsel, and his Eighth Amendment right to present complete evidence of mitigating circumstances. *Id.*, at 664.

The United States Court of Appeals for the Fifth Circuit affirmed. 602 F. 2d 694 (1979). The court held that Smith's death sentence could not stand because the State's "surprise" use of Dr. Grigson as a witness, the consequences of which the court described as "devastating," denied Smith due process in that his attorneys were prevented from effectively challenging the psychiatric testimony. *Id.*, at 699. The court went on to hold that, under the Fifth and Sixth Amendments, "Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination." *Id.*, at 709. Because Smith was not accorded these rights, his death sentence was set aside. While "leav[ing] to state authorities any questions that arise about the appropriate way to proceed when the state cannot legally execute a defendant whom it has sentenced to death," the court indicated that "the same testimony from Dr. Grigson, based on the same examination of Smith" could not be used against Smith at any future resentencing proceeding. *Id.*, at 703, n. 13, 709, n. 20.

II

A

Of the several constitutional issues addressed by the District Court and the Court of Appeals, we turn first to whether the admission of Dr. Grigson's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination because respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding. Our initial inquiry must be whether the Fifth Amendment privilege is applicable in the circumstances of this case.

(1)

The State argues that respondent was not entitled to the protection of the Fifth Amendment because Dr. Grigson's testimony was used only to determine punishment after conviction, not to establish guilt. In the State's view, "incrimination is complete once guilt has been adjudicated," and, therefore, the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial. Brief for Petitioner 33–34. We disagree.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe* v. *Connecticut*, 367 U. S. 568, 581–582 (1961) (opinion announcing the judgment) (emphasis added). See also *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964); E. Griswold, The Fifth Amendment Today 7 (1955).

The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U. S. 1, 49 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made " 'the deluded instrument of his own conviction,' " *Culombe* v. *Connecticut*, *supra*, at 581, quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.

We can discern no basis to distinguish between the guilt

and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.[6] Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. See *Green* v. *Georgia,* 442 U. S. 95, 97 (1979); *Presnell* v. *Georgia,* 439 U. S. 14, 16 (1978); *Gardner* v. *Florida,* 430 U. S. 349, 357–358 (1977) (plurality opinion). Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.[7] Yet the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to Dr. Grigson similarly infringes Fifth Amendment values.

(2)

The State also urges that the Fifth Amendment privilege is inapposite here because respondent's communications to Dr. Grigson were nontestimonial in nature. The State seeks support from our cases holding that the Fifth Amendment is not violated where the evidence given by a defendant is neither related to some communicative act nor used for the testimonial content of what was said. See, *e. g., United States* v. *Dionisio,* 410 U. S. 1 (1973) (voice exemplar); *Gilbert* v. *California,* 388 U. S. 263 (1967) (handwriting exemplar); *United States* v. *Wade,* 388 U. S. 218 (1967) (lineup); *Schmerber* v. *California,* 384 U. S. 757 (1966) (blood sample).

[6] Texas law does provide that "[n]o statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant *on the issue of guilt* in any criminal proceeding." Tex. Code Crim. Proc. Ann., Art. 46.023 (g) (Vernon 1979) (emphasis added). See also 18 U. S. C. § 4244; Fed. Rule Crim. Proc. 12.2 (c); *United States* v. *Alvarez,* 519 F. 2d 1036, 1042–1044 (CA3 1975); Note, Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, 83 Harv. L. Rev. 648, 649, and cases cited at nn. 8–9 (1969).

[7] The State conceded this at oral argument. Tr. of Oral Arg. 47, 49.

However, Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview, and he placed particular emphasis on what he considered to be respondent's lack of remorse. See App. A–27—A–29, A–33—A–34.[8] Dr. Grigson's prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime.[9] The Fifth

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[8] Although the Court of Appeals doubted the applicability of the Fifth Amendment if Dr. Grigson's diagnosis had been founded only on respondent's mannerisms, facial expressions, attention span, or speech patterns, 602 F. 2d 694, 704 (CA5 1979), the record in this case sheds no light on whether such factors alone would enable a psychiatrist to predict future dangerousness. The American Psychiatric Association suggests, however, that "absent a defendant's willingness to cooperate as to the verbal *content* of his communications, . . . a psychiatric examination in these circumstances would be meaningless." Brief for American Psychiatric Association as *Amicus Curiae* 26 (emphasis in original).

[9] On cross-examination, Dr. Grigson acknowledged that his findings were based on his "discussion" with respondent, App. A–32, and he replied to the question "[w]hat . . . was the most important thing that . . . caused you to think that [respondent] is a severe sociopath" as follows:

"He told me that this man named Moon looked as though he was going to reach for a gun, and he pointed his gun toward Mr. Moon's head, pulled the trigger, and it clicked—misfired, at which time he hollered at Howie, apparently his other partner there who had a gun, 'Watch out, Howie. He's got a gun.' Or something of that sort. At which point he told me—now, I don't know who shot this man, but he told me that Howie shot him, but then he walked around over this man who had been shot—didn't . . . check to see if he had a gun nor did he check to see if the man was alive or dead. Didn't call an ambulance, but simply found the gun further up underneath the counter and took the gun and the money. This is a very—sort of cold-blooded disregard for another human being's life. I think that his telling me this story and not saying, you know, 'Man, I would do anything to have that man back alive. I wish I hadn't just stepped over the body.' Or you know, 'I wish I had checked to see if he was all right' would indicate a concern, guilt, or remorse. But I didn't get any of this." *Id.*, at A–27—A–28.

Amendment privilege, therefore, is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.

The fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment. See n. 6, *supra.* The state trial judge, *sua sponte,* ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent. Consequently, the interview with Dr. Grigson cannot be characterized as a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense. Indeed, if the application of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen.

Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. See, *e. g., United States* v. *Cohen,* 530 F. 2d 43, 47–48 (CA5), cert. denied, 429 U. S. 855 (1976); *Karstetter* v. *Cardwell,* 526 F. 2d 1144, 1145 (CA9 1975); *United States* v. *Bohle,* 445 F. 2d 54, 66–67 (CA7 1971); *United States* v. *Weiser,* 428 F. 2d 932, 936 (CA2 1969), cert. denied, 402 U. S. 949 (1971); *United States* v. *Albright,* 388 F. 2d 719, 724–725 (CA4 1968); *Pope* v.

United States, 372 F. 2d 710, 720–721 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U. S. 651 (1968).[10]

Respondent, however, introduced no psychiatric evidence, nor had he indicated that he might do so. Instead, the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death. Respondent's future dangerousness was a critical issue at the sentencing hearing, and one on which the State had the burden of proof beyond a reasonable doubt. See Tex. Code Crim. Proc. Ann., Arts. 37.071 (b) and (c) (Vernon Supp. 1980). To meet its burden, the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated.

(3)

In *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966), the Court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda* held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.*, at 444. Thus, absent other fully effective procedures,

[10] On the same theory, the Court of Appeals here carefully left open "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state." 602 F. 2d, at 705.

a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." *Id.*, at 467–469. The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intelligent decision as to its exercise." *Ibid.*

The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] perso[n] acting solely in his interest." *Id.*, at 469. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *Counselman* v. *Hitchcock*,

142 U. S. 547, 562 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." [11] *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964). We agree with the Court of Appeals that respondent's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase.[12]

A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated,

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[11] While recognizing that attempts to coerce a defendant to submit to psychiatric inquiry on his future dangerousness might include the penalty of prosecutorial comment on his refusal to be examined, the Court of Appeals noted that making such a remark and allowing the jury to draw its own conclusions "might clash with [this Court's] insistence that capital sentencing procedures be unusually reliable." 602 F. 2d, at 707. See also *Griffin* v. *California*, 380 U. S. 609 (1965).

[12] For the reasons stated by the Court of Appeals, we reject the State's argument that respondent waived his Fifth Amendment claim by failing to make a timely, specific objection to Dr. Grigson's testimony at trial. See 602 F. 2d, at 708, n. 19. In addition, we note that the State did not present the waiver argument in its petition for certiorari. See this Court's Rule 40 (1)(d)(2) (1970).

but the State must make its case on future dangerousness in some other way.

"Volunteered statements . . . are not barred by the Fifth Amendment," but under *Miranda* v. *Arizona, supra,* we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. *Id.,* at 478. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.[13]

B

When respondent was examined by Dr. Grigson, he already had been indicted and an attorney had been appointed to represent him. The Court of Appeals concluded that he had a Sixth Amendment right to the assistance of counsel before submitting to the pretrial psychiatric interview. 602 F. 2d, at 708–709. We agree.

The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." The "vital" need for a lawyer's advice and aid during the pretrial phase was recognized by the Court nearly 50 years ago in *Powell* v. *Alabama,* 287 U. S. 45, 57, 71 (1932). Since then, we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer "at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal

[13] Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination.

charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U. S. 682, 688–689 (1972) (plurality opinion); *Moore* v. *Illinois*, 434 U. S. 220, 226–229 (1977). And in *United States* v. *Wade*, 388 U. S., at 226–227, the Court explained:

> "It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (Footnote omitted.)

See *United States* v. *Henry*, 447 U. S. 264 (1980); *Massiah* v. *United States*, 377 U. S. 201 (1964). See also *White* v. *Maryland*, 373 U. S. 59 (1963); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961).

Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail,[14] and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. See *Coleman* v. *Alabama*, 399 U. S. 1, 7–10 (1970) (plurality opinion); *Powell* v. *Alabama*, *supra*, at 57. De-

[14] Because psychiatric examinations of the type at issue here are conducted after adversary proceedings have been instituted, we are not concerned in this case with the limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in *Miranda* v. *Arizona*, 384 U. S. 436, 471–473 (1966). See *Edwards* v. *Arizona*, *post*, p. 477. Rather, the issue before us is whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination. But cf. n. 15, *infra*.

Respondent does not assert, and the Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." 602 F. 2d, at 708. Cf. *Thornton* v. *Corcoran*, 132 U. S. App. D. C. 232, 242, 248, 407 F. 2d 695, 705, 711 (1969) (opinion concurring in part and dissenting in part).

fense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness,[15] and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.

Because "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advice from someone who is trained and skilled in the subject matter." *Maness* v. *Meyers,* 419 U. S. 449, 466 (1975). As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." 602 F. 2d, at 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel." *Powell* v. *Alabama, supra,* at 69.

Therefore, in addition to Fifth Amendment considerations, the death penalty was improperly imposed on respondent because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel.[16]

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[15] It is not clear that defense counsel were even informed prior to the examination that Dr. Grigson had been appointed by the trial judge to determine respondent's competency to stand trial. See n. 5, *supra.*

[16] We do not hold that respondent was precluded from waiving this constitutional right. Waivers of the assistance of counsel, however, "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends . . . 'upon the particular facts and circumstances surround-

C

Our holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute. A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase. See n. 10, *supra.*

Moreover, under the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts. Indeed, some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are "fundamentally of very low reliability" and that psychiatrists possess no special qualifications for making such forecasts. See Report of the American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual 23–30, 33 (1974); A. Stone, Mental Health and Law: A System in Transition 27–36 (1975); Brief for American Psychiatric Association as *Amicus Curiae* 11–17.

In *Jurek* v. *Texas,* 428 U. S. 262 (1976), we held that the Texas capital sentencing statute is not unconstitutional on its face. As to the jury question on future dangerousness, the joint opinion announcing the judgment emphasized that a defendant is free to present whatever mitigating factors he may be able to show, *e. g.,* the range and severity of his past criminal conduct, his age, and the circumstances surrounding the crime for which he is being sentenced. *Id.,* at 272–273. The State, of course, can use the same type of evidence in seeking

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ing [each] case . . . .'" *Edwards* v. *Arizona, post,* at 482, quoting *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). No such waiver has been shown, or even alleged, here.

to establish a defendant's propensity to commit other violent acts.

In responding to the argument that foretelling future behavior is impossible, the joint opinion stated:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." *Id.*, at 275–276 (footnotes omitted).

While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts.

III

Respondent's Fifth and Sixth Amendment rights were abridged by the State's introduction of Dr. Grigson's testimony at the penalty phase, and, as the Court of Appeals concluded, his death sentence must be vacated.[17] Because respondent's underlying conviction has not been challenged and remains undisturbed, the State is free to conduct further pro-

[17] Because of our disposition of respondent's Fifth and Sixth Amendment claims, we need not reach the question of whether the failure to give advance notice of Dr. Grigson's appearance as a witness for the State deprived respondent of due process.

ceedings not inconsistent with this opinion. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BRENNAN.

I join the Court's opinion. I also adhere to my position that the death penalty is in all circumstances unconstitutional.

JUSTICE MARSHALL, concurring in part.

I join in all but Part II–C of the opinion of the Court. I adhere to my consistent view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. I therefore am unable to join the suggestion in Part II–C that the penalty may ever be constitutionally imposed.

JUSTICE STEWART, with whom JUSTICE POWELL joins, concurring in the judgment.

The respondent had been indicted for murder and a lawyer had been appointed to represent him before he was examined by Dr. Grigson at the behest of the State. Yet that examination took place without previous notice to the respondent's counsel. The Sixth and Fourteenth Amendments as applied in such cases as *Massiah* v. *United States,* 377 U. S. 201, and *Brewer* v. *Williams,* 430 U. S. 387, made impermissible the introduction of Dr. Grigson's testimony against the respondent at any stage of his trial.

I would for this reason affirm the judgment before us without reaching the other issues discussed by the Court.

JUSTICE REHNQUIST, concurring in the judgment.

I concur in the judgment because, under *Massiah* v. *United States,* 377 U. S. 201 (1964), respondent's counsel should have been notified prior to Dr. Grigson's examination of respondent. As the Court notes, *ante,* at 469, respondent had been indicted and an attorney had been appointed to represent

him. Counsel was entitled to be made aware of Dr. Grigson's activities involving his client and to advise and prepare his client accordingly. This is by no means to say that respondent had any right to have his counsel present at any examination. In this regard I join the Court's careful delimiting of the Sixth Amendment issue, *ante,* at 470, n. 14.

Since this is enough to decide the case, I would not go on to consider the Fifth Amendment issues and cannot subscribe to the Court's resolution of them. I am not convinced that any Fifth Amendment rights were implicated by Dr. Grigson's examination of respondent. Although the psychiatrist examined respondent prior to trial, he only testified concerning the examination after respondent stood convicted. As the court in *Hollis* v. *Smith,* 571 F. 2d 685, 690–691 (CA2 1978), analyzed the issue: "The psychiatrist's interrogation of [defendant] on subjects presenting no threat of disclosure of prosecutable crimes, in the belief that the substance of [defendant's] responses or the way in which he gave them might cast light on what manner of man he was, involved no 'compelled testimonial self-incrimination' even though the consequence might be more severe punishment."

Even if there are Fifth Amendment rights involved in this case, respondent never invoked these rights when confronted with Dr. Grigson's questions. The Fifth Amendment privilege against compulsory self-incrimination is not self-executing. "Although *Miranda*'s requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts* v. *United States,* 445 U. S. 552, 560 (1980). The *Miranda* requirements were certainly not designed by this Court with psychiatric examinations in mind. Respondent was simply not in the inherently coercive situation considered in *Miranda.* He had already been indicted, and counsel had been appointed to represent him. No claim is raised that respondent's answers to Dr. Grigson's questions

were "involuntary" in the normal sense of the word. Unlike the police officers in *Miranda,* Dr. Grigson was not questioning respondent in order to ascertain his guilt or innocence. Particularly since it is not necessary to decide this case, I would not extend the *Miranda* requirements to cover psychiatric examinations such as the one involved here.

EDWARDS *v.* ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 79–5269. Argued November 5, 1980—Decided May 18, 1981

After being arrested on a state criminal charge, and after being informed of his rights as required by *Miranda* v. *Arizona*, 384 U. S. 436, petitioner was questioned by the police on January 19, 1976, until he said that he wanted an attorney. Questioning then ceased, but on January 20 police officers came to the jail and, after stating that they wanted to talk to him and again informing petitioner of his *Miranda* rights, obtained his confession when he said that he was willing to talk. The trial court ultimately denied petitioner's motion to suppress his confession, finding the statement to be voluntary, and he was thereafter convicted. The Arizona Supreme Court held that during the January 20 meeting he waived his right to remain silent and his right to counsel when he voluntarily gave his statement after again being informed of his rights.

Held: The use of petitioner's confession against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation, as declared in *Miranda, supra.* Having exercised his right on January 19 to have counsel present during interrogation, petitioner did not validly waive that right on the 20th. Pp. 481–487.

(a) A waiver of the right to counsel, once invoked, not only must be voluntary, but also must constitute a knowing and intelligent relinquishment of a known right or privilege. Here, however, the state courts applied an erroneous standard for determining waiver by focusing on the voluntariness of petitioner's confession rather than on whether he understood his right to counsel and intelligently and knowingly relinquished it. Pp. 482–484.

(b) When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communication, exchanges, or conversations with the police. Here, the interrogation of petitioner on January 20 was at the in-

stance of the authorities, and his confession, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible. Pp. 484–487.

122 Ariz. 206, 594 P. 2d 72, reversed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 487. POWELL, J., filed an opinion concurring in the result, in which REHNQUIST, J., joined, *post*, p. 488.

Michael J. Meehan, by appointment of the Court, 447 U. S. 903, argued the cause and filed briefs for petitioner.

Crane McClennen, Assistant Attorney General of Arizona, argued the cause for respondent. With him on the briefs were *Robert K. Corbin,* Attorney General, and *William J. Schafer III.*

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case, 446 U. S. 950 (1980), limited to Question 1 presented in the petition, which in relevant part was "whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation . . . ."

I

On January 19, 1976, a sworn complaint was filed against Edwards in Arizona state court charging him with robbery, burglary, and first-degree murder.[1] An arrest warrant was issued pursuant to the complaint, and Edwards was arrested at his home later that same day. At the police station, he was informed of his rights as required by *Miranda* v. *Arizona,* 384 U. S. 436 (1966). Petitioner stated that he understood his rights, and was willing to submit to questioning. After

[1] The facts stated in text are for the most part taken from the opinion of the Supreme Court of Arizona.

being told that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal." The interrogating officer told him that he wanted a statement, but that he did not have the authority to negotiate a deal. The officer provided Edwards with the telephone number of a county attorney. Petitioner made the call, but hung up after a few moments. Edwards then said: "I want an attorney before making a deal." At that point, questioning ceased and Edwards was taken to county jail.

At 9:15 the next morning, two detectives, colleagues of the officer who had interrogated Edwards the previous night, came to the jail and asked to see Edwards. When the detention officer informed Edwards that the detectives wished to speak with him, he replied that he did not want to talk to anyone. The guard told him that "he had" to talk and then took him to meet with the detectives. The officers identified themselves, stated they wanted to talk to him, and informed him of his *Miranda* rights. Edwards was willing to talk, but he first wanted to hear the taped statement of the alleged accomplice who had implicated him.[2] After listening to the tape for several minutes, petitioner said that he would make a statement so long as it was not tape-recorded. The detectives informed him that the recording was irrelevant since they could testify in court concerning whatever he said. Edwards replied: "I'll tell you anything you want to know, but I don't want it on tape." He thereupon implicated himself in the crime.

Prior to trial, Edwards moved to suppress his confession on the ground that his *Miranda* rights had been violated when the officers returned to question him after he had invoked his right to counsel. The trial court initially granted

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[2] It appears from the record that the detectives had brought the tape-recording with them.

the motion to suppress,[3] but reversed its ruling when presented with a supposedly controlling decision of a higher Arizona court.[4] The court stated without explanation that it found Edwards' statement to be voluntary. Edwards was tried twice and convicted.[5] Evidence concerning his confession was admitted at both trials.

On appeal, the Arizona Supreme Court held that Edwards had invoked both his right to remain silent and his right to counsel during the interrogation conducted on the night of January 19.[6] 122 Ariz. 206, 594 P. 2d 72. The court then went on to determine, however, that Edwards had waived both rights during the January 20 meeting when he voluntarily gave his statement to the detectives after again being informed that he need not answer questions and that he need not answer without the advice of counsel: "The trial court's finding that the waiver and confession were voluntarily and knowingly made is upheld." *Id.*, at 212, 594 P. 2d, at 78.

Because the use of Edward's confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments as construed in *Miranda* v. *Arizona, supra,* we reverse the judgment of the Arizona Supreme Court.[7]

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[3] The trial judge emphasized that the detectives had met with Edwards on January 20, without being requested by Edwards to do so, and concluded that they had ignored his request for counsel made the previous evening. App. 91–93.

[4] The case was *State* v. *Travis,* 26 Ariz. App. 24, 545 P. 2d 986 (1976).

[5] The jury in the first trial was unable to reach a verdict.

[6] This issue was disputed by the State. The court, while finding that the question was arguable, held that Edwards' request for an attorney to assist him in negotiating a deal was "sufficiently clear" within the context of the interrogation that it "must be interpreted as a request for counsel and as a request to remain silent until counsel was present." 122 Ariz., at 211, 594 P. 2d, at 77.

[7] We thus need not decide Edwards' claim that the State deprived him of his right to counsel under the Sixth and Fourteenth Amendments as construed and applied in *Massiah* v. *United States,* 377 U. S. 201 (1964). In that case, the Court held that the Sixth Amendment right to counsel arises whenever an accused has been indicted or adversary criminal proceedings

II

In *Miranda* v. *Arizona,* the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be

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have otherwise begun and that this right is violated when admissions are subsequently elicited from the accused in the absence of counsel. While initially conceding in its opening brief on the merits that Edwards' right to counsel under *Massiah* attached immediately after he was formally charged, the State in its supplemental brief and during oral argument took the position that under *Kirby* v. *Illinois,* 406 U. S. 682, 689–690 (1972), and *Moore* v. *Illinois,* 434 U. S. 220, 226–227 (1977), the filing of the formal complaint did not constitute the "adversary judicial criminal proceedings" necessary to trigger the Sixth Amendment right to counsel. Under the State Constitution, "[n]o person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination." Ariz. Const., Art. 2, § 30. The State contends that the Sixth Amendment right to counsel does not attach until either the constitutionally required indictment or information is filed or at least no earlier than the preliminary hearing to which a defendant is entitled if the matter proceeds by complaint. Under Arizona law, a felony prosecution may be commenced by way of a complaint, Ariz. Rule of Criminal Procedure 2.2. The complaint is a "written statement of the essential facts constituting a public offense, made upon oath before a magistrate," Rule 2.3, upon which the magistrate either issues an arrest warrant or dismisses the complaint. Rule 2.4. Once arrested, the accused must be taken before the magistrate for a hearing. Rule 4.1. At that hearing, the magistrate ascertains the accused's true name and address, and informs him of the charges against him, his right to counsel, his right to remain silent, and his right to a preliminary hearing if charged via complaint. Rule 4.2. Unless waived, the preliminary hearing must take place no later than 10 days after the defendant is placed in custody. Rule 5.1. The purpose of the hearing is to determine whether probable cause exists to hold the defendant for trial. Rule 5.3. Against this background and in support of its position, the State relies on *Moore* v. *Illinois, supra,* where after recognizing that under Illinois law "[t]he prosecution in this case was commenced . . . when the victim's complaint was filed in court," we noted that "adversary judicial criminal proceedings" were initiated when the ensuing preliminary hearing occurred. *Moore, supra,* at 228. Cf. *United States* v. *Duvall,* 537 F. 2d 15, 20–22 (CA2) (the filing of

preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. 384 U. S., at 479. The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, "the interrogation must cease." If he requests counsel, "the interrogation must cease until an attorney is present." *Id.*, at 474.

Miranda thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holdings of the state courts, Edwards insists that having exercised his right on the 19th to have counsel present during interrogation, he did not validly waive that right on the 20th. For the following reasons, we agree.

First, the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). See *Faretta* v. *California*, 422 U. S. 806, 835 (1975); *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1979); *Brewer* v. *Williams*, 430 U. S.

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a complaint and the issuance of an arrest warrant does not trigger the right to counsel under the Sixth Amendment, that right accruing only upon further proceedings), cert. denied, 426 U. S. 950 (1976). The Arizona Supreme Court did not address the Sixth Amendment question, nor do we.

387, 404 (1977); *Fare* v. *Michael C.*, 442 U. S. 707, 724–725 (1979).

Considering the proceedings in the state courts in the light of this standard, we note that in denying petitioner's motion to suppress, the trial court found the admission to have been "voluntary," App. 3, 95, without separately focusing on whether Edwards had knowingly and intelligently relinquished his right to counsel. The Arizona Supreme Court, in a section of its opinion entitled "Voluntariness of Waiver," stated that in Arizona, confessions are prima facie involuntary and that the State had the burden of showing by a preponderance of the evidence that the confession was freely and voluntarily made. The court stated that the issue of voluntariness should be determined based on the totality of the circumstances as it related to whether an accused's action was "knowing and intelligent and whether his will [was] overborne." 122 Ariz., at 212, 594 P. 2d, at 78. Once the trial court determines that "the confession is voluntary, the finding will not be upset on appeal absent clear and manifest error." *Ibid.* The court then upheld the trial court's finding that the "waiver and confession were voluntarily and knowingly made." *Ibid.*

In referring to the necessity to find Edwards' confession knowing and intelligent, the State Supreme Court cited *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973). Yet, it is clear that *Schneckloth* does not control the issue presented in this case. The issue in *Schneckloth* was under what conditions an individual could be found to have consented to a search and thereby waived his Fourth Amendment rights. The Court declined to impose the "intentional relinquishment or abandonment of a known right or privilege" standard and required only that the consent be voluntary under the totality of the circumstances. The Court specifically noted that the right to counsel was a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard, *id.*, at 241, but held that "[t]he considera-

tions that informed the Court's holding in *Miranda* are simply inapplicable in the present case." *Id.*, at 246. *Schneckloth* itself thus emphasized that the voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries. Here, however sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.

Second, although we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, see *North Carolina* v. *Butler, supra,* at 372–376, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.[8] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made avail-

[8] In *Brewer* v. *Williams,* 430 U. S. 387 (1977), where, as in *Massiah* v. *United States,* 377 U. S. 201 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information. In *Massiah* and *Brewer,* counsel had been engaged or appointed and the admissions in question were elicited in his absence. But in *McLeod* v. *Ohio,* 381 U. S. 356 (1965), we summarily reversed a decision that the police could elicit information after indictment even though counsel had not yet been appointed.

able to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." 384 U. S., at 474. Our later cases have not abandoned that view. In *Michigan* v. *Mosley,* 423 U. S. 96 (1975), the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. 423 U. S., at 104, n. 10; see also *id.,* at 109–111 (WHITE, J., concurring). In *Fare* v. *Michael C., supra,* at 719, the Court referred to *Miranda*'s "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer." *Rhode Island* v. *Innis,* 446 U. S. 291, 298 (1980). We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

In concluding that the fruits of the interrogation initiated by the police on January 20 could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right

identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver. *Rhode Island* v. *Innis, supra,* makes this sufficiently clear. 446 U. S., at 298, n. 2.[9]

But this is not what the facts of this case show. Here, the officers conducting the interrogation on the evening of Jan-

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[9] If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.

Various decisions of the Courts of Appeals are to the effect that a valid waiver of an accused's previously invoked Fifth Amendment right to counsel is possible. See, *e. g., White* v. *Finkbeiner,* 611 F. 2d 186, 191 (CA7 1979) ("in certain instances, for various reasons, a person in custody who has previously requested counsel may knowingly and voluntarily decide that he no longer wishes to be represented by counsel"), cert. pending, No. 79–6601; *Kennedy* v. *Fairman,* 618 F. 2d 1242 (CA7 1980); *United States* v. *Rodriguez-Gastelum,* 569 F. 2d 482, 486 (CA9) (en banc) (stating that it makes no sense to hold that once an accused has requested counsel, "[he] may never, until he has actually talked with counsel, change his mind and decide to speak with the police without an attorney being present"), cert. denied, 436 U. S. 919 (1978). See generally *Cobbs* v. *Robinson,* 528 F. 2d 1331, 1342 (CA2 1975); *United States* v. *Grant,* 549 F. 2d 942 (CA4 1977), vacated on other grounds *sub nom. Whitehead* v. *United States,* 435 U. S. 912 (1978); *United States* v. *Hart,* 619 F. 2d 325 (CA4 1980); *United States* v. *Hauck,* 586 F. 2d 1296 (CA8 1978). The rule in the Fifth Circuit is that a knowing and intelligent waiver cannot be found once the Fifth Amendment right to counsel has been clearly invoked unless the accused initiates the renewed contact. See, *e. g., United States* v. *Massey,* 550 F. 2d 300 (1977); *United States* v. *Priest,* 409 F. 2d 491 (1969). Waiver is possible, however, when the request for counsel is equivocal. *Nash* v. *Estelle,* 597 F. 2d 513 (CA5 1979) (en banc). See *Thompson* v. *Wainwright,* 601 F. 2d 768 (CA5 1979).

uary 19 ceased interrogation when Edwards requested counsel as he had been advised he had the right to do. The Arizona Supreme Court was of the opinion that this was a sufficient invocation of his *Miranda* rights, and we are in accord. It is also clear that without making counsel available to Edwards, the police returned to him the next day. This was not at his suggestion or request. Indeed, Edwards informed the detention officer that he did not want to talk to anyone. At the meeting, the detectives told Edwards that they wanted to talk to him and again advised him of his *Miranda* rights. Edwards stated that he would talk, but what prompted this action does not appear. He listened at his own request to part of the taped statement made by one of his alleged accomplices and then made an incriminating statement, which was used against him at his trial. We think it is clear that Edwards was subjected to custodial interrogation on January 20 within the meaning of *Rhode Island* v. *Innis, supra,* and that this occurred at the instance of the authorities. His statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible.[10]

Accordingly, the holding of the Arizona Supreme Court that Edwards had waived his right to counsel was infirm, and the judgment of that court is reversed.

So ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

I concur only in the judgment because I do not agree that either any constitutional standard or the holding of *Miranda* v. *Arizona,* 384 U. S. 436 (1966)—as distinguished from its dicta—calls for a special rule as to how an accused in custody may waive the right to be free from interrogation. The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but

[10] We need not decide whether there would have been a valid waiver of counsel had the events of January 20 been the first and only interrogation to which Edwards had been subjected. Cf. *North Carolina* v. *Butler,* 441 U. S. 369 (1979).

as with all "good" things they can be carried too far. The notion that any "prompting" of a person in custody is somehow evil *per se* has been rejected. *Rhode Island* v. *Innis,* 446 U. S. 291 (1980). For me, the inquiry in this setting is whether resumption of interrogation is a result of a voluntary waiver, and that inquiry should be resolved under the traditional standards established in *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938):

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

Accord, *e. g., Fare* v. *Michael C.,* 442 U. S. 707 (1979); *North Carolina* v. *Butler,* 441 U. S. 369 (1979). In this case, the Supreme Court of Arizona described the situation as follows:

> "When the detention officer told Edwards that the detectives were there to see him, he told the officer that he did not wish to speak to anyone. The officer told him *that he had to.*" 122 Ariz. 206, 209, 594 P. 2d 72, 75 (1979) (emphasis added).

This is enough for me, and on this record the Supreme Court of Arizona erred in holding that the resumption of interrogation was the product of a voluntary waiver, such as I found to be the situation in both *Innis, supra,* at 304 (concurring opinion), and *Brewer* v. *Williams,* 430 U. S. 387, 417–418 (1977) (dissenting opinion).

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring in the result.

Although I agree that the judgment of the Arizona Supreme Court must be reversed, I do not join the Court's opinion because I am not sure what it means.

I can agree with much of the opinion. It states the settled rule:

> "It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.' *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). See *Faretta* v. *California,* 422 U. S. 806, 835 (1975); *North Carolina* v. *Butler,* 441 U. S. 369, 374–375 (1979); *Brewer* v. *Williams,* 430 U. S. 387, 404 (1977); *Fare* v. *Michael C.,* 442 U. S. 707, 724–725 (1979)." *Ante,* at 482–483.

I have thought it settled law, as these cases tell us, that one accused of crime may waive *any* of the constitutional safeguards—including the right to remain silent, to jury trial, to call witnesses, to cross-examine one's accusers, to testify in one's own behalf, and—of course—to have counsel. Whatever the right, the standard for waiver is whether the actor fully understands the right in question and voluntarily intends to relinquish it.

In its opinion today, however, the Court—after reiterating the familiar principles of waiver—goes on to say:

> "We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused [has] himself initiate[d] further communication, exchanges, or conversations with the police.*" *Ante,* at 484–485 (emphasis added).

In view of the emphasis placed on "initiation," see also *ante,* at 485–486, and n. 9, I find the Court's opinion unclear. If read to create a new *per se* rule, requiring a threshold inquiry

as to precisely who opened any conversation between an accused and state officials, I cannot agree. I would not superimpose a new element of proof on the established doctrine of waiver of counsel.

Perhaps the Court's opinion can be read as not departing from established doctrine. Accepting the formulation quoted above, two questions are identifiable: (i) was there in fact "interrogation," see *Rhode Island* v. *Innis,* 446 U. S. 291 (1980), and (ii) did the police "initiate" it? Each of these questions is, of course, relevant to the admissibility of a confession. In this case, for example, it is clear that Edwards was taken from his cell against his will and subjected to renewed interrogation. Whether this is described as police-"initiated" interrogation or in some other way, it clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel.

But few cases will be as clear as this one. Communications between police and a suspect in custody are commonplace. It is useful to contrast the circumstances of this case with typical, and permissible, custodial communications between police and a suspect who has asked for counsel. For example, police do not impermissibly "initiate" renewed interrogation by engaging in routine conversations with suspects about unrelated matters. And police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney. *E. g., State* v. *Turner,* 32 Ore. App. 61, 65, 573 P. 2d 326, 327 (1978); see *State* v. *Crisler,* 285 N. W. 2d 679, 682 (Minn. 1979); *State* v. *Marcum,* 24 Wash. App. 441, 445–446, 601 P. 2d 975, 978 (1979). It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk. Nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision. As JUSTICE WHITE has observed, this Court consistently has "rejected any paternalistic

rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case." *Michigan* v. *Mosley,* 423 U. S. 96, 109 (1975) (WHITE, J., concurring in result).[1]

In sum, once warnings have been given and the right to counsel has been invoked, the relevant inquiry—whether the suspect now desires to talk to police without counsel—is a question of fact to be determined in light of all of the circumstances. Who "initiated" a conversation may be relevant to the question of waiver, but it is not the *sine qua non* to the inquiry. The ultimate question is whether there was a free and knowing waiver of counsel before interrogation commenced.

If the Court's opinion does nothing more than restate these principles, I am in agreement with it. I hesitate to join the opinion only because of what appears to be an undue, and undefined, emphasis on a single element: "initiation." As JUSTICE WHITE has noted, the Court in *Miranda* v. *Ari-*

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[1] JUSTICE WHITE noted in *Michigan* v. *Mosley:*

"Although a recently arrested individual may have indicated an initial desire not to answer questions, he would nonetheless want to know immediately—if it were true—that his ability to explain a particular incriminating fact or to supply an alibi for a particular time period would result in his immediate release. Similarly, he might wish to know—if it were true—that (1) the case against him was unusually strong and that (2) his immediate cooperation with the authorities in the apprehension and conviction of others or in the recovery of property would redound to his benefit in the form of a reduced charge." 423 U. S., at 109, n. 1.

In *Michigan* v. *Mosley,* of course, the question was whether a suspect who had invoked his right to *remain silent* later could change his mind and speak to police. The facts of *Mosley* differ somewhat from the present case because here petitioner had *requested counsel.* It is nevertheless true in both cases that "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Id.,* at 102 (opinion of STEWART, J.).

zona, 384 U. S. 436 (1965), imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution. *Id.,* at 526 (WHITE, J., dissenting); see *Michigan* v. *Tucker,* 417 U. S. 433, 443–444 (1974). *Miranda* itself recognized, moreover, that counsel's assistance can be waived. 384 U. S., at 475 (opinion of Warren, C. J.). Waiver always has been evaluated under the general formulation of the *Zerbst* standard quoted above. My concern is that the Court's opinion today may be read as "constitutionalizing" not the generalized *Zerbst* standard but a *single element of fact* among the various facts that may be relevant to determining whether there has been a valid waiver.[2]

[2] Such a step should be taken only if it is demonstrably clear that the traditional waiver standard is ineffective. There is no indication, in the multitude of cases that come to us each Term, that *Zerbst* and its progeny have failed to protect constitutional rights.

WEBB *v.* WEBB

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 79-6853. Argued March 23, 1981—Decided May 18, 1981

This case involves a custody dispute between the mother (petitioner) and father (respondent) of a minor child. A Florida state court awarded custody to petitioner. In a subsequently filed action, a Georgia state court awarded custody to respondent, and the Georgia Supreme Court affirmed. Petitioner then filed a petition for certiorari in this Court, raising the question whether Art. IV, § 1, of the Federal Constitution required Georgia to give full faith and credit to the Florida decree, and certiorari was granted.

Held: Where the record discloses that petitioner failed to raise her federal claim in the Georgia courts and that the Georgia Supreme Court failed to rule on a federal issue, this Court is without jurisdiction to decide that issue, and accordingly the writ of certiorari is dismissed. Pp. 494–502.

Certiorari dismissed. Reported below: 245 Ga. 650, 266 S. E. 2d 463.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, in which BRENNAN, J., joined, *post,* p. 502. MARSHALL, J., filed an opinion dissenting in part, *post,* p. 502.

Mary R. Carden argued the cause for petitioner. With her on the briefs were *Edward R. Zacker, Roy M. Sobelson,* and *John L. Cromartie, Jr.*

Manley F. Brown, by appointment of the Court, 449 U. S. 1008, argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

This case involves a custody dispute between the mother and father of a minor child. Their dispute has reached this

*Briefs of *amici curiae* were filed by *Harry M. Fain* for the American Academy of Matrimonial Lawyers; by *Phyllis Gelman, Louise Gruner Gans,* and *Catherine P. Mitchell* for the National Center on Women and Family Law, Inc., et al.; and by *John C. Deacon* for the National Conference of Commissioners on Uniform State Laws.

Court because the state courts of Florida and Georgia have reached conflicting results in assigning custody of the child.

On March 8, 1979, petitioner, the mother, filed an action in Florida state court seeking custody of her son. On April 18, 1979, the Florida court entered a judgment granting her custody. On March 23, 1979, respondent, the father, filed an action in Georgia state court also seeking custody. On June 21, 1979, he was awarded custody by the Georgia court. The Georgia Supreme Court affirmed that decision. 245 Ga. 650, 266 S. E. 2d 463.

The mother then filed a petition for writ of certiorari in this Court, raising just one question: "Does Article IV, § 1 of the United States Constitution, demand that Georgia . . . give full faith and credit to a Florida decree rendered immediately prior to Georgia's acceptance of unqualified jurisdiction?" Petitioner alleged that she had properly raised this federal question in the Georgia courts. Respondent filed a brief in opposition to the petition for certiorari in which he argued that the Full Faith and Credit Clause must give way to the "best interests" of the child in a child custody proceeding.[1] At no point in his brief in opposition did respondent dispute petitioner's contention that the federal issue had been properly raised below, nor did respondent contend that there was some other jurisdictional bar that would prevent this Court from reaching the question raised in the petition.

Under our Rule 19.1, we no longer require, and in fact disfavor, the filing of the lower court record prior to action by this Court on a petition for certiorari. We are, therefore, largely dependent upon the assertions made by the parties as to what that record will demonstrate concerning the manner in which a federal question was raised below. Because petitioner forthrightly asserted that the federal question had

[1] Respondent also argued that the Georgia court properly assumed jurisdiction under the Uniform Child Custody Jurisdiction Act. This is purely a question of state law not properly subject to review in this Court.

been raised and this assertion was not disputed by respondent, we assumed that there would be no jurisdictional problem in reaching the issue raised by the petition, and we granted certiorari.[2] 449 U. S. 819. It has become clear, however, that the federal question was not raised below and that we are without jurisdiction in this case. We must therefore dismiss without reaching the merits.

Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U. S. C. § 1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which she now seeks to have this Court enforce. 28 U. S. C. § 1257 (3). Similarly our Rule 21.1 (h) requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." Our examination of the record convinces us that petitioner failed properly to raise or preserve a claim under the Full Faith and Credit Clause of the Federal Constitution in the Georgia courts.

We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York,* 394 U. S.

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[2] Because—as will be discussed *infra*—the federal issue was not addressed by the Georgia Supreme Court, it may have been better practice on our part to call for the record before acting on the petition for certiorari.

576, 582 (1969); see also *Fuller* v. *Oregon,* 417 U. S. 40, 50, n. 11 (1974); *Chambers* v. *Mississippi,* 410 U. S. 284, 290, n. 3 (1973); *Bailey* v. *Anderson,* 326 U. S. 203, 206–207 (1945). Petitioner argues that the record of this case rebuts this assumption because it demonstrates that she did raise the federal question. Therefore, in her view the State Supreme Court must be understood as having implicitly rejected her federal claim.

Although petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution. In her amended motion to dismiss in the Georgia trial court, petitioner added the following contention: "Plaintiff herein continues to act contrary to the order of the Superior Court of Berrine County, entered September 22, 1977, and also is acting in violation of the April 18, 1979, order of the circuit court of Alachua County, Florida . . . which order should be accorded full faith and credit by this court, as it was made pursuant to relevant Florida law, as stated above." Also, in petitioner's enumeration of errors to the Georgia Supreme Court, she stated that "the [c]ourt erred in failing to find a Florida decree of April 18, 1979, a valid order in a prior pending action, give such full faith and credit, enforce it by ordering Plaintiff to comply with it in all respects, and dismiss this action." [3]

It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately pre-

[3] In petitioner's brief to the Georgia Supreme Court she devoted one sentence to this issue: "In such circumstances, Appellant asserts, the decree entered in Florida should have been recognized as a final order subject to full faith and credit." Brief for Respondent 3. This lower court brief is not a part of the record, but even if it were it would not suffice to establish that petitioner's claim was based on the Federal Constitution.

sented in the state system. *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928); *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655 (1897). Petitioner argues that since the Georgia Constitution has no full faith and credit clause, there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented. See Tr. of Oral Arg. 4. We are unpersuaded. In fact, we find it far more likely that petitioner was referring to state law.

The Georgia Supreme Court understood this case to concern primarily the requirements of the Uniform Child Custody Jurisdiction Act: "This case calls for an interpretation of certain provisions of Georgia's Uniform Child Custody Jurisdiction Act, Code Ann. § 74–501, et seq." That Act has been adopted by both Georgia and Florida. Section 74–514 of that Act, as codified by Georgia, states:

> "The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Chapter, or which was made under factual circumstances meeting the jurisdictional standards of the Chapter, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Chapter." Ga. Code § 74–514 (1979).

Interpreting the meaning of this section is obviously a matter of Georgia state law, but a litigant could plausibly refer to it as a statutory full faith and credit requirement. The record supports the view that it was so understood in this case, by both the courts and the parties.

At the trial court hearing, petitioner discussed the Florida decree but did not invoke the Full Faith and Credit Clause of the Federal Constitution. Rather, petitioner argued that in failing to make the Georgia court aware of the previous decree, respondent had violated the terms of the Uniform

Child Custody Jurisdiction Act: "[W]hile all this was going on in Florida, [respondent] turned right around and filed an action here, never informed the [c]ourt here that he had done it; never made any of the disclosures that he's supposed to make under Georgia law [the Uniform Child Custody Jurisdiction Act], and never made any response to that whatsoever." Tr. 8. The appellate briefs of the parties to the Georgia Supreme Court similarly argued the application of the Act to the facts of this case. As noted above, the State Supreme Court apparently did not believe that any federal issue was presented. Finally, petitioner did not claim in her petition for rehearing before the Georgia Supreme Court that the court's failure to reach the federal claim, which petitioner now contends was raised before that court, was error. She did, however, argue that the failure of the Georgia courts to dismiss the action was error under the Act.[4]

We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings. Thus, we confront in this case the same problem that arose in *Cardinale* v. *Louisiana,* 394 U. S. 437, 438 (1969): "Although certiorari was granted to consider this question, . . . the sole federal ques-

[4] Even if, as a matter of federal law, petitioner had properly raised her federal question, we might still confront here an independent state procedural ground barring our consideration of the federal issue. Rule 45 of the Rules of the Georgia Supreme Court states: "Any enumerated error which is not supported by argument or citation of authority shall be deemed abandoned." Ga. Code § 24–4545 (Supp. 1980). The Georgia court has held that failure to include citations of authority to support enumerated errors will bar review of those errors in the State Supreme Court. *Watts* v. *Mitchell,* 227 Ga. 247, 179 S. E. 2d 774 (1971). The Georgia Supreme Court failed to discuss or even mention petitioner's full faith and credit claim. Petitioner has not demonstrated that the failure of the Georgia Supreme Court to reach the federal issue was not grounded on an application of this rule. Since we conclude that the federal claim was not properly presented, we need not reach any conclusion about application of this state-court rule.

tion argued here has never been raised, preserved, or passed upon in the state courts below." Citing a long history of cases, we stated there that "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Ibid.* We have had several occasions to repeat this rule since then, *Tacon* v. *Arizona,* 410 U. S. 351, 352 (1973); *Moore* v. *Illinois,* 408 U. S. 786, 799 (1972); *Stanley* v. *Illinois,* 405 U. S. 645, 658, n. 10 (1972); *Hill* v. *California,* 401 U. S. 797 (1971); *University of California Regents* v. *Bakke,* 438 U. S. 265, 283 (1978) (opinion of POWELL, J.), and we see no reason to deviate from it now.

It is appropriate to emphasize again, see *Cardinale* v. *Louisiana, supra,* at 439, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principal of comity requires

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the

> belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U. S. 37, 44 (1971).

The principal of comity that stands behind the "properly-raised-federal-question" doctrine is similar to the principle that stands behind the exhaustion-of-state-remedies doctrine applicable to federal habeas corpus review of the constitutional claims of state prisoners. We have described the latter doctrine as one based on "federal-state comity," *Picard* v. *Connor,* 404 U. S. 270, 275 (1971), and have described its function as reflecting

> " 'an accommodation of our federal system designed to give the State the initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights.' We have consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.' " *Ibid.* (citations omitted).

There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tri-

bunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

For all of these reasons, we, as well as litigants seeking to bring cases here from the state courts, should take care to comply with the jurisdictional statute and our rules. Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, we have not insisted on such inflexible specificity. The inevitable result is that at times there have been differences of opinion as to whether the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here.[5] At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without

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[5] See, *e. g., Wood* v. *Georgia,* 450 U. S. 261 (1981); *Vachon* v. *New Hampshire,* 414 U. S. 478 (1974); *Boynton* v. *Virginia,* 364 U. S. 454 (1960); *Bryant* v. *Zimmerman,* 278 U. S. 63 (1928).

jurisdiction in this case. Accordingly, the writ is dismissed for want of jurisdiction.

So ordered.

JUSTICE POWELL, with whom JUSTICE BRENNAN joins, concurring.

I agree that the writ should be dismissed because petitioner did not raise her federal constitutional challenge in the Georgia courts. I join the Court's opinion with the understanding, however, that the broad statements in it are not to be taken as departing from the rule, reaffirmed just this Term, that the Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. *Wood* v. *Georgia,* 450 U. S. 261, 265, n. 5 (1981). See also, *Vachon* v. *New Hampshire,* 414 U. S. 478 (1974) (finding plain error in an appeal from a state court).

JUSTICE MARSHALL, dissenting in part.

I share the Court's concerns for comity and for careful pleadings. Nonetheless, I do not believe that either of these concerns justifies the Court's apparent conclusion that a petitioner who fails to cite the exact location of a federal constitutional provision has neglected to raise a claim on that ground.

The Court attempts to reason that the petitioner neglected to raise any claim under the Full Faith and Credit Clause of the Constitution. As the Court acknowledges, however, petitioner "did use the phrase 'full faith and credit' at several points in the proceedings below." *Ante,* at 496. Indeed, she asserted in her amended complaint that the decision of the Florida court "should be accorded full faith and credit" by the Georgia court, and reiterated this claim in her enumeration of errors to the Georgia Supreme Court. The Court tries to translate these words as references not to the identical language in the Federal Constitution, but instead to a

provision of Georgia law which fails to mention any of the three words, "full," "faith," or "credit." See Ga. Code § 74–514 (1979), Uniform Child Custody Jurisdiction Act. The Georgia provision governs allocation of jurisdiction under the Uniform Child Custody Jurisdiction Act, which both Georgia and Florida have enacted as their own law. I fail to see how the interests of improved pleadings or comity are served by the Court's strained refusal to ascribe to petitioner's words their plain meaning.

It remains true that the Georgia Supreme Court neglected to pass on the import of the federal Full Faith and Credit Clause for this case. I would remand for such state review on that issue, rather than dismiss the writ and leave the decision below in place.

ALESSI ET AL. *v.* RAYBESTOS-MANHATTAN, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No 79–1943. Argued March 4, 1981—Decided May 18, 1981*

In two suits initiated in New Jersey state court, retired employees who had received workers' compensation awards subsequent to retirement challenged the validity of provisions in their employers' pension plans reducing a retiree's pension benefits by an amount equal to a workers' compensation award for which the retiree is eligible. These private pension plans are subject to federal regulation under the Employee Retirement Income Security Act of 1974 (ERISA). The employers independently removed the suits to Federal District Court, where the judges in each suit held that the pension offset provisions were invalid under a provision of the New Jersey Workers' Compensation Act prohibiting such offsets; that Congress had not intended ERISA to pre-empt such state laws; that the offsets were prohibited by ERISA's provision, 29 U. S. C. § 1053 (a), prohibiting forfeitures of pension rights except under specified conditions inapplicable to these cases; and that a Treasury Regulation authorizing offsets based on workers' compensation awards was invalid. The Court of Appeals consolidated appeals from the two decisions and reversed.

Held:

1. Congress contemplated and approved the kind of pension provisions challenged here. Pp. 509–521.

(a) Pension plan provisions for offsets based on workers' compensation awards do not contravene ERISA's nonforfeiture provisions. While § 1053 (a) prohibits forfeitures of vested rights, with specified exceptions that do not include workers' compensation offsets, nevertheless other provisions make it clear that ERISA leaves to the private parties creating the pension plan the determination of the content or amount of benefits that, once vested, cannot be forfeited. The statutory definition of "nonforfeitable" pension benefits, 29 U. S. C. § 1002 (19), assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit. Cf. *Nachman Corp.* v. *Pension Benefit*

*Together with No. 80–193, *Buczynski et al.* v. *General Motors Corp. et al.*, on certiorari to the same court.

Guaranty Corp., 446 U. S. 359. It is particularly pertinent that Congress did not prohibit "integration," a calculation practice under which benefit levels are determined by combining pension funds with other public income streams available to the retired employee. Rather, Congress accepted the practice by expressly preserving the option of pension fund integration with benefits available under both the Social Security Act and the Railroad Retirement Act. Offsets against pension benefits for workers' compensation awards work much like the integration of pension benefits with Social Security or Railroad Retirement payments, and thus the nonforfeiture provision of § 1053 (a) has no more applicability to the former kind of integration than it does to the latter. Pp. 510–517.

(b) Although neither ERISA nor its legislative history mentions integration with workers' compensation, ERISA does not forbid the Treasury Regulation permitting reductions of pension benefits based on awards under state workers' compensation laws, or Internal Revenue Service rulings to the same effect. There is no merit in the argument that integration of pension funds with workers' compensation awards, which are based on work-related injuries, lacks the rationale behind ERISA's permission of integration of pension funds with Social Security and Railroad Retirement payments, which supply payments for wages lost due to retirement. Both the Social Security and Railroad Retirement Acts also provide payments for disability, and ERISA permits pension integration with such benefits as well as with benefits for wages lost due to retirement. Moreover, when it enacted ERISA, Congress knew of the IRS rulings permitting integration with workers' compensation benefits and left them in effect. Pp. 517–521.

2. The New Jersey statute in question is pre-empted by federal law insofar as it eliminates a method for calculating pension benefits under plans governed by ERISA. The provision of ERISA, 29 U. S. C. § 1144 (a), stating that the Act's provisions shall supersede any state laws that "relate to any [covered] employee benefit plan," demonstrates that Congress meant to establish pension plan regulation as exclusively a federal concern. Regardless of whether the purpose of the New Jersey statute might have been to protect the employee's right to workers' compensation disability benefits rather than to regulate pension plans, the statute "relate[s] to pension plans" governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law, and the state provision thus is an impermissible intrusion on the federal regulatory scheme. It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law, rather than directly, through a statute called "pension

regulation," since ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. Moreover, where, as here, pension plans emerge from collective bargaining, the additional federal interest in precluding state interference in labor-management negotiations calls for pre-emption of state efforts to regulate pension terms. Pp. 521–526.

616 F. 2d 1238, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the decision of the cases.

Theodore Sachs argued the cause for appellants in No. 79–1943. With him on the briefs were *Michael S. Scarola* and *I. Mark Steckloff*. *Marc C. Gettis* argued the cause and filed briefs for petitioners in No. 80–193.

Warren John Casey argued the cause for appellees in No. 79–1943. With him on the brief was *Sebastian J. Fortunato*. *Laurence Reich* argued the cause for respondent in No. 80–193. With him on the brief were *Otis M. Smith, Eugene L. Hartwig,* and *David M. Davis*. *John J. Degan,* Attorney General, *Stephen Skillman,* Assistant Attorney General, and *Michael S. Bokar,* Deputy Attorney General, filed a brief for the State of New Jersey as appellee in No. 79–1943, under this Court's Rule 10.4, and as respondent in No. 80–193, under this Court's Rule 19.6.†

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†Briefs of *amici curiae* urging reversal were filed by *Alfred Miller* for the American Association of Retired Persons et al.; by *Gill Deford* and *Neal S. Dudovitz* for the Gray Panthers; and by *Leonard S. Zubrensky* and *Theodore Sachs* for Merl D. Stong et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Acting Assistant Attorney General Murray, Stuart A. Smith, William A. Friedlander,* and *Michael J. Roach,* for the United States; by *Richard T. Wentley* and *Patrick W. Ritchey* for Allegheny-Ludlum Industries, Inc.; by *Stanley T. Kaleczyc* for the Chamber of Commerce of the United States; by *George J. Pantos* for the ERISA Industry Committee; and by *Charles R. Volk* and *William W. Scott, Jr.,* for the National Steel Corp.

JUSTICE MARSHALL delivered the opinion of the Court.

Some private pension plans reduce a retiree's pension benefits by the amount of workers' compensation awards received subsequent to retirement. In these cases we consider whether two such offset provisions are lawful under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1976 ed. and Supp. III), and whether they may be prohibited by state law.

I

Raybestos-Manhattan, Inc., and General Motors Corp. maintain employee pension plans that are subject to federal regulation under ERISA. Both plans provide that an employee's retirement benefits shall be reduced, or offset, by an amount equal to workers' compensation awards for which the individual is eligible.[1] In 1977, the New Jersey Legislature

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[1] The Raybestos-Manhattan, Inc., plan provides:

"All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, Presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income."

The offset clause under the General Motors Corp. plan provides:

"In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

"(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of

amended its Workers' Compensation Act to expressly prohibit such offsets. The amendment states that "[t]he right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments." N. J. Stat. Ann. § 34:15–29 (West Supp. 1980–1981) (as amended by 1977 N. J. Laws, ch. 156).

Alleging violations of this provision of state law, two suits were initiated in New Jersey state court. The plaintiffs in both suits were retired employees who had obtained workers' compensation awards subject to offsets against their retirement benefits under their pension plans.[2] The defendant companies independently removed the suits to the United States District Court for the District of New Jersey. There, both District Court Judges ruled that the pension offset provisions were invalid under New Jersey law, and concluded that Congress had not intended ERISA to pre-empt state laws of this sort. The District Court Judges also held that the offsets were prohibited by § 203 (a) of ERISA, 29 U. S. C. § 1053 (a). This section prohibits forfeitures of vested pension rights except under four specific conditions inapplicable to these cases.[3] The judges concluded that offsets based on workers' compensation awards would be forbidden forfeitures,

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any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

"(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

"(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority."

[2] In No. 79–1943, former employees of Raybestos-Manhattan, Inc., sought permanently to enjoin such offsets and to recover damages for the offsets already made. Similar relief was pursued in No. 80–193, where several former employees of General Motors Corp. brought suit for themselves and on behalf of others similarly situated.

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

and struck down a contrary federal Treasury Regulation authorizing such offsets.[4]

The United States Court of Appeals for the Third Circuit consolidated the appeals from these two decisions and reversed. 616 F. 2d 1238 (1980). It rejected the District Court Judges' view that the offset provisions caused a forfeiture of vested pension rights forbidden by § 1053. Instead, the Court of Appeals reasoned, such offsets merely reduce pension benefits in a fashion expressly approved by ERISA for employees receiving Social Security benefits. Accordingly, the Court of Appeals found no conflict between ERISA and the Treasury Regulation approving reductions based on workers' compensation awards and ERISA. Finally, the court concluded that the New Jersey statute forbidding offsets of pension benefits by the amount of workers' compensation awards could not withstand ERISA's general pre-emption provision, 29 U. S. C. § 1144 (a). We noted probable jurisdiction of the appeal taken by the former employees of Raybestos-Manhattan, Inc., and granted certiorari on the petition of former employees of General Motors Corp. 449 U. S. 949 and 950 (1980). For convenience, we refer to the former employees in both cases as retirees. We affirm the judgment of the Court of Appeals.

II

Retirees claim that the workers' compensation offset provisions of their pension plans contravene ERISA's nonforfeiture provisions and that the Treasury Regulation to the contrary is inconsistent with the Act. Both claims require examination of the relevant sections of ERISA.

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[4] The Regulation provides that "nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits." 26 CFR § 1.411 (a)–4 (a) (1980).

A

As we recently observed, ERISA is a "comprehensive and reticulated statute," which Congress adopted after careful study of private retirement pension plans. *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359, 361 (1980). In *Nachman*, we observed that Congress through ERISA wanted to ensure that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit— . . . he actually receives it." *Id.*, at 375.[5] For this reason, the concepts of vested rights and nonforfeitable rights are critical to the ERISA scheme. See *id.*, at 370, 378. ERISA prescribes vesting and accrual schedules, assuring that employees obtain rights to at least portions of their normal pension benefits even if they leave their positions prior to retirement.[6] Most critically, ERISA establishes that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable

[5] In its statement of findings and declaration of policy, Congress noted that "despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." 29 U. S. C. § 1001 (a). ERISA was designed to prescribe minimum vesting and accrual standards in response to such problems. *Ibid.* To ensure that employee pension expectations are not defeated, the Act establishes minimum rules for employee participation, §§ 1051–1061; funding standards to increase solvency of pension plans, §§ 1081–1085; fiduciary standards for plan managers, §§ 1101–1114; and an insurance program in case of plan termination, §§ 1341–1348 (1976 ed. and Supp. III).

[6] ERISA establishes three accrual techniques for pension plans covered by the Act. 29 U. S. C. § 1054 (b)(1). See n. 9, *infra*. Similarly, ERISA establishes several approved vesting schedules. Under any of the approved schedules, at a time prior to normal retirement age but after a given period of service or a combination of age and length of service, the employee is to be guaranteed 100% interest in the pension benefit. 29 U. S. C. § 1053 (a)(2). See n. 10, *infra*.

upon the attainment of normal retirement age." 29 U. S. C. § 1053 (a).[7]

Retirees rely on this sweeping assurance that pension rights become nonforfeitable in claiming that offsetting those benefits with workers' compensation awards violates ERISA. Retirees argue first that no vested benefits may be forfeited except as expressly provided in § 1053. Second, retirees assert that offsets based on workers' compensation fall into none of those express exceptions. Both claims are correct; § 1053 (a) prohibits forfeitures of vested rights except as expressly provided in § 1053 (a)(3), and the challenged workers' compensation offsets are not among those permitted in that section.[8]

Despite this facial accuracy, retirees' argument overlooks a threshold issue: what defines the content of the benefit that, once vested, cannot be forfeited? ERISA leaves this question largely to the private parties creating the plan. That the private parties, not the Government, control the level of benefits is clear from the statutory language defining nonforfeitable rights as well as from other portions of ERISA. ERISA defines a "nonforfeitable" pension benefit or right as "a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

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[7] ERISA defines "normal retirement benefit" as "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." 29 U. S. C. § 1002 (22).

[8] The statute expressly exempts from its forfeiture ban offsets that: (1) are contingent on the employee's death, 29 U. S. C. § 1053 (a)(3)(A); (2) occur when the employee takes a job under certain circumstances, § 1053 (a)(3)(B); (3) are due to certain retroactive amendments to a pension plan, § 1053 (a)(3)(C); or (4) result from withdrawals of benefits derived from mandatory contributions, § 1053 (a)(3)(D). Retirees correctly point out that workers' compensation offsets fall into none of these categories.

29 U. S. C. § 1002 (19). In construing this definition last Term, we observed:

> "[T]he term 'forfeiture' normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly described as not causing a forfeiture listed in [§ 1053 (a)(3)] describes an event—such as death or temporary re-employment—that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of "nonforfeitable" to view it as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S., at 372–373.

Similarly, the statutory definition of "nonforfeitable" assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit. As we explained last Term, "it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.'" *Id.*, at 371.

Rather than imposing mandatory pension levels or methods for calculating benefits, Congress in ERISA set outer bounds on permissible accrual practices, 29 U. S. C. § 1054 (b)(1), and specified three alternative schedules for the vesting of pension rights, 29 U. S. C. § 1053 (a)(2). In so doing, Congress limited the variation permitted in accrual rates applicable across the entire period of an employee's participation in the pension plan.[9] And Congress disapproved

[9] The three different accrual practices approved for defined benefits plans are described in 29 U. S. C. § 1054 (b)(1). One prescribes a minimum percentage of the total retirement benefit that must be accrued in any given year. § 1054 (b)(1)(A). Another permits the use of any accrual formula as long as the accrual rate for a given year of service

pension practices unduly delaying an employee's acquisition of a right to enforce payment of the portion of benefits already accrued, without further employment.[10] These provisions together assure at minimum a legally enforceable claim to 100% of the pension benefits created by a covered plan for those employees who have completed 15 years of service and for those employees aged 45 or older who have completed 10 years of service.[11] Other than these restrictions, ERISA permits the total benefit levels and formulas for determining their accrual before completion of 15 years of service to vary

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does not vary beyond a specified percentage from the accrual rate of any other year under the plan. § 1054 (b) (1) (B). The third is essentially a pro rata rule under which in any given year, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age. § 1054 (b) (1) (C).

[10] Congress approved some delay in an employee's acquisition of a vested right to portions of his pension derived from employer contributions. Thus, ERISA specifies that this right could be hinged on a minimum length of service, but an employee reaching the minimum should not lose that right even if he does not continue working for that particular employer until reaching retirement age. That minimum period of service can be calculated under three different formulas, two of which permit gradual vesting of percentages of the accrued benefits over time. Compare 29 U. S. C. § 1053 (a) (2) (A) with §§ 1053 (a) (2) (B), (C). See also Schiller, Proposed ERISA Vesting Regulations: Not What They Seem To Be, 6 J. Corp. L. 263 (1981) (discussing Internal Revenue Service implementation of vesting provisions). In essence, pension plans qualifying for tax treatment advantageous to the employer both must ensure nonforfeiture of all accrued benefits derived from employee contributions and must use vesting and accrual rates assuring portions of the benefits derived from the employer contributions should the employee leave the job before the normal retirement age. 29 U. S. C. §§ 1053 (a) (1), (2).

[11] This minimum results from the formulas approving gradual vesting over time of benefits derived from employer contributions. See 29 U. S. C. §§ 1053 (a) (2) (B), (C). Alternatively, a plan may comply with ERISA "if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions." 29 U. S. C. § 1053 (a) (2) (A).

from plan to plan. See 29 U. S. C. §§ 1002 (22), (23) (benefits defined merely as those "under the plan").

It is particularly pertinent for our purposes that Congress did not prohibit "integration," a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees. The pension funds are thus integrated with the funds from other income maintenance programs, such as Social Security, and the pension benefit level is determined on the basis of the entire pool of funds. Under this practice, an individual employee's eligibility for Social Security would advantage all participants in his private pension plan, for the addition of his anticipated Social Security payments to the total benefit pool would permit a higher average pension payout for each participant. The employees as a group profit from that higher pension level, although an individual employee may reach that level by a combination of payments from the pension fund and payments from the other income maintenance source. In addition, integration allows the employer to attain the selected pension level by drawing on the other resources, which, like Social Security, also depend on employer contributions.

Following its extensive study of private pension plans before the adoption of ERISA, Congress expressly preserved the option of pension fund integration with benefits available under both the Social Security Act, 42 U. S. C. § 401 *et seq.* (1976 ed. and Supp. III), and the Railroad Retirement Act of 1974, 45 U. S. C. § 231 *et seq.* (1976 ed. and Supp. III); 29 U. S. C. §§ 1054 (b)(1)(B)(iv), 1054 (b)(1)(C), 1054 (b)(1)(G). Congress was well aware that pooling of nonpension retirement benefits and pension funds would limit

the total income maintenance payments received by individual employees and reduce the cost of pension plans to employers. Indeed, in considering this integration option, the House Ways and Means Committee expressly acknowledged the tension between the primary goal of benefiting employees and the subsidiary goal of containing pension costs. The Committee Report noted that the proposed bill would

> "not affect the ability of plans to use the integration procedures to reduce the benefits that they pay to individuals who are currently covered when social security benefits are liberalized. Your committee, however, believes that such practices raise important issues. On the one hand, the objective of the Congress in increasing social security benefits might be considered to be frustrated to the extent that individuals with low and moderate incomes have their private retirement benefits reduced as a result of the integration procedures. On the other hand, your committee is very much aware that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth or perhaps even eliminat[ing] private retirement plans." H. R. Rep. No. 93–807, p. 69 (1974), reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974 (Committee Print compiled for the Senate Committee on Labor and Public Welfare) 3189 (1976) (Leg. Hist.).[12]

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[12] The vesting, nonforfeiture, and pension benefits provisions of the bill discussed in H. R. Rep. No. 93–807 were substantially identical to those portions in the bill ultimately enacted as ERISA. The bill reported out of the Conference Committee included an additional provision to restrict temporarily any increases in pension reductions due to increases in Social Security benefits occurring after December 31, 1971. H. R. Conf. Rep. No. 93–

The Committee called for further study of the problem and recommended that Congress impose a restriction on integration of pension benefits with Social Security and Railroad Retirement payments. Congress adopted this recommendation and forbade any reductions in pension payments based on increases in Social Security or Railroad Retirement benefits authorized after ERISA took effect. 29 U. S. C. § 1056 (b). See 29 U. S. C. §§ 1054 (b)(1)(B)(iv), 1054 (b)(1)(C); H. R. Rep. No. 93–807, at 69, 2 Leg. Hist. 3189. See also 26 U. S. C. § 401 (a)(15).

In setting this limitation on integration with Social Security and Railroad Retirement benefits, Congress acknowledged and accepted the practice, rather than prohibiting it. Moreover, in permitting integration at least with these federal benefits, Congress did not find it necessary to add an exemption for this purpose to its stringent nonforfeiture protections in 29 U. S. C. § 1053 (a). Under these circumstances, we are unpersuaded by retirees' claim that the nonforfeiture provisions by their own force prohibit any offset of pension benefits by workers' compensation awards. Such offsets work much like the integration of pension benefits with Social Security or Railroad Retirement payments. The individual employee remains entitled to the established pension level, but the payments received from the pension fund are reduced by the amount received through workers' compensation. The nonforfeiture provision of § 1053 (a) has no more applicability to this kind of integration than it does to

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1280, p. 131 (1974), 3 Leg. Hist. 4405. Senator Harrison Williams explained that this provision ultimately was deleted because:

"We have been told that this will greatly increase the costs of private pension plans, something that I am sure none of the Senators would like to see occur. This is particularly true if these increased pension costs result in the termination of private pension plans. Certainly that is not the intent of this legislation which is designed to improve and encourage the expansion of private pension plans." 120 Cong. Rec. 29928 (1974), 3 Leg. Hist. 4732.

the analogous reduction permitted for Social Security or Railroad Retirement payments. Indeed, the same congressional purpose—promoting a system of private pensions by giving employers avenues for cutting the cost of their pension obligations—underlies all such offset possibilities.

Nonetheless, ERISA does not mention integration with workers' compensation, and the legislative history is equally silent on this point. An argument could be advanced that Congress approved integration of pension funds only with the federal benefits expressly mentioned in the Act. A current regulation issued by the Internal Revenue Service, however, goes further, and permits integration with other benefits provided by federal or state law. We now must consider whether this regulation is itself consistent with ERISA.

B

Codified at 26 CFR §§ 1.411 (a)–(4)(a) (1980), the Treasury Regulation provides that "nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits." The Regulation interprets 26 U. S. C. § 411, the section of the Internal Revenue Code which replicates for IRS purposes ERISA's nonforfeiture provision, 29 U. S. C. § 1053 (a).[13] The Regulation plainly encompasses

[13] The Court of Appeals characterized the Treasury Regulation as a "legislative" regulation, entitled to a more restricted scope of review than is applied to "interpretive rules." 616 F. 2d 1238, 1242. Nonetheless, the Government here represents that the Treasury Regulation is an interpretive rule. Brief for United States as *Amicus Curiae* 19, n. 12. Because an agency empowered to enact legislative rules may choose to issue nonlegislative statements, we review this Treasury Regulation under the scrutiny applicable to interpretive rules, with due deference to consistent agency practice. See *Batterton* v. *Francis*, 432 U. S. 416, 425, n. 9 (1977); *Batterton* v. *Marshall*, 208 U. S. App. D. C. 321, 332–333, 648 F. 2d 694,

awards under state workers' compensation laws. In addition, in Revenue Rulings issued prior to ERISA, the IRS expressly had approved reductions in pension benefits corresponding to workers' compensation awards. See, *e. g.*, Rev. Rul. 69–421, Part 4 (j), 1969–2 Cum. Bull. 72; Rev. Rul. 68–243, 1968–1 Cum. Bull. 157.[14]

Retirees contend that the Treasury Regulation and IRS rulings to this effect contravene ERISA. They object first that ERISA's approval of integration was limited to Social Security and Railroad Retirement payments. This objection is precluded by our conclusion that reduction of pension benefits based on the integration procedure are not *per se* prohibited by § 1053 (a), for the level of pension benefits is not prescribed by ERISA. Retirees' only remaining objection is that workers' compensation awards are so different in kind from Social Security and Railroad Retirement payments that their integration could not be authorized under the same rubric.

Developing this argument, retirees claim that workers' compensation provides payments for work-related injuries, while Social Security and Railroad Retirement supply payments solely for wages lost due to retirement. Because of this distinction, retirees conclude that integration of pension funds with workers' compensation awards lacks the rationale

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705–706 (1980); 2 K. Davis, Administrative Law Treatise § 7.8 (2d ed. 1979).

[14] Furthermore, integration with workers' compensation has been approved by the agency created under ERISA to guarantee payment of all nonforfeitable pension benefits despite termination of the relevant pension plan. That agency, the Pension Benefit Guaranty Corporation, has defined the benefits it guarantees to include "a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves or has permanently left covered employment, or to a surviving beneficiary, which payments by themselves or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient." 29 CFR § 2605.2 (1980).

behind integration of pension funds with Social Security and Railroad Retirement. Retirees' claim presumes that ERISA permits integration with Social Security or Railroad Retirement only where there is an identity between the purposes of pension payments and the purposes of the other integrated benefits. But not even the funds that the Congress clearly has approved for integration purposes share the identity of purpose ascribed to them by petitioners. Both the Social Security and Railroad Retirement Acts provide payments for disability as well as for wages lost due to retirement, and ERISA permits pension integration without distinguishing these different kinds of benefits.

Furthermore, when it enacted ERISA, Congress knew of the IRS rulings permitting integration and left them in effect.[15] These rulings do not draw the line between permissi-

[15] The House Ways and Means Committee Report proposed codification of the contemporaneous administrative practice developed by the IRS. That practice included IRS approval of integration procedures. See, *e. g.*, 26 CFR § 1.401–3 (e) (1973); Rev. Rul. 69–421, Part 4, 1969–2 Cum. Bull. 70–74; Rev. Rul. 12, 1953–1 Cum. Bull. 290. These IRS rulings implemented a provision of the Internal Revenue Code, 26 U. S. C. § 401 (a)(4), which forbids favorable tax treatment for pension plans discriminating in favor of company officers, shareholders, or highly compensated employees. The Internal Revenue Code, long before the enactment of ERISA, specified that such forbidden discrimination does not include differences in benefits "because of any retirement benefits created under State or Federal law." 26 U. S. C. § 401 (a)(5) (1976 ed., Supp. III). The IRS has consistently interpreted this discrimination provision to permit pension benefit integration with Social Security and other funds receiving employer contributions and making benefits available to the general public. See, *e. g.*, Rev. Rul. 69–4, 1969–1 Cum. Bull. 118; Rev. Rul. 69–5, 1969–1 Cum. Bull. 125; Rev. Rul. 68–243, 1968–1 Cum. Bull. 157; Rev. Rul. 61–75, 1961–1 Cum. Bull. 140. Congress essentially approved these rulings when its Conference Committee reported: "[T]he conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect." H. R. Conf. Rep. No. 93–1280, p. 277 (1974), 3 Leg. Hist. 4544.

ble and impermissible integration where retirees would prefer them to, and instead they include workers' compensation offsets within the ambit of permissible integration. The IRS rulings base their allowance of pension payment integration on three factors: the employer must contribute to the other benefit funds, these other funds must be designed for general public use, and the benefits they supply must correspond to benefits available under the pension plan. The IRS employed these considerations in approving integration with workers' compensation benefits. *E. g.*, Rev. Rul. 69–421, Part 4 (j), 1969–2 Cum. Bull. 72; Rev. Rul. 68–243, 1968–1 Cum. Bull. 157. In contrast, the IRS has disallowed offsets of pension benefits with damages recovered by an employee through a common-law action against the employer. Rev. Rul. 69–421, Part 4 (j)(4), 1969–2 Cum. Bull. 72; Rev. Rul. 68–243, 1968–1 Cum. Bull. 157–158.[16] The IRS also has not per-

[16] Retirees argue that workers' compensation should be treated the same as common-law tort damages for the purposes of integration with pension payments. Although workers' compensation resembles tort judgments against employers for employee injuries, there are differences which could explain their different treatment by the IRS. A tort judgment typically represents a finding of the employer's fault for the employee's injury. Workers' compensation, in contrast, is generally available with no showing of an employer's fault or an employee's lack of fault for the work-related injury. 1 A. Larson, Workmen's Compensation Law §§ 2.10, 6.00 (1979). In treating the two sources of payments differently, the IRS may have concluded that workers' compensation is as much an income maintenance program, responding to wage loss, as it is remuneration for injury, and therefore it may be integrated with pension benefits to the advantage of the entire employee group. See generally 4 *id.*, §§ 96.10, 97.10, 97.50. Cf. *Richardson* v. *Belcher*, 404 U. S. 78, 83 (1971) (reductions of Social Security based on workers' compensation comports with due process). In this light, the agency may well have employed the very rationale proffered by retirees—that two benefits systems must have identical purposes before they may be integrated—and departed from retirees' reasoning only in concluding that these two benefit systems share the same purpose of replacing lost wages, whatever the cause. Regardless of which view of workers' compensation this Court finds most compelling,

mitted integration with reimbursement for medical expenses or with fixed sums made for bodily impairment because such payments do not match up with any benefits available under a pension plan qualified under the Internal Revenue Code and ERISA. Rev. Rul. 78–178, 1978–1 Cum. Bull. 118.[17] Similarly, the IRS has disapproved integration with unemployment compensation, for, as payment for temporary layoffs, it too is a kind of benefit not comparable to any permitted in a qualified pension plan. *Id.*, at 117–118.

Without speaking directly of its own rationale, Congress embraced such IRS rulings. See H. R. Conf. Rep. No. 93–1280, p. 277 (1974), 3 Leg. Hist. 4544 (approving existing antidiscrimination rules). Congress thereby permitted integration along the lines already approved by the IRS, which had specifically allowed pension benefit offsets based on workers' compensation. Our judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find contrary rationales.

As a final argument, retirees claim that we should defer to the policy decisions of the state legislature. To this claim we now turn.

III

The New Jersey Legislature attempted to outlaw the offset clauses by providing that "[t]he right of compensation granted by [the New Jersey Workers' Compensation Act] may be set off against disability pension benefits or payments but *shall not be set off against employees' retirement pension benefits or payments.*" N. J. Stat. Ann. § 34:15–29 (West

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we must defer to the consistent agency position that is itself reasonable and consonant with the Act.

[17] We note that the General Motors offset clause avoids any ambiguity on this point. It disallows deductions for medical expenses or fixed payments for bodily impairment. See n. 1, *supra*. Although the Raybestos-Manhattan, Inc., plan is silent on this point, it is certainly subject to IRS regulation.

Supp. 1980) (emphasis added).[18] To resolve retirees' claim that this state policy should govern, we must determine whether such state laws are pre-empted by ERISA. Our analysis of this problem must be guided by respect for the separate spheres of governmental authority preserved in our federalist system. Although the Supremacy Clause invalidates state laws that "interfere with, or are contrary to the laws of Congress . . . ," *Gibbons* v. *Ogden,* 9 Wheat. 1, 211 (1824), the " 'exercise of federal supremacy is not lightly to be presumed,' " *New York Dept. of Social Services* v. *Dublino,* 413 U. S. 405, 413 (1973), quoting *Schwartz* v. *Texas,* 344 U. S. 199, 203 (1952). As we recently reiterated, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U. S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers* v. *Paul,* 373 U. S. 132, 142 (1963). See *Jones* v. *Rath Packing Co.,* 430 U. S. 519, 525–526 (1977); *Perez* v. *Campbell,* 402 U. S. 637, 649 (1971); *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947); *Hines* v. *Davidowitz,* 312 U. S. 52, 61–62 (1941).

In this instance, we are assisted by an explicit congressional statement about the pre-emptive effect of its action. The same chapter of ERISA that defines the scope of federal protection of employee pension benefits provides that

> "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title." 29 U. S. C. § 1144 (a).

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[18] Adopted as an amendment to the New Jersey Workers' Compensation Act, this provision reversed New Jersey's prior approval of workers' compensation offsets in collectively bargained pension agreements. See Brief for Appellee New Jersey in No. 79–1943, pp. 6–7.

This provision demonstrates that Congress intended to depart from its previous legislation that "envisioned the exercise of state regulation power over pension funds," *Malone* v. *White Motor Corp.*, 435 U. S. 497, 512, 514 (1978) (plurality opinion), and meant to establish pension plan regulation as exclusively a federal concern.[19] But for the pre-emption provision to apply here, the New Jersey law must be characterized as a state law "that relate[s] to any employee benefit plan." 29 U. S. C. § 1144 (a).[20] That phrase gives rise to some con-

[19] The scope of federal concern is, however, limited by ERISA itself. The statute explicitly preserves state regulation of "insurance, banking, or securities," 29 U. S. C. § 1144 (b)(2)(A); and "generally applicable criminal law[s] of a State," § 1144 (b)(2)(B)(4). ERISA also exempts from its coverage several kinds of plans, which may be subject to state regulation. §§ 1144 (a), 1144 (b)(2)(B). See also H. R. Conf. Rep. No. 93–1280, p. 383 (1974), 3 Leg. Hist. 4650.

[20] ERISA's pre-emption clause exempts state laws relating to pension plans that do not fall within the Act's coverage, see n. 19, *supra,* but no such exemptions are applicable here. The only exemption with any conceivable relevance pertains to state laws governing plans "maintained solely for the purpose of complying with applicable workmen's compensation laws." 29 U. S. C. § 1003 (b)(3). Retirees in No. 80–193 concede that this exception is inapplicable because the General Motors plan is not maintained solely to comply with a workmen's compensation law. Brief for Petitioners in No. 80–193, p. 44.

Retirees in No. 79–1943, however, claim that the exception should apply more generally to plans governed by state workers' compensation laws. They reason that "if a plan which is designed to 'comply with [an] applicable workmen's compensation law' is not preempted by ERISA, then *a fortiori* the underlying statute with which such plan is permitted to comply equally escapes coverage." Reply Brief for Appellants in No. 79–1943, p. 18. This reasoning wreaks havoc on ERISA's plain language, which pre-empts not plans, but "State laws." 29 U. S. C. § 1144 (a). The only relevant state laws, or portions thereof, that survive this pre-emption provision are those relating to plans that are themselves exempted from ERISA's scope. And the relevant exemption from ERISA's coverage—for plans maintained *solely* for compliance with state workers' compensation laws—has no bearing on the plans involved here, which more broadly serve employee needs as a result of collective bargaining. As

fusion where, as here, it is asserted to apply to a state law ostensibly regulating a matter quite different from pension plans. The New Jersey law governs the State's workers' compensation awards, which obviously are subject to the State's police power. As a result, one of the District Court Judges below concluded that the New Jersey provision "is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits." *Buczynski* v. *General Motors Corp.*, 456 F. Supp. 867, 873 (NJ 1978). Similarly, the other District Court Judge below reasoned that the New Jersey law "only has a collateral effect on pension plans." *Alessi* v. *Raybestos-Manhattan, Inc.*, Civ. No. 78–0434 (NJ, Feb. 15, 1979). The Court of Appeals rejected these analyses on two grounds. It read the "relate to pension plans" language in "its normal dictionary sense" as indicating a broad pre-emptive intent, and it also reasoned that the "*only* purpose and effect of the [New Jersey] statute is to set forth an additional statutory requirement for pension plans," a purpose not permitted by ERISA. 616 F. 2d, at 1250 (emphasis in original).

We agree with the conclusion reached by the Court of Appeals but arrive there by a different route. Whatever the purpose or purposes of the New Jersey statute, we conclude that it "relate[s] to pension plans" governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law. ERISA permits integration of pension funds with other public income maintenance moneys for the purpose of calculating benefits, and the IRS interpretation approves integration with the exact funds addressed by the New Jersey workers' compensation law. New Jersey's effort to ban pension benefit offsets based on workers' compensation applies directly to this cal-

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retirees do not, and cannot, claim that the plans involved here are free from ERISA's coverage, they cannot claim the exception to pre-emption restricted to laws governing such exempted plans.

culation technique. We need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme.[21]

It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law, rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For the purposes of the pre-emption provision, ERISA defines the term "State" to include: "a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly,* the terms and conditions of employee benefit plans covered by this subchapter." 29 U. S. C. § 1144 (c)(2) (emphasis added). ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision.

Another consideration bolsters our conclusion that the New Jersey provision is pre-empted insofar as it bears on pensions regulated by ERISA. ERISA leaves integration, along with other pension calculation techniques, subject to the discretion of pension plan designers. See *supra,* at 514–516. Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate pension terms. See *Teamsters* v. *Oliver,* 358 U. S. 283, 296 (1959); *Railway Employees* v. *Hanson,* 351 U. S. 225, 232 (1956). Cf. *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274 (1971); *San*

[21] Other courts have reached varying conclusions as to the meaning of ERISA's pre-emptive language in other contexts. See, *e. g., American Telephone & Telegraph Co.* v. *Merry,* 592 F. 2d 118 (CA2 1979); *Stone* v. *Stone,* 450 F. Supp. 919 (ND Cal. 1978); *Gast* v. *State,* 36 Ore. App. 441, 585 P. 2d 12 (1978). We express no views on the merits of any of those decisions.

Diego Building Trades Council v. *Garmon,* 359 U. S. 236 (1959).[22] As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring pre-emption of intrusive state law.[23]

IV

We conclude that N. J. Stat. Ann. § 34:15–29 (West Supp. 1980) is pre-empted by federal law insofar as it bears on pension plans governed by ERISA. We find further that Congress contemplated and approved the kind of pension provisions challenged here, which permit offsets of pension benefits based on workers' compensation awards. The decision of the Court of Appeals is

Affirmed.

JUSTICE BRENNAN took no part in the decision of these cases.

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[22] In light of its reading of ERISA, the Court of Appeals declined to reach the issue of pre-emption under the National Labor Relations Act. 616 F. 2d, at 1250, n. 17. The issue was, however, addressed by the District Court below in *Alessi* v. *Raybestos-Mahattan, Inc.,* Civ. No. 78–0434 (NJ, Feb. 15, 1979). That court reasoned that federal labor law pre-emption does not extend so far as to preclude state regulation of conduct touching deeply rooted local concerns. *Ibid.* (citing *San Diego Building Trades Council* v. *Garmon,* 359 U. S., at 244). Although this reasoning may apply in other contexts, we do not find it compelling in light of the direct clash between the state statute and the federal policy to keep calculation of pension benefits a subject of either labor-management negotiations or federal legislation. In this context, integration of pension benefits with other public income maintenance funds can be forbidden only by the terms of pension plans themselves, or by new federal legislation.

[23] This conclusion follows naturally from the view of a plurality of this Court in *Malone* v. *White Motor Corp.,* 435 U. S. 497 (1978). There, because Congress preserved a state role in pension regulation before ERISA, the plurality created an exception to the general rule pre-empting state regulation of collective bargaining. *Id.,* at 513–514. This exception no longer applies, however, now that ERISA, with express pre-emptive intent, has eliminated state regulation of most pension plans.

Syllabus

PARRATT ET AL. *v.* TAYLOR

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

No. 79–1734. Argued March 2, 1981—Decided May 18, 1981

Respondent, an inmate of a Nebraska prison, ordered by mail certain hobby materials. After being delivered to the prison, the packages containing the materials were lost when the normal procedure for receipt of mail packages was not followed. Respondent brought an action in Federal District Court under 42 U. S. C. § 1983 against petitioner prison officials to recover the value of the hobby materials, claiming that petitioners had negligently lost the materials and thereby deprived respondent of property without due process of law in violation of the Fourteenth Amendment. The District Court entered summary judgment for respondent, holding that negligent actions by state officials can be a basis for an action under § 1983, that petitioners were not immune from liability, and that the deprivation of the hobby materials implicated due process rights. The Court of Appeals affirmed.

Held: Respondent has not stated a claim for relief under 42 U. S. C. § 1983. Pp. 531–544.

(a) In any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. Pp. 531–535.

(b) Although respondent has been deprived of property under color of state law, he has not sufficiently alleged a violation of the Due Process Clause of the Fourteenth Amendment. The deprivation did not occur as the result of some established state procedure, but as the result of the unauthorized failure of state agents to follow established state procedure. Moreover, Nebraska has a tort claims procedure which provides a remedy to persons who have suffered a tortious loss at the hands of the State, but which respondent did not use. Such procedure could have fully compensated respondent for his property loss and was sufficient to satisfy the requirements of due process. Pp. 535–544.

620 F. 2d 307, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and STEVENS, JJ.,

joined. STEWART, J., *post*, p. 544, WHITE, J., *post*, p. 545, and BLACKMUN, J., *post*, p. 545, filed concurring opinions. POWELL, J., filed an opinion concurring in the result, *post*, p. 546. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 554.

J. Kirk Brown, Assistant Attorney General of Nebraska, argued the cause for petitioners. With him on the brief was *Paul L. Douglas*, Attorney General.

Kevin Colleran, by appointment of the Court, 449 U. S. 980, argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, *J. D. McFarlane*, Attorney General of Colorado, *Carl R. Ajello*, Attorney General of Connecticut, *David H. Leroy*, Attorney General of Idaho, *Tyrone C. Fahner*, Attorney General of Illinois, *Theodore L. Sendak*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Frank J. Kelley*, Attorney General of Michigan, *Warren R. Spannaus*, Attorney General of Minnesota, *William A. Allain*, Attorney General of Mississippi, *John Ashcroft*, Attorney General of Missouri, and *Paul Robert Otto* and *John M. Morris*, Assistant Attorneys General, *Gregory H. Smith*, Acting Attorney General of New Hampshire, *Robert Abrams*, Attorney General of New York, *Rufus L. Edmisten*, Attorney General of North Carolina, *Allen I. Olson*, Attorney General of North Dakota, *William J. Brown*, Attorney General of Ohio, *James M. Brown*, Attorney General of Oregon, *Harvey Bartle III*, Attorney General of Pennsylvania, *Daniel R. McLeod*, Attorney General of South Carolina, *Mark V. Mierhenry*, Attorney General of South Dakota, *William M. Leech, Jr.*, Attorney General of Tennessee, *Robert B. Hansen*, Attorney General of Utah, *Chancey H. Browning*, Attorney General of West Virginia, and *John D. Troughton*, Attorney General of Wyoming; for the State of Hawaii by *Wayne Minami*, Attorney General, and *James H. Dannenberg*, Deputy Attorney General; for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau*, *Wayne W. Schmidt*, *Frank G. Carrington, Jr.*, *James P. Manak*, and *Theodore L. Sendak*, Attorney General of Indiana; for the Commonwealth of Massachusetts by *Francis X. Bellotti*, Attorney General, and *Roberta Thomas Brown*, Assistant Attorney General; for the State of Texas by *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Richard E. Gray III*, Executive Assistant Attorney General, and *Barbara C. Marquardt*, Assistant Attorney General; and for the State of New Jersey by

JUSTICE REHNQUIST delivered the opinion of the Court.

The respondent is an inmate at the Nebraska Penal and Correctional Complex who ordered by mail certain hobby materials valued at $23.50. The hobby materials were lost and respondent brought suit under 42 U. S. C. § 1983 to recover their value. At first blush one might well inquire why respondent brought an action in federal court to recover damages of such a small amount for negligent loss of property, but because 28 U. S. C. § 1343, the predicate for the jurisdiction of the United States District Court, contains no minimum dollar limitation, he was authorized by Congress to bring his action under that section if he met its requirements and if he stated a claim for relief under 42 U. S. C. § 1983. Respondent claimed that his property was negligently lost by prison officials in violation of his rights under the Fourteenth Amendment to the United States Constitution. More specifically, he claimed that he had been deprived of property without due process of law.[1]

The United States District Court for the District of Nebraska entered summary judgment for respondent, and the United States Court of Appeals for the Eighth Circuit af-

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John J. Degnan, Attorney General, *Stephen Skillman,* Assistant Attorney General, and *Joseph T. Maloney* and *George W. Fisher, Jr.,* Deputy Attorneys General.

Gary H. Palm filed a brief for the Edwin F. Mandel Legal Aid Clinic as *amicus curiae* urging affirmance.

Bruce J. Ennis, Jr., filed a brief for the American Civil Liberties Union as *amicus curiae.*

[1] As we explained in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.,* at 577. It is not contended that under Nebraska law respondent does not enjoy a property interest in the hobby materials here in question.

firmed in a *per curiam* order. 620 F. 2d 307 (1980). We granted certiorari. 449 U. S. 917 (1980).

I

The facts underlying this dispute are not seriously contested. Respondent paid for the hobby materials he ordered with two drafts drawn on his inmate account by prison officials. The packages arrived at the complex and were signed for by two employees who worked in the prison hobby center. One of the employees was a civilian and the other was an inmate. Respondent was in segregation at the time and was not permitted to have the hobby materials. Normal prison procedures for the handling of mail packages is that upon arrival they are either delivered to the prisoner who signs a receipt for the package or the prisoner is notified to pick up the package and to sign a receipt. No inmate other than the one to whom the package is addressed is supposed to sign for a package. After being released from segregation, respondent contacted several prison officials regarding the whereabouts of his packages. The officials were never able to locate the packages or to determine what caused their disappearance.

In 1976, respondent commenced this action against the petitioners, the Warden and Hobby Manager of the prison, in the District Court seeking to recover the value of the hobby materials which he claimed had been lost as a result of the petitioners' negligence. Respondent alleged that petitioners' conduct deprived him of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Respondent chose to proceed in the United States District Court under 28 U. S. C. § 1343 and 42 U. S. C. § 1983, even though the State of Nebraska had a tort claims procedure which provided a remedy to persons who suffered tortious losses at the hands of the State.

On October 25, 1978, the District Court granted respond-

ent's motion for summary judgment. The District Court ruled that negligent actions by state officials can be a basis for an action under 42 U. S. C. § 1983; petitioners were not immune from damages actions of this kind; and the deprivation of the hobby kit "implicate[d] due process rights." The District Court explained:

> "This is not a situation where prison officials confiscated contraband. The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for [respondent], which loss should not go without redress." App. to Pet. for Cert. 9.

II

In the best of all possible worlds, the District Court's above-quoted statement that respondent's loss should not go without redress would be an admirable provision to be contained in a code which governed the administration of justice in a civil-law jurisdiction. For better or for worse, however, our traditions arise from the common law of case-by-case reasoning and the establishment of precedent. In 49 of the 50 States the common-law system, as modified by statute, constitutional amendment, or judicial decision governs. Coexisting with the 50 States which make it up, and supreme over them to the extent of its authority under Art. IV of the Constitution, is the National Government. At an early period in the history of this Nation, it was held that there was no federal common law of crimes, *United States* v. *Hudson & Goodwin,* 7 Cranch 32 (1812), and since *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), there has been no general common law applicable in federal courts merely by reason of diversity-of-citizenship jurisdiction. Therefore, in order properly to decide this case we must deal not simply with a single, general principle, however just that principle may be in the abstract, but with the complex interplay of the Consti-

tution, statutes, and the facts which form the basis for this litigation.

Because federal courts are courts of limited jurisdiction, we must first look to the Act of Congress which confers jurisdiction over claims such as respondent's on a United States district court. Such enactment is found in 28 U. S. C. § 1343, which provides in pertinent part:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . . .
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The statute conferring jurisdiction is in turn closely related to 42 U. S. C. § 1983, under which respondent brought this action. Section 1983 provided in the year in question:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

While we have twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under § 1983, see *Procunier* v. *Navarette,* 434 U. S. 555 (1978), and *Baker* v. *McCollan,* 443 U. S. 137 (1979), we have in each of those cases found it unnecessary to decide the issue. In *Procunier, supra,* we held that regardless of whether the

§ 1983 complaint framed in terms of negligence stated a claim for relief, the defendants would clearly have been entitled to qualified immunity and therefore not liable for damages. In *Baker, supra,* we held that no deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States had occurred, and therefore it was unnecessary to decide whether mere negligence on the part of the actor would have rendered him liable had there been such a deprivation. These two decisions, however, have not aided the various Courts of Appeals and District Courts in their struggle to determine the correct manner in which to analyze claims such as the present one which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of a constitutional deprivation and relief is sought under § 1983. The diversity in approaches is legion. See, *e. g., Williams* v. *Kelley,* 624 F. 2d 695 (CA5 1980); *Beard* v. *Mitchell,* 604 F. 2d 485 (CA7 1979); *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F. 2d 1071 (CA7 1978); *O'Grady* v. *Montpelier,* 573 F. 2d 747 (CA2 1978); *Bonner* v. *Coughlin,* 517 F. 2d 1311 (CA7 1975), modified en banc, 545 F. 2d 565 (1976); *Hampton* v. *Holmesburg Prison Officials,* 546 F. 2d 1077 (CA3 1976); *Jones* v. *Marshall,* 528 F. 2d 132 (CA2 1975); *Diamond* v. *Thompson,* 523 F. 2d 1201 (CA5 1975); *Kimbrough* v. *O'Neil,* 523 F. 2d 1057 (CA7 1975); *Carter* v. *Estelle,* 519 F. 2d 1136 (CA5 1975); *Pitts* v. *Griffin,* 518 F. 2d 72 (CA8 1975); *Russell* v. *Bodner,* 489 F. 2d 280 (CA3 1973); *Johnson* v. *Glick,* 481 F. 2d 1028 (CA2 1973); *McCray* v. *Maryland,* 456 F. 2d 1 (CA4 1972); *Carter* v. *Carlson,* 144 U. S. App. D. C. 388, 447 F. 2d 358 (1971); *Madison* v. *Manter,* 441 F. 2d 537 (CA1 1971); *Howard* v. *Swenson,* 426 F. 2d 277 (CA8 1970); *Whirl* v. *Kern,* 407 F. 2d 781 (CA5 1968); and *Striker* v. *Pancher,* 317 F. 2d 780 (CA6 1963). We, therefore, once more put our shoulder to the wheel hoping to be of greater assistance to

courts confronting such a fact situation than it appears we have been in the past.

Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker* v. *McCollan, supra,* we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983. We explained:

> "[T]he question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." 443 U. S., at 139–140.

Section 1983, unlike its criminal counterpart, 18 U. S. C. § 242, has never been found by this Court to contain a state-of-mind requirement.[2] The Court recognized as much in *Monroe* v. *Pape,* 365 U. S. 167 (1961), when we explained after extensively reviewing the legislative history of § 1983, that

> "[i]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth

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[2] Title 18 U. S. C. § 242 provides in pertinent part:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life." (Emphasis supplied.)

Amendment might be denied by the state agencies." *Id.*, at 180.

In distinguishing the criminal counterpart which had earlier been at issue in *Screws* v. *United States*, 325 U. S. 91 (1945), the *Monroe* Court stated:

> "In the *Screws* case we dealt with a statute that imposed criminal penalities for acts 'willfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.' 325 U. S., at 103. We do not think that gloss should be put on [§ 1983] which we have here. The word 'willfully' does not appear in [§ 1983]. Moreover, [§ 1983] provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the grounds of vagueness. [Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U. S., at 187.

Both *Baker* v. *McCollan* and *Monroe* v. *Pape* suggest that § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

III

Since this Court's decision in *Monroe* v. *Pape, supra,* it can no longer be questioned that the alleged conduct by the petitioners in this case satisfies the "under color of state law" requirement. Petitioners were, after all, state employees in

positions of considerable authority. They do not seriously contend otherwise. Our inquiry, therefore, must turn to the second requirement—whether respondent has been deprived of any right, privilege, or immunity secured by the Constitution or laws of the United States.

The only deprivation respondent alleges in his complaint is that "his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law." App. 8. As such, respondent's claims differ from the claims which were before us in *Monroe* v. *Pape, supra,* which involved violations of the Fourth Amendment, and the claims presented in *Estelle* v. *Gamble,* 429 U. S. 97 (1976), which involved alleged violations of the Eighth Amendment. Both of these Amendments have been held applicable to the States by virtue of the adoption of the Fourteenth Amendment. See *Mapp* v. *Ohio,* 367 U. S. 643 (1961); *Robinson* v. *California,* 370 U. S. 660 (1962). Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment *simpliciter.* The pertinent text of the Fourteenth Amendment provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis supplied.)

Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negli-

gently caused, amounted to a deprivation.[3] Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of law." *Baker* v. *McCollan,* 443 U. S., at 145. Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process.

This Court has never directly addressed the question of what process is due a person when an employee of a State negligently takes his property. In some cases this Court has held that due process requires a predeprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens. In most of these cases, however, the deprivation of property was pursuant to some established state procedure and "process" could be offered before any actual deprivation took place. For example, in *Mullane* v.

[3] Petitioners argue that even if a negligent deprivation of respondent's property occurred, there is no evidence in the record of negligence on their part. There is merit to petitioners' arguments. Petitioners were not personally involved in the handling of the packages and respondent's basic allegation appears to be that subordinates of petitioners violated established procedures which, if properly followed, would have ensured the proper delivery of respondent's packages. In the past, this Court has refused to accept § 1983 actions premised on theories of *respondeat superior. Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978); *Rizzo* v. *Goode,* 423 U. S. 362 (1976). On the other hand, there is no indication in the record that the petitioners ever raised in the District Court the argument that the loss of property was not caused by their negligence. Certainly, the District Court did not consider this an open question. In such a context, and with little or no factual development at the trial level, we can only accept for purposes of this opinion the District Court's assumption that petitioners were negligent and that this negligence contributed to respondent's loss.

Central Hanover Trust Co., 339 U. S. 306 (1950), the Court struck down on due process grounds a New York statute that allowed a trust company, when it sought a judicial settlement of its trust accounts, to give notice by publication to all beneficiaries even if the whereabouts of the beneficiaries were known. The Court held that personal notice in such situations was required and stated that "when notice is a person's due, process which is a mere gesture is not due process." *Id.*, at 315. More recently, in *Bell* v. *Burson*, 402 U. S. 535 (1971), we reviewed a state statute which provided for the taking of the driver's license and registration of an uninsured motorist who had been involved in an accident. We recognized that a driver's license is often involved in the livelihood of a person and as such could not be summarily taken without a prior hearing. In *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), we struck down the Florida prejudgment replevin statute which allowed secured creditors to obtain writs in *ex parte* proceedings. We held that due process required a prior hearing before the State authorized its agents to seize property in a debtor's possession. See also *Boddie* v. *Connecticut*, 401 U. S. 371 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); and *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). In all these cases, deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur.

We have, however, recognized that postdeprivation remedies made available by the State can satisfy the Due Process Clause. In such cases, the normal predeprivation notice and opportunity to be heard is pretermitted if the State provides a postdeprivation remedy. In *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908), we upheld the right of a State to seize and destroy unwholesome food without a preseizure hearing. The possibility of erroneous destruction of property was outweighed by the fact that the public health

emergency justified immediate action and the owner of the property could recover his damages in an action at law after the incident. In *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950), we upheld under the Fifth Amendment Due Process Clause the summary seizure and destruction of drugs without a preseizure hearing. Similarly, in *Fahey* v. *Mallonee*, 332 U. S. 245 (1947), we recognized that the protection of the public interest against economic harm can justify the immediate seizure of property without a prior hearing when substantial questions are raised about the competence of a bank's management. In *Bowles* v. *Willingham*, 321 U. S. 503 (1944), we upheld in the face of a due process challenge the authority of the Administrator of the Office of Price Administration to issue rent control orders without providing a hearing to landlords before the order or regulation fixing rents became effective. See also *Corn Exchange Bank* v. *Coler*, 280 U. S. 218 (1930); *McKay* v. *McInnes*, 279 U. S. 820 (1929); *Coffin Brothers & Co.* v. *Bennett*, 277 U. S. 29 (1928); and *Ownbey* v. *Morgan*, 256 U. S. 94 (1921). These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.[4] As we stated in *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974):

> "Petitioner asserts that his right to a hearing before his possession is in any way disturbed is nonetheless

[4] In *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), JUSTICE WHITE noted the importance of a meaningful postdeprivation hearing when referring to many of the above cases:

"While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time." *Id.*, at 179 (concurring in part and dissenting in part).

mandated by a long line of cases in this Court, culminating in *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U. S. 67 (1972). The pre-*Sniadach* cases are said by petitioner to hold that 'the opportunity to be heard must precede any actual deprivation of private property.' Their import, however, is not so clear as petitioner would have it: they merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been '[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.' *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597 (1931)." *Id.*, at 611 (footnote omitted).

Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). However, as many of the above cases recognize, we have rejected the proposition that "at a meaningful time and in a meaningful manner" *always* requires the State to provide a hearing prior to the initial deprivation of property.[5] This rejection is based in part on the impractica-

[5] As we explained in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976):

"In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg* v. *Kelly*, 397 U. S., at 266–271, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pre-

bility in some cases of providing any preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing. The prior cases which have excused the prior-hearing requirement have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities.

A case remarkably similar to the present one is *Bonner* v. *Coughlin,* 517 F. 2d 1311 (CA7 1975), modified en banc, 545 F. 2d 565 (1976), cert. denied, 435 U. S. 932 (1978). There, a prisoner alleged that prison officials "made it possible by leaving the door of Plaintiff's cell open, for others without authority to remove Plaintiff's trial transcript from the cell." 517 F. 2d, at 1318. The question presented was whether negligence may support a recovery under § 1983. Then Judge Stevens, writing for a panel of the Court of Appeals for the Seventh Circuit, recognized that the question that had to be

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termination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures." *Id.,* at 333.

decided was "whether it can be said that the deprivation was 'without due process of law.'" *Ibid.* He concluded:

> "It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against 'State' deprivations of property; in the latter situation, however, even though there is action 'under color of' state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment." *Id.*, at 1319.

We believe that the analysis recited above in *Bonner* is the proper manner in which to approach a case such as this. This analysis is also quite consistent with the approach taken by this Court in *Ingraham* v. *Wright*, 430 U. S. 651 (1977), where the Court was confronted with the claim that corporal punishment in public schools violated due process. Arguably, the facts presented to the Court in *Ingraham* were more egregious than those presented here inasmuch as the Court was faced with both an intentional act (as opposed to negligent conduct) and a deprivation of liberty. However, we reasoned:

> " 'At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of

increased assurance that the action is just, may be outweighed by the cost.' *Mathews* v. *Eldridge,* 424 U. S., at 348. We think that point has been reached in this case. In view of the low incidence of abuse, the openness of our schools, *and the common-law safeguards that already exist,* the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal. Imposing additional administrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility." *Id.,* at 682. (Emphasis supplied.)

IV

Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State. See Neb. Rev. Stat. § 81–8,209 *et seq.* (1976). Through this tort claims procedure the State hears and pays claims of prisoners housed in its penal institutions. This procedure was in existence at the time of the loss here in question but respondent did not use it. It is argued that the State does not adequately protect the respondent's interests because it provides only for an action against the State as opposed to its individual employees,

it contains no provisions for punitive damages, and there is no right to a trial by jury. Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.

Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis,* 424 U. S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE STEWART, concurring.

It seems to me extremely doubtful that the property loss here, even though presumably caused by the negligence of state agents, is the kind of deprivation of property to which the Fourteenth Amendment is addressed. If it is, then so too would be damages to a person's automobile resulting from

a collision with a vehicle negligently operated by a state official. To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution.

But even if Nebraska has deprived the respondent of his property in the constitutional sense, it has not deprived him of it without due process of law. By making available to the respondent a reparations remedy, Nebraska has done all that the Fourteenth Amendment requires in this context.

On this understanding, I join the opinion of the Court.

JUSTICE WHITE, concurring.

I join the opinion of the Court but with the reservations stated by my Brother BLACKMUN in his concurring opinion.

JUSTICE BLACKMUN, concurring.

While I join the Court's opinion in this case, I write separately to emphasize my understanding of its narrow reach. This suit concerns the deprivation only of property and was brought only against supervisory personnel, whose simple "negligence" was assumed but, on this record, not actually proved. I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty. Cf. *Moore* v. *East Cleveland,* 431 U. S. 494 (1977). I also do not understand the Court to intimate that the sole content of the Due Process Clause is procedural regularity. I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process. See, *e. g., Boddie* v. *Connecticut,* 401 U. S. 371 (1971); *Roe* v. *Wade,* 410 U. S. 113 (1973).

Most importantly, I do not understand the Court to suggest that the provision of "postdeprivation remedies," *ante,* at 538, within a state system would cure the unconstitutional

nature of a state official's intentional act that deprives a person of property. While the "random and unauthorized" nature of negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," *ante,* at 541, it is rare that the same can be said of intentional acts by state employees. When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so. See *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). In the majority of such cases, the failure to provide adequate process prior to inflicting the harm would violate the Due Process Clause. The mere availability of a subsequent tort remedy before tribunals of the same authority that, through its employees, deliberately inflicted the harm complained of, might well not provide the due process of which the Fourteenth Amendment speaks.

JUSTICE POWELL, concurring in the result.

This case presents the question whether a state prisoner may sue to recover damages under 42 U. S. C. § 1983, alleging that a violation of the Due Process Clause of the Fourteenth Amendment occurred when two shipments mailed to him were lost due to the negligence of the prison's warden and "hobby manager." Unlike the Court, I do not believe that such negligent acts by state officials constitute a deprivation of property within the meaning of the Fourteenth Amendment, regardless of whatever subsequent procedure a State may or may not provide. I therefore concur only in the result.

The Court's approach begins with three "unquestionable" facts concerning respondent's due process claim: "the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation."

Ante, at 536–537. It then goes on to reject respondent's claim on the theory that procedural due process is satisfied in such a case where a State provides a "postdeprivation" procedure for seeking redress—here a tort claims procedure. I would not decide this case on that ground for two reasons. First, the Court passes over a threshold question—whether a negligent act by a state official that results in loss of or damage to property constitutes a deprivation of property for due process purposes.[1] Second, in doing so, the Court suggests a narrow, wholly procedural view of the limitation imposed on the States by the Due Process Clause.

The central question in this case is whether *unintentional* but negligent acts by state officials, causing respondent's loss of property, are actionable under the Due Process Clause. In my view, this question requires the Court to determine whether intent is an essential element of a due process claim, just as we have done in cases applying the Equal Protection Clause [2] and the Eighth Amendment's prohibition of "cruel and unusual punishment." [3] The intent question cannot be

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[1] Assuming that there was a "deprivation" of the hobby kit under color of state law in this case, I would agree with the Court's conclusion that state tort remedies provide adequate procedural protection. Cf. *Ingraham* v. *Wright,* 430 U. S. 651, 674–682 (1977) (common-law remedies are adequate to afford procedural due process in cases of corporal punishment of students).

[2] *Washington* v. *Davis,* 426 U. S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause).

[3] In *Estelle* v. *Gamble,* 429 U. S. 97, 105 (1976), we held that "deliberate indifference to a prisoner's serious illness or injury" on the part of prison officials is sufficient to constitute an "infliction" of cruel and unusual punishment under the Eighth Amendment. We also stated that an "accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain." *Ibid. Estelle* v. *Gamble* thus supports my view of the Due Process Clause—which requires consideration not only of the *effect* of an injury or loss on

given "a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action," *Baker* v. *McCollan*, 443 U. S. 137, 139–140 (1979). Rather, we must give close attention to the nature of the particular constitutional violation asserted, in determining whether intent is a necessary element of such a violation.

In the due process area, the question is whether intent is required before there can be a "deprivation" of life, liberty, or property. In this case, for example, the negligence of the prison officials caused respondent to lose his property. Nevertheless, I would not hold that such a negligent act, causing unintended loss of or injury to property, works a deprivation in the *constitutional sense*. Thus, no procedure for compensation is constitutionally required.

A "deprivation" connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss.[4] The most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations.[5] This is the view

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a citizen but also of the *intent* of the state official whose actions caused the injury or loss.

[4] According to Webster's New International Dictionary of the English Language (2d ed. 1945), to "deprive" is to "dispossess; bereave; divest; to hinder from possessing; debar; shut out."

[5] In analogous contexts, we have held that the intent of state officials is a relevant factor to consider in determining whether an individual has suffered a denial of due process. In *United States* v. *Lovasco*, 431 U. S. 783, 790 (1977), involving preindictment prosecutorial delay, we held that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."

Similarly, in *Baker* v. *McCollan*, 443 U. S. 137 (1979), the Court reviewed a claimed violation of due process occurring when a sheriff arrested the individual named in an arrest warrant and failed for a time to realize that the warrant itself had named the wrong person. The Court there noted that "the state of mind of the defendant may be relevant on

adopted by an overwhelming number of lower courts, which have rejected due process claims premised on negligent acts without inquiring into the existence or sufficiency of the subsequent procedures provided by the States.[6] In addition, such a rule would avoid trivializing the right of action provided in § 1983. That provision was enacted to deter real *abuses* by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law. See n. 12, *infra.*[7]

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the issue of whether a constitutional violation has occurred in the first place," *id.*, at 140, n. 1, and went on to hold that there had been no deprivation of liberty without due process of law. The Court reasoned that there is no duty to investigate "every claim of innocence," *id.*, at 146, and no constitutional requirement of an "error-free investigation of such a claim," *ibid.* It relied on the fact that the sheriff had acted reasonably in relying on a facially valid arrest warrant, thus implicitly distinguishing a case involving an *intentional* deprivation of liberty without cause.

To be sure, even where there has been an intentional deprivation of property, due process claims also must satisfy the requirement that the act be sufficiently linked to an official's state-created duties or powers to constitute "state action." See n. 10, *infra.*

[6] See, *e. g.*, *Williams* v. *Kelley,* 624 F. 2d 695 (CA5 1980), cert. pending, No. 80–6165; *Bonner* v. *Coughlin,* 545 F. 2d 565 (CA7 1976) (en banc), cert. denied, 435 U. S. 932 (1978); *Harper* v. *Cserr,* 544 F. 2d 1121, 1124 (CA1 1976); *Williams* v. *Vincent,* 508 F. 2d 541, 546 (CA2 1974); *Jenkins* v. *Averett,* 424 F. 2d 1228, 1232 (CA4 1970); *Kent* v. *Prasse,* 385 F. 2d 406 (CA3 1967) (*per curiam*). See also *Paul* v. *Davis,* 424 U. S. 693, 698 (1976) (suggesting that there should not be a § 1983 action in favor of "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle").

There is no occasion here to express any view as to the possibility of negligent violations of other, more particular constitutional guarantees.

[7] We have previously expressed concerns about the prospect that the Due Process Clause may become a vehicle for federal litigation of state torts. In *Paul* v. *Davis, supra,* we held that an official action damaging the reputation of a private citizen, although an actionable tort under state law, did not constitute a deprivation of "liberty" within the meaning of

The Court appears unconcerned about this prospect, probably because of an implicit belief in the availability of state tort remedies in most cases. In its view, such remedies will satisfy procedural due process, and relegate cases of official negligence to nonfederal forums. But the fact is that this rule would "make of the Fourteenth Amendment a font of tort law," *Paul* v. *Davis*, 424 U. S. 693, 701 (1976), whenever a State has failed to provide a remedy for negligent invasions of liberty or property interests.[8] Moreover, despite

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the Fourteenth Amendment. In so holding we relied principally on the fact that the individual's interest in his reputation was not accorded a "legal guarantee of present enjoyment" under state law, since it was "simply one of a number [of interests] which the State may protect against injury by virtue of its tort law." *Id.*, at 711–712.

Attention to the "guarantees" provided by state law is at least as appropriate in a case involving an alleged deprivation of "property." It is clear that the hobby kit was respondent's "property." But it also is clear that under state law no remedy other than tort law protects property from interferences caused by the negligence of others. The reasoning of *Paul* v. *Davis* would suggest, therefore, that the enjoyment of property free of negligent interference is not sufficiently "guaranteed" by state law to justify a due process claim based on official negligence.

A State perhaps could constitutionalize certain negligent actions by state officials by criminalizing negligence, thus extending its guarantee to this kind of interference. Instead, the States merely have created systems for civil compensation of tort victims. In this sense, state law draws a clear distinction between negligently caused injuries and intentional thefts or assaults.

[8] One additional problem with the Court's purely procedural approach is worth noting. In *Kent* v. *Prasse*, *supra*, the Third Circuit faced a claimed deprivation of procedural due process by prison officials based on the failure of a State to provide a tort remedy for official negligence—the exact claim validated by the Court today. The court noted that "[i]n any event, such a deprivation would be the work of the state, not these defendants." 385 F. 2d, at 407. Arguably, if the absence of a tort remedy is the heart of one's constitutional claim, the defendant in the § 1983 suit must be the State itself, or its lawmakers, both of whom are immune from suit. See *Tenney* v. *Brandhove*, 341 U. S. 367 (1951) (legislators);

the breadth of state tort remedies, such claims will be more numerous than might at first be supposed. In *Kent* v. *Prasse,* 385 F. 2d 406 (CA3 1967) (*per curiam*), for example, a state prisoner was forced to work on a faulty machine, sustained an injury, and brought suit against prison officials. The United States Court of Appeals for the Third Circuit noted that the State, unfortunately, did not provide compensation for this injury, but stated:

> "Nor are we able to perceive that a tort committed by a state official acting under color of law is, in and of itself, sufficient to show an invasion of a person's right under [§ 1983]. While not dispositive, we note that there is no allegation that defendants violated any state criminal law or acted out of bad motive. Nor [is it] alleged that any state law was not enforced by the defendants." *Id.,* at 407.[9]

Rather than reject this reasoning, I would adopt the view that negligent official acts do not provide any basis for in-

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Edelman v. *Jordan,* 415 U. S. 651, 662–663 (1974) (Eleventh Amendment bars suits against States in federal court). If so, the only remedy available to plaintiffs would be a more substantive due process claim—where grounds for such a claim exist. The Court does not discuss this possibility.

[9] Another example is presented in the case of *Hamilton* v. *Stover,* cert. pending, No. 80–1419 (filed Feb. 20, 1981), involving a collision between a police car and another car. In an unpublished order, the Sixth Circuit affirmed dismissal of a resulting § 1983 action against the policeman, reasoning that negligent driving cannot constitute a deprivation of constitutional rights. *Hamilton* v. *Stover,* No. 79–3562 (Nov. 24, 1980). In his brief in this Court, however, the policeman points out that he and the employing municipality possess absolute immunity under Ohio law, Ohio Rev. Code § 701.02 (1976), for acts while responding to an emergency call. If this immunity has the effect of cutting off all state-law remedies, under the Court's reasoning there appears to be a deprivation of procedural due process, actionable in federal court.

quiries by federal courts into the existence, or procedural adequacy, of applicable state tort remedies.

Such an approach has another advantage; it avoids a somewhat disturbing implication in the Court's opinion concerning the scope of due process guarantees. The Court analyzes this case solely in terms of the procedural rights created by the Due Process Clause. Finding state procedures adequate, it suggests that no further analysis is required of more substantive limitations on state action located in this Clause. Cf. *Paul* v. *Davis, supra,* at 712–714 (assessing the claim presented in terms of the "substantive aspects of the Fourteenth Amendment"); *Ingraham* v. *Wright,* 430 U. S. 651, 679, n. 47 (1977) (leaving open the question whether "corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause").

The Due Process Clause imposes substantive limitations on state action, and under proper circumstances [10] these limi-

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[10] Even intentional injuries inflicted by state officials must be "state action" to implicate the due process guarantees, and must be "under color of" state law in order to be actionable under § 1983. In this area we have drawn a distinction between mere "torts of state officials" and "acts done 'under color' of law . . . which deprived a person of some right secured by the Constitution or laws of the United States." *Screws* v. *United States,* 325 U. S. 91, 109 (1945) (plurality opinion of Douglas, J.) (discussing the criminal analogue of § 1983—now codified as 18 U. S. C. § 242). Actionable deprivations must be based on "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Ibid.* (quoting *United States* v. *Classic,* 313 U. S. 299, 326 (1941)). See also *Screws, supra,* at 134 (Rutledge, J., concurring in result) (the Constitution protects the "right not to be deprived of life or liberty by a state officer *who takes it by abuse of his office and its power*") (emphasis added). Where state officials cause injuries in ways that are equally available to private citizens, constitutional issues are not necessarily raised. As Justice Douglas put it in *Screws:* "The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that

tations may extend to intentional and malicious deprivations of liberty [11] and property,[12] even where compensation is available under state law. The Court, however, fails altogether to discuss the possibility that the kind of state action alleged here constitutes a violation of the substantive guarantees of the Due Process Clause. As I do not consider a negligent act the kind of deprivation that implicates the procedural guarantees of the Due Process Clause, I certainly would not view negligent acts as violative of these substantive guarantees. But the Court concludes that there has been such a deprivation. And yet it avoids entirely the question whether the Due Process Clause may place substantive limitations on this form of governmental conduct.

In sum, it seems evident that the reasoning and decision of the Court today, even if viewed as compatible with our precedents, create new uncertainties as well as invitations to

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he is deprived of any right protected or secured by the Constitution or laws of the United States." 325 U. S., at 108.

[11] See, *e. g., Rochin* v. *California,* 342 U. S. 165 (1952); *Hall* v. *Tawney,* 621 F. 2d 607, 613 (CA4 1980) (corporal punishment of students may have violated due process if it "amounted to a brutal and inhumane abuse of official power literally shocking to the conscience"); *Bellows* v. *Dainack,* 555 F. 2d 1105, 1106, n. 1 (CA2 1977) (use of excessive force by policeman during the course of an arrest constitutes a deprivation of "liberty" without due process).

[12] See, *e. g., Kimbrough* v. *O'Neil,* 545 F. 2d 1059, 1061 (CA7 1976) (en banc) ("a taking with intent (or reckless disregard) of a claimant's property by a State agent violates the Due Process Clause of the Fourteenth Amendment and is actionable under Section 1983"); *Carter* v. *Estelle,* 519 F. 2d 1136, 1136–1137 (CA5 1975) (*per curiam*) (same). See also *San Diego Gas & Electric Co.* v. *San Diego,* 450 U. S. 621, 656, n. 23 (1981) (BRENNAN, J., dissenting) (when property is taken by the government but not in furtherance of a "public use," "the government entity may not be forced to pay just compensation under the Fifth Amendment, [but] the landowner may nevertheless have a damages cause of action under 42 U. S. C. § 1983 for a Fourteenth Amendment due process violation").

litigate under a statute that already has burst its historical bounds.[13]

JUSTICE MARSHALL, concurring in part and dissenting in part.

I join the opinion of the Court insofar as it holds that negligent conduct by persons acting under color of state law

[13] Section 1983 was enacted in 1871 as one of the statutes intended to implement the Fourteenth Amendment. For many years it remained a little-used, little-known section of the Code. In the past two decades, however, resourceful counsel and receptive courts have extended its reach vastly. This statute with a clearly understood and commendable purpose no longer is confined to deprivations of individual rights as intended in 1871. As a result, § 1983 has become a major vehicle for general litigation in the federal courts by individuals and corporations.

Professor Christina Whitman recently has addressed this expansion of § 1983 with a comprehensive assessment of arguable pluses and minuses. See Whitman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980). There will be no pluses, however, if the striking escalation of suits under § 1983 against state and local officials is augmented by suits based on negligent conduct. Professor Whitman noted, for example, that civil rights petitions by state prisoners in federal court increased from 218 cases in 1966 to 11,195 in 1979. *Id.*, at 6. See also the Annual Report of the Director of the Administrative Office of the U. S. Courts 62 (1980), reporting a further increase in this number to 12,397 in 1980. The societal costs of using this statute for a purpose never contemplated are high indeed:

"First, the existence of the statutory cause of action means that every expansion of constitutional rights [through § 1983] will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights. Second, every [such] expansion . . . displaces state lawmaking authority by diverting decision-making to the federal courts." Whitman, *supra*, at 25.

The present case, involving a $23 loss, illustrates the extent to which constitutional law has been trivialized, and federal courts often have been converted into small-claims tribunals. There is little justification for making such a claim a federal case, requiring a decision by a district court, an appeal as a matter of right to a court of appeals, and potentially, consideration of a petition for certiorari in this Court. It is not in the interest of claimants or of society for disputes of this kind to be resolved by litigation that may take years, particularly in an over-

may be actionable under 42 U. S. C. § 1983. *Ante,* at 534–535. I also agree with the majority that in cases involving claims of *negligent* deprivation of property without due process of law, the availability of an adequate postdeprivation cause of action for damages under state law may preclude a finding of a violation of the Fourteenth Amendment. I part company with the majority, however, over its conclusion that there was an adequate state-law remedy available to respondent in this case. My disagreement with the majority is not because of any shortcomings in the Nebraska tort claims procedure.[1] Rather, my problem is with the majority's application of its legal analysis to the facts of this case.

It is significant, in my view, that respondent is a state prisoner whose access to information about his legal rights is necessarily limited by his confinement. Furthermore, there is no claim that either petitioners or any other officials informed respondent that he could seek redress for the alleged deprivation of his property by filing an action under the Nebraska tort claims procedure. This apparent failure takes

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burdened federal system that never was designed to be utilized in this way. Congress, recognizing the problem with respect to prisoner petitions, enacted last year the Civil Rights of Institutionalized Persons Act, Pub. L. 96–247, 94 Stat. 349, authorizing federal courts to continue § 1983 prisoner cases for up to 90 days to allow recourse to administrative remedies. The grievance procedures, however, must be certified by the Attorney General or determined by the court to be in compliance with not insubstantial procedural requirements. *Id.*, § 7, 42 U. S. C. § 1997e (1976 ed., Supp. IV). As a result, the Act continues to allow resort to the federal courts in many cases of this kind. In view of increasing damages-suit litigation under § 1983, and the inability of courts to identify principles that can be applied consistently, perhaps the time has come for a revision of this century-old statute—a revision that would clarify its scope while preserving its historical function of protecting individual rights from unlawful state action.

[1] To be sure, the state remedies would not have afforded respondent all the relief that would have been available in a § 1983 action. See *ante,* at 543–544. I nonetheless agree with the majority that "they are sufficient to satisfy the requirements of due process." *Ante,* at 544.

on additional significance in light of the fact that respondent pursued his complaint about the missing hobby kit through the prison's grievance procedure.[2] In cases such as this, I believe prison officials have an affirmative obligation to inform a prisoner who claims that he is aggrieved by official action about the remedies available under state law. If they fail to do so, then they should not be permitted to rely on the existence of such remedies as adequate alternatives to a § 1983 action for wrongful deprivation of property. Since these prison officials do not represent that respondent was informed about his rights under state law, I cannot join in the judgment of the Court in this case.

Thus, although I agree with much of the majority's reasoning, I would affirm the judgment of the Court of Appeals.

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[2] In fact, the prison officials did not raise the issue of the availability of a state-law remedy in either the District Court or the Court of Appeals. The issue was first presented in the petition for rehearing filed in the Court of Appeals.

Syllabus

J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP.

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

No. 79–1944. Argued January 21, 1981—Decided May 18, 1981

Petitioner, a former automobile dealer, brought suit against respondent automobile manufacturer in Federal District Court, alleging that respondent's "sales incentive" programs over a certain period violated the price-discrimination prohibition of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. Under its programs, respondent paid a bonus to its dealers if they exceeded their quotas—set by respondent for each dealer—of cars to be sold at retail or purchased from respondent. Petitioner alleged that respondent set petitioner's quotas higher than those of its competitors; that to the extent it failed to meet its quotas, and to the extent its competitors met their lower quotas, petitioner received fewer bonuses; and that the net effect was that it paid more for its automobiles than did its competitors. Petitioner contended that the amount of the price discrimination—the amount of the price difference multiplied by the number of petitioner's purchases—was $81,248, and that when petitioner went out of business, the going-concern value of the business ranged between $50,000 and $170,000. Respondent maintained that the sales incentive programs were nondiscriminatory, and that they did not injure petitioner or adversely affect competition. The jury returned a verdict awarding petitioner $111,247.48 in damages, which the District Court trebled. The Court of Appeals reversed, holding that it was unnecessary to consider whether a violation of § 2 (a) had been proved, since petitioner had failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury, as was required in order to recover treble damages under § 4 of the Clayton Act.

Held:

1. Petitioner's contention that once it has proved a price discrimination in violation of § 2 (a) it is entitled at a minimum to so-called "automatic damages" in the amount of the price discrimination is without merit. Section 2 (a), a prophylactic statute which is violated merely upon a showing that "the effect of such discrimination *may be* substantially to lessen competition," does not require, for purposes of

injunctive actions, that the discrimination must in fact have harmed competition. *Corn Products Co.* v. *FTC*, 324 U. S. 726; *FTC* v. *Morton Salt Co.*, 334 U. S. 37. However, under § 4 of the Clayton Act, which is essentially a remedial statute providing treble damages to any person "who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws," a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. Thus it must prove more than a violation of § 2 (a), since such proof establishes only that injury *may* result. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477. Pp. 561–563.

2. The rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury, see, *e. g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, will not be applied here to determine whether petitioner, though not entitled to "automatic damages," has produced enough evidence of actual injury to sustain recovery. While it is a close question whether petitioner's evidence would be sufficient to support a jury award even under such rule, a more fundamental difficulty is that the cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof. In this case, it cannot be said with assurance that respondent is a "wrongdoer" since the Court of Appeals went directly to the issue of damages after bypassing the question whether respondent in fact violated § 2 (a). The proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence was insufficient to support a finding of such violation. If the court determines that respondent did violate the Act, it should then consider the sufficiency of petitioner's evidence of injury. Pp. 563–568.

607 F. 2d 1133, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and STEVENS, JJ., joined. POWELL, J., filed an opinion dissenting in part, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 569.

C. Lee Reeves argued the cause and filed briefs for petitioner.

J. Ross Forman III argued the cause and filed a brief for respondent.*

**Robert H. Whaley* filed a brief for Ricky Hasbrouck et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* were filed by *Thomas E. Deacy, Jr.*, *E. Houston*

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is the appropriate measure of damages in a suit brought under § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

Petitioner, for several decades a Chrysler-Plymouth dealer in Birmingham, Ala., went out of business in 1974. It subsequently brought suit against respondent in the United States District Court for the Northern District of Alabama, alleging that from January 1970 to May 1974 respondent's various "sales incentive" programs violated § 2 (a). Under one type of program, respondent assigned to each participating dealer a sales objective and paid to the dealer a bonus on each car sold in excess of that objective. Under another type of program, respondent required each dealer to purchase from it a certain quota of automobiles before it would pay a bonus on the sale of automobiles sold at retail. The amount of the

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Harsha, and *Alan I. Becker,* for Cessna Aircraft Co.; and by *John T. Cusack* and *Gordon B. Nash, Jr.,* for Vanco Beverage, Inc.

[1] Section 2 (a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a), provides in pertinent part:

"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 such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them . . . ."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

bonus depended on the number of retail sales (or wholesale purchases) made in excess of the dealer's objective, and could amount to several hundred dollars. Respondent set petitioner's objectives higher than those of its competitors, requiring it to sell (or purchase) more automobiles to obtain a bonus than its competitors. To the extent petitioner failed to meet those objectives and to the extent its competitors met their lower objectives, petitioner received fewer bonuses. The net effect of all this, according to petitioner, was that it paid more money for its automobiles than did its competitors. It contended that the amount of the price discrimination—the amount of the price difference multiplied by the number of petitioner's purchases—was $81,248. It also claimed that the going-concern value of the business as of May 1974 ranged between $50,000 and $170,000.

Respondent maintained that the sales incentive programs were nondiscriminatory, and that they did not injure petitioner or adversely affect competition. The District Court denied respondent's motion for a directed verdict. The jury returned a verdict against respondent and awarded petitioner $111,247.48 in damages, which the District Court trebled.

The Court of Appeals for the Fifth Circuit reversed with instructions to dismiss the complaint. 607 F. 2d 1133 (1979). It found that in order to recover treble damages under § 4 of the Clayton Act, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of damage. It found it unnecessary to consider whether petitioner proved that respondent's incentive programs violated § 2 (a) because, in its view, petitioner had "failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury." *Id.*, at 1135. Rejecting petitioner's theory of "automatic damages," under which mere proof of discrimination establishes the fact and amount of injury, the court held that injury must be proved by more than mere "[c]onclusory statements

by the plaintiff, without evidentiary support." *Id.*, at 1136–1137. The court concluded that the District Court erred in refusing respondent's motion for a directed verdict and in denying its motion for judgment notwithstanding the verdict. We granted certiorari, 449 U. S. 819 (1980), to review the decision of the Court of Appeals.

I

Petitioner first contends that once it has proved a price discrimination in violation of § 2 (a) it is entitled at a minimum to so-called "automatic damages" in the amount of the price discrimination. Petitioner concedes that in order to recover damages it must establish cognizable injury attributable to an antitrust violation and some approximation of damage. Brief for Petitioner 9. It insists, however, that the jury should be permitted to infer the requisite injury and damage from a showing of a substantial price discrimination. Petitioner notes that this Court has consistently permitted such injury to be inferred in injunctive actions brought to enforce § 2 (a), *e. g., FTC* v. *Morton Salt Co.*, 334 U. S. 37 (1948), and argues that private suits for damages under § 4 should be treated no differently. We disagree.[2]

By its terms § 2 (a) is a prophylactic statute which is violated merely upon a showing that "the effect of such discrimination *may be* substantially to lessen competition."

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[2] The automatic-damages theory has split the lower courts. The leading case approving the theory is *Fowler Manufacturing Co.* v. *Gorlick*, 415 F. 2d 1248 (CA9 1969), cert. denied, 396 U. S. 1012 (1970). See also *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988 (CA8) (involving §§ 2 (d) and 2 (e) of the Act), cert. denied, 326 U. S. 773 (1945); *Grace* v. *E. J. Kozin Co.*, 538 F. 2d 170 (CA7 1976) (involving § 2 (c) of the Act). The leading case rejecting the theory is *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F. 2d 457 (CA2), cert. denied, 353 U. S. 965 (1957). Accord, *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105 (CA3 1980); *McCaskill* v. *Texaco, Inc.*, 351 F. Supp. 1332 (SD Ala. 1972), affirmance order, 486 F. 2d 1400 (CA5 1973); *Kidd* v. *Esso Standard Oil Co.*, 295 F. 2d 497 (CA6 1961).

(Emphasis supplied.) As our cases have recognized, the statute does not "require that the discriminations must in fact have harmed competition." *Corn Products Refining Co.* v. *FTC,* 324 U. S. 726, 742 (1945); *FTC* v. *Morton Salt Co., supra,* at 46 ("the statute does not require the Commission to find that injury has actually resulted"). Section 4 of the Clayton Act, in contrast, is essentially a remedial statute. It provides treble damages to "[a]ny person who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws . . . ." (Emphasis supplied.) To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. *Perkins* v. *Standard Oil Co.,* 395 U. S. 642, 648 (1969) (plaintiff "must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered"). It must prove more than a violation of § 2 (a), since such proof establishes only that injury *may* result.

Our decision here is virtually governed by our reasoning in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477 (1977). There we rejected the contention that the mere violation of § 7 of the Clayton Act, which prohibits mergers which *may* substantially lessen competition, gives rise to a damages claim under § 4. We explained that "to recover damages [under § 4] respondents must prove more than that the petitioner violated § 7, since such proof establishes only that injury may result." *Id.,* at 486. Likewise in this case, proof of a violation does not mean that a disfavored purchaser has been actually "injured" within the meaning of § 4.

The legislative history buttresses this view. Both the Patman bill, H. R. 8442, § 2 (d), 74th Cong., 1st Sess. (1935), as introduced in the House, and the Robinson bill, S. 3154, § 2 (d), 74th Cong., 2d Sess. (1935), as introduced in the Senate, provided that a plaintiff's damages for a violation of § 2 (a) shall be presumed to be the amount of the price discrimination. The provision, however, encountered such

strong opposition in both Houses that the House Committee eliminated it from its bill, H. R. Rep. No. 2287, 74th Cong., 2d Sess., 16 (1936), and the Senate Committee modified the provision to authorize presumptive damages in the amount of the discrimination only when plaintiff shows the "fact of damage." S. Rep. No. 1502, 74th Cong., 2d Sess., 8 (1936). The Conference Committee eliminated even that compromise, and § 2 (a) was passed in its present form. Congress thus has rejected the very concept which petitioner seeks to have the Court judicially legislate. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 199–201 (1974).[3]

II

Petitioner next contends that even though it may not be entitled to "automatic damages" upon a showing of a violation of § 2 (a), it produced enough evidence of actual injury to survive a motion for a directed verdict. That evidence consisted primarily of the testimony of petitioner's owner, Mr. Payne, and an expert witness, a professor of economics. Payne testified that the price discrimination was one of the causes of the dealership going out of business. In support of that contention, he testified that his salesmen told him that the dealership lost sales to its competitors, and that its market share of retail Chrysler-Plymouth sales in the Birmingham area was 24% in 1970, 27% in 1971, 23% in 1972, and 25% in 1973. Payne contended that it was proper to infer that the 4% drop in 1972 was a result of the incentive pro-

[3] Relying on *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 757 (1947), petitioner argues that this Court has previously accepted the automatic-damages theory. In that case, the Court stated that if petitioner can show an illegal price discrimination under the Act, "it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices." *Ibid.* But that statement is merely dictum, since the only issue before the Court was whether a violation of § 2 (a) could be used as an affirmative defense to void a contract.

grams. He also testified that the discrimination caused him to "force" business so that he could meet his assigned quotas. That is, his desire to make a sale induced him to "overallow" on trade-ins, thus reducing his profits on his used car operation. App. 51–52. Payne adduced evidence showing that his average gross profit on used car sales was below that of his competitors, though that same evidence revealed that his average gross profit on new sales was higher. *Id.*, at 269.

Neither Payne nor petitioner's expert witness offered documentary evidence as to the effect of the discrimination on retail prices. Although Payne asserted that his salesmen and customers told him that the dealership was being undersold, *id.*, at 35–37, 92, 95, he admitted he did not know if his competitors did in fact pass on their lower costs to their customers. *Id.*, at 44, 57. Petitioner's expert witness took a somewhat different position. He believed that the discrimination would ultimately cause retail prices to be held at an artificially high level since petitioner's competitors would not reduce their retail prices as much as they would have done if petitioner received an equal bonus from respondent. *Id.*, at 103, 135. He also testified that petitioner was harmed by the discrimination even if the favored purchasers did not lower their retail prices, since petitioner in that case would make less money per car.[4] *Id.*, at 139.

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[4] Respondent suggests that petitioner's inability to show that his favored competitors lowered their retail sales price should defeat recovery. That argument assumes that evidence of a lower retail price is the *sine qua non* of antitrust injury, that the disfavored purchaser is simply not "injured" unless the favored purchaser has lowered his price. If the favored purchaser has lowered his retail price, for example, the disfavored purchaser will lose sales to the extent it does not match that lower price. Similarly, if the disfavored purchaser matches the lower price, it will lose profits. Because petitioner has not shown that the favored purchasers have lowered their retail price, petitioner is arguably foreclosed from showing that it lost either sales or profits. Justice Cardozo seemingly adopted

Even construed most favorably to petitioner, the evidence of injury is weak. Petitioner nevertheless asks us to consider the sufficiency of its evidence in light of our traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury. In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123–124 (1969), for example, the Court discussed at some length the fixing of damages in a case involving market exclusion. We accepted the proposition that damages could be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation:

> "[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact-finder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes,

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this position in *ICC* v. *United States*, 289 U. S. 385, 390–391 (1933), a case involving rate discrimination under the Interstate Commerce Act:

"If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered price . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Petitioner argues that is an overly narrow view of antitrust injury. To the extent a disfavored purchaser must pay more for its goods than its competitors, it is less able to compete. It has fewer funds available with which to advertise, make capital expenditures, and the like. Although the inability of petitioner to show that the favored retailers lowered their retail price makes petitioner's argument particularly weak, we find it unnecessary to decide in this case whether such failure as a matter of law demonstrates no competitive injury.

that defendants' wrongful acts had caused damage to the plaintiffs.' *Bigelow* v. *RKO Pictures, Inc., supra,* at 264. See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 377–379 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555, 561–566 (1931)." *Ibid.*

In *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U. S. 251 (1946), relied on in *Zenith,* film distributors had conspired to deny the plaintiff theater access to first-run films. The jury awarded damages based on a comparison of plaintiff's actual profits with the contemporaneous profits of a competing theater with access to first-run films. Plaintiff had also adduced evidence comparing his actual profits during the conspiracy with his profits when he had been able to obtain first-runs. The lower court thought the evidence too imprecise to support the award, but we reversed because the evidence was sufficient to support a "just and reasonable inference" of damage. We explained:

> "[A]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." 327 U. S., at 264–265.

Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as *Bigelow,* that it does not " 'come with very good grace' " for

the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted. *Hetzel* v. *Baltimore & Ohio R. Co.,* 169 U. S. 26, 39 (1898) (quoting *United States Trust Co.* v. *O'Brien,* 143 N. Y. 284, 289, 38 N. E. 266, 267 (1894). Accord, *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts"); *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 379 (1927).

Applying the foregoing principles to this case is not without difficulty. In the first place, it is a close question whether petitioner's evidence would be sufficient to support a jury award even under our relaxed damages rules. In those cases where we have found sufficient evidence to permit a jury to infer antitrust injury and approximate the amount of damages, the evidence was more substantial than the evidence presented here. In *Zenith,* for example, plaintiff compared its sales in Canada, where it was subject to a violation, with its sales in the United States, where it was not. And in *Bigelow,* plaintiff adduced evidence not only comparing its profits with a competitor not subject to the violation but also comparing its profits during the time of the violation with the period immediately preceding the violation.[5]

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[5] *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555 (1931), is similarly distinguishable. In upholding a jury verdict against respondents for a violation of § 2 of the Sherman Act, the Court observed: "It is true that there was uncertainty as to the extent of damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result

But a more fundamental difficulty confronts us in this case. The cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof. In this case, however, we cannot say with assurance that respondent is a "wrongdoer." Because the court below bypassed the issue of liability and went directly to the issue of damages, we simply do not have the benefit of its views as to whether respondent in fact violated § 2 (a). Absent such a finding, we decline to apply to this case the lenient damages rules of our previous cases. Had the court below found a violation, we could more confidently consider the adequacy of petitioner's evidence.

Accordingly, we think the proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed, and we think this would be a poor case in which to depart from that practice. If the court determines on remand that respondent did violate the Act, the court should then consider the sufficiency of petitioner's evidence of injury in light of the cases discussed above. We, of course, intimate no views as to how that issue should be decided. We emphasize that even if there has been a violation of the Robinson-Patman Act, petitioner is not excused from its burden of proving antitrust injury and damages. It is simply that once a violation has been established, that burden is to some extent lightened.

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of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. . . ." *Id.*, at 562. "If the damage is certain, the fact that its extent is uncertain does not prevent a recovery." *Id.*, at 566.

In this case, by contrast, the issue is not so much the amount of damages as whether petitioner has in fact been injured by an antitrust violation.

For the foregoing reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting in part.

I concur in Part I of the Court's opinion, but simply would affirm the judgment of the Court of Appeals.

The Court of Appeals concluded that petitioner "failed to introduce substantial evidence of injury attributable to [respondent's program], much less substantial evidence of the amount of such injury." 607 F. 2d 1133, 1135. In Part II of its opinion, the Court today reviews the evidence, vacates the judgment of the Court of Appeals, and remands the case for a resifting of the evidence and determination of whether respondent violated the Clayton Act as amended by the Robinson-Patman Act. The Court identifies no error of fact or law in the judgment of the Court of Appeals, but vacates that judgment only because the Court finds it "unclear" whether there is sufficient evidence. I find no basis for this Court undertaking to second-guess the Court of Appeals as to the sufficiency of evidence.

Even if there were some satisfactory reason for us to review the evidence in this relatively uncomplicated case, I think the Court of Appeals was plainly correct in finding petitioner's evidence insufficient to show a competitive injury of the kind that the antitrust laws were enacted to prevent. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488–489 (1977). Section 2 (a) is a prophylactic statute that makes unlawful price discrimination that "may . . . lessen competition." Thus, a court cannot infer from the fact of a violation that defendant's behavior has caused plaintiff any injury. A plaintiff must show, to recover damages for violation of § 2 (a), that unlawful discrimination in price allowed a favored competitor to draw sales or profits

from him, the unfavored competitor. See *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F. 2d 457, 458 (CA2), cert. denied, 353 U. S. 965 (1957). Petitioner's evidence, which the Court concedes to be "weak," *ante*, at 565, amounts to nothing more than a showing that its market share declined temporarily 4% in 1972. Petitioner presented no substantial evidence that respondent's incentive program caused its market share to shrink. Indeed, over the 4-year period of the challenged programs its market share increased 1%. Rather, petitioner relied on its president's conclusory testimony, which consisted in major part of hearsay statements from petitioner's automobile salesmen. Hypothetical analysis of the "predicted effects" of respondent's program by an economics professor also was relied upon by petitioner to prove the actual cause of injury. One hardly would expect this Court to reject a Court of Appeals judgment that evidence as flimsy as this was insufficient to go to the jury.

My concern with the Court's opinion, however, goes beyond its reviewing the evidence. I have understood that in a Robinson-Patman Act case the plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence. See *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969). Only when this fact has been proved may a court properly be lenient in the evidence it requires to prove the amount of damages. See *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931). It is not at all apparent that the Court adequately recognizes this distinction.

It seems to me that today's remand measurably increases the uncertainty inherent in the generalities of the Robinson-Patman Act. Accordingly, I dissent.

Syllabus

UNITED STATES *v.* SWANK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 79–1515. Argued December 9, 1980—Decided May 18, 1981

Held: The "percentage depletion" allowance under §§ 611 and 613 of the Internal Revenue Code of 1954—whereby the owner of an economic interest in a mineral deposit is allowed a special deduction from taxable income measured by a percentage of his gross income derived from exhaustion of the mineral—may not be denied to respondent lessees of underground coal who had the right to extract and sell the coal at prices fixed by them, paying a fixed royalty per ton to their lessors, merely because their leases were subject to termination by the lessor on 30 days' notice. Pp. 576–585.

(a) The deduction provides a special incentive for engaging in the mining business that goes well beyond a purpose of merely allowing the owner of a wasting asset to recoup the capital invested in that asset, and hence eligibility for the deduction is determined not by the amount of the capital investment but by the mine operator's "economic interest" in the coal. The question here is whether the deduction for the asset depleted by respondents will be received by anyone, since the tax consequences of the lessors' receipt of royalties will not be affected, either favorably or unfavorably, by the decision. Pp. 576–579.

(b) Under their leases, respondents had a legal interest in the coal both before and after it was mined, and were free to sell the coal at whatever price the market could bear. Thus, they had a depletable "economic interest" in the coal deposits, not merely an "economic advantage." *Parsons* v. *Smith,* 359 U. S. 215, and *Paragon Jewel Coal Co.* v. *Commissioner,* 380 U. S. 624, distinguished. Nor does the right to terminate give the lessor the only significant economic interest in the coal as a matter of "practical economics." It is by no means certain that an increase in the price of coal will induce a lessor to terminate a satisfactory business relationship, and it would be unfair to deny a lessee a tax benefit that is available to competitors simply because he accepted the business risk of termination that his competitors were able to avoid when they negotiated their mining leases. Moreover, the Government has not suggested any rational basis for linking the right to a depletion deduction to the period of time that the taxpayer operates a mine. Thus, the mere existence of the lessors' unexercised

right to terminate respondents' leases did not destroy their economic interest in the leased mineral deposits. Pp. 579–585.

221 Ct. Cl. 246, 602 F. 2d 348, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 585.

Stuart A. Smith argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Ferguson,* and *Michael L. Paup.*

LeRoy Katz argued the cause for respondents and filed a brief for respondent Black Hawk Coal Corp., Inc. *Lloyd R. Persun* and *Howell C. Mette* filed a brief for respondents Swank et al. *Woodrow A. Potesta* and *Robert Lathrop* filed a brief for respondent Bull Run Mining Co., Inc.

JUSTICE STEVENS delivered the opinion of the Court.

The owner of an economic interest in a mineral deposit is allowed a special deduction from taxable income measured by a percentage of his gross income derived from exhaustion of the mineral. This deduction, codified in §§ 611 and 613 of the Internal Revenue Code of 1954, is designed to compensate such owners for the exhaustion of their interest in a wasting asset, the mineral in place.[1] This case presents the question

[1] "§ 611. Allowance of deduction for depletion

"(a) *General Rule*

"In the case of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary. . . ." 26 U. S. C. § 611 (a).

"§ 613. Percentage depletion

"(a) *General Rule*

"In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the

whether that "percentage depletion" allowance must be denied to otherwise eligible lessees of underground coal because their leases were subject to termination by the lessor on 30 days' notice.

This question arises out of three different tax refund suits that were decided by the Court of Claims in a single opinion. 221 Ct. Cl. 246, 602 F. 2d 348. The controlling facts are essentially the same in all three cases. Each taxpayer operated a coal mine pursuant to a written lease; in exchange for a fixed royalty per ton, the lessor granted the lessee the right to extract coal and to sell it at prices determined by the lessee. Each lease contained a clause permitting the lessor to terminate the lease on 30 days' notice. In fact, however, none of the lessors exercised that right; each lessee mined a substantial tonnage of coal during an uninterrupted operation that continued for several years. The proceeds from the sale of the coal represented the only revenue from which the lessees recovered the royalties paid to the lessors.

In each of the cases, certain additional facts help to illuminate the issue. In the *Black Hawk* [2] case the lease was to continue "during the term commencing on the first day

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percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). . . . In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

"(b) *Percentage depletion rates*

"The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

. . . . .

"(4) *10 percent*

"Asbestos, . . . brucite, coal, lignite, perlite, sodium chloride, and wollastonite." 26 U. S. C. §§ 613 (a), (b)(4).

[2] Black Hawk Coal Corp., Inc., operated drift mines in Pike County, Ky. Its refund suit covered the tax years 1970–1972.

of March, 1964, and terminating when LESSEE shall have exhausted all of The Feds Creek (or Clintwood) Seam of coal, . . . or until said tenancy shall be earlier terminated . . . ." App. 77a. The lease required Black Hawk to pay a royalty of 25 cents per ton of coal or $5,000 per year, whichever was larger. *Id.*, at 77a–78a. In addition, the lease required Black Hawk to pay all taxes on the underground coal, as well as the taxes on its plant and equipment and on mined coal. *Id.*, at 79a. Black Hawk paid independent contractors a fixed price per ton to remove the coal, and Black Hawk was free to sell the coal to any party at whatever price it could obtain. Black Hawk mined the seam to exhaustion, operating continuously under the lease for 13 years. *Id.*, at 70a–71a. The Government stipulated that Black Hawk was the sole claimant to the percentage depletion deduction; no claim had been made by the lessor or by any independent mining contractor employed by Black Hawk. *Id.*, at 71a.

The *Swank* case involves two separate leases executed by Swank and Northumberland County, Pa., pursuant to which Swank operated mines on land owned by the county. The first lease, a deep-mining lease executed in 1964, was terminated in 1968 after a mountain slide forced Swank to close the mine. *Id.*, at 52a. The second, a strip-mining lease executed in 1966, was still being operated by Swank's successor in interest in 1977 when the case was tried. During the tax years in dispute, Swank's royalty payments to the county at the rate of 35 cents per ton amounted to $7,545.10 in 1966 and $6,854.05 in 1967. *Id.*, at 53a. The deduction for depletion, which was based on the gross income received from the sale of the coal, was significantly larger.[3] The record also indicates that Swank invested significant sums in the construc-

[3] The Government states that the depletion deductions claimed by Swank in 1966 and 1967 amounted to $41,371.24 and $15,204.32. Brief for United States 3. See also App. 8a–9a. No other party claimed the depletion deduction on coal mined by Swank.

tion of access roads, the acquisition of equipment, and the purchase and improvement of a "tipple"—the surface structure that is used to remove slate and rock from the mined product and to sort the coal into specific sizes for marketing. *Id.*, at 55a–56a.

The *Bull Run*[4] case involves a 5-year lease executed in 1967 and renewed in 1972. *Id.*, at 90a–91a. Unlike the leases in the other cases, it gave the lessor a right of first purchase if it was willing to meet the lessee's price, and in the tax year in dispute the lessor did purchase all of the coal mined by Bull Run. 221 Ct. Cl., at 249, n. 4, 602 F. 2d, at 350, n. 4. The lease did not, however, limit the lessee's right to set selling prices or to sell to others who were willing to pay more than the lessor. *Ibid.* Like the lease in *Black Hawk*, the lease provided for a royalty of 25 cents per ton. App. 91a. As is also true in both *Black Hawk* and *Swank*, there is no suggestion that any other party has made any claim to any part of the percentage depletion allowance at issue in this case.[5] See *id.*, at 92a. The Bull Run lease, like the others, contained a provision giving the lessor the right to cancel on 30 days' written notice.[6]

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[4] Bull Run Mining Co. operated in West Virginia. In its brief, Bull Run states that the leased coal was mined to exhaustion in September 1978. Brief for Respondent Bull Run Mining Co. 2.

[5] Bull Run claimed a depletion deduction of $39,981.41 for 1974, the tax year in question. App. 92a.

[6] The relevant section of the lease provides:

"5. *CANCELLATION*. It is agreed between the parties that either party to this agreement may cancel this lease upon giving to the other party a written notice at least thirty (30) days prior to the effective date of said cancellation. If any coal is mined during said thirty (30) day period, the same shall be paid for the same as if said notice were not given, and upon the expiration of said thirty (30) days, Lessee agrees to deliver the possession of said premises to the Lessor. Upon such cancellation becoming effective, Lessor shall reasonably compensate Lessee for the then fair market value of track, conveyors, dumps, bins, motors and other equipment which Lessee shall have affixed to the premises, and if the parties

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Since 1913 the Internal Revenue Code or its predecessors have provided special deductions for depletion of wasting assets. We have explained these deductions as resting "on the theory that the extraction of minerals gradually exhausts the capital investment in the mineral deposit," and therefore the depletion allowance permits "a recoupment of the owner's capital investment in the minerals so that when the minerals are exhausted, the owner's capital is unimpaired." *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, 312.[7] The percentage depletion allowance, however, is clearly more than a method of enabling the operator of a coal mine to recover the amount he has paid for the unmined coal. Because the deduction is computed as a percentage of his gross income from the mining operation and is not computed with reference to the operator's investment, it provides a special incentive for engaging in this line of business that goes well beyond a purpose of merely allowing the owner of a wasting asset to recoup the capital invested in that asset.[8] As the Court said in *Southwest Exploration Co., supra:*

"The present allowance, however, bears little relation-

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cannot agree upon such compensation, Lessee shall have a period of four (4) months within which to remove his equipment, from the effective date of cancellation." *Id.*, at 96a.

[7] In *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 366, the Court explained that the deduction "is permitted in recognition of the fact that the mineral deposits are wasting assets and is intended as compensation to the owner for the part used up in production."

[8] The *Swank* case is illustrative of the nature of the depletion deduction. We can determine from the fact that Swank paid royalties of $7,545.10 in 1966 and $6,854.05 in 1967 that Swank mined roughly the same amount of coal in both years, 21,557 tons in 1966 and 19,585 tons in 1967. Thus Swank could apparently claim a depletion allowance of about $1.92 per ton in 1966 and about 78 cents per ton in 1967. Inasmuch as the depletion allowance is a percentage of gross income, these figures—which suggest that the selling price of the coal may have been almost as high as $20

> ship to the capital investment, and the taxpayer is not limited to a recoupment on his original investment. The allowance continues so long as minerals are extracted, and even though no money was actually invested in the deposit. The depletion allowance in the Internal Revenue Code of 1939 [the forerunner of the present statute] is solely a matter of congressional grace . . . ." 350 U. S., at 312.[9]

Hence eligibility for the deduction is determined not by the amount of the capital investment but by the mine operator's "economic interest" in the coal.[10]

A recognition that the percentage depletion allowance is more than merely a recovery of the cost of the unmined coal is especially significant in this case. The question here is

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a ton—indicate the lack of any specific relationship between the lessee's cost of the raw coal and the value of the depletion allowance.

[9] In the Revenue Act of 1918, the capital to be recovered through the depletion allowance was not determined by the owner's investment in the minerals but rather was measured by the fair market value of the property at the date the mineral deposits were "discovered." See Revenue Act of 1918, ch. 18, §§ 214 (a) (10), 234 (a) (9), 40 Stat. 1068, 1078. Although this method of determining the depletion allowance was changed to the percentage depletion method for oil and gas in 1926, Revenue Act of 1926, ch. 27, § 204 (c), 44 Stat. (part 2) 16, and for coal in 1932, Revenue Act of 1932, ch. 209, § 114 (b) (4), 47 Stat. 203, this Court, in *Helvering* v. *Bankline Oil Co., supra,* at 366–367, recognized that "[t]he granting of an arbitrary deduction . . . of a percentage of gross income was in the interest of convenience and in no way altered the fundamental theory of the allowance." Thus since 1918 the depletion deduction has not been limited to a recoupment of the operator's investment.

[10] The Court developed the "economic interest" test in *Palmer* v. *Bender,* 287 U. S. 551. In *Palmer,* the Court stated:

"The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital." *Id.,* at 557.

whether a deduction for the asset depleted by respondents will be received by *anyone*.[11] The tax consequences of the lessors' receipt of royalties will not be affected, either favor-

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[11] The Government argues that the Court of Claims erred in concluding that a consequence of the Government's position is that no one will receive the percentage depletion deduction. See 221 Ct. Cl. 246, 251, 602 F. 2d 348, 351; Brief for United States 22–23. This argument is not persuasive.

Under § 631 (c) of the Internal Revenue Code, the lessor is required to treat his royalty income as a capital gain and is not entitled to claim a percentage depletion deduction. Section 631 (c) provides in pertinent part:

"In the case of the disposal of coal (including lignite), or iron ore mined in the United States, held for more than 1 year before such disposal, by the owner thereof under any form of contract by virtue of which such owner retains an economic interest in such coal or iron ore, the difference between the amount realized from the disposal of such coal or iron ore and the adjusted depletion basis thereof plus the deductions disallowed for the taxable year under section 272 shall be considered as though it were a gain or loss, as the case may be, on the sale of such coal or iron ore. *Such owner shall not be entitled to the allowance for percentage depletion provided in section 613 with respect to such coal or iron ore.* This subsection shall not apply to income realized by any owner as a co-adventurer, partner, or principal in the mining of such coal or iron ore, and the word 'owner' means any person who owns an economic interest in coal or iron ore in place, including a sublessor." 26 U. S. C. § 631 (c) (1976 ed., Supp. III) (emphasis added).

Unlike the percentage depletion deduction, the capital gains treatment required by § 631 (c) is directly related to the lessor's capital investment in the mine. Because the lessor's gain is measured by the difference between his cost, computed on a per ton basis, and his royalty, he of course recoups his capital investment as the coal is mined. In this sense, he receives "cost depletion." The difference between the lessor's "cost depletion" and the lessee's "percentage depletion" is indicated by the record in the *Swank* case. In 1966 the royalty payments amounted to $7,545.10; a part of that amount was the lessor's capital gain and the remainder was his "cost depletion." In contrast, the "percentage depletion" claimed by the lessee amounted to $41,371.24. The amounts are not in dispute. Thus, contrary to the Government's argument, the provision of capital gains treatment to the lessor does not indicate that the percentage depletion deduction, which we have characterized as a form of "congressional grace,"

ably or unfavorably, by our decision in this case.[12] The Government therefore is not contending that the wrong party is claiming the percentage depletion allowance. Rather, the Government takes the position that no such deduction shall be allowed to any party if the legal interest of the lessee-operator is subject to cancellation on short notice.[13]

II

The language of the controlling statute makes no reference to the minimum duration of the interest in mineral deposits on which a taxpayer may base his claim to percentage depletion.[14] The relevant Treasury Regulation merely requires the taxpayer to have an "economic interest" in the unmined coal.[15] That term is broadly defined by regulation as follows:

"(b) *Economic interest.* (1) Annual depletion deduc-

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will be available to some other party if it cannot be claimed by the lessee. See n. 12, *infra.*

[12] The Government conceded at oral argument that the lessor's entitlement to the capital gain treatment of the royalty proceeds would be the same regardless of whether the lessee is entitled to percentage depletion. Tr. of Oral Arg. 16. Moreover, the Government also conceded that even if the lessees had a long-term lease and were clearly entitled to the depletion allowance, the lessors would nevertheless have a retained economic interest in the coal. *Id.,* at 16–18. Therefore, the lessors would be required by § 631 (c) to take capital gains rather than a depletion deduction regardless of whether we hold that the lessee is entitled to the percentage depletion deduction.

[13] Although these cases involve provisions for cancellation on 30 days' notice, the Government advises us that it takes the same position with respect to any lease cancellable on less than one year's notice. Tr. of Oral Arg. 8. This position has its genesis in G. C. M. 26290, 1950–1 Cum. Bull. 42, declared obsolete, Rev. Rul. 70–277, 1970–1 Cum. Bull. 280. See also Rev. Rul. 74–507, 1974–2 Cum. Bull. 179.

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

[15] The Court early recognized that lessees had an economic interest in the mines:

"It is, of course, true that the leases here under review did not convey title to the unextracted ore deposits . . . ; but it is equally true that such

> tions are allowed only to the owner of an economic interest in mineral deposits or standing timber. An economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he must look for a return of his capital." [16]

The Government's argument that the termination clause deprived the lessees of an economic interest is advanced in two forms. First, the Government notes that the regulation distinguishes a mere "economic advantage" [17] from a depletable "economic interest," and argues that two cases—*Parsons* v. *Smith,* 359 U. S. 215, and *Paragon Jewel Coal Co.* v. *Commissioner,* 380 U. S. 624—in which the Court concluded that mining contractors had only an "economic advantage" rather than an "economic interest" in coal deposits—support the conclusion that these lessees also had a mere "economic advantage." Second, the Government argues as a matter of "practical economics" that the right to terminate gives the lessor the only significant economic interest in the coal. Neither submission is persuasive.

The *Parsons* opinion covered two consolidated cases with similar facts. In each the owner of coal-bearing land entered

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leases, conferring upon the lessee the exclusive possession of the deposits and the valuable right of removing and reducing the ore to ownership, created a very real and substantial interest therein. . . . And there can be no doubt that such an interest is property." *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 369.

[16] Treas. Reg. §1.611–1 (b), 26 CFR § 1.611–1 (b) (1980).

[17] The regulation provides an example of such an "economic advantage":

"[A]n agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation for extraction or cutting does not convey a depletable economic interest." *Ibid.*

into a contract with the taxpayer providing that the taxpayer would strip-mine the coal and deliver it to the owner for a fixed price per ton. Neither of the contracts purported to give the mining contractor any interest in the coal, either before or after it was mined, or any right to sell it to third parties. See 359 U. S., at 216–219. The contracts were terminable on short notice and terminability was one of the seven factors the Court listed to support its conclusion that the independent contractors did not have an economic interest in the coal.[18] It is perfectly clear, however, that the Court would have reached the same conclusion if that factor had not been present.

The facts in the *Paragon Jewel* case were much like those in *Parsons,* except that the mining contractors dealt with

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[18] The Court listed the seven factors in this paragraph:

"To recapitulate, the asserted fiction is opposed to the facts (1) that petitioners' investments were in their equipment, all of which was movable—not in the coal in place; (2) that their investments in equipment were recoverable through depreciation—not depletion; (3) *that the contracts were completely terminable without cause on short notice;* (4) that the landowners did not agree to surrender and did not actually surrender to petitioners any capital interest in the coal in place; (5) that the coal at all times, even after it was mined, belonged entirely to the landowners, and that petitioners could not sell or keep any of it but were required to deliver all that they mined to the landowners; (6) that petitioners were not to have any part of the proceeds of the sale of the coal, but, on the contrary, they were to be paid a fixed sum for each ton mined and delivered, which was, as stated in *Huss,* agreed to be in 'full compensation for the full performance of all work and for the furnishing of all [labor] and equipment required for the work'; and (7) that petitioners, thus, agreed to look only to the landowners for all sums to become due them under their contracts. The agreement of the landowners to pay a fixed sum per ton for mining and delivering the coal 'was a personal covenant and did not purport to grant [petitioners] an interest in the [coal in place].' *Helvering* v. *O'Donnell,* 303 U. S. 370, 372. Surely these facts show that petitioners did not actually make any capital investment in, or acquire any economic interest in, the coal in place, and that they may not fictionally be regarded as having done so." 359 U. S., at 225 (emphasis added).

lessees instead of the owners of the underground coal. As in *Parsons,* the contractors agreed to mine the coal at their own expense and deliver it to Paragon's tipple at a fixed fee per ton.[19] The contractors had no control over the coal after delivery to Paragon, had no responsibility for its sale or in fixing its price, and did not even know the price at which Paragon sold the coal. 380 U. S., at 628. The Court stated that the Commissioner took the position that

> "only a taxpayer with a legally enforceable right to share in the value of a mineral deposit has a depletable capital or economic interest in that deposit and the contract miners in this case had no such interest in the unmined coal." *Id.,* at 627.

The Court agreed that the miners did not have an economic interest in the coal:

> "Here, Paragon was bound to pay the posted fee regardless of the condition of the market at the time of the particular delivery and thus the contract miners did not look to the sale of the coal for a return of their investment, but looked solely to Paragon to abide by its covenant." *Id.,* at 635.

Thus in *Paragon Jewel Coal Co.,* as in *Parsons,* the terminability of the agreements was not the dispositive factor,[20] and

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[19] Although this fee varied depending on the general trends of the market price and labor costs, the Court noted that such changes "were always prospective, the contractors being notified several days in advance of any change so that they always knew the amount they would get for the mining of the coal upon delivery." 380 U. S., at 628.

[20] With respect to the terminability issue, although no specific right to terminate was mentioned in the agreement, the *Paragon Jewel* Court concluded that because the contractors had apparently been able to terminate at will, such a power should also be imputed to Paragon. The Court indicated, however, that even if the agreements were not terminable at will, the "right to mine to exhaustion, without more, does not constitute an economic interest under *Parsons.*" *Id.,* at 634.

neither case answers the narrow question before us in this case.[21]

The contrast between the interest of the contractors in *Parsons* and *Paragon Jewel* and the lessees in these cases is stark. Whereas those contractors never acquired any legal interest in the coal, the lessees in these cases had a legal interest in the mineral both before and after it was mined, and were free to sell the coal at whatever price the market could bear. Indeed, the Government does not contend that, absent the termination clauses, the lessees would not have had an economic interest in the coal. In contrast, it seems clear that the contract miners' interest in the *Parsons* and *Paragon Jewel* cases would have been insufficient even if their agreements had been for a fixed term.

The Government, however, does argue that the lessors' right to terminate the leases alone made the taxpayers' interest so tenuous as to defeat a claim to the percentage depletion deduction.[22] According to the Government, as a mat-

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[21] Another distinguishing feature of *Paragon Jewel* is that that case really presented an issue respecting which taxpayer—the contract miner or the lessee—should receive the depletion allowance. See *id.*, at 626, 630; *id.*, at 639–649 (Goldberg, J., dissenting). The fact that the existence of a right to terminate is relevant in what is essentially a dispute between the parties to the contract surely does not support the conclusion that such an unexercised right has any bearing on the question whether *any* taxpayer may claim percentage depletion.

[22] "Although he has a potential right to benefit from a rise in the market, that right is illusory for practical economics will compel the lessor to terminate the lease and conclude a more favorable arrangement if market conditions so dictate." Brief for United States 19.

"As we have pointed out (*supra,* page 19), if the market price of the minerals rises above the lessor's royalty, the lessor will assuredly exercise his right to terminate the lease on short notice and will either enter into a more profitable lease or extract the mineral himself and sell it. In these circumstances, the lease provision permitting termination on short notice gives the lessor the unilateral right to assume complete and unfettered dominion over the mineral deposit, *viz.*, an economic interest in the minerals in place. The unexercised termination clause therefore

ter of "practical economics" an increase in the price of the minerals will "assuredly" lead to an exercise of the lessors' right to terminate; accordingly, the only significant economic interest is controlled by the lessor. We find this theoretical argument unpersuasive for at least three reasons.

First, the royalty rate is a relatively small element of the mine operator's total cost.[23] Therefore, even if the price of coal increases, the lessor cannot be certain that he will be able to negotiate a more favorable lease with another lessee. Moreover, the quantity of coal extracted by the operator each year may be as important in providing royalties for the lessor as the rate per ton. Purely as a theoretical matter, it therefore is by no means certain that an increase in the price of coal will induce a lessor to terminate a satisfactory business relationship. Indeed, the only evidence in the record—the history of three different operations that were uninterrupted for many years—tends to belie the Government's entire argument.[24]

Second, from the standpoint of the taxpayer who did in fact conduct a prolonged and continuous operation, it would

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has profound economic significance, rather than, as the decision below erroneously concluded (Pet. App. 5a), 'mere existence.'" *Id.*, at 21–22 (footnotes omitted).

[23] In *Swank*, for example, the royalty payment was 35 cents per ton, while the price of coal apparently approached $20 per ton. See n. 8, *supra*.

[24] The Court of Claims opinion also recognized the weakness of this argument. The court stated that counsel for one of the taxpayers at oral argument had noted that the lessors had not terminated even though the value of coal had increased markedly. The taxpayer argued that lessors would be reluctant to terminate because "the costs of continuing with an existing mine are usually so great, comparatively, that it is difficult for a lessor to obtain new lessees at terms more favorable to the lessors than the existing leases." 221 Ct. Cl., at 251, n. 9, 602 F. 2d, at 351, n. 9. The court did not accept these representations as evidence but indicated that "the record contains nothing to contradict this explanation for what seems to be the fact that leases of this type have not been regularly cancelled by lessors in recent years." *Ibid.*

seem rather unfair to deny him a tax benefit that is available to his competitors simply because he accepted a business risk—the risk of termination—that his competitors were able to avoid when they negotiated their mining leases. It is unlikely that Congress intended to limit the availability of the percentage depletion deduction to the mining operations with the greatest bargaining power.

Third, and most important, the Government has not suggested any rational basis for linking the right to a depletion deduction to the period of time that the taxpayer operates a mine. If the authorization of a special tax benefit for mining a seam of coal to exhaustion is sound policy, that policy would seem equally sound whether the entire operation is conducted by one taxpayer over a prolonged period or by a series of taxpayers operating for successive shorter periods. The Government has suggested no reason why the efficient removal of a great quantity of coal in less than 30 days should have different tax consequences than the slower removal of the same quantity over a prolonged period.[25]

The Court of Claims correctly concluded that the mere existence of the lessors' unexercised right to terminate these leases did not destroy the taxpayers' economic interest in the leased mineral deposits.

The judgment is

Affirmed.

JUSTICE WHITE, with whom JUSTICE STEWART joins, dissenting.

The Court today rejects the Internal Revenue Service's interpretation of §§ 611 and 613 and the applicable regulation because it has not "suggested any rational basis for linking

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[25] As we have indicated, the depletion deduction is geared to the depletion of the mineral in place, and not to the taxpayer's capital investment. Therefore, we can perceive no reason to impose duration requirements on the availability of the deduction for taxpayers who admittedly otherwise have an "economic interest" in the coal, are dependent on the market to recover their costs, and are actually depleting the mineral in place.

the right to a depletion deduction to the period of time that the taxpayer operates a mine." *Ante,* at 585. The Court suggests that depletion tax policy should be the same "whether the entire operation is conducted by one taxpayer over a prolonged period or by a series of taxpayers operating for successive shorter periods." *Ibid.* My disagreement with the Court's opinion is simple. It is not our function to speculate on who deserves an allowance; our duty is to determine if the Service's interpretation is a reasonable one. Since in my view the construction of the statutory provisions and the attendant regulation is clearly acceptable, I dissent.

Congress has provided for a depletion allowance in recognition of the fact that mineral deposits are wasting assets, in order to compensate "the owner for the part used up in production." *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 366 (1938). The theoretical justification for the allowance is that it will permit an owner to recoup his capital investment in the minerals as the resources are being exhausted. *Commissioner* v. *Southwest Exploration Co.,* 350 U. S. 308, 312 (1956); *United States* v. *Cannelton Sewer Pipe Co.,* 364 U. S. 76, 81 (1960). The fact that the manner of calculating the depletion allowance has changed and is not that closely tied to the underlying justification of recouping a party's capital investment is immaterial since the method of calculating the deduction is a matter of convenience and "in no way alter[s] the fundamental theory of the allowance." *Bankline Oil, supra,* at 367. In essence, therefore, any "right" to a depletion allowance under the statute is properly predicated on some indication of capital investment in the minerals in place.

From the earliest cases dealing with the statutory predecessors of § 611 and § 613, this Court has recognized the "capital investment" theory underlying the depletion allowance. In *Palmer* v. *Bender,* 287 U. S. 551, 557 (1933), the Court stated:

"The language of the statute is broad enough to provide,

> at least, for every case in which the taxpayer has acquired, *by investment,* any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a *return of his capital.*" (Emphasis supplied.)

Other cases have expressed the capital investment theory in somewhat different terms by noting that there exists a critical distinction between possessing an economic *interest* in the minerals in place, which entitles a party to the depletion allowance, and possessing a mere economic *advantage,* which does not entitle one to the allowance. See *Bankline Oil, supra,* at 367 (" 'economic interest' is not to be taken as embracing a mere economic advantage derived from production, through a contractual relation to the owner, by one who has no capital investment in the mineral deposit"); *Kirby Petroleum Co.* v. *Commissioner,* 326 U. S. 599, 603 (1946).

It is true, as recognized by the Court, that the statute does not specifically refer to a minimum duration of a leasehold to qualify a lessee to an allowance. But it is also true that the Service has promulgated a regulation which has fully adopted the "economic advantage-interest" distinction noted in the Court's earlier opinions:

> "(b) *Economic interest.* (1) Annual depletion deductions are allowed only to the owner of an economic interest in mineral deposits or standing timber. An economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he must look for a return of his capital. . . . *A person who has no capital investment in the mineral deposit . . . does not possess an economic interest merely because through a contractual relation he possesses a mere economic or pecuniary advantage derived from production.* For ex-

> ample, an agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation for extraction or cutting does not convey a depletable economic interest. . . ." Treas. Reg. § 1.611–1 (b), 26 CFR § 1.611–1 (b) (1980) (emphasis supplied).

Under the Court's prior cases, the regulation's explicit acceptance of the economic-interest standard is proper and must be afforded substantial weight by a reviewing court. A regulation adopted pursuant to a statute must be given effect if there is a reasonable basis for the interpretation given by the Commissioner. See *Fulman* v. *United States,* 434 U. S. 528, 533 (1978); *Bingler* v. *Johnson,* 394 U. S. 741, 749–750 (1969); *Commissioner* v. *South Texas Lumber Co.,* 333 U. S. 496, 501 (1948). Here, imposing an economic-interest requirement for any entitlement to a depletion allowance is clearly reasonable given that our prior cases have indicated that the statute encompassed such a requirement. Indeed, earlier versions of the same regulation have been expressly accepted and applied by the Court. See, *e. g., Paragon Jewel Coal Co.* v. *Commissioner,* 380 U. S. 624, 632 (1965).

Furthermore, although the term "economic interest" is not self-defining, the Service has the authority and the responsibility to interpret and apply the economic-interest standard contained in its own regulation. It has done so through various interpretative decisions and has concluded in the exercise of its expertise that the duration of the leasehold interest is a critical factor in determining a lessee's right to a depletion allowance under the statute.[1] A coal mining company's in-

[1] The position of the Service is that in order for a leaseholder to qualify as possessing an economic interest in the mineral deposit, the leaseholder's "right to extract must be of sufficient duration to allow it to remove a substantial amount of the mineral deposit to which it would look for a

terest in the coal lands may run from a straightforward fee simple ownership to a variety of lesser interests down to a nonexclusive right to extract coal as a tenant at will. The Service is of the view that a taxpayer operating pursuant to a lease must be assured of a right to continue mining for a reasonably long period of time. Accordingly, the Service believes that a lease which is revocable on short notice does not create a sufficient economic interest to justify the taking of a depletion allowance.

The Service's interpretation of its own regulation is entitled to deference. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980) ("[a]n agency's construction of its own regulations has been regarded as especially due [considerable respect]"); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413–414 (1945) (courts must look to "administrative construction of the regulation if the meaning of the words used is in doubt" and give it "controlling weight unless it is plainly erroneous or inconsistent with the regulation"). See also *Fribourg Navigation Co.* v. *Commissioner*, 383 U. S. 272, 300 (1966) (WHITE, J., dissenting) (given that Congress gave to "the Secretary of the Treasury or his delegate, not to this Court, the primary responsibility of determining what constitutes a 'reasonable' allowance for depreciation," courts should affirm the Commissioner's position

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return of its capital." Rev. Rul. 74–506, 1974–2 Cum. Bull. 178–179 (6-month lease where it was anticipated that the period was sufficient to exhaust a mineral deposit did provide a sufficient economic interest). See Rev. Rul. 77–341, 1977–2 Cum. Bull. 204–205. The Service has also indicated that a 1-year lease which was renewable unless terminated for cause was sufficient for a coal mining lessee to acquire an economic interest for the purposes of obtaining a depletion allowance under § 613 of the Code. See Rev. Rul. 74–507, 1974–2 Cum. Bull. 179. See also G. C. M. 26290, 1950–1 Cum. Bull. 42. Thus, contrary to the Court's view, the Service has not focused on the duration of the lease as the only relevant factor. Marketing schemes and other indicia of economic ownership are also relevant in the determination.

when he "adopts a rational position that is consistent with the purpose behind the depreciation deduction, congressional intent, and the language of the statute and interpretative Treasury Regulations"). Of course, Revenue Rulings and other interpretative documents do not have the same force as Treasury Regulations. But this fact does not mean that the consistent interpretation of the Service may be disregarded because the Court feels another interpretation is more reasonable, especially in cases like the present where the interpretation involves the application of terms expressly used in the regulation. Indeed, in *National Muffler Dealers Assn.* v. *United States,* 440 U. S. 472 (1979), the Court afforded substantial deference to the Service's interpretation of a phrase in a regulation. Under the relevant regulation, certain tax advantages were made dependent on whether a particular activity was in a "line of business." Like the "economic interest" concept involved in this case, the meaning of "line of business" was open to different interpretations. The Commissioner, as expressed in a variety of Revenue Rulings, see *id.,* at 483–484, had defined "line of business" in a narrow fashion. The Court upheld the administrative interpretation of the "line of business" concept, and stated:

> "In short, while the Commissioner's reading of § 501 (c)(6) perhaps is not the only possible one, it does bear a fair relationship to the language of the statute, it reflects the views of those who sought its enactment, and it matches the purpose they articulated. It evolved as the Commissioner administered the statute and attempted to give to a new phrase a content that would reflect congressional design. The regulation has stood for 50 years, and the Commissioner infrequently but consistently has interpreted it to exclude an organization like the Association that is not industrywide. *The Commissioner's view therefore merits serious deference." Id.,* at 484 (emphasis supplied).

In my view, the posture of the present case is identical to that of *National Muffler*. Here, the acknowledged standard of an economic interest contained in the regulation has been interpreted by the Service to require a lessee to possess a lease which is not terminable at will on short notice. This consistent interpretation of the applicable regulation is entitled to deference, which the Court today chooses not to give it. It is also significant to note that this interpretation has also been accepted and applied by the majority of the lower courts that have considered the question.[2]

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[2] See, *e. g.*, *Whitmer* v. *Commissioner*, 443 F. 2d 170, 173 (CA3 1971) (right of lessor to terminate at will "would appear to be fatal to a lessee's ability to claim the depletion deduction, because no right to extract until exhaustion of the coal has been granted"); *McCall* v. *Commissioner*, 312 F. 2d 699, 705 (CA4 1963) ("[w]here the contract is terminable at will, at least by the owner or long-term lessee, that feature is the determining feature"); *United States* v. *Stallard*, 273 F. 2d 847, 851 (CA4 1959) (the most important factor "is whether the producer has the right under the contract to exhaust the deposit to completion or is subject in this respect to the will of the owner through a provision in the agreement empowering the owner to terminate the contract at will"); *Weaver* v. *Commissioner*, 72 T. C. 594, 606 (1979) ("a miner who can be ousted immediately or on nominal notice from a mineral deposit at any time without cause is not really an owner of any economic interest in the deposit"); *Mullins* v. *Commissioner*, 48 T. C. 571, 583 (1967) (courts have repeatedly held that "the right to mine to exhaustion or for a specific period is the critical factor in determining whether a lessee has obtained a depletable economic interest in the mineral in place"); *Bolling* v. *Commissioner*, 37 T. C. 754 (1962). See also *Costantino* v. *Commissioner*, 445 F. 2d 405, 409 (CA3 1971); *Commissioner* v. *Mammoth Coal Co.*, 229 F. 2d 535 (CA3 1956); *Usibelli* v *Commissioner*, 229 F. 2d 539 (CA9 1955); *Holbrook* v. *Commissioner*, 65 T. C. 415, 418–421 (1975).

To be sure there is authority to the contrary. See *Winters Coal Co.* v. *Commissioner*, 496 F. 2d 995 (CA5 1974); *Bakertown Coal Co.* v. *United States*, 202 Ct. Cl. 842, 485 F. 2d 633 (1973). The decision in *Winters Coal* is obscure because two members of the Fifth Circuit panel held that an economic interest existed for the reason that the taxpayer had purchased surface access rights which were necessary to mine the coal, and given this investment, a depletion allowance was justified. See *Commissioner* v. *South-*

The Service's concern with the nature of the underlying lease in determining whether an economic interest exists is also reasonable in light of our prior cases. In this regard, *Parsons* v. *Smith,* 359 U. S. 215 (1959), and *Paragon Jewel Coal Co.* v. *Commissioner,* 380 U. S. 624 (1965), provide two examples suggesting that the duration of a leasehold interest is an important factor in determining whether an economic interest exists. In *Parsons,* the Court noted that the interest asserted by the mining contractors rested entirely on the contracts. The Court found that the mining contracts did not entitle them to a depletion allowance since the contracts "were completely terminable without cause on short notice." 359 U. S., at 224. In *Paragon Jewel,* a lessee made agreements with various companies to mine the coal. The agreements were silent regarding termination and were apparently for an indefinite period. The contractors were under no obligation to mine any specific amount of coal and were not given the right to mine any area to exhaustion. The Court held that the mining companies had no right to receive a depletion allowance.

None of the reasons forwarded by the Court for rejecting the Service's view is persuasive. The fact that respondents did in fact mine to exhaustion is irrelevant to a determination of the legal rights underlying the leasehold. Indeed, the right to mine to exhaustion, without anything more, "does not constitute an economic interest under *Parsons,* but is 'a mere economic advantage derived from production, through a contractual relation to the owner, by one who has no capital investment in the mineral deposit.' " *Paragon Jewel, supra,* at 634–635 (quoting *Bankline Oil,* 303 U. S., at 367). Both *Paragon Jewel* and *Parsons* also make clear that the fact of coal mining itself, regardless how great the cost of

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west Exploration Co., 350 U. S. 308 (1956). The Service indicated that it would not follow *Bakertown Coal* because, in its view, the terminability of a lease was "fatal to a claim of an economic interest . . . ." Rev. Rul. 77–481, 1977–2 Cum. Bull. 205–206.

the equipment or structures required to mine the coal, is irrelevant to the determination whether a mining company is entitled to a depletion allowance. The costs of mining, like the costs of doing any business, are deductible as business expenses or are depreciable expenses under other parts of the Code, and do not themselves serve to create an economic interest in the minerals in place. *Paragon Jewel, supra,* at 630–631; *Parsons, supra,* at 224–225.[3]

In essence, the Court argues that because respondents own the coal and sell it on the open market, they must have an interest in the mineral in place. Accordingly, so the argument goes, they are entitled to a depletion allowance be-

[3] Nor is it of any consequence that the owners of the land may not be able to take advantage of the percentage allowance provided by § 611 and § 613 even if the lessees are held not to be entitled to it. Under the Code, the owners are entitled to another favorable tax treatment permitting them to consider royalty payments as capital gains. See 26 U. S. C. § 631 (c) (1976 ed., Supp. III). The tax treatment under § 631 (c) serves the same function as the depletion allowance at issue in this case since the amount which the owner considers as capital gain takes into account his adjusted depletion basis in the coal extracted during the year. Thus, the owner is taxed under the favorable capital gain method only on the difference between the amount realized less the adjusted depletion basis, which is the pro rata cost to the taxpayer of the coal extracted. It is clear, therefore, that § 631 (c) permits the owner to recoup his capital investment without impairment under a method substantially akin to cost depletion. It is specious, therefore, to argue that respondents are entitled to a depletion allowance because the owners are denied one since the owners in fact receive a benefit similar to a depletion allowance.

In any event, even if the owners were denied a depletion allowance, this fact would be immaterial. Tax benefits are not entitlements, and it has been specifically noted that the provision of a depletion allowance is solely a matter of legislative grace. *Paragon Jewel,* 380 U. S., at 631; *Parsons,* 359 U. S., at 219; *Bankline Oil,* 303 U. S., at 366; *Anderson* v. *Helvering,* 310 U. S. 404, 408 (1940); *Commissioner* v. *Southwest Exploration Co., supra,* at 312. The only relevant question is whether under the present law respondents qualify under the statute in their own right, and not with respect to the independent tax treatment of the lessors.

cause they were "at risk" with respect to the market. To be sure, neither *Parsons* nor *Paragon Jewel* involved a situation where the mining concern sold in the open market. But obviously, if the relationship to the market was the sole factor of importance, then the opinions in those two cases could have been drastically simplified. The Court could have stated that the marketing system, in and of itself, was such as to preclude the taking of the depletion allowance. This the Court did not do, and I find it peculiar that the Court today chooses to rewrite those cases in light of what it determines to be the more important factor. Indeed, the Court's focus on the marketing scheme for determining whether a depletion allowance should be permitted is far less sensible than the Service's duration-of-the-lease requirement. Market conditions may change, and drastic changes could predictably result in the leases being cancelled. A company with an assured right to mine the coal for a term is not at the mercy of the lessor. Respondents had no such right and their reliance on the market for economic return on their investment is therefore illusory since it is dependent on the lessor's willingness to permit continued extraction of the coal. The fact that in these particular cases this did not happen is beside the point. What matters is that respondents had absolutely no legal right to mine coal beyond the 30-day period provided in the leases. In this light, the Service was well within bounds in concluding that they had not demonstrated an economic interest in the mineral in place.

Of course, the question of what constitutes an economic interest is susceptible to differing interpretations. A 1-day lease would clearly not give the mining company any reasonable expectation of economic interest in the minerals in place. Perhaps equally clear is the fact that such an economic interest would be created by a long-term lease where the lessee has a guaranteed right to mine an area to exhaustion. In the grey area in between, reasonable minds could differ on the nature of the interests possessed. In my mind, the Service

has reasonably interpreted the acknowledged and accepted distinction between economic interest and economic advantage by focusing on the duration of the leasehold interest. In applying the economic-interest requirement, the Service has reasonably insisted upon some enforceable expectation of continuity in mining rights. It may well be that the Service could have concluded otherwise in the present cases. The point, however, is that the Service believes that a lease which is terminable on 30 days' notice without cause is not long enough to create an economic interest. Because I believe that the Service's long-held view, accepted by most lower courts, can hardly be considered to be irrational, I dissent from the Court's opinion which is nothing more than a substitution of what it deems meet and proper for the wholly reasonable views of the Internal Revenue Service as to the meaning of its own regulation and of the statutory provisions. It is also plain enough to see that with the owner recovering his investment tax-free, allowing depletion to these respondents with no more than an ephemeral interest in the coal is precisely the kind of an unjustified deduction, an undeserved windfall, that we should not require contrary to the informed views of the Service.

RODRIGUEZ *v.* COMPASS SHIPPING CO., LTD., ET AL.

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

No. 79–1977. Argued January 12, 1981—Decided May 18, 1981*

Section 33 (b) of the Longshoremen's and Harbor Workers' Compensation Act provides that a longshoreman's acceptance, pursuant to an award in a compensation order, of compensation from his employer for injuries incurred in the course of employment "shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against [a person other than the employer] unless [the longshoreman] shall commence an action against such third person within six months after such award." Petitioner longshoremen, who had been injured aboard ship in the course of their employment, accepted compensation under such an award from their respective stevedore employers. More than six months after the awards, each petitioner commenced an action in Federal District Court against the shipowner involved, alleging that the shipowner had negligently caused his injury. The District Courts granted summary judgments for the shipowners (respondents) on the ground that, because petitioners failed to bring suit within six months of the compensation awards, their causes of action had been assigned to their employers who thereafter had the exclusive right to pursue the third-party claims. The Court of Appeals affirmed.

Held: Section 33 (b) precludes petitioners from pursuing their third-party claims against respondent shipowners. Pp. 602–618.

(a) The language of § 33 (b) is both mandatory and unequivocal. The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required 6-month period, both of which conditions were satisfied in these cases. When such assignment occurs, it transfers to the employer the employee's entire right to commence a third-party action, the words "all right" in § 33 (b) precluding the possibility of only a partial assignment or concurrent rights in the employee and employer to sue in the postassignment period. Although

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*Together with *Perez* v. *Arya National Shipping Line, Ltd.*, and *Barulec* v. *Ove Skou, R. A.*, also on certiorari to the same court (see this Court's Rule 19.4).

petitioners' employers failed to pursue the assigned claims, the statute does not expressly require that they do so nor does it provide for relief to employees should the assigned claims lie dormant. Pp. 602–604.

(b) Nothing in the legislative history shows any intent by Congress to preserve the employee's right to commence a third-party suit after the 6-month period expires. To the contrary, the history indicates that once that period expires, the employer possesses complete control of third-party claims. Moreover, the history forecloses the argument that Congress did not intend an assignment of a third-party claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the longshoreman. The simple standard set forth in § 33 (b)—exclusive control of the cause of action in the employee for six months and in the employer thereafter—protects the interests of both employees and employers and is consistent with the Act's general policy of encouraging the prompt and efficient administration of compensation claims. Pp. 604–612.

(c) There is no evidence that Congress gave the employee the right or procedural mechanism, after assignment, to compel the assignee either to bring a third-party suit or to reassign the cause of action to the employee in response to a formal request to do so. And Congress' failure to amend § 33 (b) in 1972, when the Act was thoroughly reexamined, does not evidence congressional approval of a Court of Appeals' decision holding that, notwithstanding § 33 (b), a longshoreman who has accepted compensation under an award may maintain a third-party action whenever it becomes evident that his employer has no intention to file suit on the assigned claim. Such legislative inaction does not modify the plain terms of § 33 (b). Pp. 612–617.

617 F. 2d 955 and 622 F. 2d 572 and 575, affirmed.

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

Martin Lassoff argued the cause for petitioners. On the brief was *Morris Cizner.*

Joseph T. Stearns argued the cause and filed a brief for respondents Compass Shipping Co., Ltd., et al. *Francis X. Byrn* argued the cause and filed a brief for respondent Ove Skou, R. A.†

†*Harry M. Philo, Arthur Roth, C. Arthur Rutter, Jr.,* and *John H. Klein* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging reversal.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in these three cases[1] is whether a longshoreman may prosecute a personal injury action against a negligent shipowner after his right to recover damages has been assigned to his employer by operation of § 33 (b) of the Longshoremen's and Harbor Workers' Compensation Act (Act), 33 U. S. C. § 901 *et seq.*[2]

Each petitioner is a longshoreman who was injured aboard ship in the regular course of his employment. Each asserted a claim for compensation against the stevedore by whom he was employed. Each accepted compensation from his employer pursuant to an award in a compensation order.[3] More

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[1] Although a single petition for certiorari was filed on behalf of the three petitioners, their lawsuits proceeded independently of one another at earlier stages of the litigation. Three separate District Court opinions were issued. See *Rodriguez* v. *Compass Shipping Co.*, 456 F. Supp. 1014 (SDNY 1978); *Perez* v. *Arya National Shipping Line, Ltd.*, 468 F. Supp. 799 (SDNY 1979); *Barulec* v. *Ove Skou, R. A.*, 471 F. Supp. 358 (SDNY 1979). The Court of Appeals affirmed the decision in *Rodriguez* in a published opinion, 617 F. 2d 955 (1980), and on the same day affirmed the *Perez* and *Barulec* decisions in unpublished orders citing its opinion in *Rodriguez*. See *Barulec* v. *Ove Skou, R. A.*, 622 F. 2d 572 (1980); *Perez* v. *Arya National Shipping Line, Ltd.*, 622 F. 2d 575 (1980).

[2] Section 33 (b) of the Act provides:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." 44 Stat. (part 2) 1440, as amended, 33 U. S. C. § 933 (b).

[3] In the *Rodriguez* and *Barulec* cases, the plaintiffs and their employers agreed to settlements in informal conferences convened by the Office of Workers' Compensation Programs. Although a since-amended regulation required that such settlements be embodied in formal compensation orders, see 20 CFR § 702.315 (a) (1976), no formal orders were entered in these cases. Accordingly, the plaintiffs argued in the lower courts that the assignment provision of § 33 (b) had not been activated because they had not accepted "compensation under an award in a compensation order

than six months later,[4] each commenced an action against the shipowner alleging that the defendant had negligently caused his injury.[5] The District Courts granted motions for sum-

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filed by the deputy commissioner or Board," as required by the statute. The District Courts rejected petitioners' argument, concluding that settlement agreements reached after official informal conferences were equivalent to formal orders for purposes of § 33 (b). See *Rodriguez, supra,* at 1018–1020; *Barulec,* 471 F. Supp., at 360–362. The Court of Appeals agreed. See 617 F. 2d, at 958–960. Although petitioners challenged this ruling in their petition for certiorari, our order granting the petition did not extend to this question. 449 U. S. 818. Accordingly, for purposes of our decision, we assume that their acceptance of compensation operated as an assignment under § 33 (b). Petitioner Perez apparently did not contend below that he had not accepted "compensation under an award" within the meaning of § 33 (b). See 468 F. Supp. 799 (SDNY 1979).

[4] Rodriguez filed suit approximately 32 months, Perez filed suit approximately 15 months, and Barulec filed suit approximately 1 year after accepting compensation. See 617 F. 2d, at 957; *Perez,* 468 F. Supp., at 800; *Barulec,* 471 F. Supp., at 359.

[5] The Act expressly provides that the employee is not required to elect between his right to compensation from his employer and his claim for damages against a third party. Section 33 (a), as set forth in 33 U. S. C. § 933 (a), provides:

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

Section 5 (b) of the Act, as set forth in 33 U. S. C. § 905 (b), provides:

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged

mary judgment filed by the respondent shipowners on the ground that, by reason of the longshoremen's failure to bring suit within six months, their causes of action had been assigned to the stevedores who thereafter had the exclusive right to pursue the third-party claims.[6] The Court of Appeals for the Second Circuit affirmed, 617 F. 2d 955 (1980); 622 F. 2d 572 and 575 (1980),[7] and we granted certiorari to resolve the conflict with the contrary holding of the Court of Appeals for the Fourth Circuit in *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F. 2d 1037 (1980). 449 U. S. 818.[8]

There is no dispute about the parties' respective interests in either (a) a claim asserted by a longshoreman against a shipowner within the 6-month period following acceptance of a compensation award, or (b) a claim asserted by the stevedore against the shipowner after the 6-month period has elapsed. In the former situation, the longshoreman has exclusive control of the action; any recovery in excess of the amount required to pay the cost of litigation and to reimburse the employer for the statutory compensation paid pur-

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in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

[6] In all three cases, although the District Courts rejected the contention that a stevedore's failure to pursue an assigned claim, without more, establishes a conflict of interest resulting in reassignment of the claim to the longshoreman, the plaintiffs were given an opportunity to present evidence establishing a specific conflict of interest, such as that found in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U. S. 525. See *Rodriguez, supra*, at 1023; *Perez*, 468 F. Supp., at 801; *Barulec*, 471 F. Supp., at 362. Despite the opportunity to pursue further discovery, none of the plaintiffs was able to present evidence supporting his conflict-of-interest allegation, and the District Courts accordingly entered summary judgment in favor of the shipowners.

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

[8] The Fourth Circuit issued its opinion in *Caldwell* eight days after the *Rodriguez* opinion was issued by the Second Circuit.

suant to the award belongs entirely to the longshoreman.[9] In the latter situation, the stevedore has exclusive control of the litigation; any net recovery—after the compensation award and the litigation costs have been recouped—must be shared 80% by the longshoreman and 20% by the employer.[10] The question presented by these cases is what right, if any, the longshoreman has against the third-party shipowner if he does not sue within the 6-month period and the employer

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[9] Section 33 (f) of the Act, as set forth in 33 U. S. C. § 933 (f), provides:

"If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

[10] Section 33 (e) of the Act, as set forth in 33 U. S. C. § 933 (e), provides:

"Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

"(1) The employer shall retain an amount equal to—

"(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

"(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

"(C) all amounts paid as compensation;

"(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

"(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer."

fails to do so thereafter. Both the plain language of the statute and the history of its amendments dictate the same answer.

I

Even though the language of § 33 (b) is simple and direct, it is appropriate to begin by quoting our description last Term of the context in which it appears:

> "The Act provides a comprehensive scheme governing an injured longshoreman's rights against the stevedore and shipowner. The longshoreman is not required to make an election between the receipt of compensation and a damages action against a third person, 33 U. S. C. § 933 (a). After receiving a compensation award from the stevedore, the longshoreman is given six months within which to bring suit against the third party. 33 U. S. C. § 933 (b). If he fails to seek relief within that period, the acceptance of the compensation award operates as an assignment to the stevedore of the longshoreman's rights against the third party." *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U. S. 74, 77–78.

As is apparent, § 33 (b) plays a central role in this comprehensive legislative scheme.

The language of § 33 (b) is both mandatory and unequivocal. It provides that the acceptance of compensation under an award "*shall operate* as an assignment to the employer of *all right* of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." 33 U. S. C. § 933 (b) (emphasis supplied).[11]

[11] In *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 269, we described § 33 (b):

"Under § 933 (b), an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoreman's rights against the third party unless the longshoreman sues within six months."

The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required period of six months. These conditions are admittedly satisfied in these cases.[12] The statutory assignment encompasses "all right" of the employee to recover damages from a third party. These words preclude the possibility that the assignment is only a partial one that does not entirely divest the employee of his right to sue, or that the employee and the employer possess concurrent rights to sue in the postassignment period. When the § 33 (b) assignment occurs, it transfers the employee's entire right to commence a third-party action to the employer.

Application of this plain statutory language to the undisputed facts in these cases leads to the conclusion that petitioners may not pursue their claims for damages against the respondent shipowners. Petitioners filed these actions well beyond the 6-month period following acceptance of compensation, and offered no excuse for their delay. Although their employers failed to pursue the assigned claims, the statute does not expressly require that employers pursue third-party claims, nor does it provide for relief to employees should the assigned claims lie dormant. Therefore, petitioners appear to be without a cause of action under the statute.

In an attempt to avoid the conclusion mandated by its plain language, petitioners contend that the Act should be construed either to include an unexpressed condition precedent to any effective assignment—namely, the absence of any possible conflict of interest between the employer-stevedore and the employee—or to grant the employee an implicit right to have the third-party claim reassigned if the employer fails to sue. Normally, these contentions would be foreclosed by the lack of any ambiguity in the statutory language. But the statutory language was also unambiguous in

[12] See nn. 3, 4, *supra*.

1956 when this Court held in *Czaplicki* v. *The Hoegh Silvercloud,* 351 U. S. 525, that § 33 (b) contained a limited exception. It therefore is appropriate to evaluate petitioners' contentions in the light of the relevant legislative history. In making this evaluation, however, we adhere to the rule that, "[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U. S. 102, 108.

II

As originally enacted in 1927, the Act gave an injured longshoreman the right to elect between the certain recovery of compensation from his employer without any proof of fault, or the less certain, but probably more generous, remedy of an action for damages against a negligent third party.[13] The employee's election to accept compensation under the Act effected an immediate assignment to his employer of his cause of action for negligence.[14] Under the original Act, the longshoreman could pursue either remedy but not both, and nothing more than the acceptance of compensation was required to evidence the employee's election. See, *e. g., Toomey* v. *Waterman S.S. Corp.,* 123 F. 2d 718, 721 (CA2 1941).

In 1938, Congress amended the Act to provide that the

[13] As originally enacted, and until 1959, § 33 (a) read:

"If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person." 44 Stat. (part 2) 1440.

[14] The original § 33 (b) provided:

"Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election." 44 Stat. (part 2) 1440.

acceptance of compensation would operate as an assignment only if the payment was "under an award in a compensation order filed by the deputy commissioner." [15] This procedural change was designed to protect the employee from the harsh consequences of an improvident election.[16] Although Congress thereby reduced the danger that an employee would make an election without being advised about its consequences, the 1938 amendment did nothing to mitigate those consequences once the election was made.

In 1956, this Court held that an injured longshoreman could enforce his right of action against a third party, notwithstanding his acceptance of compensation from his employer. *Czaplicki* v. *The Hoegh Silvercloud, supra.*[17] In

[15] From 1938 until 1959, § 33 (b) provided:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person." 52 Stat. 1168.

[16] The amendment's purpose was explained in the House Report:

"The purpose of this amendment is to remove possible cause of complaint regarding the operation of the provision in subdivision (b) of section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tort feasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person . . . to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury." H. R. Rep. No. 1945, 75th Cong., 3d Sess., 9 (1938).

See also *Hernandez* v. *Costa Armatori, S. p. A.*, 467 F. Supp. 1064, 1066 (EDNY 1979), affirmance order, 622 F. 2d 573 (CA2 1980).

[17] In the interim between the 1938 amendment and the decision in *Czaplicki,* this Court issued two decisions of some significance to the present case. In 1946, in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, the Court concluded that an injured longshoreman could pursue a third-party

that case, both the employer and the third party allegedly responsible for the unseaworthy condition that had caused the employee's injury were insured by the Travelers Insurance Co. Because the stevedore had no interest in recovering the compensation payments that had been made by its insurance carrier,[18] and because that carrier would be responsible for both prosecuting and defending any third-party claim, no one other than the injured longshoreman had a sufficient interest in the claim to bring suit. Because of the conflict between the assignee's interest and the interest of the employee, the Court construed the Act to allow the longshoreman to enforce the third-party claim in his own name.[19] The Court

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claim against a shipowner for unseaworthiness, as well as for negligence. In 1956, in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, the Court held that a shipowner found liable to a longshoreman for damages in a third-party action could seek indemnification from the stevedore based upon the stevedore's contractual duty to provide workmanlike service. Congress in 1972 overruled both *Sieracki* and *Ryan Stevedoring*. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S., at 262.

[18] Section 33 (i) of the Act as it read in 1956 provided that a stevedore's compensation insurer was subrogated to the stevedore's rights in the assigned claim. "Travelers, therefore, was the proper party to sue on those rights of action." 351 U. S., at 529. The subrogation provision is now § 33 (h), 33 U. S. C. § 933 (h).

[19] The Court explained its reasoning in detail:

"[T]he injured employee has an interest in his right of action even after it has been assigned. Normally, this interest will not be inconsistent with that of the assignee, for presumably the assignee will want to recoup the payments made to the employee. Since the assignee's right to recoup comes before the employee's interest, and because the assignee is likely to be in a better position to prosecute any claims against a third party, control over the right of action is given to the assignee, who can either institute proceedings for the recovery of damages against a third person, 'or may compromise with such third person either without or after instituting such proceeding.' § 33 (d), 33 U. S. C. § 933 (d). In giving the assignee exclusive control over the right of action, however, we think that the statute presupposes that the assignee's interests will not be in conflict with those of the employee, and that through action of the assignee the

did not hold that no assignment had occurred; rather, it held that under "the peculiar facts" of the case, the election and consequent assignment did not bar the employee's action.[20]

Two years after *Czaplicki,* in *Johnson* v. *Sword Line, Inc.,* 257 F. 2d 541 (1958), the Court of Appeals for the Third Circuit held that a different sort of conflict of interest would also preserve the longshoreman's right to sue a third party after accepting compensation from his employer. This Court had previously held, in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U. S. 124, that a shipowner who was liable to a longshoreman could assert a claim for indemnity against the employer-stevedore. That holding inevitably created a

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employee will obtain his share of the proceeds of the right of action, if there is a recovery. Here, where there is such a conflict of interests, the inaction of the assignee operates to defeat the employee's interest in any possible recovery. Since an action by Travelers would, in effect, be an action against itself, Czaplicki is the only person with sufficient adverse interest to bring suit. In this circumstance, we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally." 351 U. S., at 531.

[20] At several points in the *Czaplicki* opinion, the Court emphasized the limited nature of its holding:

"Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced. In these circumstances, we cannot agree that Czaplicki is precluded by the assignment of his rights of action from enforcing those rights in an action brought by himself." *Id.,* at 530.

"Respondents contend that since Czaplicki did not, under § 33 (a), 33 U. S. C. § 933 (a), elect to proceed against third parties, but rather chose to accept compensation, he can in no event revoke this election and maintain this suit. But, as this Court has already pointed out, 'election not to sue a third party and assignment of the cause of action are two sides of the same coin.' *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, 455. Czaplicki can bring suit not because there has been no assignment, but because in the peculiar facts here there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action. For the same reason, we hold that the election to accept compensation, as a step toward the compensation award, does not bar this suit." *Id.,* at 532–533.

conflict between the stevedore's interest in recouping the compensation awarded to the longshoreman and its interest in avoiding the risk of a substantially larger liability as an indemnitor. The Court of Appeals reasoned that the stevedore's potential liability under the indemnity claim authorized by *Ryan Stevedoring* had the practical effect of enlarging the conflict-of-interest rationale of *Czaplicki*, which had narrowly rested on the peculiar facts of that case, to encompass substantially every case in which a stevedore failed to bring a third-party action.[21] Accordingly, the court concluded that a conflict of interest could be presumed to exist whenever the statutory assignee failed to pursue or to reassign the assigned claim, unless that claim was obviously lacking in merit. See 257 F. 2d, at 544–546.[22]

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[21] The Court of Appeals explained the conflict created by *Ryan Stevedoring*:

"Since any recovery by the injured employee against the shipowner could be recouped in an action by the shipowner against the stevedoring company, the practical effect of the Ryan case is to cause the employer-stevedoring companies, who may anticipate a shipowner's claim to indemnity to resist the making of any payment to the injured stevedore until an award is made, at which time assignment of the cause of action by reason of the provisions of the statute takes place. When the statutory assignment has taken place the employer-stevedoring company will then refuse to bring an action against the shipowner, and by the same token would also refuse to reassign the cause of action to the injured stevedore, for to do so might result in an eventual high award by way of indemnification against the stevedoring company and hence against the insurance carrier." 257 F. 2d., at 545.

The Court of Appeals essentially articulated in greater detail a concern expressed by Justice Black in his dissenting opinion in *Ryan Stevedoring*:

"The employer as an assignee of an employee's claim will know that if he wins a lawsuit, he loses a lawsuit." 350 U. S., at 145.

[22] Cf. *Di Somma* v. *N. V. Koninklyke Nederlandsche Stoomboot*, 188 F. Supp. 292 (SDNY 1960). This expansion of *Czaplicki* was not, however, uniformly accepted by all federal courts. Other courts rejected a broad reading of *Czaplicki* and limited the conflict-of-interest exception

The impact of *Ryan Stevedoring* upon third-party claims assigned to employers by operation of § 33 (b) was brought to the attention of Congress as well. In 1956, a House Subcommittee conducted hearings on proposed legislation that ultimately evolved into the 1959 amendments to the Act.[23] One of the bills considered by the Subcommittee was H. R. 5357, which provided, among other things, that an employee could commence a third-party suit within six months after accepting compensation, and that an employer who successfully pursued an assigned third-party claim was entitled to keep one-third of any net recovery. As explained by Congressman Zelenko, the bill's author, these provisions were designed to mitigate the problems identified in Justice Black's dissenting opinion in *Ryan Stevedoring*.[24] Other witnesses

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to the peculiar situation presented in that case. See, *e. g., Sabol* v. *Merritt Chapman & Scott Corp.*, 241 F. 2d 765 (CA2 1957).

[23] See Hearings before a Special Subcommittee of the House Committee on Education and Labor on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act, 84th Cong., 2d Sess. (May 23, 24, and June 11, 1956) (House Hearings).

[24] Congressman Zelenko opened his testimony by inserting into the record a copy of the *Ryan Stevedoring* decision, which he asserted "endangered or seriously weakened" the right of longshoremen to recover from third parties. See House Hearings, at 1. Congressman Zelenko indicated that Justice Black's dissent accurately summarized the damaging effects of that decision. *Id.*, at 12. He went on to explain:

"H. R. 5357 avoids and eliminates the circumstances indicated by Judge Black where to the detriment of the employee, the employer under the present section and by reason of the Ryan decision may decide not to proceed with the third-party action." *Ibid.*

Later, in response to questioning by members of the Subcommittee, Congressman Zelenko explained the connection between H. R. 5357 and *Ryan Stevedoring* in more detail:

"I hope I have answered your question by trying to show what the situation in the Ryan case would be. That is the factual and the legal situation, and assuming we had the Ryan case pending at this time, the employer would lose any interest in proceeding with it, and the longshoreman would suffer. That is what Judge Black was talking about. Under

appearing before the Subcommittee also expressed concern about the conflict-of-interest problem created by *Ryan Stevedoring* and endorsed H. R. 5357 as an effective solution to that problem.[25]

In 1959, Congress acted to remedy the problems created by the potential conflict between the interests of the employer and the employee in prosecuting third-party claims.[26] Its solution was not to create or to define an exception to the assignment by operation of law. Rather, Congress substantially adopted the central provisions of the Zelenko bill by amending § 33 (b) to postpone the assignment by operation of law until six months after the acceptance of compensation under an award, and by amending § 33 (e) to allow an employer to retain one-fifth of the net proceeds of its suc-

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H. R. 5357 both parties go in there and if the longshoreman chooses to go ahead, he does so; and if he does not go ahead, the employer starts a lawsuit in his own behalf only after the longshoreman has had the opportunity to do so, and he does not want to avail himself of it, then they give the employer this right of assignment automatically, so he gets the same measure of protection." House Hearings, at 15.

The Zelenko bill also provided an added incentive for employers to sue by giving them one-third of any excess recovery. See, *e. g., id.*, at 12–13, 19, 43–44, 102.

[25] See, *e. g., id.*, at 28, 44–45, 61–62, 72, 103–105, 106–107, 110, 115, 124–125. Cf. *id.*, at 83–84, 92–93. It should be noted that at the time of these hearings *Czaplicki* was pending before this Court. Czaplicki's attorneys participated in the hearings, and described to the Subcommittee the facts of *Czaplicki* and the Court of Appeals' decision in that case. They also informed the Subcommittee that this Court had granted Czaplicki's petition for certiorari, and that the case had been argued. See House Hearings, at 59, 62.

[26] The House Report on a predecessor of the bill that amended § 33 (b) in 1959 stated:

"Developments under the act which concerned the Subcommittee on Safety and Compensation have been . . . the automatic assignment of a third-party cause of action to the employer and the refusal by the employer to pursue the third-party claim because of a conflict of interest . . . ." H. R. Rep. No. 229, 86th Cong., 1st Sess., 3 (1959).

cessful third-party action.[27] The effect of the 6-month provision, of course, was to give the longshoreman an unqualified right to bring a third-party action during the 6-month period. If his financial circumstances made it imperative that he accept a prompt settlement of his compensation claim, he could do so without forfeiting his right to seek a more liberal recovery from a responsible third party. Moreover, by bringing his own action, the longshoreman could avoid the risk that his employer's potential conflict of interest—or possibly erroneous evaluation of the merits of the claim—might result in its abandonment.[28] The amendment to § 33 (e) provided an additional incentive to the employer to sue after assignment of the claim by giving him a share in any excess recovery.

Nothing in the 1959 amendments purports to preserve the employee's right to commence a third-party suit after the 6-month period expires. Although the amendments encourage employers to pursue assigned claims, they do not qualify the assignee's control of the cause of action after the assignment takes place. To the contrary, the legislative history indi-

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[27] At the same time, Congress amended § 33 (a) to provide expressly that the employee need not elect between his statutory right to compensation from his employer and his claim against a third party. See n. 5, *supra*.

[28] The Senate Report contained the following evaluation of the bill amending § 33 (b):

"The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. . . . The committee believe that in theory and practice this is [a] sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and rights of all who are involved.

". . . In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action." S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959).

cates that once the 6-month period expires, the employer possesses complete control of third-party claims.[29]

This history forecloses the argument that Congress did not intend an assignment of a third-party claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the longshoreman. The statutory language provides a different and clearly defined solution to the conflict-of-interest problem that had been created by *Ryan Stevedoring*.[30] Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control. The simple standard set forth in § 33 (b) protects the interests of both employees and employers, and is consistent with the general policy of the Act to encourage the prompt and efficient administration of compensation claims. See *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U. S. 268, 282.

III

Although the assignment at the end of the 6-month period occurs automatically, the Court of Appeals for the Fourth Circuit has held that the employee retains a right after assignment to compel the assignee either to bring a third-party suit or to reassign the cause of action to the employee in response to a formal request to do so. See *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F. 2d 1037 (1980). The court "readily found" the procedural mechanism for implementing this nonstatutory right to a reassignment, *id.*, at 1046, but we

[29] See *id.*, at 2–3; H. R. Rep. No. 229, *supra*, at 3–4. See also House Hearings, at 15, 19–20, 44–45.

[30] Whether the statutory language provides the exclusive solution for unusual conflict-of-interest problems, such as that identified in *Czaplicki*, is a question that is not presented on the facts of these cases. We accordingly do not decide whether, or to what extent, *Czaplicki* survived the 1959 amendments.

find no evidence that Congress created either the substantive right itself or the procedural rights that the court discerned.

The predicate for the Fourth Circuit's analysis was an assumption that Congress did not intend to allow the longshoreman to lose his rights against a third party simply because (a) he failed to take any action within six months and (b) his employer decided not to sue the third party thereafter.[31] To avoid the "practical problem" presented in such a situation, the court fashioned a "solution" that the Act "does not specifically provide." *Id.*, at 1045. We are persuaded that the reason Congress did not specifically provide the solution which the court readily found is that Congress did indeed intend to require the employee either to act promptly or to accept the consequences of an assignment of

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[31] "Ordinarily, therefore, it is likely that the interests of both longshoreman and assignee in having their substantive rights pursued and of the third person in facing a single action will be achieved under LHWCA.

"But LHWCA does not yet deal directly with certain practical problems that may interrupt or wrench these expectations. These can arise whenever by design or inadvertence the longshoreman fails during the statutory period to prosecute the claim while the right of action is exclusively his. Following this failure, the assignee may, for a variety of reasons, not then itself prosecute the claim. It may not consider a claim thought meritorious by the longshoreman to be sufficiently so to warrant the expense of litigation. It may have a specific conflict of interest that militates against prosecuting the claim. It may simply be dilatory to the point that the claim is threatened by a limitations bar. Under all of these, and to precisely the same degree under all, the longshoreman faces a practical problem for which LHWCA provides no direct solution: forcing action by the assignee, or somehow retrieving the right of action. While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's substantive right might be lost simply through inaction of the assignee until the claim is barred from prosecution by anyone. What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason." 618 F. 2d, at 1045.

his claim to the employer.[32] One of the consequences of such an assignment is the risk that the employer will choose not to sue. The comprehensive character of the procedures outlined in the Act precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress expressly addressed.[33] The fact that parties sometimes fail to assert meritorious claims within the period authorized by law is not a sufficient reason for refusing to enforce an unequivocal statutory bar.

IV

Finally, relying upon *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S. 256, petitioners argue that Congress' failure to amend § 33 (b) in 1972, when the Act was thoroughly re-examined, evidences implicit congressional approval of the decision of the Court of Appeals for the District of Columbia Circuit in *Potomac Electric Power Co.* v. *Wynn,* 120 U. S. App. D. C. 13, 343 F. 2d 295 (1965) (*per curiam*). In that case, the court held that a longshoreman who has accepted compensation under an award may maintain a third-party action whenever it becomes evident that his employer has no intention to file suit on the assigned claim. *Id.,* at 16, 343 F. 2d, at 298. See also *Joyner* v. *F & B Enterprises, Inc.,* 145 U. S. App. D. C. 262, 264, 448 F. 2d

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[32] The District Court in the *Perez* case aptly evaluated the so-called "problem" created by an employer's failure to sue after statutory assignment of the employee's cause of action:

"[W]hatever the consequences of a failure to sue, an employee who fails to sue within six months of accepting compensation under an award . . . is as responsible for that failure as an employer who neglects, for whatever reason, to pursue an assigned claim." 468 F. Supp., at 802.

[33] "Consequently, as we have done before, we must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act . . . .' *Northeast Marine Terminal Co.* v. *Caputo,* 432 U. S., at 278–279." *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S., at 271.

1185, 1187 (1971). The court construed the 1959 amendments as enlarging the employee's protection, and considered the rationale of *Czaplicki* to apply whenever a potential conflict of interest is present. In its judgment, the employer's failure to sue was sufficient evidence of a conflict to justify an independent action by the employee, notwithstanding the assignment provisions in the Act.[34] 120 U. S. App. D. C., at 16, 343 F. 2d, at 298.

For reasons already stated, we are satisfied that that opinion did not correctly construe the 1959 amendments.[35] It is true that Congress did not expressly disclaim that case in 1972, but that legislative inaction does not modify the plain terms of the 1959 amendments. Nor did Congress expressly endorse the *Wynn* decision. More importantly, the statu-

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[34] Petitioners suggest that such an automatic rule is justified because of a stevedore's normal reluctance to file suit against a customer. However, in rejecting a similar conflict-of-interest argument, the District Court in *Hernandez* v. *Costa Armatori, S. p. A.*, 467 F. Supp., at 1067–1068, identified the flaw in this reasoning:

"[T]his is not the kind of matter that Congress could have viewed as sufficient to invalidate the assignment. Such a conflict has always been inherent in the statutory scheme. Presumably every stevedore would prefer not to give offense to its customer.

. . . . . .

"Plaintiff has thus referred only to 'conflicts of interest' of which Congress was aware in enacting the statute. To allow them as exceptions to the statutory assignment would be to read Section 933 (b) out of the Act."

In addition, where, as is often the case, the stevedore's insurer is subrogated to the stevedore's interest in an assigned claim, see 33 U. S. C. § 933 (h), this potential conflict probably will not be of much significance. The insurer is unlikely to sacrifice a meritorious claim for fear of antagonizing a customer of the stevedore.

[35] Nor did it correctly construe *Czaplicki*. As discussed *supra*, at 605–607, that decision was narrowly drawn to redress certain inequities that arose from "the peculiar facts" of that case. *Czaplicki* did not hold that the § 33 (b) assignment could be avoided whenever an employer failed to pursue an assigned claim.

tory interpretation announced in *Wynn* can hardly be compared to the well-established rule of maritime law at issue in *Edmonds*. There is no reason to believe that "Congress has relied upon conditions" that *Wynn* created. *Edmonds, supra,* at 273.[36] In fact, the statutory changes adopted in 1972 are entirely consistent with our interpretation of § 33 (b). Moreover, those changes remind us that one of the purposes of the Act is to minimize the need for litigation as a means of providing compensation for injured workmen. See *Bloomer,* 445 U. S., at 86.

Three of the 1972 Amendments are pertinent. First, the level of benefits was substantially increased, thereby increasing the likelihood that the statutory compensation recoverable without proof of fault would be adequate.[37] Second, the shipowner's right to seek indemnity from the stevedore under *Ryan Stevedoring* was eliminated, thereby removing a category of litigation from the courts, placing more definite limits on the stevedore's insurance costs, and removing a potential source of conflict between the interests of employers and employees.[38] Third, the shipowner's nearly absolute liability for unseaworthiness was eliminated, thereby further narrowing the area of potential litigation and increasing the relative importance of statutory awards as the favored method of compensation.[39] See generally *Scindia Steam Navigation Co.*

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[36] Indeed, shortly after *Wynn* was decided, the Fifth Circuit concluded that, while *Czaplicki* was still good law, it should be narrowly applied to specific conflicts of interest identified on a case-by-case basis. See *McClendon* v. *Charente Steamship Co.,* 348 F. 2d 298, 301–303 (1965). The court expressly declined to adopt the automatic rule applied in *Wynn*. See 348 F. 2d, at 303.

[37] See *Director, Office of Workers' Compensation Programs* v. *Rasmussen,* 440 U. S. 29, 32–35.

[38] See *Edmonds* v. *Compagnie Generale Transatlantique, supra,* at 262.

[39] In its explanation of the reasons for eliminating the unseaworthiness remedy, the House Report accompanying the 1972 Amendments stated:

"The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased sub-

v. *De Los Santos, ante,* at 164–165. In making these changes, Congress necessarily balanced the conflicting interests of the vessel owner, the stevedore, and the longshoreman. As with other problems of interpreting the intent of Congress in fashioning various details of this legislative compromise, the wisest course is to adhere closely to what Congress has written.[40] The meaning of § 33 (b) is plain and should be respected.

V

In sum, we conclude that the Court of Appeals in these cases correctly held that § 33 (b) precludes petitioners from pursuing their third-party claims. Whatever the continued validity of our decision in *Czaplicki,* a question we need not and do not decide today,[41] these cases do not involve "the

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stantially in recent years and that much of the financial resources which could be better utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action." H. R. Rep. No. 92–1441, p. 5 (1972).

[40] "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' Our task is to interpret what Congress has said . . . ." *Director, Office of Workers' Compensation Programs* v. *Rasmussen, supra,* at 47.

[41] As our analysis indicates, the 1959 and 1972 Amendments have substantially undercut the basis for the *Czaplicki* exception to § 33 (b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his rights against a third party where the employer failed to sue due to a conflict of interest. 351 U. S., at 532–533. After the 1959 amendments, there is such a procedure: the employee may simply file his own third-party suit within six months after accepting compensation.

Similarly, to the extent that *Czaplicki* and its progeny sought to

peculiar facts" on which *Czaplicki* was based. Rather, petitioners essentially have relied upon conflicts inherent in the statutory scheme and in the relationships among longshoremen, stevedores, and shipowners. The notion adopted in some post-*Czaplicki* decisions that a conflict of interest may be presumed whenever an employer does not sue on an assigned claim is simply untenable in light of the plain statutory language and the history of the 1959 and 1972 Amendments. We leave for another day the question whether an assignment under § 33 (b) will bar a longshoreman's third-party action if there is specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended § 33.

The judgments of the Court of Appeals are

Affirmed.

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mitigate the conflict of interest created by *Ryan Stevedoring*, the 1972 Amendments eliminate the need for a judicially created exception to § 33 (b):

"[B]efore the [1972] Amendments, the longshoreman and the stevedore had adverse interests in the third-party action: if the longshoreman were successful in that suit, the shipowner frequently would attempt to require the stevedore to make payment of amounts due the longshoreman. With the abolition of the shipowner's cause of action, the stevedore and the longshoreman had a common interest in the longshoreman's recovery against the shipowner." *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U. S. 74, 84–85.

See also *Valentino* v. *Rickners Rhederei, G. M. B. H.*, 552 F. 2d 466, 470 (CA2 1977).

FLYNT ET AL. *v.* OHIO

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 80–420. Argued March 24, 1981—Decided May 18, 1981

In a prosecution charging petitioners with disseminating obscenity in violation of Ohio law, the trial court granted their motions to dismiss the complaints on the ground that they had been subjected to selective and discriminatory prosecution in violation of the Equal Protection Clause of the Fourteenth Amendment. The Ohio Court of Appeals reversed and remanded the case for trial, finding the evidence insufficient to support the allegations of discriminatory prosecution. The Ohio Supreme Court affirmed.

Held: Because the Ohio Supreme Court's decision was not a final judgment within the meaning of 28 U. S. C. § 1257, the writ of certiorari previously granted by this Court is dismissed for want of jurisdiction. In the context of a criminal prosecution, finality of judgment is normally defined by the imposition of a sentence. Here there has been no finding of guilt and no sentence imposed. Nor is the Ohio Supreme Court's decision a final judgment within any of the four exceptions to the general rule identified in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469. Resolution of the question whether the obscenity prosecution of petitioners was selective or discriminatory in violation of the Equal Protection Clause can await final judgment in the state criminal proceeding without any adverse effect upon important federal interests.

Certiorari dismissed. Reported below: 63 Ohio St. 2d 132, 407 N. E. 2d 15.

Herald Price Fahringer argued the cause and filed briefs for petitioners.

Bruce A. Taylor argued the cause for respondent. With him on the brief was *Jose Feliciano.*

Andrew J. Levander argued the cause *pro hac vice* for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree* and *Acting Assistant Attorney General Keeney.*

PER CURIAM.

On July 14, 1976, criminal complaints were issued against petitioners charging them with disseminating obscenity in violation of Ohio Rev. Code Ann. § 2907.32 (1975). The Municipal Court granted petitioners' motions to dismiss the complaints on the ground that petitioners had been subjected to selective and discriminatory prosecution in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals of Ohio reversed, finding the evidence insufficient to support petitioners' allegations of selective and discriminatory prosecution. The case was remanded for trial. The Ohio Supreme Court affirmed. 63 Ohio St. 2d 132, 407 N. E. 2d 15 (1980). We granted certiorari. 449 U. S. 1033 (1980). Because the decision of the Ohio Supreme Court was not a final judgment within the meaning of 28 U. S. C. § 1257, we dismiss the writ for want of jurisdiction.

Consistent with the relevant jurisdictional statute, 28 U. S. C. § 1257, the Court's jurisdiction to review a state-court decision is generally limited to a final judgment rendered by the highest court of the State in which decision may be had. *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 476–477 (1975). In general, the final-judgment rule has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124 (1945). Applied in the context of a criminal prosecution, finality is normally defined by the imposition of the sentence. *Parr* v. *United States,* 351 U. S. 513, 518 (1956); *Berman* v. *United States,* 302 U. S. 211, 212 (1937); see also *Whitus* v. *Georgia,* 385 U. S. 545, 547 (1967). Here there has been no finding of guilt and no sentence imposed.

The Court has, however, in certain circumstances, treated state-court judgments as final for jurisdictional purposes al-

though there were further proceedings to take place in the state court. Cases of this kind were divided into four categories in *Cox Broadcasting Corp.* v. *Cohn, supra,* and each category was described. We do not think that the decision of the Ohio Supreme Court is a final judgment within any of the four exceptions indentified in *Cox.*

In the first place, we observed in *Cox* that in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved. There was thus no probability of piecemeal review with respect to federal issues. Here, it appears that other federal issues will be involved in the trial court, such as whether or not the publication at issue is obscene.

Second, it is not even arguable that the judgment involved here falls within any of the first three categories identified in the *Cox* opinion, and the argument that it is within the fourth category, although not frivolous, is unsound. The cases falling within the fourth exception were described as those situations:

> "[w]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state

courts for purposes of the state litigation." 420 U. S., at 482–483.

Here, it is apparent that if we reversed the judgment of the Ohio Supreme Court on the federal defense of selective enforcement, there would be no further proceedings in the state courts in this case. But the question remains whether delaying review until petitioners are convicted, if they are, would seriously erode federal policy within the meaning of our prior cases. We are quite sure that this would not be the case and that we do not have a final judgment before us.

The cases which the *Cox* opinion listed as falling in the fourth category involved identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in the state courts. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974); *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555 (1963); *Construction Laborers* v. *Curry,* 371 U. S. 542 (1963). Here there is no identifiable federal policy that will suffer if the state criminal proceeding goes forward. The question presented for review is whether on this record the decision to prosecute petitioners was selective or discriminatory in violation of the Equal Protection Clause. The resolution of this question can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth exception to swallow the rule. Any federal issue finally decided on an interlocutory appeal in the state courts would qualify for immediate review. That this case involves an obscenity prosecution does not alter the conclusion. Obscene material, properly defined, is beyond the protection of the First Amendment. *Miller* v. *California,* 413 U. S. 15, 23–24 (1973). As this case comes to us, we are confronted only with a state effort to prosecute an unprotected activity, the dissemination of obscenity. The obscenity issue has not yet been decided in the state courts, and no federal policy bars a trial on that question. There is no

reason to treat this selective prosecution claim differently than we would treat any other claim of selective prosecution.

Accordingly, the writ is dismissed for want of jurisdiction.

So ordered.

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

I believe that a criminal trial of the petitioners under this Ohio obscenity law will violate the Constitution of the United States. See, *e. g., Wood* v. *Georgia,* 450 U. S. 261, 275 (opinion of BRENNAN, J.); *ibid.* (opinion of STEWART, J.); *Sewell* v. *Georgia,* 435 U. S. 982, 988 (dissenting opinion); *Splawn* v. *California,* 431 U. S. 595, 602 (STEWART, J., dissenting). It is clear to me, therefore, that "identifiable . . . constitutional polic[y]" will be "undermined by the continuation of the litigation in the state courts." *Ante,* at 622.

Accordingly, I think that under the very criteria discussed in the opinion of the Court, the judgment before us is "final for jurisdictional purposes." *Ante,* at 620. Believing that the Ohio trial court acted correctly in dismissing the complaints, and that the state appellate courts were in error in overturning that dismissal, I would reverse the judgment.

JUSTICE STEVENS, dissenting.

The decision of a federal question by the highest court of the State is final within the meaning of 28 U. S. C. § 1257 "if a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 483. In the Court's view, this ground does not support reviewability in this case because the Court can discern "no identifiable federal policy that will suffer if the state criminal proceeding goes forward." *Ante,* at 622. In my opinion, the interest in protecting magazine publishers from being prosecuted criminally because state officials or their constituents are offended by the content of an admittedly

nonobscene political cartoon is not merely "an identifiable federal policy"; it is the kind of interest that motivated the adoption of the First Amendment to the United States Constitution.

Petitioners publish Hustler, a national magazine. The trial court dismissed the criminal complaint against them after hearing evidence tending to establish that Ohio's decision to bring this prosecution was motivated by hostility to a political cartoon that is constitutionally indistinguishable from the rather trite depiction held to be protected by the First Amendment in *Papish* v. *University of Missouri Curators,* 410 U. S. 667. The Ohio Court of Appeals reversed, and that court's decision was affirmed by the Supreme Court of Ohio over the dissent of Justice Brown.

Because the Court has decided today to dismiss the writ of certiorari for want of jurisdiction, I will not comment on the merits beyond indicating that they concern the standards that a court must apply in determining whether an exercise of prosecutorial discretion has been based on an impermissible criterion such as race, religion, or the exercise of First Amendment rights. Because I place a high value on the federal interest in preventing such prosecutions and because the reinstatement of this criminal complaint may seriously erode that federal interest, I respectfully dissent.

BELTRAN *v.* MYERS, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF HEALTH, ET AL.

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

No. 80–5303. Argued March 24, 1981—Decided May 18, 1981

Held: The Court of Appeals' decision upholding, as not in conflict with governing federal law, a California statute that denies Medicaid benefits to "medically needy" persons because of their previous transfers of assets for less than full consideration is vacated, and the case is remanded. After this Court's grant of certiorari, Congress amended the Social Security Act to alter significantly the federal standards governing state Medicaid plans with respect to transfer-of-asset rules. This change, which may require some modification of the California rule, makes it inappropriate for this Court to decide the merits of the underlying dispute as considered by the Court of Appeals. Instead, the recent statutory amendment requires reconsideration of the decision below by the Court of Appeals.

622 F. 2d 1304, vacated and remanded.

Gill Deford argued the cause for petitioner. With him on the briefs was *Neal S. Dudovitz.*

Richard J. Magasin, Deputy Attorney General of California, argued the cause for respondents. With him on the brief were *George Deukmejian,* Attorney General, *Thomas E. Warriner,* Assistant Attorney General, and *Anne S. Pressman* and *Donald A. Robinson,* Deputy Attorneys General.*

PER CURIAM.

We granted a writ of certiorari, 449 U. S. 951 (1980), to review a decision of the United States Court of Appeals for the Ninth Circuit, holding that California's "transfer-of-assets"

**Robert Abrams,* Attorney General of New York, *Shirley Adelson Seigel,* Solicitor General, *Clifford A. Royael,* and *Stephen H. Sachs,* Attorney General of Maryland, filed a brief for the Attorney General of New York et al. as *amici curiae* urging affirmance.

statute applicable to "medically needy" recipients of Medicaid benefits does not conflict with governing federal law. *Dawson* v. *Myers*, 622 F. 2d 1304 (1980). Petitioner is an individual considered "medically needy" under California's Medicaid plan,[1] who represents the class of all such persons who have been denied Medicaid benefits because of previous transfers of assets for less than full consideration.[2] She argues that this exclusion is impermissible because it is based on a rule applicable only to "medically needy" recipients, and could not apply under federal law to "categorically needy" recipients.[3]

After our grant of certiorari on November 3, 1980, Congress passed § 5 of Pub. L. 96–611, 94 Stat. 3567 (Dec. 28, 1980)

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[1] "Medically needy" persons are included in the categories of Medicaid recipients—aged, blind, disabled, or dependent children—which are derived from Social Security welfare programs. They have income levels, however, that are too high to qualify for regular income assistance under the Supplemental Security Income (SSI) or Aid to Families with Dependent Children programs, and for this reason are distinguished from "categorically needy" recipients. 42 CFR § 435.4 (1980).

[2] The California rule is set out in Cal. Welf. & Inst. Code Ann. § 14015 (West 1980). This statute provides in part:

"[A]ny transfer of the holdings by gift or, knowingly, without adequate and reasonable consideration, shall be presumed to constitute a gift of property with intent to qualify for assistance and such act shall disqualify the owner for further aid for a period determined under standards established by the director, and in no event for less than half of the period that the capital value of the transferred property would have supplied the person's maintenance needs based on his circumstances at the time of his transfer plus the cost of any needed medical care."

[3] See n. 1, *supra*. The categorically needy receive Medicaid benefits merely by virtue of their eligibility for income assistance under the SSI or AFDC programs. Since that eligibility has not, until recently, been conditioned on a person's retention of existing assets, States could not apply a transfer-of-assets disqualification to the categorically needy.

Petitioner's claim here is that she must be accorded the same treatment under the terms of 42 U. S. C. §§ 1396a (a)(10)(C), (17)(B). See also 42 CFR § 435.401 (1980).

(the "Boren-Long Amendment"), which made material changes in the law in this area. This section creates a presumption that assets disposed of for less than full consideration within the preceding 24 months should be included in the resources of an applicant for SSI benefits. The applicant can overcome this presumption with "convincing evidence to establish that the transaction was exclusively for some . . . purpose" other than establishing eligibility. § 5 (a) (amending § 1613 of the Social Security Act, 42 U. S. C. § 1382b). This section goes on to allow state Medicaid plans to apply similar rules to Medicaid recipients—including both the categorically needy and the medically needy. Pub. L. 96–611, § 5 (b), 94 Stat. 3568 (amending § 1902 of the Social Security Act, 42 U. S. C. § 1396a). It states that if the state plan includes a transfer-of-assets rule, it shall specify a procedure for implementing the denial of benefits "which, except as provided in paragraph (2), is not more restrictive than the procedure specified" for SSI. Paragraph (2) provides that where the uncompensated value of the disposed-of resources exceeds $12,000, the States may impose a period of ineligibility exceeding 24 months, as long as this period bears "a reasonable relationship to such uncompensated value."

In sum, it would appear that in the future the States will be permitted to impose transfer-of-assets restrictions generally similar to that of California. This change will take effect on July 1, 1981, Pub. L. 96–611, § 2, 94 Stat. 3567—a matter of weeks from now. This raises the question whether it is appropriate for the Court to decide the merits of the underlying dispute as considered by the Court of Appeals.

We have determined that the change caused by the recent statutory amendment requires reconsideration of the decision below by the Court of Appeals. Because of the statutory change, the federal standards governing state plans with respect to transfer-of-asset rules have been altered significantly. Although it is fair to say that Congress generally

endorsed rules like California's, the detailed provisions recently enacted may require some changes in the California rule. We note in particular that California seems to include the residence of the claimant among the assets that may not be given away without a corresponding loss in Medicaid coverage.[4] Under the Boren-Long Amendment, however, arguably such an asset must be excluded.[5] Petitioner should have the opportunity to argue the validity of the California law under the new federal law—an issue that was not addressed by the parties in this Court.

We vacate the decision below, and remand this case to the

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[4] Petitioner herself was penalized by California for a gift of her home to relatives.

[5] The amendment to § 1613 of the Social Security Act, 42 U. S. C. § 1382b, in § 5 (a) of Pub. L. 96–611, 94 Stat. 3567, provides for consideration in the SSI program of any disposed of resources "(but subject to the exclusions under subsection (a))." Subsection (a) of § 1613, 42 U. S. C. § 1382b (a), provides for exclusion from consideration of a claimant's home, household effects, and certain other items. If the new law has the effect of allowing uncompensated disposal of these excluded items without corresponding reductions in SSI benefits, it may also have the effect of requiring States to ignore transfer of these same assets in administering Medicaid. See Pub. L. 96–611, § 5 (b), 94 Stat. 3568 (providing that the state plan's "procedure" cannot be more restrictive than the rules applicable to SSI, except that the period of ineligibility may be longer than 24 months if the value of the assets exceeds $12,000). See also 126 Cong. Rec. 33928 (1980) (Sen. Long) ("Generally, State [Medicaid] rules could not be more restrictive than the Federal SSI rule except that the period of disqualification could be longer than 24 months in cases where a very large disposal of assets—more than $12,000—is involved"). But see Senate Committee on Finance, Spending Reductions: Recommendations Required by the Reconciliation Process in Section 3 (a) (15) of H. Con. Res. 307, the First Budget Resolution for Fiscal Year 1981, 96th Cong., 2d Sess., 20 (Comm. Print 1980) (analysis of an identical amendment of the SSI statute included in S. 2885, 96th Cong., 2d Sess., § 511 (1980)) ("the committee amendment would require that *any resources* which an individual has given away or sold for less than fair market value would still be considered as available for his support, during the 2 years following the transfer of the asset") (emphasis added).

Court of Appeals for reconsideration of its decision in light of the recent statutory change.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL join, concurring in the judgment.

For the reasons stated by the United States Court of Appeals for the Second Circuit in *Caldwell* v. *Blum,* 621 F. 2d 491 (1980), cert. pending, No. 79–2034,[1] the application of California's "transfer-of-assets" rule to the medically needy class members prior to the effective date of the Boren-Long Amendment, Pub. L. 96–611, 94 Stat. 3567, is prohibited by existing federal law. The judgment of the Court of Appeals for the Ninth Circuit in this case must therefore be set aside. On remand, the Court of Appeals should, of course, consider the impact of the statutory change on the class members' future rights, but it also should determine what relief is appropriate to remedy the past violations.[2] Cf. *Quern* v. *Jordan,* 440 U. S. 332.

Accordingly, I concur in the Court's decision to vacate the judgment of the Court of Appeals and to remand this case for further proceedings.

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[1] See also *Fabula* v. *Buck,* 598 F. 2d 869 (CA4 1979); *Robinson* v. *Pratt,* 497 F. Supp. 116 (Mass. 1980), appeal dism'd, vacated and remanded, 645 F. 2d 89 (CA1 1981); *Scarpuzza* v. *Blum,* 73 App. Div. 2d 237, 426 N. Y. S. 2d 505 (1980). Cf. *Blum* v. *Caldwell,* 446 U. S. 1311 (MARSHALL, J., in chambers).

[2] In addition to declaratory and injunctive relief, the plaintiffs seek "reimbursement for those amounts which they had been forced to pay because of the state's transfer rule." *Dawson* v. *Myers,* 622 F. 2d 1304, 1309 (CA9 1980). The Boren-Long Amendment clearly does not control this claim for reimbursement for sums paid by the plaintiffs in the past.

TEXAS INDUSTRIES, INC. *v.* RADCLIFF MATERIALS, INC., ET AL.

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

No. 79–1144. Argued March 3, 1981—Decided May 26, 1981

Petitioner and respondents manufacture and sell ready-mix concrete. A purchaser of concrete from petitioner filed a civil action against petitioner in Federal District Court, alleging that petitioner and certain unnamed firms had conspired to raise concrete prices in violation of § 1 of the Sherman Act, and seeking treble damages under § 4 of the Clayton Act. After learning through discovery that respondents were the alleged co-conspirators, petitioner filed a third-party complaint against them, seeking contribution should it be held liable in the original action. The District Court dismissed the third-party complaint for failure to state a claim upon which relief could be granted, holding that federal law does not allow an antitrust defendant to recover in contribution from alleged co-conspirators. The Court of Appeals affirmed.

Held: There is no basis in federal statutory or common law for allowing federal courts to fashion the right to contribution urged by petitioner. Pp. 634–647.

(a) Congress neither expressly nor implicitly intended to create such a right to contribution. Nothing in the Sherman and Clayton Acts or in their legislative history refers to contribution, and there is nothing to indicate any congressional concern with softening the blow on joint wrongdoers. Rather, the very idea of treble damages reveals an intent to punish past, and deter future, unlawful conduct, not to ameliorate the liability of joint wrongdoers. Pp. 639–640.

(b) The federal courts are not empowered to fashion a federal common-law rule of contribution among antitrust wrongdoers. Contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law. Moreover, even though Congress may have intended to allow federal courts to develop governing principles of law in the common-law tradition with regard to substantive violations of the Sherman Act, it does not follow that Congress intended to give courts as wide discretion in formulating remedies to enforce the Act or the kind of relief sought through contribution. There is nothing in the Act itself, in its legislative history, or in the overall

legislative scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted. Pp. 640–646.

(c) Regardless of the merits of the conflicting arguments on the complex policy questions presented by petitioner's claimed right to contribution, this is a matter for Congress, not the courts to resolve. Pp. 646–647.

604 F. 2d 897, affirmed.

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

Benjamin R. Slater, Jr., argued the cause for petitioner. With him on the briefs was *William J. Hamlin.*

Dando B. Cellini argued the cause for respondents. With him on the brief were *James A. Babst, Ewell P. Walther, Jr.*, and *Stephen H. Kupperman.*

Solicitor General McCree argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Assistant Attorney General Litvack, Deputy Solicitor General Wallace, Stephen M. Shapiro, Barry Grossman,* and *Bruce E. Fein.**

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*Briefs of *amici curiae* urging reversal were filed by *Eugene Driker* for Borman's Inc.; by *Denis McInerney, William T. Lifland,* and *Allen S. Joslyn* for CPC International Inc.; by *Cloyd R. Mellott, J. Gary Kosinski, Ray C. Stoner, Michael R. Borasky, James M. Nicholson,* and *William E. Craig* for Georgia-Pacific Corp. et al.; by *Harold F. Baker, Alan M. Wiseman,* and *Gaspare J. Bono* for Mead Corp.; and by *Leslie H. Arps, Kenneth A. Plevan, John M. Nannes, Richard M. Schwartz,* and *Thomas R. Long* for Westvaco Corp.

Briefs of *amici curiae* urging affirmance were filed by *R. Clifford Potter* for Boise Cascade Corp.; by *Lowell E. Sachnoff* and *Stephen D. Susman* for the Corrugated Container Class in M. D. L. 310; by *David L. Foster* and *John W. Malley* for Duplan Corp.; and by *Robert M. Johnson* for River Cement Co.

Briefs of *amici curiae* were filed by *James W. Witherspoon* for A. L. Black et al.; by *Harold G. Christensen, Michael R. Carlston,* and *Craig S. Cook* for Olson Farms, Inc.; by *Earl E. Pollock* for Owens-Illinois, Inc., et al.; by *Richard W. Odgers* and *C. Douglas Floyd* for Safeway Stores, Inc.; and by *Donald G. Kempf, Jr.*, and *Hammond E. Chaffetz* for Weyerhaeuser Co. et al.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the question whether the federal antitrust laws allow a defendant, against whom civil damages, costs, and attorney's fees have been assessed, a right to contribution from other participants in the unlawful conspiracy on which recovery was based. We granted certiorari to resolve a conflict in the Circuits. 449 U. S. 949 (1980).[1] We affirm.

I

Petitioner and the three respondents manufacture and sell ready-mix concrete in the New Orleans, La., area. In 1975, the Wilson P. Abraham Construction Corp., which had purchased concrete from petitioner, filed a civil action in the United States District Court for the Eastern District of Louisiana naming petitioner as defendant;[2] the complaint alleged that petitioner and certain unnamed concrete firms had conspired to raise prices in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, which provides in relevant part:

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

The complaint sought treble damages plus attorney's fees under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

[1] Compare *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (CA5 1979) (this case), and *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979–2 Trade Cases ¶ 62,995 (CA10), rehearing en banc granted (Dec. 27, 1979), with *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (CA8 1979).

[2] The complaint also named one of petitioner's former employees as a codefendant; this employee has never been served.

> trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [3]

Through discovery, petitioner learned that Abraham believed respondents were the other concrete producers that had participated in the alleged price-fixing scheme.[4] Petitioner then filed a third-party complaint against respondents seeking contribution from them should it be held liable in the action filed by Abraham. The District Court dismissed the third-party complaint for failure to state a claim upon which relief could be granted, holding that federal law does not allow an antitrust defendant to recover in contribution from co-conspirators. The District Court also determined there was no just reason for delay with respect to that aspect of the case and entered final judgment under Federal Rule of Civil Procedure 54 (b).

On appeal, the Court of Appeals for the Fifth Circuit affirmed, holding that, although the Sherman and the Clayton Acts do not expressly afford a right to contribution, the issue should be resolved as a matter of federal common law. *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (1979). The court then examined what it perceived to be the benefits and the difficulties of contribution and concluded that no common-law rule of contribution should be fashioned by the courts.

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[3] The phrase "antitrust laws" includes the Sherman Act and the Clayton Act. 15 U. S. C. § 12 (a).

[4] In 1973, a federal grand jury in Louisiana issued indictments against petitioner, respondents (or their corporate predecessors), and certain employees charging a price-fixing conspiracy in violation of § 1 of the Sherman Act. Each defendant ultimately entered a plea of *nolo contendere.*

II

The common law provided no right to contribution among joint tortfeasors. *Union Stock Yards Co.* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217 (1905); W. Prosser, Law of Torts § 50, pp. 305–307 (4th ed. 1971). See *Merryweather* v. *Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K. B. 1799). See also *Northwest Airlines, Inc.* v. *Transport Workers*, *ante*, at 86–87, n. 16. In part, at least, this common-law rule rested on the idea that when several tortfeasors have caused damage, the law should not lend its aid to have one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim. *E. g.*, *Atkins* v. *Johnson*, 43 Vt. 78, 81–82 (1870). See Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 130–134 (1932). Since the turn of the century, however, 39 states and the District of Columbia have fashioned rules of contribution in one form or another, 10 initially through judicial action and the remainder through legislation. See *Northwest Airlines, Inc.* v. *Transport Workers*, *ante*, at 86–87, and n. 16. Because courts generally have acknowledged that treble-damages actions under the antitrust laws are analogous to common-law actions sounding in tort,[5] we are urged to follow this trend and adopt contribution for antitrust violators.

The parties and *amici* representing a variety of business

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[5] See, *e. g.*, *Solomon* v. *Houston Corrugated Box Co.*, 526 F. 2d 389, 392, n. 4 (CA5 1976); *Simpson* v. *Union Oil Co.*, 311 F. 2d 764, 768 (CA9 1963); *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967, 970 (CA7), cert. denied, 321 U. S. 792 (1943); *Williamson* v. *Columbia Gas & Elec. Corp.*, 110 F. 2d 15, 18 (CA3 1939), cert. denied, 310 U. S. 639 (1940). Cf. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 552 (1902). Although not expressly characterizing antitrust violations as tortious, our opinion in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 342–348 (1971), repeatedly referred to common-law rules and trends regarding release of joint tortfeasors in determining the validity of a release of an alleged antitrust violator.

interests—as well as a legion of commentators [6]—have thoroughly addressed the policy concerns implicated in the creation of a right to contribution in antitrust cases. With potentially large sums at stake, it is not surprising that the numerous and articulate *amici* disagree strongly over the basic issue raised: whether sharing of damages liability will advance or impair the objectives of the antitrust laws.

Proponents of a right to contribution advance concepts of fairness and equity in urging that the often massive judgments in antitrust actions be shared by all the wrongdoers. In the abstract, this position has a certain appeal: collective fault, collective responsibility. But the efforts of petitioner and supporting *amici* to invoke principles of equity presuppose a legislative intent to allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing. Moreover, traditional equitable standards have something to say about the septic state of the hands of such a suitor in the courts, and, in the context of one wrongdoer suing a co-conspirator, these standards similarly suggest that parties generally *in pari delicto* should be left where they are found. See *supra,* at 634.[7]

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[6] See, *e. g.,* Cirace, A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits, 55 St. John's L. Rev. 42 (1980); Corbett, Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions, 31 Ford. L. Rev. 111 (1962); Easterbrook, Landes, & Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331 (1980); Floyd, Contribution Among Antitrust Violators: A Question of Legal Process, 1980 B. Y. U. L. Rev. 183; Polinsky & Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447 (1981); Note, 63 Cornell L. Rev. 682 (1978); Note, 48 Geo. Wash. L. Rev. 749 (1980); Note, 93 Harv. L. Rev. 1540 (1980); Note, 78 Mich. L. Rev. 892 (1980); Note, 58 Texas L. Rev. 961 (1980); Recent Developments, 33 Vand. L. Rev. 979 (1980); Note, 66 Va. L. Rev. 797 (1980).

[7] Of course, not all equitable principles apply in antitrust cases. For example, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392

The proponents of contribution also contend that, by allowing one violator to recover from co-conspirators, there is a greater likelihood that most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing. It is argued that contribution would thus promote more vigorous private enforcement of the antitrust laws and thereby deter violations, one of the important purposes of the treble-damages action under § 4 of the Clayton Act. See, *e. g.*, *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 344 (1979); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 262 (1972); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968). Independent of this effect, a right to contribution may increase the incentive of a single defendant to provide evidence against co-conspirators so as to avoid bearing the full weight of the judgment. Realization of this possibility may also deter one from joining an antitrust conspiracy.

Respondents and *amici* opposing contribution point out that an even stronger deterrent may exist in the possibility, even if more remote, that a single participant could be held fully liable for the total amount of the judgment. In this view, each prospective co-conspirator would ponder long and hard before engaging in what may be called a game of "Russian roulette." [8] Moreover, any discussion of this problem

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U. S. 134 (1968), the Court held that traditional notions of *in pari delicto* would not bar a franchisee from recovering from its franchisor even though the franchisee had sought a franchise and thus, to some degree, acquiesced in the scheme alleged to be illegal.

[8] Economists disagree over whether business decisionmakers, be they the high-level or the middle-level management, are "risk averse"; *i. e.*, they would prefer a greater certainty of a small loss to a less certain chance of a greater loss. Compare K. Elzinga & W. Breit, The Antitrust Penalties 126–129 (1976), with Easterbrook, Landes, & Posner, *supra* n. 6, at 352, n. 50. See also Polinsky & Shavell, *supra* n. 6, at 452–455; Shavell, Risk Sharing and Incentives in the Principal and Agent Relationship, 10 Bell J. Econ. 55 (1979).

must consider the problem of "overdeterrence," *i. e.*, the possibility that severe antitrust penalties will chill wholly legitimate business agreements. See *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 441–442 (1978).

The parties and *amici* also discuss at length how a right to contribution should be structured and, in particular, how to treat problems that may arise with the allocation of damages among the wrongdoers and the effect of settlements. Dividing or apportioning damages among a cluster of co-conspirators presents difficult issues, for the participation of each in the conspiracy may have varied. Some may have profited more than others; some may have caused more damage to the injured plaintiff. Some may have been "leaders" and others "followers"; one may be a "giant," others "pygmies." [9] Various formulae are suggested: damages may be allocated according to market shares, relative profits, sales to the particular plaintiff, the role in the organization and operation of the conspiracy, or simply pro rata, assessing an equal amount against each participant on the theory that each one is equally liable for the injury caused by collective action. In addition to the question of allocation, a right to contribution may have a serious impact on the incentive of defendants to settle. Some *amici* and commentators have suggested that the total amount of the plaintiff's claim should be reduced by the amount of any settlement with any one co-conspirator; others

[9] A small business that mimics the practices of larger companies may be participating directly in the conspiracy or simply "tagging along" with larger companies. See, *e. g.*, Markham, The Nature and Significance of Price Leadership, 41 Amer. Econ. Rev. 891 (1951); Posner, Oligopoly and the Antitrust Laws: A Suggested Approach, 21 Stan. L. Rev. 1562, 1582 (1969); Washburn, Price Leadership, 64 Va. L. Rev. 691, 693–697, 708–712 (1978). Although following industry leaders may help support an inference of agreement, "this Court has never held that proof of parallel business behavior [by itself] conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954).

strongly disagree. Similarly, vigorous arguments can be made for and against allowing a losing defendant to seek contribution from co-conspirators who settled with the plaintiff before trial. Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation. See, *e. g., Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 737–747 (1977).

III

The contentions advanced indicate how views diverge as to the "unfairness" of not providing contribution, the risks and trade-offs perceived by decisionmakers in business, and the various patterns for contribution that could be devised. In this vigorous debate over the advantages and disadvantages of contribution and various contribution schemes, the parties, *amici,* and commentators have paid less attention to a very significant and perhaps dispositive threshold question: whether courts have the power to create such a cause of action absent legislation and, if so, whether that authority should be exercised in this context.

Earlier this Term, in *Northwest Airlines, Inc.* v. *Transport Workers, ante,* p. 77, we addressed the similar question of a right to contribution under the Equal Pay Act of 1963, 29 U. S. C. § 206 (d), and Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* We concluded that a right to contribution may arise in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution. *Ante,* at 90–91.[10]

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[10] In *Northwest Airlines,* we decided that no such right exists under the Equal Pay Act or Title VII, and we declined to fashion such a right from federal common law.

A

There is no allegation that the antitrust laws expressly establish a right of action for contribution. Nothing in these statutes refers to contribution, and if such a right exists it must be by implication. Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress. *E. g., California* v. *Sierra Club, ante,* p. 287; *Universities Research Assn.* v. *Coutu,* 450 U. S. 754 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11 (1979); *Touche Ross & Co.* v. *Redington,* 442 U. S. 560 (1979). Congressional intent may be discerned by looking to the legislative history and other factors: *e. g.,* the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief. See *California* v. *Sierra Club, supra; Cort* v. *Ash,* 422 U. S. 66 (1975).

Petitioner readily concedes that "there is nothing in the legislative history of the Sherman Act or the Clayton Act to indicate that Congress considered whether contribution was available to defendants in antitrust actions." Brief for Petitioner 10. Moreover, it is equally clear that the Sherman Act and the provision for treble-damages actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade. On the contrary, petitioner "is a member of the class whose activities Congress intended to regulate for the protection and benefit *of an entirely distinct class," Piper* v. *Chris-Craft Industries, Inc.,* 430 U. S. 1, 37 (1977) (emphasis added). The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers. The absence of any reference to contribution in the legislative history or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of other factors unnecessary. *California* v. *Sierra Club, ante,* at 298; *Touche Ross & Co.* v.

Redington, supra, at 574–576. We therefore conclude that Congress neither expressly nor implicitly intended to create a right to contribution.[11] If any right to contribution exists, its source must be federal common law.

B

There is, of course, "no federal general common law." *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78 (1938). Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." See *United States* v. *Standard Oil Co.,* 332 U. S. 301, 308 (1947). These instances are "few and restricted," *Wheeldin* v. *Wheeler,* 373 U. S. 647, 651 (1963), and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 426 (1964), and those in which Congress has given the courts the power to develop substantive law, *Wheeldin* v. *Wheeler, supra,* at 652.

(1)

The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal

[11] That Congress knows how to define a right to contribution is shown by the express actions for contribution under § 11 (f) of the Securities Act of 1933, 15 U. S. C. § 77k (f), and §§ 9 (e) and 18 (b) of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78i (e) and 78r (b). Some courts have extrapolated from these provisions that when an implied right of action exists under the securities laws, there also is an implied right to contribution. See, *e. g., Heizer Corp.* v. *Ross,* 601 F. 2d 330 (CA7 1979); *Globus, Inc.* v. *Law Research Service, Inc.,* 318 F. Supp. 955 (SDNY), aff'd, 442 F. 2d 1346 (CA2), cert. denied, 404 U. S. 941 (1971); *De Haas* v. *Empire Petroleum Co.,* 286 F. Supp. 809 (Colo. 1968), aff'd in part, rev'd in part, 435 F. 2d 1223 (CA10 1970). We intimate no view as to the correctness of these decisions; in any event, they do not support implication of a right to contribution when a statute expressly creates a damages action but does not provide for contribution. See *Northwest Airlines, Inc.* v. *Transport Workers, ante,* at 91–92, n. 24.

common law, *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 591 (1973), nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States,[12] interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations,[13] and admiralty cases.[14] In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

In areas where federal common law applies, the creation of a right to contribution may fall within the power of the federal courts. For example, in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974), we held that con-

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[12] See, *e. g.*, *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580 (1973); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943).

[13] See, *e. g.*, *Illinois* v. *Milwaukee*, 406 U. S. 91 (1972); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938). Many of these cases arise from interstate water disputes. Such cases do not directly involve state boundaries, disputes over which more often come to this Court under our original jurisdiction; they nonetheless involve especial federal concerns to which federal common law applies. In *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, *supra*, at 110, decided the same day as *Erie*, the Court observed:

"Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions."

[14] See, *e. g.*, *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256 (1979); *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16 (1963).

tribution is available among joint tortfeasors for injury to a longshoreman. But that claim arose within admiralty jurisdiction, one of the areas long recognized as subject to federal common law, see *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S. 256, 259 (1979); our decision there was based, at least in part, on the traditional division of damages in admiralty not recognized at common law, see 417 U. S., at 110. *Cooper Stevedoring* thus does not stand for a general federal common-law right to contribution. See *Northwest Airlines, Inc.* v. *Transport Workers, ante,* at 96–97.

The antitrust laws were enacted pursuant to the power of Congress under the Commerce Clause, Art. I, § 8, cl. 3, to regulate interstate and foreign trade, and the case law construing the Sherman Act now spans nearly a century. Nevertheless, a treble-damages action remains a private suit involving the rights and obligations of private parties. Admittedly, there is a federal interest in the sense that vindication of rights arising out of these congressional enactments supplements federal enforcement and fulfills the objects of the statutory scheme. Notwithstanding that nexus, contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority. Cf. *Bank of America* v. *Parnell,* 352 U. S. 29, 33 (1956). In short, contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law.

(2)

Federal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law. See *Wheeldin* v. *Wheeler, supra,* at 652. In this vein, this Court has read § 301 (a) of the Labor Management Relations Act, 29 U. S. C. § 185 (a), not only as granting jurisdiction over defined

areas of labor law but also as vesting in the courts the power to develop a common law of labor-management relations within that jurisdiction. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957). A similar situation arises with regard to the first two sections of the Sherman Act, which in sweeping language forbid "[e]very contract, combination . . . , or conspiracy, in restraint of trade" and "monopoliz[ing], or attempt[ing] to monopolize, . . . any part of the trade or commerce . . . ." 15 U. S. C. §§ 1, 2. We noted in *National Society of Professional Engineers* v. *United States,* 435 U. S. 679, 688 (1978):

> "Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."

Accord, *United States* v. *United States Gypsum Co.,* 438 U. S., at 438, and n. 14; 2 P. Areeda & D. Turner, Antitrust Law ¶ 302 (1978). See 21 Cong. Rec. 2456, 2460, 3149, 3152 (1890).[15]

It does not necessarily follow, however, that Congress intended to give courts as wide discretion in formulating remedies to enforce the provisions of the Sherman Act or the kind of relief sought through contribution. The intent to allow courts to develop governing principles of law, so unmistakably clear with regard to substantive violations, does not appear in debates on the treble-damages action created

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[15] Congress assumed the courts would refer to the existing law of monopolies and restraints on trade. See, *e. g., Mitchel* v. *Reynolds,* 1 P. Wms. 181, 24 Eng. Rep. 347 (K. B. 1711); *Darcy* v. *Allein,* 11 Co. Rep. 84, 77 Eng. Rep. 1260 (K. B. 1603). See generally P. Areeda, Antitrust Analysis 44–46 (3d ed. 1981); Letwin, The English Common Law Concerning Monopolies, 21 U. Chi. L. Rev. 355 (1954).

in § 7 of the original Act, 26 Stat. 210.[16] Floyd, *supra* n. 6, at 228. In the Senate debates of 1890, Senator Morgan described the type of authority given the courts:

> "Now, whoever recovers upon this statute, in whatever court he may go to, will recover upon the statute. It is very true that we use common-law terms here and common-law definitions in order to define an offense which is in itself comparatively new, *but it is not a common-law jurisdiction that we are conferring upon the circuit courts of the United States.*" 21 Cong. Rec. 3149 (1890) (emphasis added).

The Senator added that common-law actions in state courts might still exist, but recovery of treble damages would not be available, for its source is federal, not state, law. *Ibid.* This description of the power of federal courts under the Act suggests a sharp distinction between the lawmaking powers conferred in defining violations and the ability to fashion the relief available to parties claiming injury.[17]

In contrast to the sweeping language of §§ 1 and 2 of the Sherman Act, the remedial provisions defined in the antitrust laws are detailed and specific: (1) violations of §§ 1

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[16] Section 4 of the Clayton Act, 15 U. S. C. § 15, which provides the private treble-damages action, derives from § 7 of the Sherman Act as originally enacted. See H. R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, p. 14 (1914). Congress repealed the original § 7 in 1955, Act of July 7, 1955, ch. 283, 69 Stat. 282, as being redundant of Clayton Act § 4, H. R. Rep. No. 422, 84th Cong., 1st Sess., 2 (1955); S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955).

[17] Courts, of course, should be wary of relying on the remarks of a single legislator, and Senator Morgan's comments are not unambiguous. Yet it is clear that when the Sherman Act was adopted the common law did not provide a right to contribution among tortfeasors participating in proscribed conduct. One permissible, though not mandatory, inference is that Congress relied on courts' continuing to apply principles in effect at the time of enactment. See, *e. g., Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S., at 273.

and 2 are crimes; (2) Congress has expressly authorized a private right of action for treble damages, costs, and reasonable attorney's fees; [18] (3) other remedial sections also provide for suits by the United States to enjoin violations [19] or for injury to its "business or property," [20] and *parens patriae* suits by state attorneys general; [21] (4) Congress has provided that a final judgment or decree of an antitrust violation in one proceeding will serve as prima facie evidence in any subsequent action or proceeding; [22] and (5) the remedial provisions in the antimerger field, not at issue here, are also quite detailed.[23]

> "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc.* v. *Transport Workers, ante,* at 97.

That presumption is strong indeed in the context of antitrust violations; the continuing existence of this statutory scheme for 90 years without amendments authorizing contribution is not without significance. There is nothing in the statute itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted.

Our cases interpreting the treble-damages action, see, *e. g.*, *Hawaii* v. *Standard Oil Co.,* 405 U. S. 251 (1972); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U. S. 321 (1971); *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134 (1968), do not suggest that, in the past,

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[18] Clayton Act § 4 (original version at Sherman Act § 7).
[19] Sherman Act § 4, 15 U. S. C. § 4.
[20] Clayton Act § 4A, 15 U. S. C. § 15a.
[21] Clayton Act §§ 4C–4H, 15 U. S. C. §§ 15c–15h.
[22] Clayton Act § 5 (a), 15 U. S. C. § 16 (a).
[23] Clayton Act §§ 7–11, 15 U. S. C. §§ 18–21.

we have invoked some broad-ranging common-law source for creating a cause of action. Nor does the judicial determination that defendants should be jointly and severally liable suggest that courts also may order contribution, since joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants. See *Atlanta* v. *Chattanooga Foundry & Pipeworks,* 127 F. 23, 26 (CA6 1903), aff'd, 203 U. S. 390 (1906). These cases do no more than identify the scope of the remedy Congress itself has provided. See Floyd, *supra* n. 6, at 227–231.

> "In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines, Inc.* v. *Transport Workers, ante,* at 97.

We are satisfied that neither the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution sought here.

IV

The policy questions presented by petitioner's claimed right to contribution are far-reaching. In declining to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.

The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements

of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit. As in *Diamond* v. *Chakrabarty,* 447 U. S. 303, 317 (1980):

> "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."

Accord, *United States* v. *Topco Associates,* 405 U. S. 596, 611–612 (1972).

Because we are unable to discern any basis in federal statutory or common law that allows federal courts to fashion the relief urged by petitioner, the judgment of the Court of Appeals is

Affirmed.

WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 79–1423. Argued January 12, 1981—Decided May 26, 1981

California, in addition to imposing a premiums tax on both foreign and domestic insurance companies doing business in the State, imposes a "retaliatory" tax on such a foreign insurer when the insurer's State of incorporation imposes higher taxes on California insurers doing business in that State than California would otherwise impose on that State's insurers doing business in California. Appellant, an Ohio insurer doing business in California, after unsuccessfully filing administrative refund claims for California retaliatory taxes paid, brought a refund suit in California Superior Court, alleging that the retaliatory tax violates the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. The Superior Court ruled the tax unconstitutional, but the California Court of Appeal reversed.

Held:

1. The retaliatory tax does not violate the Commerce Clause. The McCarran-Ferguson Act, which leaves the regulation and taxation of insurance companies to the States, removes entirely any Commerce Clause restriction upon California's power to tax the insurance business. Neither the language nor the history of that Act suggests that it does not permit, as appellant argues, "anti-competitive state taxation that discriminates against out-of-state insurers." Pp. 652–655.

2. Nor does the retaliatory tax violate the Equal Protection Clause. Pp. 655–674.

(a) Whatever the extent of a State's authority to exclude foreign corporations from doing business within the State, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose. Pp. 655–668.

(b) The purpose of the retaliatory tax to promote the interstate business of California insurers by deterring other States from imposing discriminatory or excessive taxes on California insurers is a legitimate state purpose. And the California Legislature *rationally could have*

believed that the retaliatory tax would promote that purpose, it being immaterial whether *in fact* the tax will accomplish its objectives. Assuming that the lawmakers of each State are motivated in part by a desire to promote the interests of their domestic insurance industry, it is reasonable to suppose that California's retaliatory tax will induce other States to lower the burdens on California insurers in order to spare their domestic insurers the cost of the retaliatory tax in California. Pp. 668–674.

99 Cal. App. 3d 410, 159 Cal. Rptr. 539, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 674.

Alan R. Vogeler argued the cause and filed briefs for appellant.

Timothy G. Laddish, Deputy Attorney General of California, argued the cause for appellee. With him on the brief was *George Deukmejian*, Attorney General.*

JUSTICE BRENNAN delivered the opinion of the Court.

California imposes two insurance taxes on insurance companies doing business in the State. A premiums tax, set at a fixed percentage of premiums paid on insurance policies is-

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith, Michael L. Paup,* and *Ernest J. Brown* for the United States; by *Robert Abrams,* Attorney General, *Shirley Adelson Siegel,* Solicitor General, and *Jeremiah Jochnowitz,* Assistant Solicitor General, for the State of New York; and by *Jerome R. Hellerstein* and *William B. Randolph* for the Life Insurance Council of New York.

Briefs of *amici curiae* urging affirmance were filed by *Robert K. Corbin,* Attorney General of Arizona, *Edwin P. Lee,* and *Bronson C. La Follette,* Attorney General of Wisconsin, for the State of Arizona et al.; by *William M. Leech, Jr.,* Attorney General, *Jimmy G. Creecy,* Deputy Attorney General, and *Kate Eyler,* Assistant Attorney General, for the State of Tennessee; and by *Matthew J. Zinn* for the American Insurance Association et al.

sued in the State, is imposed on both foreign and domestic insurance companies and a "retaliatory" tax, set in response to the insurance tax laws of the insurer's home State, is imposed on some foreign insurance companies. This case presents the question of the constitutionality of retaliatory taxes assessed by the State of California against appellant Western & Southern Life Insurance Co., an Ohio corporation, and paid under protest for the years 1965 through 1971.

I

Section 685 of the California Insurance Code imposes a retaliatory tax on out-of-state insurers doing business in California, when the insurer's State of incorporation imposes higher taxes on California insurers doing business in that State than California would otherwise impose on that State's insurers doing business in California.[1] In computing the re-

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[1] "When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or other material obligations, prohibitions or restrictions are or would be imposed upon California insurers, or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this State, so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions, of whatever kind shall be imposed upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in California. Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state or country on California insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this article." Cal. Ins. Code Ann. § 685 (West 1972).

This provision was enacted in present form in 1959, pursuant to the California Constitution, Art. XIII, § 14–4/5 (f)(3). At that time, the

taliatory tax owed by a given out-of-state insurer, California subtracts the California taxes otherwise due from the total taxes that would be imposed on a hypothetical similar California company doing business in the out-of-state insurer's State of incorporation. If the other State's taxes on the hypothetical California insurer would be greater than California's taxes on the other State's insurer, a retaliatory tax in the amount of the difference is imposed. If the other State's taxes on the hypothetical California insurer would be less than or equal to California's taxes, however, California exacts no retaliatory tax from the other State's insurer.

Western & Southern, an Ohio corporation headquartered in Ohio, has engaged in the business of insurance in California since 1955. During the years in question, the company paid a total of $977,853.57 to the State in retaliatory taxes. After unsuccessfully filing claims for refunds with appellee Board of Equalization, Western & Southern initiated this refund suit in Superior Court, arguing that California's retaliatory tax violates the Commerce and Equal Protection Clauses of the United States Constitution.[2]

California Constitution permitted imposition of the retaliatory tax only when the other State taxed California insurers at a higher rate than it taxed its own insurers. See Cal. Const., Art. XIII, § 14-4/5 (f)(3) (West Supp. 1964). In 1964, however, the California Constitution was amended to permit the imposition of the retaliatory tax whenever the other State's taxes on California insurers are higher than California taxes on similar insurers. Cal. Const., Art. XIII, § 14–4/5 (f)(3) (West. Supp. 1966). See *Franklin Life Ins. Co.* v. *State Board of Equalization*, 63 Cal. 2d 222, 225–227, 404 P. 2d 477, 480–481 (1965).

[2] Western & Southern also challenges a provision of California's property tax law, since repealed, which permitted certain domestic insurance companies to credit a greater portion of property tax paid on their principal offices against their premiums tax liability than foreign insurers could credit. Cal. Rev. & Tax. Code Ann. §§ 12241 (a) and (b) (West 1970). We need not consider this challenge, because any increase in the property tax deduction would merely trigger an offsetting increase in the retaliatory tax. See App. 86–87.

The Superior Court tried the case on stipulated facts without a jury, and ruled that the retaliatory tax is unconstitutional. It ordered a full refund of retaliatory taxes paid, plus interest and costs. App. 78–79. The California Court of Appeal reversed, upholding the retaliatory tax. 99 Cal. App. 3d 410, 159 Cal. Rptr. 539. The California Supreme Court denied Western & Southern's petition for hearing. App. 89. Western & Southern filed a notice of appeal in this Court, and we noted probable jurisdiction. 449 U. S. 817 (1980). We affirm.

II

The Commerce Clause provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States." U. S. Const., Art. I, § 8, cl. 3. In terms, the Clause is a grant of authority to Congress, not an explicit limitation on the power of the States. In a long line of cases stretching back to the early days of the Republic, however, this Court has recognized that the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce.[3] Even in the absence of congressional action, the courts may decide whether state regulations challenged under the Commerce Clause impermissibly burden interstate commerce. See, *e. g., Minnesota* v. *Clover Leaf Creamery Co.,* 449 U. S. 456 (1981); *Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978).

Our decisions do not, however, limit the authority of *Congress* to regulate commerce among the several States as it sees fit. In the exercise of this plenary authority, Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.,* 447 U. S. 27, 44 (1980); see *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S. 525, 542–543 (1949). If Congress ordains that the States

[3] See *Cooley* v. *Board of Wardens,* 12 How. 299 (1852); *Gibbons* v. *Ogden,* 9 Wheat. 1, 209 (1824).

may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.

Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act, 59 Stat. 33, 15 U. S. C. § 1011 *et seq.*, as this Court acknowledged in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U. S. 451, 452 (1962). See also *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 219, n. 18 (1979); *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.*, 348 U. S. 310, 319 (1955). Nevertheless, Western & Southern, joined by the Solicitor General as *amicus curiae,* argues that the McCarran-Ferguson Act does not permit "anti-competitive state taxation that discriminates against out-of-state insurers." Brief for Appellant 28; Brief for United States as *Amicus Curiae* 16. We find no such limitation in the language or history of the Act.

Section 1 of the Act, 59 Stat. 33, 15 U. S. C. § 1011, contains a declaration of policy:

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Section 2 (a), 59 Stat. 33, 15 U. S. C. § 1012 (a), declares: "The business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The unequivocal language of the Act suggests no exceptions.

The McCarran-Ferguson Act was passed in the wake of *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), which held that insurance is "commerce" within the meaning of the Commerce Clause. Prior to *South-East-*

ern Underwriters, insurance was not considered to be commerce within the meaning of the Commerce Clause, *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495 (1913); *Paul* v. *Virginia,* 8 Wall. 168 (1869), and thus "negative implication from the commerce clause was held not to place *any limitation* upon state power over the [insurance] business." *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 414 (1946) (emphasis added). Believing that the business of insurance is "a local matter, to be subject to and regulated by the laws of the several States," H. R. Rep. No. 143, 79th Cong., 1st Sess., 2 (1945), Congress explicitly intended the McCarran-Ferguson Act to restore state taxing and regulatory powers over the insurance business to their pre-*South-Eastern Underwriters* scope. H. R. Rep. No. 143, *supra,* at 3; see *SEC* v. *National Securities, Inc.,* 393 U. S. 453, 459 (1969); *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 412–413 (1954).

The Court has squarely rejected the argument that discriminatory state insurance taxes may be challenged under the Commerce Clause despite the McCarran-Ferguson Act. *Prudential Ins. Co.* v. *Benjamin, supra; Prudential Ins. Co.* v. *Hobbs,* 328 U. S. 822 (1946) (*per curiam*). In *Benjamin,* the Court considered a South Carolina insurance premiums tax imposed solely on foreign insurance companies. The Court found it unnecessary to decide whether the tax "would be valid in the dormancy of Congress' power," 328 U. S., at 427, or whether the tax "would be discriminatory in the sense of an exaction forbidden by the commerce clause," *id.,* at 428. Expressly *assuming* that the tax would be discriminatory, *id.,* at 429, the Court held that enactment of the McCarran-Ferguson Act "put the full weight of [Congress'] power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." *Id.,* at 431. In *Hobbs,* this Court sustained against a Commerce Clause challenge a Kansas retaliatory insurance tax indistinguishable

from California's.[4] The Kansas Supreme Court, upholding the retaliatory tax, had held that the McCarran-Ferguson Act "left the matter of regulation and taxation of insurance companies to the states." *In re Insurance Tax Cases,* 160 Kan. 300, 313, 161 P. 2d 726, 735 (1945). This Court summarily affirmed, citing *Benjamin* and its companion case, *Robertson* v. *California,* 328 U. S. 440 (1946). *Prudential Ins. Co.* v. *Hobbs, supra,* at 822.[5]

We must therefore reject Western & Southern's Commerce Clause challenge to the California retaliatory tax: the McCarran-Ferguson Act removes entirely any Commerce Clause restriction upon California's power to tax the insurance business.

III

Ordinarily, there are three provisions of the Constitution under which a taxpayer may challenge an allegedly discriminatory state tax: [6] the Commerce Clause, see, *e. g., Complete*

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[4] The California courts have described the Kansas retaliatory insurance tax as "substantially identical" to § 685. *Atlantic Ins. Co.* v. *State Board of Equalization,* 255 Cal. App. 2d 1, 10, 62 Cal. Rptr. 784, 790 (1967), cert. denied and appeal dism'd, 390 U. S. 529 (1968).

[5] Western & Southern argues that the instant case is not controlled by *Hobbs* because the Kansas Supreme Court said in *Hobbs:* "We are unable to find in the record evidence to support the view that the tax in question upon foreign insurance companies is greater than that levied on the home insurance companies." 160 Kan., at 311, 161 P. 2d, at 734. But the principle of *Benjamin,* applied in *Hobbs,* was that it was *unnecessary* for the Court to decide whether the challenged tax was discriminatory, since the McCarran-Ferguson Act simply made the Commerce Clause inapplicable. Thus, Western & Southern's reliance on this purported distinction carries no weight.

[6] We reject appellee's argument that the McCarran-Ferguson Act altered constitutional standards other than those derived from the Commerce Clause. The House Report states:

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Under-*

Auto Transit, Inc. v. *Brady,* 430 U. S. 274 (1977); the Privileges and Immunities Clause of Art. IV, § 2, see, *e. g., Toomer* v. *Witsell,* 334 U. S. 385 (1948); and the Equal Protection Clause, see, *e. g., Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562 (1949).[7] This case assumes an unusual posture, however, because the Commerce Clause is inapplicable to the business of insurance, see Part II, *supra,* and the Privileges and Immunities Clause is inapplicable to corporations, see *Hemphill* v. *Orloff,* 277 U. S. 537, 548–550 (1928). Only the Equal Protection Clause remains as a possible ground for invalidation of the California tax.[8]

The Fourteenth Amendment forbids the States to "deny to any person within [their] jurisdiction the equal protec-

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writers Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court . . . ." H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

In *State Board of Insurance* v. *Todd Shipyards Corp.,* 370 U. S. 451 (1962), we said:

"Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment. And while Congress has authority by § 5 of that Amendment to enforce its provisions [citing cases], the McCarran-Ferguson Act does not purport to do so." *Id.,* at 457.

[7] Although Western & Southern raises a due process claim in its statement of questions presented, it does not separately address that claim in its brief. We therefore assume that any due process argument is subsumed in the equal protection issue. See *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U. S. 456, 470, n. 12 (1981).

[8] *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408 (1946), did not resolve the equal protection issue. The Court stated in reference to the South Carolina tax challenged in that case:

"No conceivable violation of the commerce clause, in letter or spirit, is presented. Nor is contravention of any other limitation." *Id.,* at 436.

The appellant in that case, however, challenged the South Carolina tax under the Commerce Clause, *id.,* at 411, and nothing in the opinion of the Court suggests that the Court considered or decided any equal protection issue.

tion of the laws," but does not prevent the States from making reasonable classifications among such persons. See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359–360 (1973); *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 526–527 (1959). Thus, California's retaliatory insurance tax should be sustained if we find that its classification is rationally related to achievement of a legitimate state purpose.

But as appellee points out, state tax provisions directed against out-of-state parties have not always been subjected to such scrutiny. Rather, a line of Supreme Court cases most recently exemplified by *Lincoln National Life Ins. Co.* v. *Read*, 325 U. S. 673 (1945), holds that a State may impose a tax on out-of-state corporations for the "privilege" of doing business in the State, without any requirement of a rational basis. Since the California courts have defined the retaliatory tax as a "privilege" tax, *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 4 Cal. App. 3d 21, 35, 84 Cal. Rptr. 88, 97–98 (1970), application of the reasoning of these cases would require us to sustain the tax without further inquiry into its rational basis. We must therefore decide first whether California's retaliatory tax is subject to such further inquiry.

Some past decisions of this Court have held that a State may exclude a foreign corporation from doing business or acquiring or holding property within its borders. *E. g.*, *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 211 (1945); *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588–589, 592 (1839). From this principle has arisen the theory that a State may attach such conditions as it chooses upon the grant of the privilege to do business within the State. *Paul* v. *Virginia*, 8 Wall., at 181. While this theory would suggest that a State may exact any condition, no matter how onerous or otherwise unconstitutional, from a foreign corporation desiring to do business within it, this Court has also held that a State may not impose *unconstitutional* conditions on the grant of a priv-

ilege. *E. g., Sherbert* v. *Verner,* 374 U. S. 398, 404 (1963); *Wieman* v. *Updegraff,* 344 U. S. 183, 192 (1952); *Frost & Frost Trucking Co.* v. *Railroad Comm'n,* 271 U. S. 583, 592–593 (1926).

These two principles are in obvious tension. If a State cannot impose unconstitutional conditions on the grant of a privilege, then its right to withhold the privilege is less than absolute. But if the State's right to withhold the privilege is absolute, then no one has the right to challenge the terms under which the State chooses to exercise that right. In view of this tension, it is not surprising that the Court's attempt to accommodate both principles has produced results that seem inconsistent or illogical. Compare *Doyle* v. *Continental Ins. Co.,* 94 U. S. 535 (1877), with *Insurance Co.* v. *Morse,* 20 Wall. 445 (1874); and compare *Lincoln National Life Ins. Co.* v. *Read, supra,* with *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494 (1926).

The doctrine that a State may impose taxes and conditions at its unfettered discretion on foreign corporations, in return for granting the "privilege" of doing business within the State, originated in *Paul* v. *Virginia, supra,* a case decided only 15 months after the effective date of the Fourteenth Amendment. A Virginia statute required foreign insurance companies to purchase and file a specified amount of bonds as security for the protection of persons insured. No such requirement was imposed on domestic insurers. Several New York insurance companies refused to comply, and their agent was accordingly denied a license to engage in the insurance business in Virginia. The agent was prosecuted for selling insurance without a license; he defended on the ground that the statute was unconstitutional under the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause.[9]

[9] The Court disposed of plaintiff in error's Commerce Clause argument on the ground that the business of insurance is not commerce. 8 Wall., at 183. See *supra,* at 653–654.

This Court sustained the Virginia statute. Viewing corporations as recipients of "special privileges," 8 Wall., at 181, and believing that "it might be of the highest public interest that the number of corporations in the State should be limited," *id.*, at 182, the Court held that a State's assent to the creation of a domestic corporation or the entry of a foreign corporation "may be granted upon such terms and conditions as those States may think proper to impose." *Id.*, at 181.[10] Under this view, there was no need for the Court to consider whether the statute was arbitrary, irrational, or discriminatory.

> "[The States] may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." *Ibid.*

In two important respects, the legal underpinnings of *Paul* v. *Virginia* were soon eroded. First, the advent of laws of general incorporation, which swept the country in the late 19th century, see *Louis K. Liggett Co.* v. *Lee,* 288 U. S. 517, 557–564 (1933) (Brandeis, J., dissenting), altered the very nature of the corporation. Such laws, stimulated largely by "the desire for equality and the dread of special privilege[s]," *id.*, at 549, n. 4, permitted persons to form corporations freely, subject only to generally applicable requirements and limitations. Incorporation lost its status as a special privilege. See

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[10] This view of the corporation reflected the common understanding through the first three-quarters of the 19th century. As Justice Brandeis has noted, "at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unavailable." *Louis K. Liggett Co.* v. *Lee,* 288 U. S. 517, 549 (1933) (dissenting opinion). See also 1 W. Fletcher, Cyclopedia of the Law of Private Corporations 5–6 (1974); G. Henderson, The Position of Foreign Corporations in American Constitutional Law 64–68 (1918) (hereafter Henderson).

Henderson 68.[11] Second, the Fourteenth Amendment, ratified in 1868, introduced the constitutional requirement of equal protection, prohibiting the States from acting arbitrarily or treating similarly situated persons differently, *even with respect to privileges formerly dispensed at the State's discretion.* The combination of general incorporation laws and equal protection necessarily undermined the doctrine of *Paul* v. *Virginia.* If the right to incorporate or to do business within a State ceases to be a privilege to be dispensed by the State as it sees fit, and becomes a right generally available to all on equal terms, then the argument for special exactions as "privilege taxes" is destroyed.

The Court was slow to recognize the consequences of these developments. In *Philadelphia Fire Assn.* v. *New York,* 119 U. S. 110 (1886), the first relevant decision governed by the Fourteenth Amendment, the Court unhesitatingly applied the doctrine of *Paul* v. *Virginia* to sustain a New York retaliatory insurance tax against an equal protection challenge. The Court held that a corporation is not a "person within [the State's] jurisdiction," 119 U. S., at 116, for purposes of the Equal Protection Clause unless it is in compliance with the conditions placed upon its entry into the State, and that a corporation assents to all state laws in effect at the time of its entry. *Id.,* at 119.[12]

"The State, having the power to exclude entirely, has

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[11] In 1869, the year *Paul* v. *Virginia* was decided, the Commonwealth of Virginia did not permit general incorporation of insurance companies. Va. Code of 1860, ch. 65, § 4. Thus, the Court's conception of the corporate franchise in that case as a "grant of special privileges to the corporators," *Paul* v. *Virginia,* 8 Wall., at 181, was an accurate portrayal of the corporation as it existed at that time. This was not to last for long. See Act of Mar. 30, 1871, 1870 Va. Acts, ch. 277 (general incorporation law made applicable to insurance companies).

[12] As appellee concedes, the theory espoused in *Philadelphia Fire Assn.* that a foreign corporation is not "a person within [the State's] jurisdiction" within the meaning of the Equal Protection Clause unless it is

> the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. . . . By going into the State of New York in 1872, [the Philadelphia Fire Association] assented to such prerequisite as a condition of its admission within the jurisdiction of New York." *Id.*, at 119–120.

Justice Harlan dissented. Acknowledging that a State may prescribe certain conditions upon the entry of a foreign corporation, he insisted "that it is the settled doctrine of this court, that the terms and conditions so prescribed must not be repugnant to the Constitution of the United States, or inconsistent with any right granted or secured by that instrument." *Id.*, at 125. "Can it be," he asked, "that a corporation is estopped to claim the benefit of the constitutional provision securing to it the equal protection of the laws simply because it voluntarily entered and remained in a State which has enacted a statute denying such protection to it and to like corporations from the same State?" *Id.*, at 127.

Although dicta in several cases supported Justice Harlan's view that a State may not impose conditions repugnant to the Constitution upon the grant of a privilege, see, *e. g.*, *Ducat* v. *Chicago*, 10 Wall. 410, 415 (1871); *Doyle* v. *Continental*

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in compliance with all conditions imposed on its entry is now discarded. See *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.*, 262 U. S. 544, 549–551 (1923) (holding that a foreign corporation is "within" the State if it files a lawsuit therein); *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, 424 (1921) (holding that "corporations doing business in a State and having an agent there are within the jurisdiction of the State").

Ins. Co., 94 U. S., at 540, the Court continued to reject constitutional claims by corporations challenging conditions to entry. *E. g., New York* v. *Roberts,* 171 U. S. 658, 665–666 (1898); *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 312–315 (1892); *Pembina Consol. Silver Mining & Milling Co.* v. *Pennsylvania,* 125 U. S. 181, 184–185 (1888). Nonetheless, the first quarter of this century saw "an almost complete disintegration" of the doctrine of *Paul* v. *Virginia.* Henderson 111. The change became evident in the October Term 1909, when the Court decided four cases in conflict with the principle that the States possess unlimited power to condition the entry of foreign corporations.[13] The most significant of these decisions for our purposes is *Southern R. Co.* v. *Greene,* 216 U. S. 400 (1910), which expressly rejected the contention "that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation." *Id.*, at 417.[14]

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[13] *Southern R. Co.* v. *Greene,* 216 U. S. 400 (1910); *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146 (1910); *Pullman Co.* v. *Kansas,* 216 U. S. 56 (1910); *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1 (1910) (*Western Union I*).

[14] *Southern R. Co.* relied on two Commerce Clause cases decided earlier in the same Term, in both of which Justice Harlan wrote the plurality opinion. *Western Union I, supra,* and *Pullman Co.* v. *Kansas, supra,* struck down Kansas taxes imposed on the total authorized capital of out-of-state corporations, representing the corporations' property both within and without Kansas. The State defended the taxes on the strength of *Paul* v. *Virginia* and like cases, as conditions imposed on the privilege of doing business within the State. The plurality held that a State may not impose unconstitutional conditions on the privilege of doing business within the State. See 216 U. S., at 33–38, 46–48; *Pullman Co.* v. *Kansas, supra,* at 62–63. Accord, *Ludwig* v. *Western Union Telegraph Co., supra.* Since a tax imposed on the out-of-state operations of an interstate company violates the Commerce Clause, see 216 U. S., at 38–45, such a tax may not be imposed as a prerequisite to doing business in the State. The plurality opinion distinguished *Paul* v. *Virginia* as involving the business of insur-

The plaintiff, Southern Railway, had been admitted to do business in Alabama and had invested in permanent facilities in the State. At that time, franchise taxes imposed on domestic corporations were equal to privilege taxes imposed on foreign corporations. Later, Alabama imposed an additional privilege tax on foreign corporations, which Southern Railway challenged on equal protection grounds. The Court held that classifications among corporations for purposes of taxation are constitutional under the Equal Protection Clause only if they bear a "reasonable and just relation" to the purpose for which they are imposed. *Ibid.* Noting that there were domestic corporations in Alabama whose business was indistinguishable from that of Southern Railway, the Court stated that "[i]t would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and [the] other for the right to be a corporation." *Id.*, at 417–418. The Court held that "to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws." *Id.*, at 418.[15]

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ance, which was not considered interstate commerce. 216 U. S., at 33–34. Although modified in detail, the principle established in these cases still governs Commerce Clause challenges to state privilege taxes. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977).

Justice Holmes, in dissent in both cases, pointed out that if a State has an "absolute arbitrary power" to exclude foreign corporations, then no conditions imposed on corporations in the exercise of that power could be unconstitutional. 216 U. S., at 54.

[15] *Southern R. Co.* did not, however, overrule *Philadelphia Fire Assn.* v. *New York* and like cases. Although acknowledging the difference in principle between its decision and that in *Philadelphia Fire Assn.*, 216 U. S., at 416, *Southern R. Co.* distinguished the earlier case on the ground that the Philadelphia Fire Association, unlike the Southern Railway, held only a one-year license renewable at the State's discretion.

In *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494 (1926), the Court extended the protections of *Southern Railway* against discriminatory taxation to corporations holding short-term licenses, and to those without substantial permanent property in the State.[16] 272 U. S., at 508, 509, 514–515. With respect to the general tax burden on business, "the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind." *Id.*, at 511.[17]

After *Hanover Fire Ins. Co.*, little was left of the doctrine of *Paul* v. *Virginia* and *Philadelphia Fire Assn.* v. *New York*, 119 U. S. 110 (1886). It was replaced by a new doctrine:

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may

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[16] This effectively overruled those portions of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 88 (1913), overruled on other grounds, *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 218 (1925), and *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 156–158 (1918), that appeared to limit *Southern R. Co.* to cases in which the foreign corporation held substantial permanent property within the State.

[17] *Hanover Fire Ins. Co.* also held that, with respect to an admission fee charged to the corporation prior to its entry into the State, "the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment." 272 U. S., at 511. The opinion makes clear, however, that a tax on the business of the corporation after its admission may not be imposed in the guise of an admission fee. *Ibid.*

thus be manipulated out of existence." *Frost & Frost Trucking Co.* v. *Railroad Comm'n,* 271 U. S., at 593–594. See also *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490, 497 (1927).

The decision in *Lincoln National Life Ins. Co.* v. *Read,* 325 U. S. 673 (1945), thus stands as a surprising throwback to the doctrine of *Paul* v. *Virginia* and *Philadelphia Fire Assn.* v. *New York.* There, the Court seemed to adopt precisely the argument that was rejected in *Hanover Fire Ins. Co.*: "that a State may discriminate against foreign corporations by admitting them under more onerous conditions than it exacts from domestic companies . . . ." 325 U. S., at 677; cf. 272 U. S., at 507.[18] The Court stated that the argument that a State may not impose unconstitutional conditions to entry "proves too much." 325 U. S., at 677. "If it were adopted," the Court said, "then the long-established rule that a State may discriminate against foreign corporations by admitting them under more onerous conditions than it exacts from domestic companies would go into the discard." *Ibid.*[19] So long as a tax is "levied upon the privilege of entering the State and engaging in business there," it may not be challenged under the Equal Protection Clause, even though it may impose a burden greater and more discriminatory than was imposed at the date of the corporation's entry into the State. *Id.,* at 678.

The holding in *Lincoln National* has been implicitly re-

[18] The Court in *Lincoln National Life Ins. Co.* v. *Read* erroneously distinguished *Hanover Fire Ins. Co.* as involving an out-of-state insurance company holding an "unequivocal" license rather than an annual license, renewable only upon satisfaction of the condition precedent of paying the discriminatory tax. 325 U. S., at 676. In fact, the Hanover Fire Insurance Co. held only an annual license. 272 U. S., at 509. The Court in *Hanover Fire Ins. Co.* explicitly stated that the "principle is the same," no matter whether the license is annual or indefinite. *Ibid.*

[19] The reasoning in *Lincoln National Life* was virtually identical to that offered by Justice Holmes in his *Western Union* dissent. See n. 14, *supra.*

jected in at least three subsequent cases. In *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562 (1949), the Court struck down a provision of Ohio's ad valorem tax law that subjected certain intangible property of non-Ohio corporations to a tax not applied to identical property of Ohio corporations. The Court concluded that the provision violated the Equal Protection Clause on the ground that the inequality of treatment was "not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner." *Id.,* at 572.[20] The decision in *Wheeling Steel* was not directly in conflict with that in *Lincoln National,* because the Ohio courts had held the tax in *Wheeling Steel* an "*ad valorem* property tax, . . . and in no sense a franchise, privilege, occupation, or income tax." 337 U. S., at 572. However, the *Wheeling Steel* decision rejected the *principle* of *Lincoln National:* the opinion declared that a State's power to exclude out-of-state corporations is limited by the Constitution; the State may not "exac[t] surrender of rights derived from the Constitution of the United States." 337 U. S., at 571 (citing *Hanover Fire Ins. Co.* v. *Harding, supra,* at 507).

In *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U. S. 522 (1959), this Court sustained an Ohio statute exempting nonresidents from an ad valorem tax on certain property held in a storage warehouse, but not exempting Ohio residents from the tax. Without alluding to any possibility that legislative classifications based on State of incorporation should be subject to a different standard from other classifications, the Court held that state tax laws "must proceed upon a rational

[20] The State argued that other States could enact similar provisions, and thereby eliminate any inequality. This Court concluded, however, that "[i]t is hard to see that this offer of reciprocity restores to appellants any of the equality which the application of the Ohio tax, considered alone, so obviously denies." 337 U. S., at 573.

basis and may not resort to a classification that is palpably arbitrary." *Id.*, at 527.[21]

Finally, in *WHYY, Inc.* v. *Glassboro,* 393 U. S. 117 (1968), this Court struck down a New Jersey statute exempting nonprofit corporations incorporated in New Jersey from tax, but denying a similar exemption to nonprofit corporations incorporated in other States. Disregarding *Lincoln National,* the Court stated the applicable principle of law as follows:

> "This Court has consistently held that while a State may impose conditions on the entry of foreign corporations to do business in the State, once it has permitted them to enter, 'the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis.' *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 571–572. See *Reserve Life Ins. Co.* v. *Bowers,* 380 U. S. 258; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494; *Southern R. Co.* v. *Greene,* 216 U. S. 400." 393 U. S., at 119–120.

In view of the decisions of this Court both before and after *Lincoln National,* it is difficult to view that decision as other than an anachronism. We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that

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[21] Justice Harlan and I, concurring, went still further. Arguing that the Equal Protection Clause must be used as "an instrument of federalism," 358 U. S., at 532, we rejected the Court's analysis as insufficiently protective of out-of-state interests. We stated that the Equal Protection Clause denies a State "the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation." *Id.*, at 533. Our position has not been adopted by the Court, which has subsequently required no more than a rational basis for discrimination by States against out-of-state interests in the context of equal protection litigation. *E. g., Baldwin* v. *Montana Fish and Game Comm'n,* 436 U. S. 371, 388–391 (1978); *Hughes* v. *Alexandria Scrap Corp.,* 426 U. S. 794, 810–814 (1976).

authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose. As we held in *Power Manufacturing Co.* v. *Saunders,* 274 U. S., at 493–494:

> "No doubt there are . . . subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made."

IV

In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose? See *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U. S., at 461–463; *Vance* v. *Bradley,* 440 U. S. 93, 97–98 (1979).

The legislative purpose of California's retaliatory tax is not difficult to discern, for such taxes have been a common feature of insurance taxation for over a century. Although variously expressed, the principal purpose of retaliatory tax laws is to promote the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes. A survey of state retaliatory tax laws summarized:

> "[W]hatever their character, it is obvious . . . that their ultimate object is not to punish foreign corporations doing business in the state, or retort the action of the foreign state in placing upon corporations of the enact-

> ing state doing business therein burdens heavier than those imposed upon corporations of such foreign state doing business in the enacting state, but to induce such foreign state to show the same consideration to corporations of the enacting state doing business therein as is shown to corporations of such foreign state doing business in the enacting state." Annot., 91 A. L. R. 795 (1934).

Accord, *Bankers Life Co.* v. *Richardson,* 192 Cal. 113, 124–125, 218 P. 586, 591 (1923); *State ex rel. Crittenberger* v. *Continental Ins. Co.,* 67 Ind. App. 536, 542, 116 N. E. 929, 936 (1917); *Phoenix Ins. Co.* v. *Welch,* 29 Kan. 672, 674–675 (1883); *Life & Cas. Ins. Co.* v. *Coleman,* 233 Ky. 350, 351–352, 25 S. W. 2d 748, 749–750 (1930); *State* v. *Ins. Co. of North America,* 71 Neb. 320, 324, 99 N. W. 36, 38 (1904); *Massachusetts Mut. Ins. Co.* v. *Knowlton,* 94 N. H. 409, 412, 54 A. 2d 163, 165 (1947); *Commonwealth* v. *Fireman's Fund Ins. Co.,* 369 Pa. 560, 565–566, 87 A. 2d 255, 258 (1952); *Pacific Mut. Life Ins. Co.* v. *State,* 161 Wash. 135, 137–138, 296 P. 813, 814–815 (1931).[22]

California's retaliatory tax is based upon a model statute drafted by the insurance industry, and is virtually identical to that enacted by many other States. 4 California Assembly Interim Committee on Revenue and Taxation, The Insurance Tax, No. 15, pp. 64, 66 (1964) (hereafter Insurance Tax). Since the amount of revenue raised by the retaliatory tax is relatively modest, *id.,* at 65, and the impetus for passage of the tax comes from the nationwide insurance industry, it is clear that the purpose is not to generate revenue at the expense of out-of-state insurers, but to apply pressure on other

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[22] Although the retaliatory tax is an imposition on interstate insurance companies, it is supported by the industry as a means of fostering uniform and moderate levels of taxation nationwide. See Brief for the American Insurance Association et al. as *Amici Curiae;* Council of State Governments, State Retaliatory Taxation of the Insurance Industry 12 (1977).

States to maintain low taxes on California insurers. As a committee of the California Assembly has said: "The actual rationale for the provision is that the application of the retaliatory laws acts as a deterrent to state taxation on the insurance industry." *Id.*, at 66.[23]

Decisions by the California courts lend weight to this analysis. The Court of Appeal in the instant case held that the purpose of the retaliatory tax "is to put pressure on the several states to impose the same tax burden on all insurance companies, foreign or domestic, and thereby encourage the doing of interstate business." 99 Cal. App. 3d, at 413, 159 Cal. Rptr., at 541. Accord, *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 4 Cal. App. 3d, at 34, 84 Cal. Rptr., at 96; *Atlantic Ins. Co.* v. *State Board of Equalization*, 255 Cal. App. 2d 1, 4, 62 Cal. Rptr. 784, 786 (1967), cert. denied and appeal dism'd, 390 U. S. 529 (1968).

Many may doubt the wisdom of California's retaliatory tax; indeed, the retaliatory tax has often been criticized as a distortion of the tax system and an impediment to the raising of revenue from the taxation of insurance. See, *e. g.*, Council of State Governments, State Retaliatory Taxation of the Insurance Industry 12–13 (1977); Task Force Report, Statement of Policy on Insurance Premium Taxation, 1 Proc. Nat. Assn. of Ins. Comm'rs 71 (1971); Report of New Jersey Tax Policy Comm., Pt. V, pp. 47–48 (1972); Strickler, The Mess in State Premium Taxation of Insurance Companies, 69 Best's Rev. 34, 38 (1969). But the courts are not empowered to second-guess the wisdom of state policies. *Ferguson* v. *Skrupa*, 372 U. S. 726, 729 (1963). Our review is confined to the *legitimacy* of the purpose.

[23] The nature of the classification supports this conclusion as well. The retaliatory tax is not imposed on foreign corporations *qua* foreign corporations, as would be expected were the purpose of the tax to raise revenue from noncitizens; rather, it is imposed only on corporations whose home States impose more onerous burdens on California insurers than California otherwise would impose on those corporations.

There can be no doubt that promotion of domestic industry by deterring barriers to interstate business is a legitimate state purpose. This Court has recognized the legitimacy of state efforts to maintain the profit level of a domestic industry, *Parker* v. *Brown,* 317 U. S. 341, 363–367 (1943), and of efforts to "protect and enhance the reputation" of a domestic industry so that it might compete more effectively in the interstate market, *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 143 (1970). California's effort on behalf of its domestic insurance industry is no less legitimate.

The mere fact that California seeks to promote its insurance industry by influencing the policies of other States does not render the purpose illegitimate. As we said in *United States Steel Corp.* v. *Multistate Tax Comm'n,* 434 U. S. 452, 478 (1978):

> "Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, see, *e. g., Austin* v. *New Hampshire,* 420 U. S. 656 (1975), it is not clear how our federal structure is implicated."

Having established that the purpose of California's lawmakers in enacting the retaliatory tax was legitimate, we turn to the second element in our analysis: whether it was reasonable for California's lawmakers to believe that use of the challenged classification would promote that purpose. We acknowledge at the outset that many persons believe that retaliatory taxes are not an effective means for accomplishment of the goal of deterring discriminatory and excessive taxation of insurance companies by the various States. See, *e. g.,* Bodily, The Effects of Retaliation on the State Taxation of Life Insurers, 44 J. of Risk & Ins. 21 (1977); Pelletier, Insurance Retaliatory Laws, 39 Notre Dame Law. 243, 268–269 (1964); Task Force Report, *supra,* at 71. But whether

in fact the provision will accomplish its objectives is not the question: the Equal Protection Clause is satisfied if we conclude that the California Legislature *rationally could have believed* that the retaliatory tax would promote its objective. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S., at 466; *Vance* v. *Bradley*, 440 U. S., at 111; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154 (1938).

The Interim Committee on Revenue and Taxation of the California Assembly conducted a major study of the State's tax system before recommending passage of a constitutional amendment permitting enforcement of the present retaliatory tax.[24] That study found:

> "It is true that insurers are disadvantaged by retaliatory taxation provisions in the short run, for they usually result in some insurers paying more in taxes in retaliating states. But, in the long run, insurers as a group pay less in taxes because of these provisions, since legislators, when considering measures affecting insurers, do consider retaliatory effects in instance after instance." Insurance Tax, at 66.

The study concluded that retaliatory taxes "have kept premiums lower and insurers' profits higher than would otherwise have been the case." *Id.*, at 67. It therefore recommended passage of the proposed constitutional amendment. See *ibid.*

We cannot say that the California Legislature's conclusions were irrational, or even unreasonable. Assuming that the lawmakers of each State are motivated in part by a desire to promote the interests of their domestic insurance industry, it is reasonable to suppose that California's retaliatory tax will induce other States to lower the burdens on California insurers in order to spare their domestic insurers the cost of the retaliatory tax in California.

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

In any event, we do not find the evidence against the retaliatory tax overwhelming. The California Department of Finance evaluated the effect of the retaliatory laws:

> "Whether the insurance companies have sponsored this legislation or not, in their resistance to tax change they have benefitted by it. The home-owned companies in all but a half dozen states are able to say, 'Don't raise our taxes. If you do, we will have to pay more in other states.' The effectiveness of this barrier is demonstrated by the fact that of the 48 states, only 9 increased their insurance tax rates in the last twelve years. . . . None of these is an outstanding insurance state." State Department of Finance, Budget Div., Highlights of Proposal for Quarterly Insurance Tax Payments 3 (1963).

The California courts examined the issue, and found:

> "The common purpose of [retaliatory tax] legislation in the several states has been to discourage any state from imposing discriminatory taxes or other burdens upon out-of-state companies. The effort seems to have been very largely successful; in any event taxes on insurance premiums have stayed close to 2 percent in most states, for both domestic and out-of-state insurers." *Atlantic Ins. Co.* v. *State Board of Equalization,* 255 Cal. App. 2d, at 4, 62 Cal. Rptr., at 786.

Authorities in the field have found the evidence mixed. The leading empirical study of the effect of retaliatory tax laws examined tax rates on life insurance premiums from 1935 through 1972, and found: (1) that tax rates have not increased significantly in absolute terms over the period; (2) that life insurance premiums taxes have declined as a percentage of total state tax revenues; [25] and (3) that dis-

[25] A large part of this decline may be accounted for by the general decline in the States' reliance on business taxes. From 1957 to 1972, the proportion of total state tax revenues attributable to general business

crimination against foreign insurance companies has declined over the period. Bodily, 44 J. of Risk & Ins., at 27–32. These results are precisely those that advocates of the retaliatory tax would predict, and thus provide some support for that theory. Statistical analysis of the available data, however, failed to verify this conclusion: the correlation between retaliatory tax laws and the observed results was not found to be statistically significant. *Id.*, at 30–31. The author therefore concluded that retaliatory taxes have been "of questionable value." *Id.*, at 34. Cf. Pelletier, 39 Notre Dame Law., at 267–269; Felton, Retaliatory Insurance Company Taxation: An Evaluation, 28 J. of Ins. 71, 77–78 (1961).

Parties challenging legislation under the Equal Protection Clause cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." *United States* v. *Carolene Products Co., supra,* at 154. On this standard, we cannot but conclude that the California retaliatory insurance tax withstands the strictures of the Fourteenth Amendment.

Affirmed.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The practice of holding hostages to coerce another sovereign to change its policies is not new; nor, in my opinion, is it legitimate. California acknowledges that its discrimina-

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taxes fell by 17.7%, while the proportion attributable to life insurance premiums taxes fell by 20.0%. Bodily, The Effects of Retaliation on the State Taxation of Life Insurers, 44 J. of Risk & Ins. 21, 31–32 (1977). But see State Department of Finance, Budget Div., Highlights of Proposal for Quarterly Insurance Tax Payments 3–4 (1963) (showing that since 1950, the proportion of California tax revenues attributable to insurance taxes has decreased substantially relative to that attributable to bank and corporate taxes).

tion against Ohio citizens within its jurisdiction is specifically intended to coerce the Ohio Legislature into enacting legislation favored by California. Today the Court holds that this state purpose is legitimate. In my opinion that coercive motivation is not an acceptable justification for California's discriminatory treatment of nonresidents.

The discrimination disclosed by this record is much more irregular than a simple preference for domestic corporations over foreign corporations. Some foreign insurance companies pay the same tax that domestic companies pay. Those that pay higher taxes than California companies do not all pay the same tax. Thus, for example, California taxes insurance companies incorporated in Ohio at a 2.5% rate, Montana companies at a 2.75% rate, and West Virginia and Idaho companies at a 3% rate.[1] The prevailing tax rate in California for domestic companies and most foreign companies is 2.35%.[2] Thus the insurance companies competing in the California market are subjected to flagrant discrimination.

A desire to eliminate discrimination in other States does not justify the discrimination practiced by California. All insurance companies that do business in Ohio are taxed at the 2.5% rate and all those that compete in the West Virginia market pay the 3% rate. Neither of those States has meddled in California's affairs or taken any action that has a special impact in California. California's justification for its retaliatory tax scheme is simply to apply pressure on other States to lower their tax rates to the level that California considers acceptable. The possibility that different States

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[1] See Cal. Ins. Code Ann. § 685 (West 1972); Idaho Code § 41–402 (1977); Ohio Rev. Code Ann. § 5729.03 (1973); Mont. Code Ann. § 33–2–705 (1979); W. Va. Code §§ 33–3–14 and 33–3–14a (Supp. 1980). As the Court's opinion indicates, *ante*, at 651, the amount of retaliatory taxes reflected by these small percentage differences is significant.

[2] Cal. Rev. & Tax. Code Ann. §§ 12201, 12202 (West 1970).

may have different fiscal needs is a matter of no concern to California.[3]

Furthermore, the discrimination is not justified by any actions taken in California. The State has not pointed to any significant difference in the way different taxpayers conduct their business in California. No administrative problems justify charging residents of some States higher taxes than others. The mere difference in residence is admittedly an insufficient reason for disparate treatment,[4] and the incremental tax collected from out-of-state companies is not justified as a revenue measure.[5] Thus the retaliatory in-

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[3] The United States, as *amicus curiae,* takes the position that California has no legitimate interest in Ohio's level of taxation or fiscal structure when no discriminatory action against California citizens or corporations is involved. It states:

"The several states have different resources, populations, social and economic conditions, levels of public service, fiscal structures, methods and sources of raising revenue, and tax burdens, both in gross and per capita. With respect to other states, where no discriminatory or hostile action is involved, the states are largely autonomous in these matters. And even if another state has engaged in discriminatory action, the Constitution, as this Court has pointed out, does not contemplate the economic warfare of reprisal and retaliation. *A&P Tea Co.* v. *Cottrell,* 424 U. S. 366 (1976)." Brief for United States as *Amicus Curiae* 10.

[4] As the Court states:

"We consider it now established that, whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Ante,* at 667–668.

See also *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 572:

"It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner."

[5] "[I]t is clear that the purpose is not to generate revenue at the expense

crement is in the nature of a monetary penalty imposed on foreign citizens to apply pressure to their sovereign. Analytically, pressure of that kind is comparable to ransom.[6]

The Fourteenth Amendment to the United States Constitution provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." The federal interest vindicated by this provision requires every State to respect the individuality and the essential equality of every person subject to its jurisdiction; it forbids disparate treatment that is unrelated to any difference in the character or the behavior of persons subject to the State's jurisdiction. California's disapproval of the official policies of the State of Ohio cannot justify the exaction of special payments from individuals who come from that State, even though such exactions may cause them to plead with their legislature to conform to California's will.[7]

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of out-of-state insurers, but to apply pressure on other States to maintain low taxes on California insurers." See *ante*, at 669–670.

[6] California's objective is to confer a limited benefit on a limited group of companies that are incorporated under its laws. This case involves the special interest of insurance companies in paying taxes at a rate no higher than the rate California requires for its budgetary purposes. The next case may involve a different industry with a different special interest. Thus, for example, the trucking industry or the motorcoach industry might favor high speed limits, loose safety inspection laws, and lax emission standards. If their lobbyists could persuade the legislature of a powerful State to adopt rules favorable to their interests, then under today's holding they may also seek retaliatory programs that would apply pressure to neighboring States to adopt similar rules. Although such a statute might violate other constitutional provisions, such as the Commerce Clause, under today's holding the Equal Protection Clause would present no impediment.

[7] In holding that California's purpose in enacting the discriminatory tax is legitimate, the Court compares this case to state attempts to maintain the profit level of a domestic industry, *Parker* v. *Brown*, 317 U. S. 341, 363–367, and efforts to "protect and enhance the reputation" of a domestic industry, enabling it to compete more effectively in the interstate market. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 143. The enactment

In my opinion the federal interest in the impartial administration of the laws of the several States is unquestionably paramount to any one State's parochial interest in applying pressure to its neighbors by use of "retaliatory" legislation. This discriminatory legislation is not justified by a legitimate purpose and therefore violates the Equal Protection Clause.

I respectfully dissent.

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of a statute designed to confer a direct benefit or to provide protection for domestic corporations is surely not comparable to California's imposition of a burden on foreign corporations designed to coerce foreign States to enact legislation which will benefit California corporations at the expense of the interest which motivated the foreign State's original tax rate.

Syllabus

CLAYTON *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.

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

No. 80–5049. Argued March 4, 1981—Decided May 26, 1981*

After being discharged for violation of his employer's plant rule prohibiting defined misbehavior, an employee, pursuant to the grievance and arbitration procedure mandated by the collective-bargaining agreement between the employer and respondent union, asked his union representative to file a grievance on his behalf on the ground that his dismissal was not for just cause. The union pursued the grievance through the third step of the grievance procedure and requested arbitration, but it then withdrew the request. The union constitution required union members aggrieved by any action of the union to exhaust the internal union appeals procedures before seeking redress from a court. The employee, however, instead of filing an appeal from the union's decision not to seek arbitration of his grievance, filed an action in Federal District Court under § 301 (a) of the Labor Management Relations Act, alleging that the union had breached its duty of fair representation and that the employer had breached the collective-bargaining agreement by discharging him without just cause. He sought reinstatement from the employer and monetary relief from both the employer and the union. The District Court sustained the union and the employer's affirmative defense that the employee had failed to exhaust the internal union appeals procedures, and accordingly dismissed the suit against both the union and the employer. The Court of Appeals affirmed the dismissal of the suit against the union but reversed the dismissal against the employer. The court held that the employee's failure to exhaust was fatal to his claim against the union because by filing an internal appeal he might have received money damages, the relief he sought in his § 301 suit against the union. But the court held that the employee's failure to exhaust did not bar his suit against the employer because the internal appeals procedures

*Together with No. 80–54, *ITT Gilfillan, a Division of International Telephone & Telegraph Corp.* v. *Clayton,* also on certiorari to the same court.

could not result in either reinstatement of his job, the relief sought from the employer under § 301 (a), or reactivation of his grievance.

Held: Where the internal union appeals procedures could not reactivate the employee's grievance or grant him the complete relief he sought under § 301 (a), he should not have been required to exhaust such procedures prior to bringing suit against the union and the employer under § 301 (a). Pp. 685–696.

(a) Because internal union appeals procedures, in contrast to contractual grievance and arbitration procedures negotiated by the parties to a collective-bargaining agreement, are created by the union constitution and are designed to settle disputes between an employee and his union arising under the constitution, the policies encouraging private resolution of grievances arising out of the collective-bargaining process are not directly applicable to the issue whether to require exhaustion of internal union procedures. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, distinguished. Such policies are furthered by an exhaustion requirement only where the internal procedures can either grant the aggrieved employee full relief or reactivate his grievance. Pp. 685–689.

(b) If the internal procedures are inadequate to effect the relief sought by the employee, his failure to exhaust should be excused and he should be permitted to pursue his claim for breach of the duty of fair representation and breach of the collective-bargaining agreement in court under § 301. Here, although it appears that some monetary relief could be obtained through the internal procedures, it also appears that the union could neither reinstate the employee in his job nor reactivate his grievance because of certain time restrictions in the collective-bargaining agreement for obtaining arbitration of a grievance. These restrictions on the relief available through the internal procedures rendered such procedures inadequate. The policy underlying § 301 to effect a relatively rapid disposition of labor disputes would be undermined by an exhaustion requirement unless the internal procedures are capable of either reactivating the employee's grievance or of redressing it. Pp. 689–693.

(c) Although the argument that exhaustion of internal procedures should be required might have force if the employee's § 301 suit is only against the union and the internal procedures are adequate to grant the relief sought against the union, the defense should not be available where, as here, the employee sued both the union and the employer. If a trial court required exhaustion of the internal procedures with respect to the suit against the union but not against the employer, it would be faced with the undesirable alternatives of either staying the suit against the employer pending such exhaustion, thus

violating national labor policy, or of permitting the suit against the employer to proceed and tolling the statute of limitations against the union pending exhaustion, with the possible result that the court would find itself with two separate § 301 suits based on the same facts proceeding at different paces in its courtroom. Pp. 694–695.

623 F. 2d 563, affirmed in part, reversed in part, and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 696. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and POWELL, JJ., joined, *post*, p. 698.

Everett F. Meiners argued the cause and filed a brief for petitioner in No. 80–54. *John T. McTernan*, by appointment of the Court, 449 U. S. 1008, argued the cause for petitioner in No. 80–5049 and respondent in No. 80–54. With him on the briefs was *Elizabeth B. Spector*.

M. Jay Whitman argued the cause for respondents in No. 80–5049. With him on the brief were *John A. Fillion* and *Lawrence Rosenzweig*.†

JUSTICE BRENNAN delivered the opinion of the Court.

An employee seeking a remedy for an alleged breach of the collective-bargaining agreement between his union and employer must attempt to exhaust any exclusive grievance and arbitration procedures established by that agreement before he may maintain a suit against his union or employer under § 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (a). *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 652–653 (1965); see *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 563 (1976); *Vaca* v. *Sipes*,

†Briefs of *amici curiae* were filed by *J. Albert Woll, Laurence Gold*, and *Marsha Berzon* for the American Federation of Labor and Congress of Industrial Organizations; by *James C. Paras, Bruce A. Nelson, Thomas E. Wilson*, and *Stephen A. Bokat* for the Chamber of Commerce of the United States; and by *Wesley J. Fastiff* and *Kathleen M. Kelly* for Safeway Stores, Inc., et al.

386 U. S. 171, 184 (1967). The question presented by these cases is whether, and in what circumstances, an employee alleging that his union breached its duty of fair representation in processing his grievance, and that his employer breached the collective-bargaining agreement, must also attempt to exhaust the internal union appeals procedures established by his union's constitution before he may maintain his suit under § 301.

I

After eight years in the employ of ITT Gilfillan, Clifford E. Clayton, a member of the United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) and a shop steward of its Local 509, was dismissed for violating a plant rule prohibiting defined misbehavior. Pursuant to the mandatory grievance and arbitration procedure established by the collective-bargaining agreement between ITT and Local 509, Clayton asked his union representative to file a grievance on his behalf on the ground that his dismissal was not for just cause. The union investigated Clayton's charges, pursued his grievance through the third step of the grievance procedure, and made a timely request for arbitration.[1] It then withdrew the request, choosing not to proceed to arbitration. Clayton was notified of the union's decision after the time for requesting arbitration had expired.[2]

The UAW requires every union member "who feels aggrieved by any action, decision, or penalty imposed upon

[1] The collective-bargaining agreement between Local 509 and ITT Gilfillan establishes a four-step grievance procedure, with binding arbitration as the fourth step. Article IX of the agreement provides that if the union wishes to request arbitration, it must do so within 15 working days after completion of the third step of the grievance procedure. App. 31–36.

[2] Clayton was notified of the union's decision by a letter written by the International Representative responsible for servicing Local 509. *Id.*, at 78–79. Neither the union nor the employer contests Clayton's allegation that he received this letter more than 15 working days after completion of the third step of the grievance procedure. See *id.*, at 7; Tr. 88–99.

him" by the union to exhaust internal union appeals procedures before seeking redress from a "civil court or governmental agency." UAW Constitution, Art. 33, § 12. These procedures, established by Arts. 32 and 33 of the UAW Constitution and incorporated into Art. IV of Local 509's bylaws, direct the employee first to seek relief from the membership of his local. Art. 33, § 3. If not satisfied with the result obtained there, the employee may further appeal to the International Executive Board of the UAW, and eventually to either the Constitutional Convention Appeals Committee or to a Public Review Board composed of "impartial persons of good public repute" who are not members or employees of the union. Arts. 32, 33, §§ 3–11.

Clayton did not file a timely internal appeal from his local's decision not to seek arbitration of his grievance.[3] Instead, six months after the union's withdrawal of its request for arbitration, Clayton filed this action under § 301 (a) of the Labor Management Relations Act, 1947, 29 U. S. C. § 185 (a), in the District Court for the Central District of California. He alleged that the union had breached its duty of fair representation by arbitrarily refusing to pursue his grievance past the third step of the grievance procedure, and that the employer had breached the collective-bargaining agreement by discharging him without just cause.[4]

Both the union and the employer pleaded as an affirmative defense Clayton's failure to exhaust the internal union appeals procedures. App. 12, 18. The District Court sustained this defense, finding that Clayton had failed to exhaust the

[3] Under Art. 33, § 3, of the UAW Constitution, Clayton had 30 days from the date the union withdrew its request for arbitration to initiate the internal union appeals procedures.

[4] To prevail in an action under § 301 against either the employer or the union, an employee must ordinarily establish both that the union breached its duty of fair representation and that the employer breached the collective-bargaining agreement. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 570–571 (1976).

internal appeals procedures; that those procedures were adequate as a matter of law; that Clayton had been advised of their existence; and that his failure to exhaust could not be excused as futile. Record 397–404. Accordingly, the court dismissed Clayton's suit against both the union and the employer.

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of Clayton's suit against the union and reversed the dismissal of his suit against the employer. 623 F. 2d 563 (1980). Focusing on the adequacy of the relief available under the internal union appeals procedures the Court of Appeals held that Clayton's failure to exhaust was fatal to his claim against the union, because by filing an internal appeal Clayton might have received money damages, the relief he sought in his § 301 suit against the union. *Id.*, at 566. However, the Court held that Clayton's failure to exhaust did not bar his suit against the employer, because the internal appeals procedures could not result in either reinstatement of his job, which was the relief Clayton sought from the employer under § 301, or in reactivation of his grievance. *Id.*, at 569–570.

In No. 80–5049, Clayton argues that his § 301 claim against the UAW and Local 509 should be allowed to proceed despite his failure to exhaust internal union procedures. In No. 80–54, ITT Gilfillan argues that if Clayton's failure to exhaust bars his suit against the union, it must also bar his suit against the employer.

The Courts of Appeals are divided over whether an employee should be required to exhaust internal union appeals procedures before bringing suit against a union or employer under § 301. Some hold that the employee's failure to exhaust internal union procedures may not be asserted as a defense by an employer.[5] Others permit the defense to be

[5] See, *e. g.*, *Johnson* v. *General Motors*, 641 F. 2d 1075, 1083 (CA2 1981); *Geddes* v. *Chrysler Corp.*, 608 F. 2d 261, 264 (CA6 1979); *Petersen* v.

asserted by an employer if the internal appeals procedures could result in reactivation of the grievance.[6] With respect to a union, some courts hold that the employee's failure to exhaust is excused if union officials would be so hostile to an employee that he could not hope to obtain a fair hearing.[7] Others would also excuse the employee's failure to exhaust if the substantive relief available through the internal procedures would be less than that available in his § 301 action.[8]

We granted certiorari to resolve the conflict. 449 U. S. 950 (1980). We reverse the dismissal of Clayton's suit against the union and affirm the reversal of the dismissal of his suit against the employer. We hold that where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his § 301 suit, exhaustion will not be required with respect to either the suit against the employer or the suit against the union.

II

In *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), we were asked to decide whether an employee alleging a vio-

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Rath Packing Co., 461 F. 2d 312, 315 (CA8 1972); *Retana* v. *Apartment, Motel, Hotel and Elevator Operators Union*, 453 F. 2d 1018, 1027, n. 16 (CA9 1972).

[6] See, *e. g.*, *Varra* v. *Dillon Companies, Inc.*, 615 F. 2d 1315, 1317–1318 (CA10 1980); *Baldini* v. *Local Union No. 1095*, 581 F. 2d 145, 150 (CA7 1978); *Winter* v. *Local Union No. 639*, 186 U. S. App. D. C. 315, 319–320, 569 F. 2d 146, 150–151 (1977); *Harrison* v. *Chrysler Corp.*, 558 F. 2d 1273, 1278 (CA7 1977).

[7] See, *e. g.*, *Fizer* v. *Safeway Stores, Inc.*, 586 F. 2d 182, 183–184 (CA10 1978); *Winter* v. *Local Union No. 639, supra*, at 318, 569 F. 2d, at 149; *Imel* v. *Zohn Mfg. Co.*, 481 F. 2d 181, 184 (CA10 1973), cert. denied, 415 U. S. 915 (1974).

[8] See, *e. g.*, *Tinsley* v. *United Parcel Service, Inc.*, 635 F. 2d 1288, 1290 (CA7 1980); *Geddes* v. *Chrysler Corp., supra*, at 264; *Baldini* v. *Local Union No. 1095, supra*, at 149; *Buzzard* v. *Local Lodge 1040*, 480 F. 2d 35, 41 (CA9 1973). These cases compare the relief available through internal procedures with the relief available *against the union* under § 301.

lation of the collective-bargaining agreement between his union and employer must attempt to exhaust exclusive contractual grievance and arbitration procedures before bringing suit under § 301 (a).[9] In deciding that issue we looked to principles of federal common law. See *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 457 (1957). Two considerations influenced our decision to require exhaustion. First, Congress had "expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant." 379 U. S., at 653.[10] Second, a contrary rule, allowing an employee to bring suit under § 301 without attempting to exhaust the contractual grievance procedures, would "deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." *Ibid.*[11] The

[9] Section 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (a), provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[10] Section 203 (d) of the Labor Management Relations Act, 61 Stat. 153, 29 U. S. C. § 173 (d), provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

[11] We also noted that exhaustion would serve the interests of both the union and the employer:

"[It] complements the union's status as exclusive bargaining representative by permitting [the union] to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees." 379 U. S., at 653.

Moreover, exhaustion would not adversely affect the employee:

"[I]t cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved em-

rule established by *Republic Steel* was thus intended to protect the integrity of the collective-bargaining process and to further that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over the interpretation and application of collective-bargaining agreements. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S., at 567, 570–571.

The contractual procedures we required the employee to exhaust in *Republic Steel* are significantly different from the procedures at issue here. In these cases, the Court is asked to require exhaustion of *internal* union procedures. These procedures are wholly a creation of the UAW Constitution. They were not bargained for by the employer and union and are nowhere mentioned in the collective-bargaining agreement that Clayton seeks to have judicially enforced.[12] Nonetheless, Clayton's employer and union contend that exhaustion of the UAW procedures, like exhaustion of contractual grievance and arbitration procedures, will further national labor policy and should be required as a matter of federal common law. Their argument, in brief, is that an exhaustion requirement will enable unions to regulate their internal affairs without undue judicial interference and that it will also promote the broader goal of encouraging private resolution of disputes arising out of a collective-bargaining agreement.

We do not agree that the policy of forestalling judicial interference with internal union affairs is applicable to these

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ployee until the employee has attempted to implement the procedures and found them so." *Ibid.*

We concluded that since an employee bringing a § 301 claim is asserting rights created by a collective-bargaining agreement, he should also be required to pursue the dispute-resolution procedures created by that agreement. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S., at 562–563; *Vaca* v. *Sipes*, 386 U. S. 171, 184 (1967).

[12] Indeed, the parties concede that Clayton has exhausted the grievance and arbitration procedures that were expressly created by the collective-bargaining agreement.

cases.[13] This policy has been strictly limited to disputes arising over *internal* union matters such as those involving the interpretation and application of a union constitution. As we stated in *NLRB* v. *Marine Workers,* 391 U. S. 418 (1968), the policy of deferring judicial consideration of internal union matters does not extend to issues "in the public domain and beyond the internal affairs of the union." *Id.,* at 426, n. 8.[14] Here, Clayton's dispute against his union is based upon an alleged breach of the union's duty of fair representation. This allegation raises issues rooted in statutory policies extending far beyond internal union interests.

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[13] This policy has its statutory roots in § 101 (a)(4) of the Landrum-Griffin Act, 73 Stat. 522, 29 U. S. C. § 411 (a)(4), which is part of the subchapter of that Act entitled "Bill of Rights of Members of Labor Organizations." Section 101 (a)(4) provides:

"No labor organization shall limit the right of any member thereof to institute an action in any court, . . . *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal . . . proceedings against such organizations or any officer thereof . . . ."

[14] In *NLRB* v. *Marine Workers,* we held that respondent union could not discipline one of its members for failing to exhaust internal appeals procedures before filing an unfair labor practice charge with the National Labor Relations Board, because the unfair labor practices charge was "in the public domain and beyond the internal affairs of the union." 391 U. S., at 425. "A proceeding by the [NLRB] is not to adjudicate private rights but to effectuate a public policy," and "[a]ny coercion used to discourage, retard, or defeat . . . access [to those proceedings] is beyond the legitimate interests of a labor organization." *Id.,* at 424. Moreover, "[t]here cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member. If the member becomes exhausted, instead of the remedies, the issues of public policy are never reached and an airing of the grievance never had." *Id.,* at 425. See also 105 Cong. Rec. 17899 (1959) (remarks of Sen. Kennedy) (§ 101 (a)(4) not intended "to eliminate existing grievance procedures established by union constitutions for redress of alleged violations of *their internal governing laws*").

See *United Parcel Service, Inc.* v. *Mitchell, ante,* at 66, and n. 2 (STEWART, J., concurring); *Hines* v. *Anchor Motor Freight, Inc., supra,* at 562; *Vaca* v. *Sipes,* 386 U. S., at 182; *Humphrey* v. *Moore,* 375 U. S. 335 (1964).

Our analysis, then, focuses on that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over collective-bargaining agreements. Concededly, a requirement that aggrieved employees exhaust internal remedies might lead to nonjudicial resolution of some contractual grievances. For example, an employee who exhausts internal union procedures might decide not to pursue his § 301 action in court, either because the union offered him a favorable settlement, or because it demonstrated that his underlying contractual claim was without merit. However, we decline to impose a universal exhaustion requirement lest employees with meritorious § 301 claims be forced to exhaust themselves and their resources by submitting their claims to potentially lengthy internal union procedures that may not be adequate to redress their underlying grievances.

As we stated in *NLRB* v. *Marine Workers, supra,* at 426, and n. 8, courts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.

Clayton has not challenged the finding of the lower courts that the UAW internal appeals procedures are fair and reasonable. He concedes that he could have received an impar-

tial hearing on his claim had he exhausted the internal union procedures. See *Glover* v. *St. Louis-San Francisco R. Co.*, 393 U. S. 324, 330–331 (1969). Accordingly, our inquiry turns to the second factor, whether the relief available through the union's internal appeals procedures is adequate.

In his suit under § 301, Clayton seeks reinstatement from his employer and monetary relief from both his employer and his union.[15] Although, the UAW Constitution does not indicate on its face what relief is available through the internal union appeals procedures,[16] the parties have stipulated that the Public Review Board can award backpay in an appropriate case, Tr. 35–36, and the two decisions of the Public Review Board reprinted in the joint appendix both resulted in awards of backpay. App. 89–109. It is clear, then, that at least some monetary relief may be obtained through the internal appeals procedures.[17]

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[15] App. 8–9. Reinstatement is available only from the employer, because the union has no power to order reinstatement under the collective-bargaining agreement. Damages, however, can be assessed against both the employer and the union. As we stated in *Vaca* v. *Sipes*, 386 U. S., at 197–198, an employee who establishes that the union breached its duty of fair representation in processing his grievance, and that the employer breached the collective-bargaining agreement, may be entitled to an award of damages "apportion[ed] . . . between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer."

[16] The UAW Constitution states only that the Constitution Convention Appeals Committee has "the authority to consider and decide all appeals submitted to it," Art. 33, § 8, and that the Public Review Board has the "authority and duty to make final and binding decisions on all cases appealed to it," Art. 32, § 3 (b), and to "dispose of all facets of the appeal." Art. 33, § 11.

[17] The record does not indicate whether this monetary relief includes backpay only, or whether it also may include prospective monetary relief

It is equally clear that the union can neither reinstate Clayton in his job, see n. 15, *supra,* nor reactivate his grievance. Article IX of the collective-bargaining agreement between Local 509 and ITT Gilfillan provides that the union may obtain arbitration of a grievance only if it gives "notice . . . to the Company in writing within fifteen (15) working days after the date of the Company's decision at Step 3 of the Grievance Procedure." By the time Clayton learned of his union's decision not to pursue the grievance to arbitration, this 15-day time limit had expired. See n. 2, *supra.* Accordingly, the union could not have demanded arbitration even if the internal appeal had shown Clayton's claim to be meritorious. The union was bound by its earlier decision not to pursue Clayton's grievance past the third stage of the grievance and arbitration procedure.[18] For the reasons that follow, we conclude that these restrictions on the relief avail-

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and incidental or punitive damages, relief that Clayton is apparently seeking in his § 301 action. See App. 9.

[18] The parties stipulated at trial that once Local 509 withdrew its request for arbitration, that "was the end of the road so far as remedies under the contract were concerned." Tr. 109; see also *id.,* at 260, 268. That stipulation is consistent with the collective-bargaining agreement. Although Art. VIII, § 5, which establishes time limits for processing *grievances,* states that "[t]he time limits contained herein may be extended by mutual agreement in writing by the parties concerned," there is no comparable waiver provision in Art. IX, which establishes the 15-day time limit for requesting *arbitration.* See also *Tinsley* v. *United Parcel Service, Inc.,* 635 F. 2d, at 1292; *Baldini* v. *Local Union No. 1095,* 581 F. 2d, at 150; *Harrison* v. *Chrysler Corp.,* 558 F. 2d., at 1279.

Although most collective-bargaining agreements contain similarly strict time limits for seeking arbitration of grievances, there are some exceptions. The UAW informs us that "[s]ome employers and unions have, through collective bargaining, agreed to allow the reinstatement of withdrawn grievances where a union tribunal reverses the union's initial decision. This is true, for example, in the current UAW contracts with the major automobile and agricultural implement manufacturers." Brief for Respondents in No. 80–5049, p. 18, n. 40. In such cases, the relief available through the union's internal appeal procedures would presumably be adequate.

able through the internal UAW procedures render those procedures inadequate.[19]

Where internal union appeals procedures can result in either complete relief to an aggrieved employee or reactivation of his grievance, exhaustion would advance the national labor policy of encouraging private resolution of contractual labor disputes. In such cases, the internal union procedures are capable of fully resolving meritorious claims short of the judicial forum. Thus, if the employee received the full relief he requested through internal procedures, his § 301 action would become moot, and he would not be entitled to a judicial hearing. Similarly, if the employee obtained reactivation of his grievance through internal union procedures, the policies underlying *Republic Steel* would come into play,[20] and the employee would be required to submit his claim to the collectively bargained dispute-resolution procedures.[21] In either case, exhaustion of internal remedies could result in final resolution of the employee's contractual grievance through private rather than judicial avenues.

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[19] Accordingly, we need not discuss the third factor, whether exhaustion of the union's otherwise adequate internal appeals procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.

[20] Allowing a defendant in a § 301 action to demand exhaustion of internal union procedures when those procedures could lead to reactivation of a stalled grievance is wholly consistent with *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650 (1965). In *Republic Steel,* we held that an employer may rely on a provision in a collective-bargaining agreement requiring its employees to submit all contractual grievances to arbitration prior to bringing suit under § 301. If a provision in the collective-bargaining agreement also permits reactivation of a grievance after an internal union appeal, an employer or union should also be able to rely on that provision and thus defend the § 301 suit on the ground that the employee failed to exhaust internal union procedures.

[21] In addition, by reactivating the grievance, the union might be able to rectify the very wrong of which the employee complains—a breach of the duty of fair representation caused by the union's refusal to seek arbitration—and the employee would then be unable to satisfy the precondition to a § 301 suit against the employer.

By contrast, where an aggrieved employee cannot obtain either the substantive relief he seeks or reactivation of his grievance, national labor policy would not be served by requiring exhaustion of internal remedies. In such cases, exhaustion would be a useless gesture: it would delay judicial consideration of the employee's § 301 action, but would not eliminate it.[22] The employee would still be required to pursue judicial means to obtain the relief he seeks under § 301. Moreover, exhaustion would not lead to significant savings in judicial resources, because regardless of the outcome of the internal appeal, the employee would be required to prove *de novo* in his § 301 suit that the union breached its duty of fair representation and that the employer breached the collective-bargaining agreement.[23] As we recently stated, one of the important federal policies underlying § 301 is the "'relatively rapid disposition of labor disputes.'" *United Parcel Service, Inc.* v. *Mitchell, ante,* at 63, quoting *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U. S. 696, 707 (1966). This policy is undermined by an exhaustion requirement unless the internal procedures are capable of either reactivating the employee's grievance or of redressing it.[24]

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[22] Of course exhaustion might deplete the employee's energy and resources to the point where he chooses not to pursue his § 301 claim in court, but that result is surely inconsistent with federal policy.

[23] Even if the union admitted during the internal appeals procedures that it had breached its duty of fair representation, an admission the UAW has apparently made only once in the 20 years preceding 1977, see Klein, Enforcement of the Right to Fair Representation: Alternative Forums, The Duty of Fair Representation 103 (1977), the employee would still not be saved the time and expense of proving that breach in his § 301 suit. While a union's admission that it breached its duty of fair representation is certainly evidence a court can consider, an employer defending a § 301 suit would still be entitled to prove that no such breach had occurred. See *Vaca* v. *Sipes,* 386 U. S., at 186–187.

[24] We are also not persuaded by the Court of Appeals' assumption that exhaustion would narrow and focus the issues for ultimate judicial determination. The Court of Appeals stated:

"The UAW's liability (if any) for breach of its duty of fair representation

In reliance upon the Court of Appeals' opinion in these cases, the UAW contends that even if exhaustion is not required with respect to the employer, it should be required with re-

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would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. But *the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compiling a record that would greatly assist the court now.*" 623 F. 2d, at 566 (emphasis added).

There are three reasons why we are not persuaded by this analysis. First, the record *does* indicate why the union withdrew its request for arbitration of Clayton's grievance. The letter from Local 509's International Representative to Clayton, informing him that the union had withdrawn its request for arbitration, listed five reasons in support of the union's decision. See n. 2, *supra.* Second, since the UAW Constitution does not on its face require any of the decisionmaking panels of the union to explain the reasons underlying their disposition of an employee's internal union appeal, there is no guarantee that exhaustion will result in a useful interpretation of union rules. Third, in many cases the union tribunal is not permitted to consider certain allegations the employee could assert under § 301. In these cases, for example, Clayton alleges that the union "acted *arbitrarily* . . . and discriminatorily" in refusing to seek arbitration of his grievance. App. 6 (emphasis added). The UAW Constitution, however, states that the Public Review Board can only consider allegations that the employee's grievance "was improperly handled [by the union] because of *fraud, discrimination, or collusion with management.*" Art. 33, § 8 (b) (emphasis added). This standard offers the aggrieved employee less protection than the "arbitrary, discriminatory, or in bad faith" standard for breach of the duty of fair representation that we developed in *Vaca* v. *Sipes, supra,* at 190. As the General Counsel to the Public Review Board has stated:

"The UAW acknowledges that it has a duty of fair representation to its members. Moreover, it acknowledges that its members may assert a claim for a breach of the duty of fair representation within the system of internal remedies. It does not concede to its members, however, that arbitrary, perfunctory, or negligent conduct amounts to a breach of the duty of fair representation, nor does it permit them even to assert this type of claim before the PRB, since the standard of review is jurisdictional. That is, unless the requisite claim is made (fraud, discrimination, or collusion) the board may not entertain it." Klein, *supra,* at 99.

See also *Johnson* v. *General Motors,* 641 F. 2d, at 1081. Of course,

spect to the union, because the relief Clayton seeks *against the union* in his § 301 suit is available through internal union procedures. But cf. n. 17, *supra*. We disagree. While this argument might have force where the employee has chosen to bring his § 301 suit only against the union, the defense should not be available where, as here, the employee has filed suit against both the union and the employer. A trial court requiring exhaustion with respect to the suit against the union, but not with respect to the suit against the employer, would be faced with two undesirable alternatives. If it stayed the action against the employer pending resolution of the internal appeals procedures, it would effectively be requiring exhaustion with respect to the suit against the employer, a result we have held would violate national labor policy. Yet if it permitted the action against the employer to proceed, and tolled the running of the statute of limitation in the suit against the union until the internal procedures had been exhausted, it could very well find itself with two separate § 301 suits, based on the same facts, proceeding at different paces in its courtroom. As we suggested in *Vaca* v. *Sipes,* 386 U. S., at 197, this is a result that should be avoided if possible. The preferable approach is for the court to permit the employee's § 301 action to proceed against both defendants, despite the employee's failure to exhaust, unless the internal union procedures can reactivate the grievance or grant the relief that would be available in the employee's § 301 suit against both defendants.

III

In contrast to contractual grievance and arbitration procedures, which are negotiated by the parties to a collective-bargaining agreement and are generally designed to provide

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if an allegation cannot be considered by the Public Review Board, no record helpful to a court will be made with respect to that issue. In sum, we conclude that the prospect that exhaustion would create a record helpful to a court in a subsequent § 301 action is too speculative to be given much weight.

an exclusive method for resolving disputes arising under that agreement, internal union appeals procedures are created by the union constitution and are designed to settle disputes between an employee and his union that arise under that constitution. Because of this distinction, the policies underlying *Republic Steel,* encouraging private resolution of grievances arising out of the collective-bargaining process, are not directly applicable to the issue whether to require exhaustion of internal union procedures.

We conclude that the policies underlying *Republic Steel* are furthered by an exhaustion requirement only where the internal union appeals procedures can either grant the aggrieved employee full relief or reactivate his grievance. For only in those circumstances is there a reasonable possibility that the employee's claim will be privately resolved. If the internal procedures are not adequate to effect that relief, the employee should not be required to expend time and resources seeking a necessarily incomplete resolution of his claim prior to pursuing judicial relief. If the internal procedures are inadequate, the employee's failure to exhaust should be excused, and he should be permitted to pursue his claim for breach of the duty of fair representation and breach of the collective-bargaining agreement in court under § 301.

In this case, the internal union appeals panels cannot reactivate Clayton's grievance and cannot grant Clayton the reinstatement relief he seeks under § 301. We therefore hold that Clayton should not have been required to exhaust internal union appeals procedures prior to bringing suit against his union and employer under § 301.

Affirmed in part, reversed in part, and remanded.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, dissenting.

I join JUSTICE REHNQUIST's dissent, and write briefly to

emphasize a rationale—suggested by an *amicus curiae**—that is consistent both with national labor policy and the relevant precedents.

In briefest summary, I would hold that in the circumstances of this case no issue concerning the breach of the union's statutory duty of fair representation properly can be said to arise *at all.* The union has not made a final determination whether to pursue arbitration on Clayton's behalf. Clayton should not be able to claim a breach of duty by the union until the union has had a full opportunity to make this determination. No such opportunity exists until Clayton exhausts the procedures available for resolving that question. Thus, as Clayton cannot claim a breach of duty by the union, he cannot bring a breach of contract suit under § 301 against his employer.

In my view, the asserted distinction in a tripartite case such as this one between contractual and internal union remedies, *ante,* at 687, is immaterial. The situation presented in this case is well within the doctrine underlying *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650 (1965), that employees must pursue all procedures established for determining whether a union will go forward with a grievance. Employees must pursue available procedures even if the collective-bargaining agreement contains time limits that appear on their face to bar revival of the grievance. As the Court noted in *John Wiley & Sons* v. *Livingston,* 376 U. S. 543, 556–557 (1964), "[q]uestions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it." Therefore, "it best accords with the usual purposes of an arbitration clause and with the policy behind federal labor law to regard procedural disagreements not as separate disputes but as aspects of the

*Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 3–4, 5–14.

dispute which called the grievance procedures into play." *Id.*, at 559. Thus, the question whether such time limits should be waived in a particular case is itself an arbitrable matter.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL join, dissenting.

The Court of Appeals for the Ninth Circuit held that the defense of exhaustion of internal union remedies was available to the union defendant in this § 301 action but not to the employer defendant. The result of this ruling was to put the employer in the unenviable position of having to defend the manner in which the union represented one of its employees (Clayton) during a grievance procedure. The Court's opinion today rights what I view as the principal error in the decision below by requiring the actions against the employer and union to proceed simultaneously. *Ante,* at 695. The Court reaches this conclusion by holding that in this particular case the exhaustion defense should not be available to either the union or employer. I, however, view differently than does the Court the benefits to be obtained from requiring exhaustion in these cases, and would require Clayton to exhaust his intraunion remedies before proceeding against either his union or employer.

The Court does not require exhaustion of internal union remedies in this case because it finds the remedies cannot provide Clayton with all the substantive relief he seeks (*i. e.,* money damages *and* reinstatement) or with reactivation of his grievance. *Ante,* at 693. The Court, however, concedes that where the internal remedies can provide such relief, the exhaustion defense should be available to the employer and union alike. *Ante,* at 692, and n. 20. Presumably, this would require exhaustion in a § 301 case where the only relief sought was money damages and money damages were obtainable through the internal union procedures. In such a case, the employee would be able to obtain all "the substantive relief he seeks." *Ante,* at 693.

The Court creates a three-prong test for determining when a district court should exercise its discretion and require exhaustion of intraunion remedies. *Ante,* at 689. Admittedly, a district court when exercising this discretion should carefully consider the first criterion referred to by the Court—whether union officials are so hostile to the employee that he could not obtain a fair hearing on his claim. *Ibid.* However, there is no question that this criterion does not come into play in this case. *Ibid.*

The second prong of the Court's test is "whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301 . . . ." *Ibid.* Exhaustion is not required in this case, the Court says, because the UAW's internal union appeals procedures cannot provide Clayton with reinstatement or reactivation of his grievance.

However, no prior case of this Court has held that exhaustion should not be required unless the internal union remedies can provide all the substantive relief requested or reactivation of the grievance. The principal difficulty with the Court's opinion lies in its framing of this second criterion which reflects much too narrow a view of the purposes of the exhaustion defense and the benefits which will likely result from requiring exhaustion in a case where a union has established a means for reviewing the manner in which it has represented an employee during a grievance. It is worth noting that neither *NLRB* v. *Marine Workers,* 391 U. S. 418 (1968), on which the Court so heavily relies, nor any other case of this Court, supports the language used by the Court in the second prong of its test. In fact, *Marine Workers* simply states exhaustion should not be required "when the administrative remedies are inadequate." *Id.,* at 426, n. 8. Our focus therefore should be on the adequacies of the union remedies when viewed in the context of the underlying purpose of the exhaustion defense—which is to encourage private rather than judicial resolution of disputes.

The exhaustion of intraunion remedies, even where those remedies cannot provide reinstatement or reactivation of a grievance, does promote private resolution of labor disputes. Resort to the intraunion appeals procedures provides the union with its first opportunity to focus on the issue of fair representation—as opposed to the alleged breach of the collective-bargaining agreement. Resort to the union appeals procedures gives the union an opportunity to satisfy the employee that its decision not to pursue a grievance was correct. If successful on this score, litigation is averted. Where a union determines through its appeals procedures that it mishandled an employee's grievance, litigation may also be averted because at that point both the union and the employer have a strong incentive to pursue private resolution of the grievance. Even where a collective-bargaining agreement does not provide for reactivation of a grievance, it is reasonable to assume that many employers, when confronted with both a determination by a union that it had breached its duty of fair representation and the immediate prospect of an employee commencing litigation, would seriously consider voluntarily reactivating the grievance procedure to avoid the additional burden and costs of litigation. Should litigation nonetheless occur, exhaustion may well have narrowed the factual and legal issues to be decided and thus result in a savings of judicial resources. A fact that should also not be discounted is that the conscientious handling by a union of an employee's intraunion appeal cannot help but enhance the union's prestige with its members. Cf. *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650, 653 (1965). Exhaustion promotes union democracy and self-government as well as the broader policy of noninterference with internal union affairs. A union's incentive to maintain internal procedures which provide substantial procedural protection and which can afford significant substantive relief will be greatly undermined if an employee can simply bypass the procedures at will.

The error in the Court's analysis results in part from its

apparent belief that intraunion remedies must provide a complete substitute for either the courts or the contract grievance procedure in order to be deemed "adequate." The purpose of intraunion remedies, however, is quite different. These remedies are provided to facilitate or encourage the private resolution of disputes, not to be a complete substitute for the courts. Intraunion remedies can serve this purpose so long as they have the capacity to address whether the union wrongfully handled the grievance. Obviously, if a union appeals procedure cannot address this question, exhaustion should not be required.

An additional question which is also of great importance is whether a union should ever be found to have breached its duty of fair representation when a union member shuns an appeals procedure which is both mandated by the union consitution and established for the purpose of allowing the union to satisfy its duty of fair representation. It seems to me not at all unreasonable to say that a union should have the right to require its members to give it the first opportunity to correct its own mistakes. Responsible union self-government demands a fair opportunity to function. This is especially true in a situation such as here where exhaustion of the union remedies could eliminate the need to litigate altogether. Congress has recognized the importance of these values in § 101 (a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 U. S. C. § 411 (a)(4). This section provides in part:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or any proceeding before any administrative agency . . . . *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . . ."

In § 101 (a)(4), Congress has restricted the power of unions to limit the rights of their members to resort to the courts. At the same time, however, Congress gave the judiciary the discretion to require union members to exhaust hearing procedures. As this Court explained in *Marine Workers,* the language in § 101 (a)(4) is

> "a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency." 391 U. S., at 426.

Section 101 (a)(4) reflects what I believe to be the reasonable compromise Congress reached when trying to balance two somewhat competing interests—furtherance of the national labor policy in favor of private resolution of disputes on the one hand and the desire not to unduly burden or "exhaust" an individual employee with time-consuming procedures on the other. It is fair to say that § 101 (a)(4) represents Congress' judgment that limiting access to the courts for at least four months is not an unreasonable price to pay in exchange for the previously mentioned benefits exhaustion may provide.

The language of § 101 (a)(4) also goes a long way to satisfy the third prong of the test set forth by the Court today. Exhaustion of internal union procedures should not be required where such would unreasonably delay an employee's opportunity to obtain a judicial hearing on the merits of his claim. *Ante,* at 689. Intraunion procedures which take years to complete serve no worthwhile purpose in the overall scheme of promoting the prompt and private resolution of claims. But a requirement that an employee not be per-

mitted to go to court without first having pursued an intraunion appeal for at least four months does substantially further this national labor policy without placing any unfair burden on an employee. As such, I think all interested parties would be well served by a requirement that employees exhaust their intraunion procedures for this limited period of time prescribed by Congress.

H. A. ARTISTS & ASSOCIATES, INC., ET AL. *v.* ACTORS' EQUITY ASSN. ET AL.

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

No. 80-348. Argued March 23, 1981—Decided May 26, 1981

Respondent union, which represents most of the stage actors and actresses in the United States, has entered into collective-bargaining agreements with virtually all major theatrical producers throughout the country, fixing minimum (scale) wages and other conditions of employment for those represented by the union. Because of abuses by theatrical agents who, as independent contractors, negotiated employment contracts for actors and actresses with producers, particularly abuses as to the extraction of high commissions tending to undermine collectively bargained rates of compensation, the union in 1928 unilaterally established a licensing system for the regulation of agents, prohibiting union members from using an agent who has not obtained a license from the union. The essential elements of the licensing system have remained unchanged. To obtain a license, an agent must agree to comply with union regulations which, *inter alia,* prohibit agent commissions on scale portions of wages received by an actor or an actress from a producer, limit commissions on wages in excess of scale pay, and require payment to the union of franchise fees. Petitioners, agents who refused to obtain union licenses, instituted this action, contending that the union's regulations violated §§ 1 and 2 of the Sherman Act. After trial, the District Court dismissed the complaint, finding that the union's agency franchise system was protected from liability by the antitrust exemptions of unions and their members arising under the Clayton Act and the Norris-LaGuardia Act. The Court of Appeals affirmed, determining that the central feature of the union's franchising system—the exaction of an agreement by agents as to their commissions—was immune from antitrust challenge. The court suggested that if the exactions of franchise fees exceeded the union's costs in administering its license system, they could not legally be collected; but despite the lack of any cost evidence at trial, the court concluded that the fees were sufficiently low that a remand on the point would not serve any useful purpose.

Held:

1. Labor unions acting in their self-interest and not in combination with nonlabor groups enjoy statutory exemption from Sherman Act

liability, but the exemption does not apply when a union combines with a "nonlabor group," or persons who are not "parties to a labor dispute" within the meaning of the Norris-LaGuardia Act. *United States* v. *Hutcheson*, 312 U. S. 219. Here, the union's franchising of agents did not involve any combination between the union and any "nonlabor groups." The record amply supports the conclusion that there was no combination between the union and the theatrical producers, and the determination of whether the combination between the union and those agents who agreed to become franchised was a combination with a "nonlabor group" depends on whether there was "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." *Musicians* v. *Carroll*, 391 U. S. 99, 106. Because of the peculiar structure of the legitimate theater industry, where it is customary if not essential for union members to secure employment through agents whose fees are calculated as a percentage of the member's wage—thus making it impossible for the union to defend even the integrity of the minimum wages it has negotiated with producers without regulation of agency fees—the union's regulations are within the labor exemption. Agents must, therefore, be considered a "labor group" and their controversy with the union is plainly a "labor dispute" as defined in the Norris-LaGuardia Act. The union's regulations are also clearly designed to promote its legitimate self-interest. Pp. 713–722.

2. However, the union's justification for the franchise fees—based only on the suggestion in the most general terms that they are related to the basic purposes of its regulations—is inadequate to warrant the conclusion that the fees are a permissible component of the exempt regulatory system. P. 722.

622 F. 2d 647, affirmed in part, reversed in part, and remanded.

STEWART, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in all but Part II–D of which BURGER, C. J., and BRENNAN and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and MARSHALL, J., joined, *post*, p. 723.

Howard Breindel argued the cause for petitioners. With him on the briefs was *Charles Donelan.*

Jerome B. Lurie argued the cause for respondents. With him on the brief were *Sidney E. Cohn, Mary K. O'Melveny, Nan Bases,* and *Samuel Estreicher.*

Laurence Gold argued the cause for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance. With him on the brief were *J. Albert Woll* and *George Kaufmann.**

JUSTICE STEWART delivered the opinion of the Court.

The respondent Actors' Equity Association (Equity) is a union representing the vast majority of stage actors and actresses in the United States. It enters into collective-bargaining agreements with theatrical producers that specify minimum wages and other terms and conditions of employment for those whom it represents. The petitioners are independent theatrical agents who place actors and actresses in jobs with producers. The Court of Appeals for the Second Circuit held that the respondents' [1] system of regulation of theatrical agents is immune from antitrust liability by reason of the statutory labor exemption from the antitrust laws, 622 F. 2d 647.[2] We granted certiorari to consider the availability of that exemption in the circumstances presented by this case. 449 U. S. 991.

I

A

Equity is a national union that has represented stage actors and actresses since early in this century. Currently representing approximately 23,000 actors and actresses, it has collective-bargaining agreements with virtually all major theatrical producers in New York City, on and off Broadway,

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**David Alter, Joseph Ferraro, Mortimer Becker, Henry Kaiser, Ronald Rosenberg,* and *Paul P. Selvin* filed a brief for the American Federation of Television and Radio Artists et al. as *amici curiae* urging affirmance.

[1] The respondent Donald Grody is the executive secretary of Equity.

[2] The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U. S. C. § 17 and 29 U. S. C. § 52, and §§ 4, 5, and 13 of the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U. S. C. §§ 104, 105, and 113.

and with most other theatrical producers throughout the United States. The terms negotiated with producers are the minimum conditions of employment (called "scale"); an actor or actress is free to negotiate wages or terms more favorable than the collectively bargained minima.

Theatrical agents are independent contractors who negotiate contracts and solicit employment for their clients. The agents do not participate in the negotiation of collective-bargaining agreements between Equity and the theatrical producers. If an agent succeeds in obtaining employment for a client, he receives a commission based on a percentage of the client's earnings. Agents who operate in New York City must be licensed as employment agencies and are regulated by the New York City Department of Consumer Affairs pursuant to New York law, which provides that the maximum commission a theatrical agent may charge his client is 10% of the client's compensation.

In 1928, concerned with the high unemployment rates in the legitimate theater and the vulnerability of actors and actresses to abuses by theatrical agents,[3] including the extraction of high commissions that tended to undermine collectively bargained rates of compensation, Equity unilaterally established a licensing system for the regulation of agents. The regulations permitted Equity members to deal only with those agents who obtained Equity licenses and thereby agreed to meet the conditions of representation prescribed by Equity. Those members who dealt with nonlicensed agents were subject to union discipline.

The system established by the Equity regulations was immediately challenged.[4] In *Edelstein* v. *Gillmore,* 35 F. 2d

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[3] Such vulnerability was, and still remains, particularly acute for actors and actresses without established professional reputations, who have always constituted the overwhelming majority of Equity's members.

[4] The challenge was grounded on allegations of common-law tortious interference with business relationships.

723, the Court of Appeals for the Second Circuit concluded that the regulations were a lawful effort to improve the employment conditions of Equity members. In an opinion written by Judge Swan and joined by Judge Augustus N. Hand,[5] the court said:

> "The evils of unregulated employment agencies (using this term broadly to include also the personal representative) are set forth in the defendants' affidavits and are corroborated by common knowledge. . . . Hence the requirement that, as a condition to writing new business with Equity's members, old contracts with its members must be made to conform to the new standards, does not seem to us to justify an inference that the primary purpose of the requirement is infliction of injury upon plaintiff, and other personal representatives in a similar situation, rather than the protection of the supposed interests of Equity's members. *The terms they insist upon are calculated to secure from personal representatives better and more impartial service, at uniform and cheaper rates, and to improve conditions of employment of actors by theater managers.* Undoubtedly the defendants intend to compel the plaintiff to give up rights under existing contracts which do not conform to the new standards set up by Equity, but, as already indicated, *their motive in so doing is to benefit themselves and their fellow actors in the economic struggle.* The financial loss to plaintiff is incidental to this purpose." *Id.,* at 726 (emphasis added).[6]

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[5] Judge Manton dissented without opinion.

[6] For contemporary descriptions of agent abuses of actors and actresses, see generally A. Harding, The Revolt of the Actors (1929). See also New Rules for Actors, N. Y. Times, Sept. 24, 1928, p. 20, col. 3; The New Republic, Oct. 24, 1928, p. 263. Cf. *Ribnik* v. *McBride,* 277 U. S. 350, 359–375 (Stone, J., joined by Holmes and Brandeis, JJ., dissenting) (general abuses by employment agencies, particularly at times of wide-

The essential elements of Equity's regulation of theatrical agents have remained unchanged since 1928.[7] A member of Equity is prohibited, on pain of union discipline, from using an agent who has not, through the mechanism of obtaining an Equity license (called a "franchise"), agreed to comply with the regulations. The most important of the regulations requires that a licensed agent must renounce any right to take a commission on an employment contract under which an actor or actress receives scale wages.[8] To the extent a contract includes provisions under which an actor or actress will sometimes receive scale pay—for rehearsals or "chorus"

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spread unemployment). The Court's decision in *Ribnik* v. *McBride* was overruled unanimously in *Olsen* v. *Nebraska,* 313 U. S. 236.

[7] The petitioners do not dispute this. The regulations have undergone revision in some details, largely as a result of negotiations between Equity and Theatrical Artists Representatives Associates (TARA), which until shortly before this litigation began was the only association voicing the concerns of agents with regard to their representation of Equity members. Until their voluntary resignation in late 1977, most of the petitioners were members of TARA. The petitioners are now members of the National Association of Talent Representatives (NATR). Unlike TARA, which functions only in the legitimate theater field, NATR also functions in the fields of motion pictures and television. In those fields, agents operate under closely analogous agent regulations maintained by the Screen Actors' Guild and the American Federation of Television and Radio Artists.

The history of the negotiations and disputes between Equity and TARA are described in the opinion of the District Court in the present case. 478 F. Supp. 496, 498 (SDNY).

[8] The minimum, or "scale," wage varies. In August 1977, for example, the minimum weekly salary was $335 for Broadway performances, and $175 for performances off Broadway. Scale wages are set by a collective-bargaining agreement between Equity and the producers, to which the agents are not parties. When an agent represents an actor or actress whose professional reputation is not sufficient to demand a salary higher than scale, the agent hopes to develop a relationship that will become continually more remunerative as the performer's professional reputation grows, and with it the power to demand an ever higher salary. No agent is required to represent an actor or actress whom he does not wish to represent.

employment, for example—and sometimes more, the regulations deny the agent any commission on the scale portions of the contract. Licensed agents are also precluded from taking commissions on out-of-town expense money paid to their clients. Moreover, commissions are limited on wages within 10% of scale pay,[9] and an agent must allow his client to terminate a representation contract if the agent is not successful in procuring employment within a specified period.[10] Finally, agents are required to pay franchise fees to Equity. The fee is $200 for the initial franchise, $60 a year thereafter for each agent, and $40 for any subagent working in the office of another. These fees are deposited by Equity in its general treasury and are not segregated from other union funds.

In 1977, after a dispute between Equity and Theatrical Artists Representatives Associates (TARA)—a trade association representing theatrical agents, see n. 7, *supra*—a group of agents, including the petitioners, resigned from TARA because of TARA's decision to abide by Equity's regulations. These agents also informed Equity that they would not accept Equity's regulations, or apply for franchises. The petitioners instituted this lawsuit in May 1978, contending that Equity's regulations of theatrical agents violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2.

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[9] It is Equity's view that commissions in the industry are not necessarily related to efforts by the agents, and that an agent often functions as little more than an "order taker," who is able to collect a percentage of a client's wages for the duration of a show for doing little more than answering a producer's telephone call. Indeed, an agent may collect a commission on the salary of an actor or actress he represents even if the client obtains the job without the agent.

[10] Equity argues that this restriction is necessary because there is an incentive for agents to represent as many actors and actresses as possible—and not necessarily to serve them all well—because an agent receives a commission whenever his client is employed at a salary higher than scale, regardless of the extent of his involvement in obtaining employment for the client.

B

The District Court found, after a bench trial, that Equity's creation and maintenance of the agency franchise system were fully protected by the statutory labor exemptions from the antitrust laws, and accordingly dismissed the petitioners' complaint. 478 F. Supp. 496 (SDNY). Among its factual conclusions, the trial court found that in the theatrical industry, agents play a critical role in securing employment for actors and actresses:

> "As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent. Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent, who may have a greater chance of gaining an audition for his client.
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> . . . . . .
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> "Testimony confirmed that agents play an integral role in the industry; without an agent, an actor would have significantly lesser chances of gaining employment." *Id.*, at 497, 502.

The court also found "no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and TARA or between Actors' Equity and producers," and concluded that "[t]he Actors Equity franchising system was employed by Actors' Equity for the purpose of protecting the wages and working conditions of its members." *Id.*, at 499.

The Court of Appeals unanimously affirmed the judgment of the District Court. It determined that the threshold issue was, under *United States* v. *Hutcheson,* 312 U. S. 219, 232, whether Equity's franchising system involved any combina-

tion between Equity and any "non-labor groups" or persons who are not "parties to a labor dispute." 622 F. 2d, at 648–649. If it did, the court reasoned, the protection of the statutory labor exemption would not apply.

First, the Court of Appeals held that the District Court had not been clearly erroneous in finding no agreement, explicit or tacit, between Equity and the producers to establish or police the franchising system. *Ibid.* Next, the court turned to the relationship between the union and those agents who had agreed to become franchised, in order to determine whether those agreements would divest Equity's system of agency regulation of the statutory exemption. Relying on *Musicians* v. *Carroll,* 391 U. S. 99, the court concluded that the agents were themselves a "labor group," because of their substantial "economic inter-relationship" with Equity, under which "the union [could] not eliminate wage competition among its members without regulation of the fees of the agents." 622 F. 2d, at 650, 651. Accordingly, since the elimination of wage competition is plainly within the area of a union's legitimate self-interest, the court concluded that the exemption was applicable.[11]

After deciding that the central feature of Equity's franchising system—the union's exaction of an agreement by agents not to charge commissions on certain types of work—was immune from antitrust challenge, the Court of Appeals turned to the petitioners' challenge of the franchise fees exacted from agents. Equity had argued that the fees were necessary to meet its expenses in administering the franchise system, but no evidence was presented at trial to show that the costs justified the fees actually levied. The Court of Appeals suggested that if the exactions exceeded the true

[11] The Court of Appeals recognized that even if there had been an agreement between Equity and a "non-labor group," the agreement might still have been protected from the antitrust laws under the "non-statutory" exemption. 622 F. 2d, at 649, n. 1. See *Connell Construction Co.* v. *Pumbers & Steamfitters,* 421 U. S. 616, 622. See n. 19, *infra.*

costs, they could not legally be collected, as such exactions would be unconnected with any of the goals of national labor policy that justify the labor antitrust exemption. Despite the lack of any cost evidence at trial, however, the appellate court reasoned that the fees were sufficiently low that a remand to the District Court on this point "would not serve any useful purpose." *Id.*, at 651.

II

A

Labor unions are lawful combinations that serve the collective interests of workers, but they also possess the power to control the character of competition in an industry. Accordingly, there is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment.[12] In the years immediately following passage of the Sherman Act, courts enjoined strikes as unlawful restraints of trade when a union's conduct or objectives were deemed "socially or economically harmful." *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 485 (Brandeis, J., dissenting).[13] In response to these practices, Congress acted, first in the Clayton Act, 38 Stat. 731, and later in the Norris-LaGuardia Act, 47 Stat. 70, to immunize labor unions and labor disputes from challenge under the Sherman Act.

Section 6 of the Clayton Act, 15 U. S. C. § 17, declares that human labor "is not a commodity or article of commerce," and immunizes from antitrust liability labor organi-

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[12] See generally Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14 (1963). See also Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183 (1980).

[13] See Winter, *supra* n. 12, at 30–38.

zations and their members "lawfully carrying out" their "legitimate object[ives]." Section 20 of the Act prohibits injunctions against specified employee activities, such as strikes and boycotts, that are undertaken in the employees' self-interest and that occur in the course of disputes "concerning terms or conditions of employment," and states that none of the specified acts can be "held to be [a] violatio[n] of any law of the United States." 29 U. S. C. § 52. This protection is re-emphasized and expanded in the Norris-LaGuardia Act, which prohibits federal-court injunctions against single or organized employees engaged in enumerated activities,[14] and specifically forbids such injunctions notwithstanding the claim of an unlawful combination or conspiracy. While the Norris-LaGuardia Act's bar of federal-court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes.[15]

In *United States* v. *Hutcheson,* 312 U. S. 219, the Court held that labor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability. After describing the

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[14] As is true under the Clayton Act, the specified activities are protected only in the context of a labor dispute. The Norris-LaGuardia Act defines a labor dispute to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113 (c).

[15] In *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.,* 311 U. S. 91, 103, the Court stated: "For us to hold, in the face of [the Norris-LaGuardia Act], that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress."

congressional responses to judicial interference in union activity, *id.*, at 229–230, the Court declared that

> "[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *Id.*, at 232 (footnote omitted).

The Court explained that this exemption derives not only from the Clayton Act, but also from the Norris-LaGuardia Act, particularly its definition of a "labor dispute," see n. 14, *supra*, in which Congress "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act." 312 U. S., at 236. Thus under *Hutcheson*, no federal injunction may issue over a "labor dispute," and "§ 20 [of the Clayton Act] removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman [Act]." *Ibid.*[16]

The statutory exemption does not apply when a union combines with a "non-labor group." *Hutcheson*, *supra*, at 232. Accordingly, antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade. In *Allen Bradley Co.* v. *Electrical Workers*, 325 U. S. 797, for example, the Court held that a union had violated the Sherman Act when it combined with manufacturers and contractors to erect a sheltered local business market in

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[16] See also *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469. There, in the Term preceding that in which the *Hutcheson* case was decided, the Court reasoned that the Sherman Act prohibits only restraints on "commercial competition," 310 U. S., at 497, 499, 510–511—or those market restraints designed to monopolize supply, control prices, or allocate product distribution—and that unions are not liable where they merely further their own goals in the labor market.

order "to bar all other business men from [the market], and to charge the public prices above a competitive level." *Id.*, at 809.[17] The Court indicated that the union efforts would, standing alone, be exempt from antitrust liability, *ibid.*, but because the union had not acted unilaterally, the exemption was denied.[18] Congress "intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.*, at 811.[19]

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[17] In *Hunt* v. *Crumboch*, 325 U. S. 821, decided the same day as *Allen Bradley*, the Court ruled that the labor exemption protected a union's boycott of a truck hauler through successful secondary pressure on purchasers of the hauler's services with whom the union had contracts, because of the absence of union participation in a conspiracy with the hauler's competitors. See 325 U. S., at 824; Meltzer, *supra* n. 12, at 677, and n. 74.

[18] *Mine Workers* v. *Pennington*, 381 U. S. 657, also dealt with a union combination with employers, but the grounds of decision were unrelated to the antitrust exemption.

[19] Even where there are union agreements with nonlabor groups that may have the effect of sheltering the nonlabor groups from competition in product markets, the Court has recognized a "nonstatutory" exemption to shield such agreements if they are intimately related to the union's vital concerns of wages, hours, and working conditions. See, *e. g.*, *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676. This nonstatutory exemption was described as follows in *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S., at 622:

"The Court has recognized . . . that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. . . .

"The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for

B

The Court of Appeals properly recognized that the threshold issue was to determine whether or not Equity's franchising of agents involved any combination between Equity and any "non-labor groups," or persons who are not "parties to a labor dispute." 622 F. 2d, at 649 (quoting *Hutcheson,* 312 U. S., at 232).[20] And the court's conclusion that the trial court had not been clearly erroneous in its finding that there was no combination between Equity and the theatrical producers [21] to create or maintain the franchise system is amply supported by the record.

The more difficult problem is whether the combination between Equity and the agents who agreed to become franchised was a combination with a "nonlabor group." The answer to this question is best understood in light of *Musicians* v. *Carroll,* 391 U. S. 99. There, four orchestra leaders, members of the American Federation of Musicians, brought an action based on the Sherman Act challenging the union's unilateral system of regulating "club dates," or one-time musical engagements. These regulations, *inter alia,* enforced a

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the lessening of business competition based on differences in wages and working conditions."

Neither the District Court nor the Court of Appeals in this case decided whether the nonstatutory exemption would independently shield the respondents from the petitioners' antitrust claims. See n. 11, *supra.*

[20] Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur. See *Meat Drivers* v. *United States,* 371 U. S. 94; *Columbia River Packers Assn.* v. *Hinton,* 315 U. S. 143. See generally 1 P. Areeda & D. Turner, Antitrust Law § 229c, pp. 195–198 (1978). There is no dispute about Equity's status as a bona fide labor organization.

[21] As the employers of Equity's members, producers are plainly a "nonlabor group." Employers almost always will be a "nonlabor group," although an exception has been recognized, for example, when the employer himself is in job competition with his employees. See *Musicians* v. *Carroll,* 391 U. S. 99 (orchestra leaders who both lead an orchestra and play an instrument).

closed shop; required orchestra leaders to engage a minimum number of "sidemen," or instrumentalists; prescribed minimum prices for local engagements; [22] prescribed higher minimum prices for traveling orchestras; and permitted leaders to deal only with booking agents licensed by the union.

Without disturbing the finding of the Court of Appeals that the orchestra leaders were employers and independent contractors, the Court concluded that they were nonetheless a "labor group" and parties to a "labor dispute" within the meaning of the Norris-LaGuardia Act, and thus that their involvement in the union regulatory scheme was not an unlawful combination between "labor" and "nonlabor" groups. The Court agreed with the trial court that the applicable test was whether there was "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." *Id.*, at 106.

The Court also upheld the restrictions on booking agents, who were *not* involved in job or wage competition with union members. Accordingly, these restrictions had to meet the "other economic interrelationship" branch of the disjunctive test quoted above. And the test was met because those restrictions were " 'at least as intimately bound up with the subject of wages' . . . as the price floors." *Id.*, at 113 (quoting *Teamsters* v. *Oliver*, 362 U. S. 605, 606). The Court noted that the booking agent restrictions had been adopted, in part, because agents had "charged exorbitant fees, and booked engagements for musicians at wages . . . below union scale." [23]

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[22] These consisted of a minimum scale for sidemen, a "leader's fee," which was twice the sidemen's scale in orchestras of at least four, and an additional 8% for social security, unemployment insurance, and other expenses. In addition, if a leader did not appear but designated a subleader, and four or more musicians performed, the leader was required to pay from his leader's fee 1.5 times the sidemen's scale to the subleader.

[23] The Court did not explicitly determine whether the second prong

C

The restrictions challenged by the petitioners in this case are very similar to the agent restrictions upheld in the *Carroll* case.[24] The essential features of the regulatory scheme are identical: members are permitted to deal only with agents who have agreed (1) to honor their fiduciary obligations by avoiding conflicts of interest, (2) not to charge excessive commissions, and (3) not to book members for jobs paying less than the union minimum.[25] And as in *Carroll,* Equity's

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of the *Hutcheson* test for the statutory exemption had been met, *i. e.,* whether the union had acted in its "self-interest." But given its various findings that the challenged restrictions were designed to cope with job competition and to protect wage scales and working conditions, 391 U. S., at 108, 109, 110, 113, it clearly did so *sub silentio.*

[24] Several cases before *Carroll* also upheld union regulation of the practices of independent entrepreneurs affecting the wages or working conditions of union members. See *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.,* 311 U. S. 91; *Teamsters* v. *Oliver,* 358 U. S. 283 (*Oliver I*); *Teamsters* v. *Oliver,* 362 U. S. 605 (*Oliver II*). In *Milk Wagon Drivers,* the Court held that the union had engaged in a "labor dispute" within the meaning of the Norris-LaGuardia Act when it attempted to organize independent "vendors" who supplied milk to retail stores. There the union feared that the "vendor system" was designed to escape the payment of union wages and the assumption of union-imposed working conditions. In *Oliver I,* the *Milk Wagon Drivers* decision was invoked to protect from state antitrust challenge a union's successful efforts to prescribe through collective-bargaining agreements a wage scale for truck-drivers, and minimum rental fees for drivers who owned their own trucks. The union feared that driver-owners, whose fees included not only an entrepreneurial component but also a "wage" for the labor of driving, might undercut the union scale by charging a fee that effectively included a subscale wage component. The Court stated that "[t]he regulations embod[ied] . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." 358 U. S., at 294. See also *Oliver II, supra,* at 606 (after remand to the state court).

[25] Indeed, the District Court in *Carroll,* whose judgment was affirmed by this Court "in its entirety," 391 U. S., at 114, drew parallels with the restrictions at issue in the present case. The court noted that "[a]p-

regulation of agents developed in response to abuses by employment agents who occupy a critical role in the relevant labor market.[26] The agent stands directly between union members and jobs, and is in a powerful position to evade the union's negotiated wage structure.

The peculiar structure of the legitimate theater industry, where work is intermittent, where it is customary if not essential for union members to secure employment through agents, and where agents' fees are calculated as a percentage of a member's wage, makes it impossible for the union to defend even the integrity of the minimum wages it has negotiated without regulation of agency fees.[27] The regulations are "brought within the labor exemption [because they are] necessary to assure that scale wages will be paid . . . ." *Carroll,* 391 U. S., at 112. They "embody . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure." *Teamsters* v. *Oliver,* 358 U. S.

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parently, similar abuses by booking agents existed in other fields too. *Edelstein* v. *Gillmore,* 35 F. 2d 723, 726 (2d Cir. 1929) (actors)." *Carroll* v. *AFM,* 241 F. Supp. 865, 892 (SDNY).

The petitioners argue that theatrical agents are indistinguishable from "numerous [other] groups of persons who merely supply products and services to union members" such as landlords, grocers, accountants, and lawyers. But it is clear that agents differ from these groups in two critical respects: the agents control access to jobs and negotiation of the terms of employment. For the actor or actress, therefore, agent commissions are not merely a discretionary expenditure of disposable income, but a virtually inevitable concomitant of obtaining employment.

[26] See *Carroll* v. *AFM,* 241 F. Supp., at 881–882; Harding, *supra* n. 6, at 319–325.

[27] The Court of Appeals found that "the union *cannot* eliminate wage competition among its members without regulation of the fees of the agents." 622 F. 2d, at 651 (emphasis added). Wage competition is prevented not only by the rule precluding commissions on scale jobs. Actors and actresses could also compete over the percentage of their wages they were willing to cede to an agent, subject only to the restrictions imposed by state law.

283, 294. Agents must, therefore, be considered a "labor group," and their controversy with Equity is plainly a "labor dispute" as defined in the Norris-LaGuardia Act: "representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U. S. C. § 113 (c).

Agents perform a function—the representation of union members in the sale of their labor—that in most nonentertainment industries is performed exclusively by unions. In effect, Equity's franchise system operates as a substitute for maintaining a hiring hall as the representative of its members seeking employment.[28]

Finally, Equity's regulations are clearly designed to promote the union's legitimate self-interest. *Hutcheson,* 312 U. S., at 232. In a case such as this, where there is no direct wage or job competition between the union and the group it regulates, the *Carroll* formulation to determine the

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[28] In many industries, unions maintain hiring halls and other job referral systems, particularly where work is typically temporary and performed on separate project sites rather than fixed locations. By maintaining halls, unions attempt to eliminate abuses such as kickbacks, and to insure fairness and regularity in the system of access to employment. In a 1947 Senate Report, Senator Taft explained: "The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall." S. Rep. No. 1827, 81st Cong., 2d Sess., 13 (1947), quoted in *Teamsters* v. *NLRB,* 365 U. S. 667, 673–674.

The National Labor Relations Board and the courts have ruled that union demands for hiring halls are a mandatory subject of collective bargaining, and that strikes to obtain such provisions are protected activity. See, *e. g., Houston Chapter, Associated General Contractors,* 143 N. L. R. B. 409, enf'd, 349 F. 2d 449 (CA5); *NLRB* v. *Tom Joyce Floors, Inc.,* 353 F. 2d 768, 771 (CA9). Cf. *Teamsters* v. *NLRB, supra,* at 672–673, 676.

presence of a nonlabor group—whether there is " 'some . . . economic interrelationship affecting legitimate union interests . . . ,' " 391 U. S., at 106 (quoting District Court opinion)—necessarily resolves this issue.

D

The question remains whether the fees that Equity levies upon the agents who apply for franchises are a permissible component of the exempt regulatory system. We have concluded that Equity's justification for these fees is inadequate. Conceding that *Carroll* did not sanction union extraction of franchise fees from agents,[29] Equity suggests, only in the most general terms, that the fees are somehow related to the basic purposes of its regulations: elimination of wage competition, upholding of the union wage scale, and promotion of fair access to jobs. But even assuming that the fees no more than cover the costs of administering the regulatory system, this is simply another way of saying that without the fees, the union's regulatory efforts would not be subsidized—and that the dues of Equity's members would perhaps have to be increased to offset the loss of a general revenue source.[30] If Equity did not impose these franchise fees upon the agents, there is no reason to believe that any of its legitimate interests would be affected.[31]

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[29] See *Carroll*, 241 F. Supp., at 881. We have, in fact, found no case holding that a union may extract such fees from independent agents who represent union members.

[30] As already indicated, the franchise fees are not segregated in any manner but merely deposited in the union's general fund.

[31] The respondents offer union hiring hall fees as an analogy in support of Equity's collection of franchise fees. In that context, the respondents argue, without citation, that a union may impose reasonable fees upon employers to meet the costs of maintaining a union-run hiring hall. But even if the respondents' statement of labor law is correct, the analogy would not be persuasive. Assuming that hiring hall fees are so imposed, the fees are borne by parties who directly benefit from the employment

III

For the reasons stated, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, concurring in part and dissenting in part.

I join all but Part II–D of the Court's opinion. That part holds that respondents' exaction of a franchise fee is not a "permissible component of the exempt regulatory system." *Ante,* at 722. Rather, I agree with the Court of Appeals that the approximately $12,000 collected annually in fees is not "incommensurate with Equity's expenses in maintaining a full-time employee to administer the system," 622 F. 2d 647, 651 (CA2 1980), and thus is not "unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor," *ibid.*

The Court justifies its conclusion by suggesting that, since the union could increase its dues to offset the revenue lost from invalidation of the fee system, "there is no reason to believe that any of [the union's] legitimate interests would be affected," if the fee system were found to violate the antitrust laws. *Ante,* at 722. The union could of course raise its dues, but the issue here is whether the conceded antitrust immunity of the franchising system includes the franchise fee.

I find somewhat incongruous the Court's conclusion that an incident of the overall system constitutes impermissible regulation, but that agents in general may be significantly

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services of the hiring halls and are collected by the entities that provide them. That is not true in the present case.

The view expressed in the separate opinion filed today as to who are the beneficiaries of the franchising system will undoubtedly surprise the agents who brought this lawsuit. *Post,* at 724.

regulated because they are not a "nonlabor group." This incongruity is highlighted by the similarity between union hiring halls and the franchising system, a similarity which the Court itself acknowledges: "Equity's franchise system operates as a substitute for maintaining a hiring hall as the representative of its members seeking employment." *Ante,* at 721. The Court disregards this similarity in concluding that the franchising system does not "directly benefit" the agents who are required to pay the fees. *Ante,* at 722, n. 31. It reaches this conclusion by incorrectly assuming that the only parties who directly benefit from the hiring hall and the franchising system are employers and employees and producers and actors, as the case may be. But surely the agents also benefit from the franchising system, which provides an orderly and protective mechanism for pairing actors who seek jobs with producers who seek actors. The system is thus the means by which the agents ultimately receive their commissions; it is as much the source of their livelihood as it is that of the actors.

Because the fee is an incident of a legitimate scheme of regulation and because it is commensurate in amount with the purpose for which it is sought, I would also affirm this holding of the Court of Appeals.

Syllabus

MARYLAND ET AL. v. LOUISIANA

ON EXCEPTIONS TO REPORTS OF SPECIAL MASTER

No. 83, Orig. Argued January 19, 1981—Decided May 26, 1981

In this original action, several States, joined by the United States, the Federal Energy Regulatory Commission (FERC), and a number of pipeline companies, challenge the constitutionality of Louisiana's tax on the "first use" of any natural gas brought into Louisiana which was not previously subjected to taxation by another State or the United States. The primary effect of the tax, which is imposed on pipeline companies, is on gas produced in the federal Outer Continental Shelf (OCS) and then piped to processing plants in Louisiana and, for the most part, eventually sold to out-of-state consumers. The first-use tax statute (Act), as well as provisions of other Louisiana statutes, provides a number of exemptions from and credits for the tax whereby Louisiana consumers of OCS gas for the most part are not burdened by the tax, but it uniformly applies to gas moving out of the State. Section 47:1303C of the Act declares that "the tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas," and prohibits any attempt to allocate the cost of the tax to any party except the ultimate consumer. A Special Master filed reports, including one recommending that Louisiana's motion to dismiss on jurisdictional grounds be denied, and that the plaintiff States' motion for judgment on the pleadings be denied and further evidentiary hearings be conducted. Exceptions were filed to the reports.

Held:

1. Louisiana's exceptions to the Special Master's recommendation that the motion to dismiss be denied are rejected. Pp. 735–745.

(a) Louisiana's First-Use Tax, while imposed on the pipelines, is passed on to the ultimate consumer. Thus the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of imposition of the tax, are directly affected in a "substantial and real" way so as to justify the exercise of this Court's original jurisdiction under Art. III, § 2, cl. 2, of the Constitution, which provides for such jurisdiction over cases in which a "State shall be a Party," and 28 U. S. C. § 1251 (a) (1976 ed., Supp. III), which provides that this Court shall have "original and exclusive jurisdiction of all controversies between two or more States." Jurisdiction is also supported by the plaintiff States' interests as *parens patriae,* acting to protect their citizens from substantial economic injury presented by imposition of

the First-Use Tax. *Pennsylvania* v. *West Virginia,* 262 U. S. 553. Pp. 735–739.

(b) This case is an appropriate one for the exercise of this Court's exclusive jurisdiction under § 1251 (a), even though state-court actions are pending in Louisiana in which the constitutional issues raised here are presented. Neither the plaintiff States, the United States, nor the FERC is a named party in any of the state actions, and they have not sought to intervene therein. Louisiana's tax, affecting millions of consumers in over 30 States, implicates serious and important concerns of federalism fully in accord with the purposes and reach of this Court's original jurisdiction. The exercise of original jurisdiction is also justified because the tax affects the United States' interests in the administration of the OCS area and the case is therefore an appropriate one for the exercise of this Court's nonexclusive original jurisdiction, under 28 U. S. C. § 1251 (b)(2) (1976 ed., Supp. III), of suits brought by the United States against a State. *Arizona* v. *New Mexico,* 425 U. S. 794, distinguished. Pp. 739–745.

2. Plaintiffs' exceptions to the Special Master's recommendation that judgment on the pleadings be denied pending further evidentiary hearings, are sustained. Pp. 746–760.

(a) Section 47:1303C of the Louisiana Act violates the Supremacy Clause. Under the Natural Gas Act, determining pipeline and producer costs is the task of the FERC in the first instance, subject to judicial review. In exercising its authority to regulate the determination of the proper allocation of costs associated with the interstate sale of natural gas to consumers, the FERC normally allocates part of the processing costs between marketable hydrocarbons extracted in the course of processing and the "dried" gas, insisting that the owners of the hydrocarbons bear a fair share of the expense associated with processing rather than passing all of the costs on to the gas consumers. However, § 47:1303C provides that the amount of the Louisiana tax is a cost associated with uses made by the owner in preparation of marketing the natural gas and forecloses the owner from seeking reimbursement for payment of the tax from any third party other than a purchaser of the gas, even though the third party may be the owner of marketable hydrocarbons extracted from processing. Thus the Louisiana statute is inconsistent with the federal scheme and must give way. Cf. *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas,* 372 U. S. 84. Pp. 746–752.

(b) The First-Use Tax is unconstitutional under the Commerce Clause. The flow of gas from OCS wells, through processing plants in Louisiana, and through interstate pipelines to the ultimate consumers in

over 30 States, constitutes interstate commerce and, even though "interrupted" by certain events in Louisiana, is a continual flow of gas in interstate commerce. The tax impermissibly discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions provided in the Act and other Louisiana statutes whereby Louisiana consumers of OCS gas are substantially protected against the impact of the tax, whereas OCS gas moving out of the State is burdened with the tax. Nor can the tax be justified as a "compensatory" tax, compensating for the effect of the State's severance tax on local production of natural gas, since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land. Pp. 753–760.

Exceptions to Special Master's report sustained in part and overruled in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post,* p. 760. REHNQUIST, J., filed a dissenting opinion, *post,* p. 760. POWELL, J., took no part in the consideration or decision of the case.

Stephen H. Sachs, Attorney General of Maryland, argued the cause for plaintiffs. With him on the briefs were *David H. Feldman, Diana Gribbon Motz,* and *Robert A. Zarnoch,* Assistant Attorneys General of Maryland; *Tyrone C. Fahner,* Attorney General of Illinois, *Hercules F. Bolos,* Special Assistant Attorney General, and *Thomas J. Swabowski,* Assistant Attorney General; *Theodore L. Sendak,* Attorney General of Indiana, and *William E. Daily* and *Robert B. Wente,* Deputy Attorneys General; *Francis X. Bellotti,* Attorney General of Massachusetts, and *Alan D. Mandl,* Assistant Attorney General; *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Arthur E. D'Hondt, Don L. Keskey,* and *John M. Dempsey,* Assistant Attorneys General; *Robert Abrams,* Attorney General of New York, *Shirley A. Siegel,* Solicitor General, and *Paulann M. Caplovitz* and *Richard W. Golden,* Assistant Attorneys General; *Dennis J. Roberts II,* Attorney General of Rhode Island, and *Stephen Lichatin III,* Assistant Attorney General; and

Bronson C. La Follette, Attorney General of Wisconsin, *Charles A. Bleck,* Assistant Attorney General, and *Steven M. Schur.*

Stuart A. Smith argued the cause for intervenors United States et al. With him on the briefs were *Solicitor General McCree, Jerome M. Feit,* and *J. Paul Douglas.*

Frank J. Peragine argued the cause for intervenor pipeline companies. With him on the briefs were *H. Paul Simon, C. McVea Oliver, William W. Brackett, Daniel F. Collins, Arthur J. Waechter, Jr., Herschel L. Abbott, Jr., Gene W. Lafitte, John M. Wilson, Ernest L. Edwards, Margaret R. Tribble, James H. Napper II,* and *Melvin Richter.*

Eugene Gressman and *Robert G. Pugh* argued the cause for defendant. With them on the briefs were *William J. Guste, Jr.,* Attorney General of Louisiana, *Carmack M. Blackmon,* Assistant Attorney General, and *William C. Broadhurst.**

JUSTICE WHITE delivered the opinion of the Court.

In this original action, several States, joined by the United States and a number of pipeline companies, challenge the constitutionality of Louisiana's "First-Use Tax" imposed on certain uses of natural gas brought into Louisiana, principally from the Outer Continental Shelf (OCS), as violative of the Supremacy Clause and the Commerce Clause of the United States Constitution.

I

The lands beneath the Gulf of Mexico have large reserves of oil and natural gas. Initially, these reserves could not be developed due to technological difficulties associated with offshore drilling. In 1938, the first drilling rig was constructed off the coast of Louisiana, and with the advent of new tech-

**Frederick Moring* filed a brief for Associated Gas Distributors as *amicus curiae.*

nologies, offshore drilling has become commonplace.[1] Exploration and development of the OCS in the Gulf of Mexico have become large industries providing a substantial percentage of the natural gas used in this country.[2] Most of the gas being extracted from the lands underlying the Gulf is piped to refining plants located in coastal portions of Louisiana where the gas is "dried"—the liquefiable hydrocarbons gathered and removed—on its way to ultimate distribution to consumers in over 30 States. It is estimated that 98% of the OCS gas processed in Louisiana is eventually sold to out-of-state consumers with the 2% remainder consumed within

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[1] The earliest offshore oil production occurred in 1896 off the coast of California. The early ventures were extensions of onshore drilling projects. U. S. Dept. of Interior, Mineral Resource Management of the Outer Continental Shelf, Geological Survey Circular 720, p. 2 (1975). The first offshore well drilled from a mobile platform, the dominant technology used today, located out of sight from land was drilled 12 miles from the Louisiana coast in 1947. *Ibid.* In its proffer of evidence, the State of Louisiana estimated that there exist over 13,000 wells operating in OCS lands in the Gulf of Mexico. See Proffer of Proof of Louisiana to Special Master 8. According to one source, 948 offshore wells were drilled off the coast of Louisiana in 1978. Braunstein & Allen, Developments in Louisiana Gulf Coast Offshore in 1978, 63 AAPG Bull. 1310 (Aug. 1979).

[2] In 1970, South Louisiana, an area including both the onshore and offshore area adjacent to Louisiana, was responsible for the production of approximately 33% of domestic natural gas production. See Federal Power Comm'n, Bureau of Natural Gas, National Gas Supply and Demand, 1971–1990, Staff Rep. No. 2, pp. 20–22 (1972); J. Schanz & H. Frank, Natural Gas in the Future National Energy Pattern, in Regulation of the Natural Gas Producing Industry 18–19 (K. Brown ed. 1972). As of 1973, over 25 trillion cubic feet of natural gas had been produced from Louisiana's offshore lands, with approximately 77% coming from federal OCS areas. Geological Survey Circular 720, *supra*, at 28 (Table 13). It has been estimated that the present reserves in the offshore area adjacent to the Gulf States is approximately 38 trillion cubic feet of gas. J. Hewitt, J. Knipmeyer, & E. Schluntz, Estimated Oil and Gas Reserves, Gulf of Mexico Outer Continental Shelf (U. S. Dept. of Interior, Geological Survey, Dec. 31, 1979).

Louisiana.[3] The contractual arrangements between a producer of gas and the pipeline companies vary. Most often, the producer sells the gas to the pipeline companies at the wellhead, although the producer may retain an interest in any extractable components. Some producers, however, retain full ownership rights and simply pay a flat fee for the use of the pipeline companies' facilities.[4]

The ownership and control of these large reserves of natural gas have been much disputed. In *United States* v. *Louisiana,* 339 U. S. 699 (1950), the Court applied the principle of its holding in *United States* v. *California,* 332 U. S. 19 (1947)—that the United States possesses paramount rights to lands beneath the Pacific Ocean seaward of California's low-water mark—to the offshore areas adjacent to Louisiana. In 1953, Congress passed the Submerged Lands Act, 43 U. S. C. §§ 1301–1315, ceding any federal interest in the lands within three miles of the coast, while confirming the Federal Government's interest in the area seaward of the 3-mile limit.[5] See *United States* v. *Louisiana,* 363 U. S. 1 (1960); *United States* v. *Maine,* 420 U. S. 515, 524–526 (1975). In the same year, Congress passed the Outer Continental Shelf Lands Act, 43 U. S. C. §§ 1331–1343 (OCS Act), which declared that the "subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition . . . ." § 1322. The OCS Act also established procedures for federal leasing of OCS land to develop mineral resources. While the passage of these Acts established the

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[3] See Proffer of Proof of Louisiana to Special Master 21 (Fact No. 43).

[4] See *id.,* at 11–13 (Facts Nos. 19–22).

[5] Representatives from the State of Louisiana, as well as from other Gulf States, appeared before Congress in support of a measure to provide the States with a share of any income from that part of the OCS abutting their respective States. See Hearings on S. 1901 before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 185–186, 187–188, 191–193, 265–266 (1953).

respective legal interests of the parties, there has been extensive litigation to establish the legal boundaries of the federal OCS domain. See generally *United States* v. *Louisiana,* 446 U. S. 253, 254–260 (1980) (detailing the history of the "long-continuing and sometimes strained controversy" between the United States and Louisiana concerning the OCS lands).

In 1978, the Louisiana Legislature enacted a tax of seven cents per thousand cubic feet of natural gas[6] on the "first use" of any gas imported into Louisiana which was not previously subjected to taxation by another State or the United States. La. Rev. Stat. Ann. §§ 47:1301–47:1307 (West Supp. 1981) (Act). The Tax imposed is precisely equal to the severance tax the State imposes on Louisiana gas producers. The Tax is owed by the owner of the gas at the time the first taxable "use" occurs within Louisiana. § 1305B. About 85% of the OCS gas brought ashore is owned by the pipeline companies, the rest by the producers. Since most States impose their own severance tax, it is acknowledged that the primary effect of the First-Use Tax will be on gas produced in the federal OCS area and then piped to processing plants located within Louisiana. It has been estimated that Louisiana would receive at least $150 million in annual receipts from the First-Use Tax.[7]

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[6] A thousand cubic feet of gas was defined, as is commonplace in the industry, as that amount of gas which occupies that volume at a temperature of 60 degrees Fahrenheit and 15.025 pounds per square inch of pressure absolute. La. Rev. Stat. Ann. § 47:1303 (B) (West Supp. 1981).

[7] Estimates of the annual revenues from the First-Use Tax have varied. The plaintiff States and the United States estimated the annual receipts to be $225 million, while the pipeline companies suggested $275 million. See also, Note, The Louisiana First-Use Tax: Does It Violate the Commerce Clause?, 53 Tulane L. Rev. 1474 (1979) ($170 million); First-Use Tax, 31 La. Coastal L. Rep. No. 31 (Oct. 1978) ($185 million in first year).

Part II of the First-Use Tax Act created the First-Use Trust Fund. Receipts of the Tax were to be placed in the fund and expended in accordance with the terms of the Act. La. Rev. Stat. Ann. § 47:1351 (West

The stated purpose of the First-Use Tax was to reimburse the people of Louisiana for damages to the State's waterbottoms, barrier islands, and coastal areas resulting from the introduction of natural gas into Louisiana from areas not subject to state taxes as well as to compensate for the costs incurred by the State in protecting those resources. § 1301C. Moreover, the Tax was designed to equalize competition between gas produced in Louisiana and subject to the state severance tax of seven cents per thousand cubic feet, and gas produced elsewhere not subject to a severance tax such as OCS gas. § 1301A. The Act specified a number of different uses justifying imposition of the First-Use Tax including sale, processing, transportation, use in manufacturing, treatment, or "other ascertainable action at a point within the state." § 1302 (8).[8]

The Act itself, as well as provisions found elsewhere in the state statutes, provided a number of exemptions from and credits for the First-Use Tax. The Severance Tax Credit provided that any taxpayer subject to the First-Use Tax was entitled to a direct tax credit on any Louisiana severance tax owed in connection with the extraction of natural resources within the State. La. Rev. Stat. Ann. § 47:647 (West Supp.

Supp. 1981). Specifically, the Act provided that 75% of the proceeds would go towards retirement of the general debt of the State. § 1351A (2). Also 25% of the proceeds were to be deposited in a Barrier Islands Conservation Account to be used to fund capital improvements for projects designed to "conserve, preserve, and maintain the barrier islands, reefs, and shores of the coastline of Louisiana." § 1351A (3).

[8] A taxable "use" was defined as:

"the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state." La. Rev. Stat. Ann. § 47:1302 (8) (West Supp. 1981).

1981).[9] Second, municipal or state-regulated electric generating plants and natural gas distributing services located within Louisiana, as well as any direct purchaser of gas used for consumption directly by that purchaser, were provided tax credits on other Louisiana taxes upon a showing that "fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and marketing costs of natural gas delivered from the federal domain of the outer continental shelf . . . ," which implicitly includes any increases resulting from the First-Use Tax. La. Rev. Stat. Ann. § 47:11B (West Supp. 1981).[10] Furthermore, imported natural gas used for drilling oil or gas within the State was exempted from the First-Use Tax. La. Rev. Stat. Ann. § 47:1303A (West Supp. 1981). Thus, Louisiana consumers of OCS gas for the most part are not burdened by the Tax, but it does uniformly apply to gas moving out of the State. The Act also purported to establish the legal effect of the Tax in terms of defining the proper

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[9] The Severance Tax Credit bill was passed at the same time as the First-Use Tax, and provides as follows:

"A. (1) Every taxpayer liable for and remitting taxes levied and collected pursuant to [the First-Use Tax] and each taxpayer who bears such taxes as a direct result of contractual terms or agreements applied in disregard of R. S. 47:1303 (C), shall be allowed a direct tax credit, at any time following payment of such tax, but, not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state, the amount of which credit shall not exceed the amount of severance taxes for which such taxpayer is liable to the state as a direct consequence of the privilege of severing natural resources from the surface of the soil or water of the state."

The tax credit also assigns the order in which the credit shall be applied depending on the type of severance credit paid. The credit is first applied to oil severance taxes and lists in descending order the other resources subject to severance tax credit. § 647A (2). The tax credit does not affect any severance taxes assessed by the local parishes. § 647C.

[10] The statutory provision exempts from the tax credit provision any increases in wellhead price attributable to inflation.

allocation of the Tax among potentially liable parties. Specifically, the Act declared that the "tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas." § 1303C. Any contract which attempted to allocate the cost of the Tax to any party except the ultimate consumer was declared to be "against public policy and unenforceable to that extent." *Ibid.*

On March 29, 1979, eight States filed a motion for leave to file a complaint under this Court's original jurisdiction pursuant to Art. III, § 2, of the Constitution. The complaint sought a declaratory judgment that the First-Use Tax was unconstitutional under: (1) the Commerce Clause, Art. I, § 8, cl. 3; (2) the Supremacy Clause, Art. VI, cl. 2; (3) the Import-Export Clause, Art. I, § 10, cl. 2; (4) the Impairment of Contracts Clause, Art. I, § 10, cl. 1; and (5) the Equal Protection Clause of the Fourteenth Amendment. The plaintiff States also sought injunctive relief against Louisiana or its agents collecting the Tax with respect to any gas in interstate commerce as well as a refund of taxes already collected. We granted plaintiffs' motion for leave to file on June 18, 1979. 442 U. S. 937. Subsequently, as is usual, we appointed a Special Master to facilitate handling of the suit. 445 U. S. 913 (1980). To date, the Special Master has issued two reports. In the first report, dated May 14, 1980, the Special Master recommended that the Court approve the motions of New Jersey, the United States, the Federal Energy Regulatory Commission (FERC), and 17 pipeline companies to intervene as plaintiffs. The Master's second report was issued on September 15, 1980, and essentially made two recommendations. First, the Master recommended that we deny Louisiana's motion to dismiss and reject the submissions that the plaintiff States had no standing to bring the action and that the case was not an appropriate one for the exercise of our original jurisdiction. Second, on the plaintiff States' motion for judgment on the pleadings on the grounds that the Tax was unconstitutional on its face, the Special Master, while recog-

nizing that the statute was constitutionally suspect in certain respects, recommended that the motion be denied and that further evidentiary hearings be conducted. We heard oral argument on the exceptions filed to the reports.

II

Initially, we must resolve Louisiana's contention, rejected by the Special Master, that the case should be dismissed. In support of its motion, Louisiana presents two principal arguments. First, Louisiana contends that the plaintiff States lack standing to bring the suit under the Court's original jurisdiction. Second, Louisiana argues that even if the bare requirements for exercise of our original jurisdiction have been met, this case is not an appropriate one to entertain here because of certain pending state-court actions in Louisiana in which the constitutional issues sought to be presented may be addressed. See *Arizona* v. *New Mexico,* 425 U. S. 794, 797 (1976). See also *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S. 493, 501 (1971). We agree with the Special Master that both contentions should be rejected.

A

1

The Constitution provides for this Court's original jurisdiction over cases in which a "State shall be a Party." Art. III, § 2, cl. 2. Congress has in turn provided that the Supreme Court shall have "original and exclusive jurisdiction of all controversies between two or more States." 28 U. S. C. § 1251 (a) (1976 ed., Supp. III). In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of

jurisprudence." *Massachusetts* v. *Missouri,* 308 U. S. 1, 15 (1939). See *New York* v. *Illinois,* 274 U. S. 488, 490 (1927); *Texas* v. *Florida,* 306 U. S. 398, 405 (1939).[11]

Louisiana asserts that this case should be dismissed for want of standing because the Tax is imposed on the pipeline companies and not directly on the ultimate consumers. Under its view, the alleged interests of the plaintiff States do not fall within the type of "sovereignty" concerns justifying exercise of our original jurisdiction. Standing to sue, however, exists for constitutional purposes if the injury alleged "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U. S. 26, 41–42 (1976). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S. 59, 72–81 (1978). This is clearly the case here. The plaintiff States are substantial consumers of natural gas.[12] The First-Use Tax, while imposed on the pipeline companies, is clearly intended to be passed on to the ultimate consumer. Indeed, the statute forbids the Tax from being passed on or back to any third party other than the purchaser of the gas and explicitly directs that it should be considered as a cost of preparing the gas for market. La. Rev. Stat. Ann. § 47:1303C (West Supp.

[11] See generally *New York* v. *New Jersey,* 256 U. S. 296, 309 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence").

[12] As alleged in the complaint, the annual increase in natural gas costs directly associated with the First-Use Tax with respect to each of the plaintiff States is as follows: Maryland ($60,000); New York ($300,000); Massachusetts ($25,000); Rhode Island ($25,000); Illinois ($270,000); Indiana ($70,000); Michigan ($650,000); Wisconsin ($70,000); New Jersey ($20,000). See Complaint, at 12–16. Total direct injuries to the plaintiff States was estimated to be $1.5 million, and injury to the citizen consumers was estimated at $120 million. *Id.,* at 16.

1981). In fact, the pipeline companies, with the approval of the FERC, have passed on the cost of the First-Use Tax to their customers. See *Louisiana First-Use Tax in Pipeline Rate Cases,* Docket No. RM78–23, Order No. 10, 43 Fed. Reg. 45553 (1978).[13] Thus, the Special Master properly determined that "although the tax is collected from the pipelines, it is really a burden on consumers." Second Report, at 12. It is clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the First-Use Tax, are directly affected in a "substantial and real" way so as to justify their exercise of this Court's original jurisdiction.

2

Jurisdiction is also supported by the States' interest as *parens patriae.* A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. See *Oklahoma ex rel. Johnson* v. *Cook,* 304 U. S. 387 (1938); *New Hampshire* v. *Louisiana,* 108 U. S. 76 (1883). But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way. See, *e. g., Missouri* v. *Illinois,* 180 U. S. 208 (1901); *Kansas* v. *Colorado,* 185 U. S. 125 (1902); *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230 (1907). See generally Note, The Original Jurisdiction of the United States Supreme Court, 11 Stan. L.

[13] In approving the pass-through, the FERC did not accept the constitutionality of the First-Use Tax; FERC has consistently taken the position that the Tax is unconstitutional. Moreover, approval of the pass-through was expressly conditioned on the pipeline companies' taking legal action to determine the legality of the Tax, and to provide for refund to the customers should it be declared unconstitutional. Administrative proceedings before the FERC are continuing, and the agency has issued an order to show cause why the gas producers should not be required to pay the portion of the First-Use Tax relating to liquid or liquefiable hydrocarbons transported with or extracted from the gas subject to the Tax.

Rev. 665, 671–678 (1959). Cf. *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 257–259 (1972) (the Court has recognized the right of a State to sue as *parens patriae* "to prevent or repair harm to its 'quasi-sovereign' interests" in original jurisdiction suits).

In this respect, this case is functionally indistinguishable from *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923), in which the Court entertained a suit brought by one State against another. In that case, West Virginia, then the leading producer of natural gas, required gas producers in the State to meet the needs of all local customers before shipping any gas interstate. Ohio and Pennsylvania moved for leave to file a complaint under the Court's original jurisdiction claiming that the statute violated the Commerce Clause in that the statute would have the effect of cutting off supplies of natural gas to those States. Both States claimed to be protecting a twofold interest—"one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected." The Court granted leave to file, finding both interests to be substantial. With respect to representing the interests of its citizens the Court stated:

> "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law." *Id.*, at 592.

Pennsylvania v. *West Virginia* counsels that we should not dismiss this action. Plaintiff States have alleged substantial and serious injury to their proprietary interests as consumers of natural gas as a direct result of the allegedly unconstitutional actions of Louisiana. This direct injury is also supported by the States' interest in protecting its citizens from substantial economic injury presented by imposition of the First-Use Tax. Nor does the incidence of the Tax fall on a small group of citizens who are likely to challenge the Tax directly. Rather, a great many citizens in each of the plaintiff States are themselves consumers of natural gas and are faced with increased costs aggregating millions of dollars per year. As the Special Master observed, individual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small. Moreover, because the consumers are not directly responsible to Louisiana for payment of the taxes, they of course are foreclosed from suing for a refund in Louisiana's courts. In such circumstances, exercise of our original jurisdiction is proper.

B

With respect to Louisiana's second argument, it is true that we have construed the congressional grant of exclusive jurisdiction under § 1251 (a) as requiring resort to our obligatory jurisdiction only in "appropriate cases." *Illinois* v. *City of Milwaukee,* 406 U. S. 91, 93 (1972); *Arizona* v. *New Mexico,* 425 U. S., at 796–797. This view is consistent with the general observation that the Court's original jurisdiction should be exercised "sparingly." *United States* v. *Nevada,* 412 U. S. 534, 538 (1973). See *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S., at 501; *Massachusetts* v. *Missouri,* 308 U. S., at 18–20.[14] In *City of Milwaukee,* we noted that what is

[14] In *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S., at 497, the Court noted that "[a]s our social system has grown more complex, the States

"appropriate" involves not only "the seriousness and dignity of the claim," but also "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." 406 U. S., at 93. Louisiana urges that presently pending state lawsuits raising the identical constitutional issues presented here constitute sufficient reason to forgo the exercise of our original jurisdiction.

There have been filed in various lower courts several suits challenging the constitutionality of the First-Use Tax. The first suit was brought by Louisiana in state court seeking a declaratory judgment that the First-Use Tax is constitutional. *Edwards* v. *Transcontinental Gas Pipe Line Corp.*, No. 216,867 (19th Judicial Dist., East Baton Rouge Parish). Among the named defendants were all of the pipeline companies doing business in the State. The pipeline companies sought to have the Tax declared unconstitutional.[15] Other lawsuits were filed in state court seeking a refund of taxes paid under protest. *Southern Natural Gas Co.* v. *McNamara*, No. 225,533 (19th Judicial District, East Baton Rouge Parish). These refund actions were filed after this Court granted plaintiff States' motion for leave to file their complaint.[16]

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have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies."

[15] The pipeline companies removed the case to federal court. Louisiana's motion to remand was granted, essentially on the ground that the intervention of the Federal District Court would be contrary to the provisions of the Tax Injunction Act, 28 U. S. C. § 1341. *Edwards* v. *Transcontinental Gas Pipe Line Corp.*, 464 F. Supp. 654 (MD La. 1979).

[16] By granting plaintiffs' motions for leave to file, we rejected Louisiana's motions that the case should be dismissed. Moreover, when we referred the case to the Special Master we expressly referred to him all

Since under Louisiana law there is no provision for interim injunctive relief, the pipeline companies were required to pay the Tax. The receipts have been put in an escrow account subject to refund with interest paid on the account at the rate of 6%. Neither the plaintiff States, the United States, nor the FERC is a named party in any of the state actions nor have they filed leave to intervene, although Louisiana represented at oral argument that such a motion would not be opposed.[17] The final suit was commenced by the FERC against various state officials, seeking to enjoin enforcement of the First-Use Tax on constitutional grounds. *FERC* v. *McNamara,* No. C. A. 78–384 (MD La.). That action is presently stayed.

In *City of Milwaukee,* on which Louisiana relies, the proposed suit by Illinois against four municipalities did not fall within our exclusive grant of original jurisdiction because political subdivisions of the State could not be considered as a State for purposes of 28 U. S. C. § 1251 (a) (1976 ed., Supp. III). 406 U. S., at 94–98. Similarly, the decision in *Wyandotte Chemicals* did not involve § 1251 (a), since it was a suit between a State and citizens of another State and so did not fall under our exclusive jurisdiction. Louisiana also relies,

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pending motions *except* for Louisiana's motion to dismiss. See 445 U. S. 913 (1980). Usually, when we decline to exercise our original jurisdiction, we do so by denying the motion for leave to file. See *Arizona* v. *New Mexico,* 425 U. S. 794 (1976). Although it is arguable that the Special Master was not empowered to consider Louisiana's motion since we did not refer the question to him, we nonetheless rely on his report in light of the fact that we must consider Louisiana's motion to dismiss on the merits in any event, and because the matter went forward before the Special Master on the assumption that the motion to dismiss had been referred. Accordingly, we now see no reason not to acquiesce in the Special Master's views that the issues were properly before him.

[17] See Tr. of Oral Arg. 55–58. It is acknowledged that but for the "invitation" there exists no procedural mechanism in Louisiana for the plaintiff States or the United States to be made parties to the state refund suit.

however, on *Arizona* v. *New Mexico* for an example of a case where we determined not to exercise our exclusive jurisdiction in a case between States because the matter was "inappropriate" for determination.[18]

In that case, we denied Arizona's motion for leave to file a complaint against New Mexico. Arizona was suing to challenge New Mexico's electrical energy tax which imposed a net kilowatt hour tax on any electric utility generating electricity in New Mexico. Arizona sought a declaratory judgment that the tax constituted, *inter alia,* an unconstitutional discrimination against interstate commerce. Arizona brought the suit in its proprietary capacity as a consumer of electricity generated in New Mexico and as *parens patriae* for its citizens. Arizona further alleged that it had no other forum in which to vindicate its interests. New Mexico asserted that the three Arizona utilities affected by the statute had chosen not to pay the tax and instead had jointly filed suit in state court seeking a declaratory judgment that the tax was unconstitutional. This Court held that "[i]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* ten-

[18] In *Pennsylvania* v. *New Jersey,* 426 U. S. 660 (1976), we denied leave to file to a number of States challenging commuter income tax provisions adopted by certain other States. That case, however, clearly has no applicability to the present action. In *Pennsylvania,* the only reason that the complaining States were denied tax revenues was because their legislatures had determined to give a credit for taxes paid to other States, and, to this extent, any injury was voluntarily suffered. *Id.,* at 664. Moreover, jurisdiction was not proper under the *parens patriae* doctrine since the claims represented the aggregation of individual claims for wrongfully paid taxes which the individual commuter taxpayers were able to contest. *Id.,* at 665–666. See generally *Massachusetts* v. *Missouri,* 308 U. S. 1, 19–20 (1939). In this case, the plaintiff States are not responsible in any way for the economic impact of the Tax. Moreover, unlike the situation in *Pennsylvania,* individual citizens have no forum in which to challenge the Tax because they did not directly pay the Tax and are not entitled to bring refund actions in Louisiana.

dered here may be litigated." 425 U. S., at 797 (emphasis in original).

Of course, the issue of appropriateness in an original action between States must be determined on a case-by-case basis. Despite the facial similarity with *Arizona* v. *New Mexico*, there are significant differences from the present case that compel an opposite result. First, one of the three electric companies involved in the state-court action in New Mexico was a political subdivision of the State of Arizona. Arizona's interests were thus actually being represented by one of the named parties to the suit. In this case, none of the plaintiff States is directly represented in the tax refund case.[19] It is also important to note that Arizona had itself not suffered any direct harm as of the time that it moved for leave to file a complaint since none of the utilities had yet paid the tax. Unlike the present case, it was highly uncertain whether Arizona's interest as a purchaser of electricity had been adversely affected.[20] New Mexico's procedure did not limit the utility companies to seeking a refund of taxes already paid, but rather permitted the companies to refuse to pay the tax pending a declaration of the statute's constitutionality. In contrast, Louisiana requires the Tax to be paid pending the refund action with interest accruing at the rate of 6%. As recognized by the Special Master, the effect of the limited interest rate is to permit Louisiana to benefit from any delay attendant to the state-court proceedings even if the Tax is ultimately found unconstitutional.

The tax at issue in the *Arizona* case did not sufficiently implicate the unique concerns of federalism forming the basis of our original jurisdiction. At most, the New Mexico tax

[19] Despite the fact that these parties have been invited to intervene, see n. 17, *supra*, the Louisiana refund action is an imperfect forum, primarily because no injunctive relief prior to the determination on the merits is possible under Louisiana law. See La. Rev. Stat. Ann. §§ 47:1575, 47:1576 (West 1970 and Supp. 1981).

[20] See 425 U. S., at 798 (STEVENS, J., concurring).

affected only some residents in one State. In the present case, the magnitude and effect of the First-Use Tax is far greater. The anticipated $150-million yearly tax is intended to be and is being passed on to millions of consumers in over 30 States. Unlike the day-to-day taxing measures which spurred the Court's observations in *Wyandotte,* it is not at all a "waste" of this Court's time to consider the validity of a tax with the structure and effect of Louisiana's First-Use Tax. Indeed, there is nothing ordinary about the Tax. Given the underlying claim that Louisiana is attempting, in effect, to levy the Tax as a substitute for a severance tax on gas extracted from areas that belong to the people at large to the relative detriment of the other States in the Union, it is clear that the First-Use Tax implicates serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction.

The exercise of our original jurisdiction is also supported by the fact that the First-Use Tax affects the United States' interests in the administration of the OCS—a factor totally absent in *Arizona* v. *New Mexico.* While we do not have exclusive jurisdiction in suits brought by the United States against a State, see 28 U. S. C. § 1251 (b)(2) (1976 ed., Supp. III), we may entertain such suits as original actions in appropriate circumstances. See, *e. g., United States* v. *California,* 332 U. S. 19 (1947). See also *United States* v. *Alaska,* 422 U. S. 184, 186, n. 2 (1975). To be sure, we "seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States* v. *Nevada,* 412 U. S., at 538. In this case, however, it is clear that a district court action brought by the United States, which necessarily would not include the plaintiff States, would be an inadequate forum in light of the present posture of this case. In addition, because of the interest of the United States in protecting its rights in the OCS area, with ramifications for all coastal States, as well

as its interests under the regulatory mechanism that supervises the production and development of natural gas resources, we believe that this case is an appropriate one for the exercise of our original jurisdiction under § 1251 (b)(2).

For the reasons stated above, we reject Louisiana's exceptions to the report of the Special Master, and accept the recommendation that we deny Louisiana's motion to dismiss.[21]

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[21] We note in passing that Louisiana's other arguments against the exercise of our original jurisdiction are lacking in merit. First, our original jurisdiction is not affected by the provisions of the Eleventh Amendment which only withholds federal judicial power in suits against a State "by Citizens of another State, or by Citizens or Subjects of any Foreign State." Thus, an original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals. *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 258–259, n. 12 (1972). Second, the Tax Injunction Act, which by its terms only applies to injunctions issued by federal district courts, 28 U. S. C. § 1341, is inapplicable in original actions. We thus reject Louisiana's exceptions based on these grounds.

Louisiana also excepted to each of the recommendations made by the Special Master in his first report concerning various preliminary matters. Given the above determination on Louisiana's motion to dismiss, we reject each of Louisiana's exceptions and adopt the recommendations contained in the Special Master's first report. Specifically, we agree that New Jersey, whose allegations of injury are identical to that of the original plaintiff States, clearly has standing and should be permitted to intervene. Second, we believe that the United States' interests in the operation of the OCS Act and the FERC's interests in the operation of the Natural Gas Act are sufficiently important to warrant their intervention as party plaintiffs, see *supra*, at 744 and this page. We have often permitted the United States to intervene in appropriate cases where distinctively federal interests, best presented by the United States itself, are at stake. See, *e. g.*, *Arizona* v. *California*, 344 U. S. 919 (1953); *Oklahoma* v. *Texas*, 253 U. S. 465 (1920). Third, the Master recommended that we grant the motion of 17 pipeline companies to intervene as plaintiffs. Given that the Tax is directly imposed on the owner of imported gas and that the pipelines most often own the gas, those companies have a direct stake in this controversy and in the interest of a full exposition of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to per-

III

On the merits, plaintiffs argue that the First-Use Tax violates the Supremacy Clause because it interferes with federal regulation of the transportation and sale of natural gas in interstate commerce. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 427 (1819). See also *Hines* v. *Davidowitz,* 312 U. S. 52 (1941). Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. See *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947). But as the Court stated in *Rice:*

> "Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n,* 250 U. S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz,* 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co.* v. *Railroad Commission,* 236 U. S. 439; *Charleston*

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mit intervention of private parties in original actions. See *Oklahoma* v. *Texas,* 258 U. S. 574 (1922). Cf. *Trbovich* v. *Mine Workers,* 404 U. S. 528, 536–539 (1972). Finally, we agree with the Special Master that the Associated Gas Distributors should be permitted to file an *amicus* brief.

> *& W. C. R. Co.* v. *Varnville Co.*, 237 U. S. 597; *New York Central R. Co.* v. *Winfield*, 244 U S. 147; *Napier* v. *Atlantic Coast Line R. Co.*, [272 U. S. 605]. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U. S. 538." *Ibid.*

Of course, a state statute is void to the extent it conflicts with a federal statute—if, for example, "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz, supra,* at 67. See generally *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157–158 (1978); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624, 633 (1973).

Plaintiffs argue that § 1303C of the Act violates the Natural Gas Act, 15 U. S. C. §§ 717–717w (1976 ed. and Supp. III) (Gas Act), as amended by the Natural Gas Policy Act of 1978.[22] In 1938, Congress enacted the Gas Act to assure

[22] The Natural Gas Policy Act of 1978 was enacted to alleviate the adverse economic effects of the disparate treatment of intrastate and interstate natural gas sales. Under 15 U. S. C. § 3320 (1976 ed., Supp. III), a price for the first sale of gas shall not be considered to exceed the maximum lawful price if it is necessary to recover "any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission."

Plaintiffs also argue that the entire scheme of taxation in Louisiana with its series of tax credits and exemptions, see text, *infra,* at 756–758, necessarily interferes with the FERC's comprehensive authority to regulate the price of gas. The Special Master determined that the decision was difficult to make given the fact that the FERC had permitted the cost to be passed on. The Special Master concluded that it may ultimately be decided that some of the costs are beyond the reach of the FERC, or that the Tax is not a "substantial hindrance" to the Commission. We do not need to reach plaintiffs' exception on this point given our resolution on the other issues presented.

that consumers of natural gas receive a fair price and also to protect against the economic power of the interstate pipelines. See *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, 612 (1944); *Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U. S. 378, 388–389 (1959). The Gas Act was intended to provide the Federal Power Commission, now the FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682 (1954).

Under the present law, natural gas owners are entitled to recover from their customers all legitimate costs associated with the production, processing, and transportation of natural gas. See *FPC* v. *United Gas Pipe Line Co.*, 386 U. S. 237, 243 (1967) (cost of service normally includes proper allowance for taxes and this allowance is "obviously within the jurisdiction of the Commission"). As part of the First-Use Tax, Louisiana has directed that the amount of the Tax should be "deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas." § 1303C.[23]

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[23] Section 1303C provides:

"[The First-Use Tax] shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this

The Act further provides that an owner shall not have an enforceable right to seek reimbursement for payment of the Tax from any third party other than a purchaser of the gas, *ibid.*, even though the third party may be the owner of marketable hydrocarbons that are extracted from the gas in the course of processing.

The effect of § 1303C is to interfere with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers. The unprocessed gas obtained at the wellhead contains extractable hydrocarbons which are most often owned and sold separately from the "dried" gas. The FERC normally allocates part of the processing costs between these related products, and insists that the owners of the liquefiable hydrocarbons bear a fair share of the expense associated with processing.[24] See generally *FPC* v. *United Gas Pipe Line Co., supra,* at 243 ("income and expense of unregulated and regulated activities should be segregated"). By specifying that the First-Use Tax is a processing cost to be either borne by the pipeline or other owner without compensation, an unlikely event in light of the large sums involved, or passed on to purchasers, Louisiana has attempted a substantial usurpation of the authority of the FERC by dictating to the pipelines the allocation of processing costs for the interstate ship-

Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest."

[24] See *Mobil Oil Corp.* v. *FPC,* 157 U. S. App. D. C. 235, 238–240, 483 F. 2d 1238, 1241–1243 (1973); *Detroit* v. *FPC,* 97 U. S. App. D. C. 260, 269–271, 230 F. 2d 810, 819–821 (1955), cert. denied, 352 U. S. 829 (1956); *Union Oil Company of California,* Docket No. CI77–828 et al., p. 11 (FERC, Apr. 12, 1978); *Canadian Superior Oil (U. S.) Ltd.,* Docket No. CI77–802 et al., p. 4 (FERC, Mar. 28, 1978); *Tennessee Gas Pipeline Co.,* 38 F. P. C. 691, 698 (1967); *Continental Oil Co.,* 27 F. P. C. 96, 107–108 (1962). Removal reduces both the volume and heat content of the natural gas ultimately received by the gas consumers. See *Area Rate Proceeding,* 40 F. P. C. 530, 611 (1968), aff'd, 428 F. 2d 407 (CA5), cert. denied, 400 U. S. 950 (1970).

ment of natural gas. Owners of natural gas are foreclosed by the operation of § 1303C from entering into valid contracts requiring the owners of the extracted hydrocarbons to reimburse the pipelines for costs associated with transporting and processing these products. The effect of § 1303C is to shift the incidence of certain expenses, which the FERC insists are incurred substantially for the benefit of the owners of extractable hydrocarbons, to the ultimate consumer of the processed gas without the prior approval of the FERC.

The effect of § 1303C is akin to the state regulation overturned in *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas,* 372 U. S. 84, 92 (1963). In *Northern Natural Gas,* a state administrative agency's rule required an interstate pipeline company to purchase natural gas ratably from all the wells in a particular field. The Court held that the rule violated the superior interests of the Federal Government under the Gas Act. The state Commission's order shifted the burden of performing the "complex task of balancing the output of thousands of natural gas wells within the State" to the pipeline company. This requirement "could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority." *Ibid.*

While the Special Master noted that the FERC was of the opinion that the First-Use Tax was impermissible, the Special Master refused to recommend that the Court grant plaintiffs' motion for judgment on the Supremacy Clause issue respecting § 1303C because he discerned a factual issue concerning the nature of the gas-drying process. Under the Special Master's view, if the facts demonstrated that processing was done for the profit of the owners of the extractable hydrocarbons, then the position of the FERC that such costs

should not be passed on to the consumers was correct. If, however, the processing was done as a means of standardizing the heat content of the gas for sale to consumers, then it would be reasonable to pass the Tax forward, and thus § 1303C would be consistent with Gas Act policy. The Special Master concluded that this question was best resolved after suitable factual development, and that in any event, it may be that "in the end FERC's orders can be adjusted so that the laws will mesh without conflict."

It is our view, however, that the issue is ripe for decision without further evidentiary hearings. Under the Gas Act, determining pipeline and producer costs is the task of the FERC in the first instance, subject to judicial review. Hence, the further hearings contemplated by the Special Master to determine whether and how processing costs are to be allocated are as inappropriate as Louisiana's effort to pre-empt those decisions by a statute directing that processing costs be passed on to the consumer. Even if the FERC ultimately determined that such expenses should be passed on *in toto,* this kind of decisionmaking is within the jurisdiction of the FERC; and the Louisiana statute, like the state Commission's order in *Northern Natural Gas, supra,* is inconsistent with the federal scheme and must give way. At the very least, there is an "imminent possibility of collision," *ibid.*[25] The FERC need not adjust its ruling to accommodate the Louisiana statute. To the contrary, the State may not trespass on the authority of the federal agency. As we see it, plaintiffs are entitled to judgment on the pleadings that

[25] It is no answer to note that the FERC has administratively determined that the Tax may be passed on. The agency's position is that the Tax is unconstitutional as an invasion of its authority; and as a condition for permitting the pipeline companies to pass the Tax through to consumers, has required that the companies "undertak[e] all legal action . . . to determine the constitutionality of the tax," and secure means for an effective refund should any taxes paid be returned upon a final finding that the Tax was unconstitutional. 43 Fed. Reg. 45553 (1978).

§ 1303C is invalid under the Supremacy Clause. To that extent, therefore, we sustain plaintiffs' exceptions to the Special Master's second report.[26]

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[26] The United States argues that once § 1303C is found unconstitutional the entire Act falls under § 4 of the Act which provides that in the event of a "final and unappealable judicial decision" upholding the right of any owner to "enforce a contract or agreement otherwise rendered unenforceable by R. S. 47:1303 (C)," the following consequences would occur:

"(2) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner costs or expenses incurred by such owner by virtue of separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then this Act shall be null and void and the secretary shall forthwith return to each taxpayer all taxes previously paid, together with interest at the rate of six percent per annum from the date of payment."

Since a specific contractual provision is not involved here, the precise terms of the Louisiana statute are not met despite the fact that a final and unappealable determination of the unconstitutionality of § 1303C has been made. Accordingly, we are not in position, based on the provision contained in § 4, to determine that the entire Act is null and void.

Plaintiff States, as well as the pipeline companies, also press another Supremacy Clause issue, contending that the First-Use Tax is inconsistent with the OCS Act, 43 U. S. C. §§ 1331–1356 (1976 ed. and Supp. III). Under § 1332, it is declared to be the policy of the United States that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter." Section 1333 (a)(1) expressly extends the Constitution and laws of the United States to the subsoil and seabed of the shelf. While the Act borrows "applicable and not inconsistent" state laws for certain purposes, such as were necessary to fill gaps in federal law, see *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352, 355–359 (1969), it expressly declares that "[s]tate taxation laws shall not apply to the outer Continental Shelf." § 1333 (a)(2)(A). Moreover, the OCS Act provides that the provision for adopting state law "shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." § 1333 (a)(3). By passing the OCS Act, Congress "emphatically implemented its view that the United States has para-

IV

Plaintiffs also argue that the First-Use Tax violates the Commerce Clause of the United States Constitution which provides that "[t]he Congress shall have Power . . . [t]o

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mount rights to the seabed beyond the three-mile limit . . . ." *United States* v. *Maine,* 420 U. S. 515, 526 (1975).

Plaintiff States contend that despite the fact that the First-Use statute declares that it is not taxing the gas itself and thus is not a state-imposed severance tax on OCS production, the inevitable intent and result of the Act is to impose a tax on the OCS production in contravention of the express prohibition of the OCS Act. It is clear that a State has no valid interest in imposing a severance tax on federal OCS land. In part, Louisiana purports to justify the Tax as a means of alleviating the alleged discrimination against Louisiana gas caused by the fact that Louisiana gas must pay the state severance tax while OCS gas does not. But if correcting the claimed imbalance were the sole justification asserted for the First-Use Tax, there would be grave doubt about the validity of the Tax. The proper fee or charge for drilling for gas on the OCS is a determination which is *solely* within the province of the Federal Government. Even if the United States were to decide to open up development to all comers at no charge in order to spur development of natural gas, Louisiana would have no interest in overriding that decision by imposing a tax to equalize the cost of local production with that on the federal OCS area. Permitting the States to exercise such power would adversely affect the price which the Government could command from private developers in their bid price. As clearly required by the OCS Act, Louisiana's sovereign interest in the development of offshore mineral interests stops at its 3-mile border. Louisiana, however, presses certain environmental interests as well in support of its First-Use Tax, and in light of this submission, we do not resolve the issue whether the Tax necessarily infringes on the sovereign interests of the United States in the OCS.

The intervening pipeline companies also argue that Louisiana has no valid environmental interest in imposing the First-Use Tax since the measure is pre-empted by the Coastal Zone Management Act of 1972, 86 Stat. 1280, as amended, 16 U. S. C. §§ 1451–1464 (1976 ed. and Supp. IV). The Coastal Zone Management Act provides federal funds to compensate States for environmental damage occurring as a result of offshore energy development to States which agree to comply with the standards mandated by the Act. The importance of the concerns for environmental damage are expressly recognized in the OCS Act. See 43 U. S. C. § 1332

regulate Commerce . . . among the several States . . . ." Art. I, § 8, cl. 3. Prior case law has established that a state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way. *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274 (1977). See *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250 (1938). The State's right to tax interstate commerce is limited, however, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. *Washington Revenue Dept.* v. *Washington Stevedoring Assn.,* 435 U. S. 734, 750 (1978). One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 458 (1959). See *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U. S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra.* See *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 356 (1951).

Initially, it is clear to us that the flow of gas from the OCS wells, through processing plants in Louisiana, and through interstate pipelines to the ultimate consumers in over 30 States constitutes interstate commerce. Louisiana argues that the taxable "uses" within the State break the flow of commerce and are wholly local events. But although the Louisiana "uses" may possess a sufficient local nexus to sup-

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(4)(A) (1976 ed., Supp. III). We need not reach this contention in light of our disposition of the other claims, and to this extent the exceptions of the plaintiff States and the pipeline companies are overruled.

port otherwise valid taxation,[27] we do not agree that the flow of gas from the wellhead to the consumer, even though "interrupted" by certain events, is anything but a continual flow of gas in interstate commerce. Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey. *California*

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[27] The United States suggests that the uses enunciated in the Act do not have a sufficient local nexus to support the Tax under the Commerce Clause. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954). While the local nexus of certain of the uses is suspect, other uses would appear to have a substantial local nexus so that on the present record it would be difficult to say that the entire Tax was unconstitutional on this ground. The Act contains a severability clause providing that if any use is found to be an unconstitutional basis for taxation, the next use would be taxed. See La. Rev. Stat. Ann. § 47:1303F (West Supp. 1981). Given our resolution on the discrimination charge, we find it unnecessary to reach the local nexus claim especially in light of the severability clause. To this extent, the exception of the United States and the FERC is overruled.

The United States and the plaintiff States also argue that the First-Use Tax is not fairly apportioned. To be valid, a tax on interstate commerce must be reasonably apportioned to the value of the activities occurring within the State upon which the Tax is imposed. See *Washington Revenue Dept.* v. *Washington Stevedoring Assn.*, 435 U. S. 734, 746–747 (1978). It is submitted that several factors suggest this principle is being violated. First, the Tax is imposed on each use as a function of the volume of the gas subject to the use, without attempting to tailor the amount of the Tax depending on the nature or extent of the actual use of the gas within Louisiana. Second, the use of the proceeds of the First-Use Tax demonstrates that the Tax is substantially in excess of the amount fairly associated with the local uses. Under the Act, 75% of the proceeds are used to service Louisiana's general debt, while only one-quarter is directly used to alleviate the alleged environmental damage caused by the pipeline activities. Third, the State has not demonstrated a sufficient relationship between other services provided by the State and the amount of the First-Use Taxes provided. In light of our determination that the Tax is discriminatory, however, we need not determine the apportionment issue. The exceptions of the United States, the FERC, and the plaintiff States to this extent are also overruled.

v. *Lo-Vaca Gathering Co.*, 379 U. S. 366, 369 (1965). See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 163 (1954); *FPC* v. *East Ohio Gas Co.*, 338 U. S. 464, 472–473 (1950); *Deep South Oil Co.* v. *FPC*, 247 F. 2d 882, 887–888 (CA5 1957). See generally *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 503–504 (1942) (fact of sale does not serve to change the "essential interstate nature of the business").

A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell*, 311 U. S. 454, 455–456 (1940). See *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 69 (1963); *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 478–480 (1932). In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions. No further hearings are necessary to sustain this conclusion. Under the specific provisions of the First-Use Tax, OCS gas used for certain purposes within Louisiana is exempted from the Tax. OCS gas consumed in Louisiana for (1) producing oil, natural gas, or sulphur; (2) processing natural gas for the extraction of liquefiable hydrocarbons; or (3) manufacturing fertilizer and anhydrous ammonia, is exempt from the First-Use Tax. § 1303A. Competitive users in other States are burdened with the Tax. Other Louisiana statutes, enacted as part of the First-Use Tax package, provide important tax credits favoring local interests. Under the Severance Tax Credit, an owner paying the First-Use Tax on OCS gas receives an equivalent tax credit on any state severance tax owed in connection with production in Louisiana. § 47:647 (West Supp. 1981). On its face, this credit favors those who both own OCS gas and engage in

Louisiana production.[28] The obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States. Finally, under the Louisiana statutes, any utility producing electricity with OCS gas, any natural gas distributor dealing in OCS gas, or any direct purchaser of OCS gas for consumption by the purchaser in Louisiana may recoup any increase in the cost of gas attributable to the First-Use Tax through credits against various taxes or a combination of taxes otherwise owed to the State of Louisiana. § 47:11B (West Supp. 1981). Louisiana consumers of OCS gas are thus substantially protected against the impact of the First-Use Tax and have the benefit of untaxed OCS gas which because it is not subject to either a severance tax or the First-Use Tax may be cheaper than locally produced gas. OCS gas

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[28] The United States has provided an example which the Special Master used to illustrate the possible discrimination:

"This difference can be illustrated by the following example. Owner A has 1000 mcf of OCS gas; owner B has 500 mcf of OCS gas and 500 mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use payment against the severance tax liability." Second Report, at 34, n. 18.

It has been observed that the credit means that "gas extracted offshore and gas extracted in Louisiana will be treated the same for Louisiana tax purposes only when the First Use Taxpayer has no severance tax liability to absorb the First Use Taxes." As a result, First-Use Taxpayers have an incentive to "undertake mineral extraction activities in Louisiana so as to minimize their effective First Use Tax burden and to compete on equal terms with other First Use Taxpayers whose First Use Tax burden has already been so minimized." W. Hellerstein, State Taxation in the Federal System: Perspectives on Louisiana's First Use Tax on Natural Gas, Shell Foundation Lecture at Tulane University School of Law (Nov. 20, 1980), pp. 23–24.

moving out of the State, however, is burdened with the First-Use Tax.[29]

The Special Master was aware that the effect of the Louisiana tax system is to favor local interests. With respect to the Severance Tax Credit, the Special Master noted that "[s]ince there is no apparent relation between the ownership of outer continental shelf gas and the production of gas in Louisiana, it is hard to understand Louisiana's motive in permitting this credit, but it obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana." Second Report, at 34. Moreover, the credit available to electrical generating plants, gas distributing services, and direct purchasers resulted in Louisiana customers being "protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State." *Ibid.* Despite these concerns, the Special Master did not recommend granting plaintiffs' motion to invalidate the Tax under the Commerce Clause because, as he saw it, it was difficult to tell the effect of the various credits, given the totality of the operation of the state tax provisions. Thus, instead of being discriminatory, the "actuality of operation" test required by *Halliburton Oil Well Cementing Co.* v. *Reily, supra,* at 69, might demonstrate after a full hearing that the First-Use Tax is a proper " 'compensating' tax intended to complement the state severance tax as the use tax complemented the sales tax in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937)." Second Report, at 35.

In our view, the First-Use Tax cannot be justified as a compensatory tax. The concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate. Here, Louisiana claims that the

[29] Of course, § 1303C itself may result in substantial discrimination since owners of gas subject to the state severance tax are not prohibited from allocating that cost to someone other than the ultimate consumer.

First-Use Tax compensates for the effect of the State's severance tax on local production of natural gas. To be sure, Louisiana has an interest in protecting its natural resources, and, like most States, has chosen to impose a severance tax on the privilege of severing resources from its soil. See *Bel Oil Corp.* v. *Roland,* 242 La. 498, 137 So. 2d 308, appeal dism'd, 371 U. S. 2 (1962); *Edwards* v. *Parker,* 332 So. 2d 175 (La. 1976). But the First-Use Tax is not designed to meet these same ends since Louisiana has no sovereign interest in being compensated for the severance of resources from the federally owned OCS land. The two events are not comparable in the same fashion as a use tax complements a sales tax. In that case, a State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State. No such equality exists in this instance.

The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce. See *Boston Stock Exchange,* 429 U. S., at 331–332; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 583–584 (1937). See generally *Halliburton Oil,* 373 U. S., at 70 ("equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"). As already demonstrated, however, the pattern of credits and exemptions allowed under the Louisiana statute undeniably violates this principle of equality. As we have said, OCS gas may generally be consumed in Louisiana without the burden of the First-Use Tax. Its principal application is to gas moving out of the State. Of course, it does equalize the tax burdens on OCS gas leaving the State and Louisiana gas going into the interstate market. But this sort of equalization is not the kind of "compensating" effect that our cases have recognized.

It may be true that further hearings would be required to provide a precise determination of the extent of the discrim-

ination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates. Accordingly, we grant plaintiffs' exception that the First-Use Tax is unconstitutional under the Commerce Clause because it unfairly discriminates against purchasers of gas moving through Louisiana in interstate commerce.

V

In conclusion, we hold that § 1303C violates the Supremacy Clause and that the First-Use Tax is unconstitutional under the Commerce Clause. Judgment to that effect and enjoining further collection of the Tax shall be entered. Jurisdiction over the case is retained in the event that further proceedings are required to implement the judgment.

So ordered.

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

CHIEF JUSTICE BURGER, concurring.

There is much validity in JUSTICE REHNQUIST's dissenting opinion, and it should keep us alert to any effort to expand the use of our original jurisdiction. However, I am satisfied that the Court's resolution of this case is sound, and I therefore join the Court's opinion.

JUSTICE REHNQUIST, dissenting.

There is no question that this controversy falls within the literal terms of the constitutional and statutory grant of original jurisdiction to this Court. U. S. Const., Art. III, § 2, cl. 2; 28 U. S. C. § 1251 (a) (1976 ed., Supp. III). As the Court stated in *Illinois* v. *Milwaukee,* 406 U. S. 91, 93 (1972), however, "[w]e construe 28 U. S. C. § 1251 (a)(1), as we do

Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases." Because of the nature of the interests which the plaintiff States seek to vindicate in this original action, and because of the existence of alternative forums in which these interests can be vindicated, I do not consider this an "appropriate case" for the exercise of original jurisdiction. The plaintiff States have not, in my view, established the "strictest necessity" required for invoking this Court's original jurisdiction, *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 505 (1971), and therefore I would grant defendant Louisiana's motion to dismiss the complaint.

I

It has been a consistent and dominant theme in decisions of this Court that our original jurisdiction should be exercised with considerable restraint and only after searching inquiry into the necessity for doing so. As we noted in *Illinois* v. *Milwaukee*, "[i]t has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.'" 406 U. S., at 93 (quoting *Utah* v. *United States*, 394 U. S. 89, 95 (1969)). Chief Justice Fuller wrote in 1900 that original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute . . . ." *Louisiana* v. *Texas*, 176 U. S. 1, 15. The reasons underlying this restraint have also been long established. The Court has wisely insisted that original jurisdiction be sparingly invoked because it is not suited to functioning as a *nisi prius* tribunal. "This Court is . . . structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original [jurisdiction] cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, at 498.[1]

[1] It is true that in this case the Court decides that judgment on the pleadings is appropriate, and that therefore it is not necessary to conduct

Over 40 years ago, when the Court's docket was considerably lighter than it is today, Chief Justice Hughes articulated the concern that accepting original-jurisdiction cases "in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it." *Massachusetts* v. *Missouri*, 308 U. S. 1, 19 (1939). The Court has recognized that expending its time and resources on original-jurisdiction cases detracts from its primary responsibility as an appellate tribunal. "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." *Washington* v. *General Motors Corp.*, 406 U. S. 109, 113 (1972). See also *Illinois* v. *Milwaukee, supra*, at 93–94 ("We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer"). Original-jurisdiction cases represent an "intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court . . . ." *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, at 505.

None of these concerns are adequately answered by the expedient of employing a Special Master to conduct hearings, receive evidence, and submit recommendations for our review. It is no reflection on the quality of the work by the Special Master in this case or any other master in any other original-jurisdiction case to find it unsatisfactory to delegate the

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a trial. I do not understand the Court, however, to be ruling that original jurisdiction is appropriate only when a trial is not necessary, and therefore in accepting original jurisdiction of this case the Court opens the door to similar cases which may necessitate a trial.

proper functions of this Court. Of course this Court cannot sit to receive evidence or conduct trials—but that fact should counsel reluctance to accept cases where the situation might arise, not resolution of the problem by empowering an individual to act in our stead. I for one think justice is far better served by trials in the lower courts, with appropriate review, than by trials before a Special Master whose rulings this Court simply cannot consider with the care and attention it should. It is one thing to review findings of a district court or state court, empowered to make findings in its own right, and quite another to accept (or reject) recommendations when this Court is in theory the primary factfinder. As Chief Justice Stone put it in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 470 (1945) (dissenting opinion): "In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties."

II

The prudential process by which the Court culls "appropriate" original-jurisdiction cases from those which are inappropriate involves two inquiries. In *Massachusetts* v. *Missouri, supra,* at 18, the Court noted:

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interests of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection."

This dual inquiry was reaffirmed in *Washington* v. *General Motors Corp., supra,* at 113. Or, as put in *Illinois* v. *Milwaukee,* 406 U. S., at 93, "the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of an-

other forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." The first prong of the inquiry thus involves an assessment of the "nature of the interests of the complaining state," "the essential quality of the right asserted," "the seriousness and dignity of the claim," and the second prong an examination of the availability of an alternative forum.

The Court accepts original jurisdiction in this case for two separate reasons: because the plaintiff States are injured in their capacity as purchasers of natural gas, *ante,* at 736–737, and because the plaintiff States may sue as *parens patriae, ante,* at 737–739. In ruling that jurisdiction exists because of the plaintiff States' own purchases of natural gas, the Court does not even purport to consider the nature or essential quality of the States' claim or whether it is of sufficient "seriousness and dignity" to justify invoking our "delicate and grave" original jurisdiction. The Court recognizes that "unique concerns of federalism" form the basis of our original jurisdiction, *ante,* at 743, but does not explain how such concerns are implicated simply because one State levies a tax on an item which is eventually passed on to consumers, one of which happens to be another State. The "nature of the interests of the complaining state—the essential quality of the right asserted" is indistinguishable from the interest and right of a private citizen, and the States' claim is of no greater "seriousness and dignity" than the claim of any other consumer.

I would hold that, as a general rule, when a State's claim is indistinguishable from the claim of any other private consumer it is insufficient to invoke our original jurisdiction. The Court in the past has referred to claims by a State in its capacity simply as consumer or owner as mere "makeweights." See *Georgia* v. *Pennsylvania R. Co., supra,* at 450; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237 (1907); see also *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 611

(1923) (Brandeis, J., dissenting). Cf. *Kansas* v. *Colorado*, 206 U. S. 46, 98 (1907). I do not think such a makeweight should suffice to invoke our original jurisdiction, particularly since States now act as consumers in a vast array of areas.

The fact that States now purchase countless varieties of items for their own use which were not purchased 50 or even 25 years ago suggests that concern for our own limited resources is not the only factor which should motivate us in allowing our original jurisdiction to be invoked sparingly. With the greatly increased litigation dockets in most state and federal trial courts, there will be the strongest temptation for various interest groups within the State to attempt to persuade the Attorney General of that State to bring an action in the name of the State in order to make an end run around the barriers of time and delay which would confront them if they were merely private litigants.[2] Thus in permitting indiscriminate use of our original jurisdiction we not only consume our own scarce resources, but permit in effect the bypassing of ordinary trial courts where private parties are required to litigate the same issues. Such a departure from past practice risks the creation of an entirely separate system for litigation in this country, standing side by side with the state-court systems and the federal-court system. It will obviously be tempting to many interests of a variety of persuasions on the merits of a particular issue to "start at the top," so to speak, and have the luxury of litigating only before a Special Master followed by the appellate-type review which this Court necessarily gives to his findings and recommendations.

If all that is required to invoke our original jurisdiction

[2] Experience teaches that these are not empty concerns. See, *e. g.*, *New Hampshire* v. *Louisiana*, 108 U. S. 76, 89 (1883) (State suing as assignee of bondholders, bondholders funding lawsuit and to collect any award); *North Dakota* v. *Minnesota*, 263 U. S. 365, 375 (1923) (State suing for flood damage to farmers' land, farmers funding lawsuit and to collect any award).

is an injury to the State as consumer caused by the regulatory activity of another State, the list of cases which could be pressed as original-jurisdiction cases must be endless. The Court's opinion contains no limiting principle, as mandated by the frequent statements that our original jurisdiction be sparingly invoked and the required inquiry into the nature of the State's claim.

I would require that the State's claim involve some tangible relation to the State's sovereign interests. Our original jurisdiction should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State, but rather should be limited to complaints by States *qua* States. This would include the prototypical original action, boundary disputes, and the familiar cases involving disputes over water rights. In such cases, the State seeks to vindicate its rights as a State, a political entity.[3] Since nothing about the complaint in this case involves sovereign interests, I would hold that there is no jurisdiction on the basis of the States' own purchases of natural gas.[4]

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[3] Requiring that a State's claim implicate sovereignty interests also serves the oft-repeated expression in our opinions that the Court will not interfere with action by one State unless the injury to the complaining State is of "serious magnitude." See *Alabama* v. *Arizona,* 291 U. S. 286, 292 (1934); *Colorado* v. *Kansas,* 320 U. S. 383, 393, and n. 8 (1943). The Court cites this concern, *ante,* at 736, n. 11, but does not explain why a tax of seven cents per thousand cubic feet of gas is an injury of "serious magnitude."

[4] It is true that the Court has exercised original jurisdiction in cases where the right asserted by a complaining State cannot truly be considered a right affecting sovereign interests. I do not doubt the Court's *power* to exercise original jurisdiction in such cases, nor do I in this case. The decision that a particular type of case was an "appropriate" one for original jurisdiction a century ago, however, does not mean that the same sort of case is an appropriate one today. Justice Harlan explicitly recognized in *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S. 493, 497–499 (1971), that societal changes and "the evolution of this Court's responsibilities in the American legal system" affected the determination of what

Nor is this an appropriate case for the plaintiff States to invoke original jurisdiction as *parens patriae*. The Court announces that a State may sue in this capacity in an original action "where the injury alleged affects the general population of a State in a substantial way," *ante*, at 737, but the established rule, which may be different than the Court's paraphrase, was articulated in *Pennsylvania* v. *New Jersey*, 426 U. S. 660, 665 (1976) (*per curiam*) in these terms: "It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." In *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387, 394 (1938), Chief Justice Hughes stressed that the principle that a State may sue as *parens patriae* "does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy."

Here the plaintiff States are not suing to advance a sovereign or quasi-sovereign interest. Rather they are suing to promote the economic interests of those of their citizens who purchase and use natural gas. Advancing the economic interests of a limited group of citizens, however, is not sufficient to support *parens patriae* original jurisdiction. In *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S. 277, 289 (1911), the Court ruled that a State had no standing to challenge in an original action unreasonable freight rates imposed by citizens of another State affecting shippers within the State. In *New Hampshire* v. *Louisiana*, 108 U. S. 76 (1883),

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was an appropriate case in which to exercise original jurisdiction. The increase in state regulatory efforts on the one hand and the role of States as consumers on the other suggests that new considerations need to be brought to bear on the present question.

the Court rejected an effort by New Hampshire to collect as assignee on Louisiana state bonds, when the proceeds would end up in the hands of the assignors, New Hampshire citizens. And in *North Dakota* v. *Minnesota,* 263 U. S. 365 (1923), the Court turned back an effort by the plaintiff State to sue for flood damage to farmers' land. In my view this suit, brought to benefit state consumers of natural gas, is closer to these cases than those cited by the Court, *Missouri* v. *Illinois,* 180 U. S. 208, 241 (1901) (health menace to entire State from spread of contagious diseases specifically noted); *Kansas* v. *Colorado,* 185 U. S. 125 (1902) (rights to water); *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230 (1907) (rights to air in unpolluted State).

The Court relies heavily on *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923), which it describes as "functionally indistinguishable" from the case before us. *Ante,* at 738–739. I think *Pennsylvania* v. *West Virginia,* decided over the dissents of Justices Holmes, Brandeis, and McReynolds, is readily distinguishable, "functionally" or otherwise. The harm in *Pennsylvania* v. *West Virginia* was the threatened complete cessation of deliveries of natural gas. This harmed all the citizens of the State, since it would have prevented any of them from purchasing the natural gas. The harm involved was also far more serious than the harm in this case. In *Pennsylvania* v. *West Virginia,* the harm was the complete halt in deliveries of a commodity upon which citizens of the plaintiff State depended. The opinion there stressed the direct link to the "health, comfort and welfare" of the citizens of Pennsylvania and the serious jeopardy they would be in if their supply of heating gas were suddenly cut off. 262 U. S., at 591–592. Such a direct link to health and welfare is simply not present in this case. The distinction between an increase in the cost of a commodity passed on to consumers complained of here, and the complete cessation of a service upon which citizens depended, seems palpable.

III

The exercise of original jurisdiction in this case is particularly inappropriate since the issues the plaintiff States would have us decide not only can be, but in fact are being, litigated in other forums. Although this case would come within our original and exclusive jurisdiction if appropriate, the question whether it is appropriate depends in part on the availability of alternative forums. See *Illinois* v. *Milwaukee,* 406 U. S., at 93; *Arizona* v. *New Mexico,* 425 U. S. 794, 796–797 (1976).[5]

The precise issues which the Court finds it somehow necessary to reach today are raised in actions which are currently pending in a Louisiana state court. An action by Louisiana seeking a declaratory judgment that its First-Use Tax is constitutional is pending, *Edwards* v. *Transcontinental Gas Pipe Line Corp.,* No. 216,867 (19th Judicial Dist., East Baton Rouge Parish), as is a refund suit brought by the 17 pipeline companies actually liable for the tax, *Southern Natural Gas Co.* v. *McNamara,* No. 225,533 (19th Judicial Dist., East Baton Rouge Parish). The pipeline companies raise in the Louisiana proceeding the identical challenges raised by the plaintiff States in the present case.[6]

In view of the foregoing I consider *Arizona* v. *New Mexico, supra,* controlling. There the Court declined to exercise orig-

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[5] The Court's dismissal of the significance of *Illinois* v. *Milwaukee* and *Ohio* v. *Wyandotte Chemicals Corp.* as cases not within the exclusive jurisdiction of this Court thus simply does not wash. *Illinois* v. *Milwaukee* indicated the appropriateness of considering the existence of alternative forums in the context of original and exclusive jurisdiction. *Arizona* v. *New Mexico* makes the appropriateness of such consideration in original and exclusive jurisdiction cases quite clear.

[6] The fact that the pipeline companies have seen fit to bring suit on their own behalf undermines the analysis of the Court that the consumers of the gas, both the States and the States' citizens, are the real parties in interest. The pipeline companies obviously have a sufficient interest to justify their suit.

inal and exclusive jurisdiction over a suit brought by Arizona challenging injury to it and its citizens as consumers of electricity generated in New Mexico and subject to a New Mexico tax. As here, the tax was imposed on utilities, not directly on the consumers. The Court quoted language from *Illinois* v. *Milwaukee, supra,* and *Massachusetts* v. *Missouri,* 308 U. S. 1 (1939), concerning the sparing use of our original jurisdiction and the appropriateness of considering alternative forums, and noted that the utilities, like the pipeline companies here, had sued in state court. The Court concluded that "[i]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated" (emphasis in original). 425 U. S., at 797. Although the Court in this case stresses that the plaintiff States are not parties in the Louisiana state-court proceedings, in *Arizona* v. *New Mexico* we specifically emphasized that the relevant question was whether the *issues* could be litigated elsewhere.

IV

The basic problem with the Court's opinion, in my view, is that it articulates no limiting principles that would prevent this Court from being deluged by original actions brought by States simply in their role as consumers or on behalf of groups of their citizens as consumers. Perhaps the principles sketched in this dissent are not the best limiting principles which could be devised, but the difficulty in developing such principles does not lessen the need for them. The absence of limiting principles in the Court's opinion, I fear, "could well pave the way for putting this Court into a quandary whereby we must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of our energies to such matters." *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S., at 504.[7] The prob-

[7] It is hardly satisfactory simply to note, as does the Court, that "the

lem is accentuated in this case because it falls within our original and exclusive jurisdiction, which means that similar cases not only can be but *must* be brought here.

In conclusion I can do no better than quote from a dissent Justice Frankfurter penned under similar circumstances:

> "Jurisdictional doubts inevitably lose force once leave has been given to file a bill, a master has been appointed, long hearings have been held, and a weighty report has been submitted. And so, were this the last as well as the first assumption of jurisdiction by this Court of a controversy like the present, even serious doubts about it might well go unexpressed. But if experience is any guide, the present decision will give momentum to kindred litigation and reliance upon it beyond the scope of the special facts of this case. . . . [L]egal doctrines have, in an odd kind of way, the faculty of self-generating extension. Therefore, in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate difficulties which I have not been able to overcome and potential abuses to which the doctrine is not unlikely to give rise." *Texas* v. *Florida,* 306 U. S. 398, 434 (1939).[8]

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issue of appropriateness in an original action between States must be determined on a case-by-case basis." *Ante,* at 743.

[8] Because of my views on the jurisdictional question I find it unnecessary to address the merits of this case, beyond noting that the pressure in original actions to avoid factual inquiries which this Court of course cannot make may go far to explain the entry of judgment on the pleadings over the ruling by the Special Master that further factual development is necessary to a proper resolution of the issues.

ST. MARTIN EVANGELICAL LUTHERAN CHURCH ET AL. *v.* SOUTH DAKOTA

CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

No. 80–120. Argued March 3, 1981—Decided May 26, 1981

Petitioner Church, located in South Dakota, is a member of the Wisconsin Evangelical Lutheran Synod. It operates an elementary Christian day school that is not a separate legal entity from the Church, but is financed by the Church's congregation and controlled by a Board elected from the congregation. Petitioner Academy is a secondary school in South Dakota owned, supported, and controlled by the Synod, and it also is not separately incorporated. Petitioners claim exemption with respect to their school employees from unemployment compensation taxes imposed by the Federal Unemployment Tax Act (FUTA) and South Dakota's complementary statutes. Title 26 U. S. C. § 3309 (b) provides an exemption with respect to, *inter alia*, "service performed—(1) in the employ of (A) a church or convention or association of churches, or (B) an organization . . . which is operated, supervised, controlled, or principally supported by a church or a convention or association of churches." A previous exemption under § 3309 (b)(3) for service performed in the employ of a school that is not an institution of higher education was repealed in 1976 when FUTA was amended. After petitioners' unsuccessful administrative appeal from South Dakota's imposition of the taxes upon them and a successful appeal to a state court, the South Dakota Supreme Court held petitioners subject to the taxes.

Held: Petitioners are exempt from unemployment compensation taxes under § 3309 (b)(1)(A). Pp. 780–788.

(a) Section 3309 (b)(1)(A), as enacted in 1970, applies to schools, like petitioners', that have no separate legal existence from a church, or as in the Academy's case, from a "convention or association of churches." The employees working within these schools plainly are "in the employ of . . . a church or convention or association of churches" within the meaning of § 3309 (b)(1)(A). And instead of construing the term "church" in § 3309 (b) as being limited to the actual house of worship, a construction that would contradict the phrasing of FUTA, such term must be construed as referring to the congregation or the hierarchy itself, that is, the church authorities who conduct the business of hiring, discharging, and directing church employees. Pp. 781–785.

(b) The legislative history, including the repeal of § 3309 (b)(3), discloses no intent by Congress to alter the scope or meaning of § 3309 (b)(1). Pp. 785–788.

290 N. W. 2d 845, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post,* p. 788.

Edward Thomas Schilling argued the cause for petitioners. With him on the briefs was *Ernst J. von Briesen.*

Mark V. Meierhenry, Attorney General of South Dakota, argued the cause for respondent. With him on the brief was *Judith A. Atkinson,* Assistant Attorney General.

Allen R. Snyder argued the cause for the State of Alabama et al. as *amici curiae* urging reversal. With him on the brief were *Charles A. Graddick,* Attorney General of Alabama, *Richard H. Bryan,* Attorney General of Nevada, *Stuart Philip Ross, Peter W. Tredick, George Cocoris,* and *John A. Flangas.*

Barry Sullivan argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree, Acting Assistant Attorney General Martin, Deputy Solicitor General Wallace, Alan I. Horowitz, Mark C. Rutzick, F. James Foley, Nathaniel Baccus III, Lois G. Williams,* and *Joseph M. Woodward.**

*Briefs of *amici curiae* urging reversal were filed by *George Deukmejian,* Attorney General, *Arthur C. deGoede,* Assistant Attorney General, and *Lawrence K. Keethe* and *Jefferey M. Vesely,* Deputy Attorneys General, for the State of California; by *Lee Boothby* and *Robert W. Nixon* for Americans United for Separation of Church and State; by *William B. Ball, Philip J. Murren,* and *Robert L. Toms* for the Association of Christian Schools International et al.; by *Henry W. Sawyer III* for the Germantown Friends School et al.; by *David C. Gibbs, Jr.,* and *Charles E. Craze* for the Grace Baptist Temple et al.; and by *Wilfred R. Caron, Charles M. Whelan, George E. Reed, Gerald C. Tobin,* and *John A. Liekweg* for the United States Catholic Conference.

Briefs of *amici curiae* were filed by *Nathan Z. Dershowitz* for the

JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioners, St. Martin Evangelical Lutheran Church (St. Martin), at Watertown, S. D., and Northwestern Lutheran Academy (Academy), at Mobridge in that State, claim exemption with respect to their school employees from taxes imposed by the Federal Unemployment Tax Act (FUTA), 26 U. S. C. §§ 3301–3311 (1976 ed. and Supp. III), and by South Dakota's statutes complementary thereto, S. D. Codified Laws § 61–1–1 *et seq.* (1978 and Supp. 1980). The exemption is claimed on both statutory and First Amendment grounds. The provisions primarily at issue are FUTA's § 3309 (b) [1] and South Dakota's § 61–1–10.4.[2]

American Jewish Congress and by *Charles Alan Siegel* for the Lutheran Church-Missouri Synod.

[1] Title 26 U. S. C. § 3309 (b) reads in pertinent part:

"This section shall not apply to service performed—

"(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

"(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order. . . ."

[2] This South Dakota statute provides:

"For the purposes of §§ 61–1–10.2 and 61–1–10.3 the term 'employment' does not apply to service performed:

"(1) In the employ of

"(a) a church or convention or association of churches, or

"(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

"(2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

"(3) In the employ of a school which is not an institution of higher education prior to January 1, 1978 . . . ."

I

A

FUTA appeared originally as Title IX of the Social Security Act of 1935, 49 Stat. 639, and was enacted in response to the widespread unemployment that accompanied the Great Depression. It called for a cooperative federal-state program of benefits to unemployed workers.[3] The Act has undergone a series of amendments that progressively have expanded coverage of the Nation's work force.[4]

This case concerns one of the more recent of those amendments, namely, that effected by § 115 (b)(1) of the Unemployment Compensation Amendments of 1976, Pub. L. 94–566, 90 Stat. 2670. The Secretary of Labor has determined that this statute rendered nonprofit church-related primary and secondary schools subject to FUTA. The South Dakota authorities went along with that ruling in their interpretation of the State's amended statute. Petitioners are among those religiously affiliated schools so claimed to be required to pay the FUTA and South Dakota taxes. They contest this construction of the statutes. They argue also, however, that holding them subject to the taxes would violate both

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[3] FUTA imposes an excise tax on "wages" paid by an "employer" in covered "employment," 26 U. S. C. § 3301, as these terms are statutorily defined. § 3306 (1976 ed. and Supp. III). An employer, however, is allowed a credit of up to 90% of the federal tax for "contributions" paid to a state fund established under a federally approved state unemployment compensation law. § 3302 (1976 ed. and Supp. III). The requirements for federal approval are contained in §§ 3304 and 3309 (1976 ed. and Supp. III), and the Secretary of Labor must annually review and certify the state plan. §§ 3304 (a) and (c) (1976 ed. and Supp. III). All 50 States have employment security laws implementing the federal mandatory minimum standards of coverage. A State, of course, is free to expand its coverage beyond the federal minimum without jeopardizing its federal certification.

[4] In response to each federal amendment, the States correspondingly have amended their statutes to retain their federal certifications.

the Free Exercise Clause and the Establishment Clause of the First Amendment.

B

Proper understanding of the effect of the 1976 amendment requires a review of FUTA's development. From 1960 to 1970, FUTA, by § 3306 (c)(8), unrestrictedly *excluded* from the definition of "employment" all "service performed in the employ of a religious, charitable, educational, or other organization described in section 501 (c)(3) which is exempt from income tax under section 501 (a)." Pub. L. 86–778, § 533, 74 Stat. 984.[5] Under this definition, nonprofit church-related schools, of course, were exempt from the tax. A 1970 amendment, however, served to narrow that broad exemption of nonprofit organizations.[6] See Employment Security Amendments of 1970, Pub. L. 91–373, § 104 (b)(1), 84 Stat. 697. The amendment generally required state coverage of employees of nonprofit organizations, state hospitals, and institutions of higher education. Simultaneously, however,

[5] From and after the effective date of the Internal Revenue Code of 1954 and until 1960, § 3306 (c)(8) related the exclusion to "service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." 68A Stat. 450.

[6] Inasmuch as the definition of "employment" in § 3306 (c)(8) continued to exclude service performed in the employ of an organization exempt from federal income tax under § 501 (c)(3), the 1970 amendment did not itself serve to impose a federal excise tax on nonprofit organizations. The amendment, however, as a condition for federal certification, required state statutes to cover employees of certain organizations of that type. § 3309 (a)(1)(A). Any covered nonprofit organization must be given the option of either making regular payments to the state unemployment fund or reimbursing the fund for benefits paid out to the organization's employees. § 3309 (a)(2). South Dakota amended its unemployment statutes accordingly. See 1971 S. D. Laws, ch. 276 (now codified, as further amended, as S. D. Codified Laws § 61–1–1 *et seq.* (1978 and Supp. 1980)).

Congress enacted a new and narrower exemption of nonprofit organizations and governmental entities. So far as pertinent to this case, that exemption was set forth in a new § 3309 (b), which then provided:

> "This section shall not apply to service performed—
>
> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education . . . ."

No one, including the Secretary of Labor, disputes that church-run elementary and secondary schools remained exempt under this new § 3309 (b).

In 1976, Congress again amended the Act. Unemployment Compensation Amendments of 1976, Pub. L. 94–566, § 115 (b)(1), 90 Stat. 2670. The effect of the 1976 amendment, so far as pertinent to this case, was to eliminate completely the theretofore existing subsection (b)(3).[7] Subsections (b)(1) and (b)(2), dealing specifically with religious employment, remained unchanged.[8]

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[7] In place of subsection (b)(3), Congress substituted a new and unrelated subsection (b)(3) that concerns the exemption of certain service in the employ of governmental entities. We continue herein to refer to the repealed subsection as "§ 3309 (b)(3)" or "(b)(3)."

[8] Following the 1976 amendment, South Dakota effected corresponding amendments of its unemployment compensation statutes. See 1977 S. D. Laws, ch. 420, §§ 9, 10, and 11 (codified as S. D. Codified Laws §§ 61–1–10.3 and 61–1–10.4 (1978)). Petitioners were ruled to be liable for state taxes under these provisions.

In 1978, the Secretary of Labor announced, in a letter made public, that the 1976 repeal of § 3309 (b)(3) of FUTA was

> "clearly intended to result in State coverage of church-related schools, whose employees constitute over 80 percent of the employees of all nonprofit schools. In light of the repeal of 3309 (b)(3), we think the only services performed in the schools that may reasonably be considered within the scope of the exclusion permitted by 3309 (b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools." Letter dated April 18, 1978, of Secretary Marshall to the Most Reverend Thomas C. Kelley, O. P., General Secretary, United States Catholic Conference.

The Secretary also ruled that neither § 3309 (b)(1)(A) nor § 3309 (b)(1)(B) was applicable to church-run schools. He notified the States, and they took steps for the collection of unemployment taxes from church-related schools. See Employment and Training Administration, U. S. Department of Labor, Unemployment Insurance Program Letter No. 39–78 (May 30, 1978), reprinted in [1978 Transfer Binder] CCH Unemp. Ins. Rep. ¶ 21,522.

II

Both St. Martin and the Academy are members of the Wisconsin Evangelical Lutheran Synod and, as such, are organizations exempt from federal income tax under 26 U. S. C. § 501 (c)(3). St. Martin operates a state-certified elementary Christian day school at Watertown that offers kindergarten through eighth-grade education. The school, which is not a separate legal entity from the church, is controlled by a Board of Education elected from the local congregation. The congregation entirely finances the school's operation. The Academy is a state-certified 4-year secondary school at Mobridge and is owned, supported, and controlled by the

Synod. It, also, is not separately incorporated. Approximately half of its students go on to become ministers within the Church. According to the record, all courses given at St. Martin and at the Academy are taught from a religious point of view based on the Synod's scriptural convictions.

When South Dakota proposed to tax them under § 61–1–10.3, petitioners took an administrative appeal. The Appeals Referee of the State's Department of Labor—Unemployment Insurance Division ruled that service performed by employees of each petitioner was "employment" within the meaning of the statute. Although finding that the Synod "believes a theological basis exists for their schools" and operates them because it "holds the conviction that training of the youth involves both education and religion and that the two are so closely interwoven they cannot be separated," App. to Pet. for Cert. A–36, the Referee declined to rule that petitioners were exempt under § 61–1–10.4, the state analogue to 26 U. S. C. § 3309 (b). See nn. 1 and 2, *supra*. He ruled that petitioners were not eligible for exemption under § 61–1–10.4 (1)(a) because, in his view, the term "church," as used in that section, referred only to the "individual 'house of worship' maintained by a particular congregation." App. to Pet. for Cert. A–43. He also ruled, *ibid.*, that they were ineligible for exemption under § 61–1–10.4 (1)(b) because "the primary purpose of the schools is education."

On appeal, the Hughes County Circuit Court reversed, finding the Referee's decision clearly erroneous. App. to Pet. for Cert. A–25. The court ruled that both St. Martin and the Academy were exempt under § 61–1–10.4 (1)(b); that the term "church" referred to "an organization of worshippers," rather than to a "house of worship"; and that the primary purpose of the schools was the propagation of the Synod's faith, a religious concern. App. to Pet. for Cert. A–30 to A–33. The South Dakota Supreme Court, by a divided vote, in turn reversed the judgment of the Circuit Court, and held petitioners subject to the unemployment

compensation taxes.[9] *In re Northwestern Lutheran Academy,* 290 N. W. 2d 845 (1980). Noting the growing number of conflicting federal and state decisions on this issue,[10] we granted certiorari. 449 U. S. 950 (1980).

III

A statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality. *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); *Machinists* v. *Street,* 367 U. S. 740, 749–750 (1961); *United States* v. *Clark,* 445 U. S. 23, 27 (1980). Accordingly, we turn first to the federal statute itself. From our reading of the legislation and of its history, we conclude that the only reasonable construction of 26 U. S. C. § 3309 (b)(1) is one

[9] The South Dakota Supreme Court's analysis depended entirely on its understanding of the meaning of FUTA and the First Amendment, and did not rest on any independent and adequate state ground. We therefore are at liberty to review this judgment, although, literally, it concerns the construction of a state statute. While the South Dakota courts remain free to construe the State's own law differently, they deserve to be made aware of the proper and, here, significant interpretation of the intertwined federal law. See, *e. g., Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U. S. 562, 566–568 (1977); *United Air Lines, Inc.* v. *Mahin,* 410 U. S. 623, 630–631 (1973); *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, 514–515 (1939).

[10] Most other courts that have addressed this general issue have ruled in favor of church-related schools. See, *e. g., Alabama* v. *Marshall,* 626 F. 2d 366 (CA5 1980), cert. pending No. 80–922; *Lutheran Church-Missouri Synod* v. *Bowling,* 89 Ill. App. 3d 100, 411 N. E. 2d 526 (1980); *Roman Catholic Church of the Archdiocese of New Orleans* v. *State,* 387 So. 2d 1248 (La. App. 1980); *Sant Bani Ashram, Inc.* v. *New Hampshire Department of Employment Security,* 121 N. H. 74, 426 A. 2d 34 (1981); *Begley* v. *Employment Security Comm'n,* 50 N. C. App. 432, 274 S. E. 2d 370 (1981); *Grace Lutheran Church* v. *North Dakota Employment Security Bureau,* 294 N. W. 2d 767 (N. D. 1980); *Employment Division* v. *Archdiocese of Portland,* 42 Ore. App. 421, 600 P. 2d 926 (1979); *Christian School Assn.* v. *Commonwealth,* 55 Pa. Commw. 555, 423 A. 2d 1340 (1980). But see *Ascension Lutheran Church* v. *Employment Security Comm'n,* 501 F. Supp. 843 (WDNC 1980).

that exempts petitioners' church-run schools, and others similarly operated, from mandatory state coverage.

A

Section 3309 was added to FUTA in 1970. Although the legislative history directly discussing the intended coverage of its subsection (b)(1) is limited,[11] the House Report had the following explanation:

> "This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes." H. R. Rep. No. 91–612, p. 44 (1969).

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[11] On the Senate floor, Senator Long, introducing the bill that became the 1970 Amendments, merely explained:

"The bill does not require extension of coverage to all jobs in nonprofit organizations. . . . [C]overage would not have to be extended to the employees of a church or religious organization, to clergymen or members of religious orders, [or] to elementary and secondary schools . . . ." 116 Cong. Rec. 10575 (1970).

Subsection (b)(1) was not specifically mentioned in the debates.

The Senate Report contained identical language. See S. Rep. No. 91–752, pp. 48–49 (1970).

Respondent would read this discussion, as the South Dakota Supreme Court majority did, to mean that Congress in 1970 intended to bring within mandatory state coverage all institutions of higher education, including those with no separate legal existence from the church or churches that operate them, except for the narrow category of seminaries and novitiates. From this, respondent extrapolates that Congress intended § 3309 (b)(1) to be read very narrowly, and that the later 94th Congress, in 1976, similarly intended to include within mandatory state coverage all primary and secondary educational institutions, including those entirely within the internal structure of churches.

The above quotation from the 1969 House Report, and its Senate counterpart, however, are susceptible of a simpler and more reasonable explanation that corresponds directly with the language of the subsection. Congress drew a distinction between employees "of a church or convention or association of churches," § 3309 (b)(1)(A), on the one hand, and employees of "separately incorporated" organizations, on the other. See H. R. Rep. No. 91–612, at 44. The former uniformly would be excluded from coverage by § 3309 (b)(1)(A), while the latter would be eligible for exclusion under § 3309 (b)(1)(B) only when the organization is "operated, supervised, controlled, or principally supported by a church or convention or association of churches." [12] To hold, as re-

[12] The importance of this distinction, and of giving meaning to both (A) and (B), is heightened by the great diversity in church structure and organization among religious groups in this country. See 1 A. Stokes, Church and State in the United States 720–883 (1950); Whelan, "Church" in the Internal Revenue Code: the Definitional Problems, 45 Ford. L. Rev. 885 (1977). This diversity makes it impossible, as Congress perceived, to lay down a single rule to govern all church-related organizations. Our holding today concerns only schools that have no legal identity separate from a church. To establish exemption from FUTA, a separately

spondent would have us do, that "organization" in subsection (b)(1)(B) also includes a church school that is not separately incorporated would make (b)(1)(A) and (b)(1)(B) redundant.

The distinction between church schools integrated into a church's structure, and those separately incorporated, is given further credence by the statute's use of specific words. The Department of Labor would interpret the term "church" in § 3309 (b)(1) as limited to the actual house of worship used by a congregation. See Brief for United States as *Amicus Curiae* 14–15.[13] This reading, however, appears to us to deny several of FUTA's phrases their intended meaning. Section 3309 (b), exempting "service performed—(1) in the employ of (A) a church . . . ," is phrased entirely in terms of the nature of the *employer,* and not in terms of the work performed or the place at which the employee works. Congress further defined "employer" in § 3306 (a) as "any *person who*—. . . paid wages . . . or . . . employed at least one individual" (emphasis added). It defined "employee" as "any individual who, under the usual common law rules applicable in

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incorporated church school (or other organization) must satisfy the requirements of § 3309 (b)(1)(B): (1) that the organization "is operated primarily for religious purposes," and (2) that it is "operated, supervised, controlled, or principally supported by a church or convention or association of churches."

Because we hold petitioners exempt under § 3309 (b)(1)(A), we leave the issue of coverage under § 3309 (b)(1)(B) for the future.

[13] The United States strongly urges this construction, noting that the Department of Labor consistently has advanced this meaning of "church" since the 1970 enactment. See U. S. Department of Labor, Draft Legislation to Implement the Employment Security Amendments of 1970, pp. 27–28. The amount of deference due an administrative agency's interpretation of a statute, however, "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944). Carefully considering the merits of the Secretary's interpretation, we believe it does not warrant deference.

determining the employer-employee relationship, has the status of an employee." §§ 3306 (i) and 3121 (d)(2). Thus, to hold "church" synonymous solely with a physical building that is a house of worship contradicts the phrasing of the statute.[14] The word "church" in § 3309 (b) must be construed, instead, to refer to the congregation or the hierarchy itself, that is, the church authorities who conduct the business of hiring, discharging, and directing church employees.[15]

We conclude that, at the time of its enactment in 1970, § 3309 (b)(1)(A) was meant to apply to schools, like petitioners', that have no separate legal existence from a church, or, as in the Academy's case, from a "convention or association of churches." As the Referee found, St. Martin directly finances, supervises, and controls its school's operations. The Synod similarly supports and controls the Academy. Only teachers trained and certified by the Synod may teach at either school, and, again as the Referee found, these teachers, both male and female, "receive a divine, life-long call" to the church. App. to Pet. for Cert. A–38. Male teachers ("teaching ministers") have equal status in the church and an equal vote on Synod matters, including matters of doctrine, with preaching ministers. *Id.*, at A–37. Neither school has a separate legal existence. Thus, the employees

[14] Congress knew how to limit expressly an exemption to the place of employment or the type of work performed. See § 3309 (b)(3) ("if such service is performed by an individual in the exercise of his duties"); § 3309 (b)(4) (service performed "in a facility"); § 3309 (b)(5) (service performed "as part of an unemployment work-relief or work-training program").

[15] Although we hold today that the word "church" in § 3309 (b) must be considered as the "employer," and not as a building that is a house of worship, we disavow any intimations in this case defining or limiting what constitutes a church under FUTA or under any other provision of the Internal Revenue Code. Cf. *Riker* v. *Commissioner,* 244 F. 2d 220 (CA9), cert. denied, 355 U. S. 839 (1957); *Chapman* v. *Commissioner,* 48 T. C. 358 (1967); *American Guidance Foundation, Inc.* v. *United States,* 490 F. Supp. 304 (DC 1980); *De La Salle Institute* v. *United States,* 195 F. Supp. 891 (ND Cal. 1961).

working within these schools plainly are "in the employ . . . of a church or convention or association of churches . . . ." [16] § 3309 (b)(1)(A).

B

The 1976 Amendments did not alter the scope of § 3309 (b)(1), either directly or by implication.[17] Congress, in eliminating the old § 3309 (b)(3), made no change in § 3309 (b)(1). It did not discuss churches or church schools, and it intimated that § 3309 (b)(1) remained unchanged. See, *e. g.*, H. R. Rep. No. 94–755, pp. 23, 41, 55–56 (1975) (explaining the then-current coverage of § 3309 (b) and the anticipated effect of the repeal, and containing no indication that the proposed amendments would alter § 3309 (b)(1)).

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[16] That church schools like those of the petitioners were eligible in 1970 for multiple exemptions under overlapping and equally precise parts of § 3309 is not remarkable. This was true, for example, for most clergy. See §§ 3309 (b)(1) and 3309 (b)(2). Clergy who teach in church-run primary or secondary schools continue to be exempt under two provisions. The deletion of only one of these clear, specific, and contemporaneous exemptions cannot, without evidence of legislative intent, effect repeal of the other or alter its plain meaning. Cf. *HCSC-Laundry* v. *United States*, 450 U. S. 1 (1981) (newly enacted, more precise exemption held to prevail over earlier, more general exemption on the basis of detailed evidence of legislative intent).

[17] The United States argues that Congress must have intended, by the 1976 Amendments, to include church-related school employees within mandatory state coverage because the 1976 Amendments were passed, in part, to replace the temporary Special Unemployment Assistance program (established under the Emergency Jobs and Unemployment Assistance Act of 1974, 88 Stat. 1845), which provided benefits to practically all workers not then covered under the permanent FUTA provisions, including employees of church schools. Brief for United States as *Amicus Curiae* 8–10. That special program, however, was funded entirely with federal money, without any employer contribution, and the 1976 Amendments did not attempt entirely to duplicate its coverage; indeed, those Amendments established new, precise exemptions for a narrow group. See 26 U. S. C. § 3309 (b)(3) (the new provision exempting certain government employees); 122 Cong. Rec. 33274–33276 (1976) (remarks of Sen. Nelson); *id.*, at 33277–33278 (remarks of Sen. Williams).

Respondent places particular emphasis on legislative statements expressing an intention, for example, to extend coverage "on the basis of services performed for all educational institutions," H. R. Rep. No. 94–755, at 56,[18] and to "employees of non-profit elementary and secondary schools," *id.*, at 2. See also *id.*, at 41 ("This section requires States, as a condition for tax offset credit to their employers, to extend coverage to employees of non-profit primary and secondary institutions of education, thus broadening present required coverage limited to non-profit institutions of higher education"); S. Rep. No. 94–1265, pp. 2, 9–10 (1976).

These references are simply too general and too ambiguous to bear the weight respondent would assign to them.[19] There is no indication that Congress, in these references, had in mind the scope of § 3309 (b)(1) and religious organizations. Rather, all the evidence demonstrates that it was concerned solely with the then-existing § 3309 (b)(3) and secular educational institutions, particularly the public schools. Furthermore, the reported comments implying total coverage of all educational institutions, as a result of the repeal of the former § 3309 (b)(3), could not be taken as literally true because the 1970 Report expressly had noted that a college

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[18] This comment reads in full:

"Section 115 (b) also has the effect of requiring the State to pay unemployment compensation on the basis of services performed for all educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education."

[19] The United States also relies on Congress' expressed intention to cover "substantially all of the nation's wage and salary earners," H. R. Rep. No. 94–755, at 1, and "to provide equal treatment of all the nation's wage and salary workers under the permanent unemployment compensation law." *Id.*, at 2. Such general statements of overall purpose contained in legislative reports cannot defeat the specific and clear wording of a statute. *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89 (1935); *Caminetti* v. *United States*, 242 U. S. 470, 490 (1917). Cf. *Gooch* v. *United States*, 297 U. S. 124, 128 (1936).

"devoted primarily to preparing students for the ministry," H. R. Rep. No. 91–612, at 44, would be exempt. All institutions of higher education had *not* been covered by the 1970 Amendments.

Respondent also relies on a single statistic estimating the number of employees newly to be covered as a result of the repeal of the then § 3309 (b)(3). See S. Rep. No. 94–1265, at 8 (table). This statistical reference, to the effect that 242,000 employees of nonprofit organizations would be covered by the 1976 repeal of subsection (b)(3), is much too meager to sustain respondent's position. The Committee Report's table containing this figure is devoid of any explanation, source, or supporting data. The South Dakota Supreme Court relied on the figure, however, reasoning that because it "approximates the total number of teachers in all nonprofit elementary and secondary schools" in 1975,[20] 290 N. W. 2d, at 849, and n. 5, Congress must have included within that number religious-school teachers, who constitute more than half the staff of all private elementary and secondary schools in the United States. Yet, in repealing § 3309 (b)(3), Congress intended to include not just full-time teachers, but all *employees* of the newly covered nonprofit private elementary and secondary schools (custodians, cafeteria workers, nurses, part-time help, counselors, etc.). Thus, the inclusion of all employees in nonprofit private lower schools within the number of persons brought within FUTA by the repeal would far exceed the 242,000 contained in the Report's table, rendering it, in our view, of dubious significance for the present issue.

This legislative history does not reveal any clear intent to repeal § 3309 (b)(1) or to alter its meaning. The Court has

[20] The court noted that census figures for 1975 showed 261,000 full-time teachers in nonprofit elementary and secondary schools, of which 150,000 were in Roman Catholic schools. Cf. Bureau of the Census, Statistical Abstract of the United States 155 (1980) (reporting that in 1976 there were 268,908 teachers in such schools and that, of these, 206,577 were in schools with a "church affiliation").

had frequent occasion to note that such indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication. "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari,* 417 U. S. 535, 550 (1974); see also *Watt* v. *Alaska, ante,* p. 259; *TVA* v. *Hill,* 437 U. S. 153, 189–190 (1978); *FTC* v. *A. P. W. Paper Co.,* 328 U. S. 193, 202–203 (1946); *Posadas* v. *National City Bank,* 296 U. S. 497, 503–505 (1936); *United States* v. *Noce,* 268 U. S. 613, 618–619 (1925); *United States* v. *Greathouse,* 166 U. S. 601, 605 (1897). This long-established canon of construction carries special weight when an implied repeal or amendment might raise constitutional questions. See *NLRB* v. *Catholic Bishop of Chicago,* 440 U. S. 490 (1979). We therefore hold that the repeal of § 3309 (b)(3) did not alter the meaning of § 3309 (b)(1). Petitioners are eligible for exemption under subsection (b)(1)(A) by virtue of the nature of their relationship to the church bodies that employ them.

This makes it unnecessary for us to consider the First Amendment issues raised by petitioners.

The judgment of the Supreme Court of South Dakota is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

The legislative history of the Unemployment Compensation Amendments of 1976, 90 Stat. 2667, persuades me that Congress did intend the repeal of 26 U. S. C. § 3309 (b)(3) to remove the exemption from coverage under the Federal Unemployment Tax Act (FUTA) for all employees of private, nonprofit elementary and secondary schools. Not only do the Senate and House Committee Reports expressly so

state,[1] but also the estimate contained in the Senate Report of the number of additional employees that would be covered by the FUTA as a result of the repeal of § 3309 (b)(3) confirms the contemporaneous understanding of the draftsmen of the 1976 Amendments.[2] Nothing in the 1976 Amendments

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[1] The House Report states:

"Section 115 (b) also has the effect of requiring the State to pay unemployment compensation on the basis of services performed for all educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education." H. R. Rep. No. 94–755, p. 56 (1975).

See also *id.*, at 2, 6, 41. Similarly, the Senate Report provides:

"The bill would require the States to extend the coverage of their unemployment compensation programs to employees of nonprofit elementary and secondary schools (present law requires coverage for employees of institutions of higher education)." S. Rep. No. 94–1265, p. 2 (1976).

See also *id.*, at 7, 9–11.

In addition, the legislative history contains several references to the general congressional intention to extend the coverage of the FUTA to substantially all of the Nation's wage earners. See, *e. g.*, H. R. Rep. No. 94–755, *supra*, at 1–2; 122 Cong. Rec. 22518–22519 (1976); *id.*, at 22899–22900. While such general statements of legislative purpose cannot override plain statutory language, see *ante*, at 786, n. 19, they are nonetheless consistent with the more specific statements of purpose quoted above.

[2] The Senate Report estimated that 242,000 additional employees of nonprofit organizations would be covered under the FUTA as a result of the repeal of § 3309 (b)(3). See S. Rep. No. 94–1265, *supra*, at 8. This figure approximated the number of full-time teachers in all private, nonprofit elementary and secondary schools in 1975. See *ante*, at 787, n. 20. Because well over one-half of these teachers were employed in parochial schools, respondent argues that this statistic, although perhaps slightly inaccurate, indicates that Congress intended to extend coverage to employees of parochial elementary and secondary schools. As the Court notes, the South Dakota Supreme Court accepted this argument. See *ante*, at 787; 290 N. W. 2d 845, 849, and n. 5 (1980).

The Court finds that respondent's reliance upon this statistic is misplaced because, "in repealing § 3309 (b)(3), Congress intended to include not just full-time teachers, but all *employees* of the newly covered nonprofit private elementary and secondary schools." *Ante*, at 787 (emphasis in original). The Court's observation, however, indicates only that the

or the corresponding legislative history suggests that Congress believed the extension of FUTA coverage to nonprofit, private schools applied only to nonprofit, private, *nonparochial* schools.[3]

Despite this legislative history, I agree with the Court's conclusion that FUTA coverage does not extend to persons employed in petitioners' schools. Although Congress' intention to cover such employees was, in my judgment, clear, the 1976 Amendments simply failed to give effect to that intention. By repealing § 3309 (b)(3), Congress removed only one of the two statutory exemptions that, by their terms, applied to employees of parochial elementary and secondary schools. Congress left in place and did not qualify the scope of the separate exemption granted by § 3309 (b)(1). The clear expressions of congressional intent that appear in the legislative history of the Act that repealed § 3309 (b)(3)

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statistic was factually inaccurate; it does not undercut respondent's reliance upon that statistic as a guide to congressional intent. Whether Congress believed that the figure 242,000 was an estimate of the number of additional teachers that would be covered by the Act as a result of the repeal of § 3309 (b)(3), or an estimate of the number of additional employees that would be so covered, the estimate would have had meaning only if at least some parochial school employees were represented among the 242,000 newly covered individuals.

It also should be noted that the Secretary of Labor, in his order declining to certify the unemployment compensation programs of the States of Alabama and Nevada under the FUTA, stated that the statistic had been supplied to Congress by the Department of Labor as the then-available best estimate of the total number of employees in all nonprofit, private elementary and secondary schools. See 44 Fed. Reg. 64378, 64380–64382, and n. 16 (1979). The Secretary also expressly stated that the estimate included employees of church-related elementary and secondary schools. See *ibid.*

[3] In light of the fact that approximately 86% of the students, see Rice, Conscientious Objection to Public Education: The Grievance and the Remedies, 1978 B. Y. U. L. Rev. 847, and over 50% of the teachers in private, nonprofit elementary and secondary schools are in parochial schools, Congress' failure to mention any exception for such schools is surely significant.

cannot alter the clear statutory language of § 3309 (b)(1). I agree with the Court that these church employees are exempt under the plain language of that provision. See also *Alabama* v. *Marshall,* 626 F. 2d 366 (CA5 1980), cert. pending, No. 80–922.

When the Court is confronted with the task of construing legislation of this character, there is special force to the rule that the plain statutory language should control and that resort to legislative history is appropriate only when the statute itself is ambiguous. Congress has a special duty to choose its words carefully when it is drafting technical and complex laws; we facilitate our work as well as that of Congress when we adhere closely to the statutory text in cases like this.[4] Failure to follow that approach led this Court into what I regard as manifest error in its recent summary, *per curiam* affirmance in *HCSC-Laundry* v. *United States,* 450 U. S. 1, a case in which the taxpayer's claim for exemption had equally strong support in the statutory text and, in my opinion, greater support in the legislative history than is true here. See *id.,* at 19–23 (STEVENS, J., dissenting). Today, although I agree that the Court reaches the result required by the text of the FUTA, I write this separate statement to emphasize that this result is not supported by the legislative history of the 1976 Amendments, nor is it consistent with the Court's contrary resolution of the parallel tax exemption issue in *HCSC-Laundry.*

Accordingly, I concur in the Court's judgment.

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[4] The Court of Appeals in *Alabama* v. *Marshall* accurately characterized the judicial function in cases such as this:

"If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But, it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today." 626 F. 2d, at 369.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 791 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 20 THROUGH MAY 26, 1981

APRIL 20, 1981

Appeals Dismissed

No. 80–851. PRINGLE *v.* TEXAS. Appeal from County Court of Hale County, Tex., dismissed for want of substantial federal question.

No. 80–927. THOMAS *v.* CROUCH, JUDGE. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 603 S. W. 2d 532.

No. 80–1303. POTOMAC EDISON CO. *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 491 Pa. 432, 421 A. 2d 214.

No. 80–1441. KODGER *v.* SINGH. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of substantial federal question.

No. 80–1360. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP. ET AL. Appeal from Sup. Ct. N. M. Motion of appellant to defer consideration of the appeal denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this motion and this case. Reported below: 96 N. M. 155, 629 P. 2d 231.

No. 80–5972. RUHL *v.* ALABAMA STATE BAR. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 391 So. 2d 1036.

No. 80–6169. STREATER *v.* UNITED STATES. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 429 A. 2d 173.

No. 80–6273. PRENZLER *v.* KAMRATH 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.

Certiorari Granted—Vacated and Remanded

No. 80–1420. UNCLE BEN'S, INC. *v.* JOHNSON. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S. 248 (1981). Reported below: 628 F. 2d 419.

No. 80–1463. MARSHALL, CORRECTIONAL SUPERINTENDENT *v.* LONBERGER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Sumner* v. *Mata,* 449 U. S. 539 (1981). Reported below: 635 F. 2d 1189.

Miscellaneous Orders

No. A–825. MISSOURI ET AL. *v.* LIDDELL ET AL. C. A. 8th Cir. Application for stay, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A–848. DEWEESE *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–858. DEERFIELD MEDICAL CENTER ET AL. *v.* CITY OF DEERFIELD BEACH ET AL. D. C. S. D. Fla. Application for stay and injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BRENNAN would grant the application.

No. D–193. In re Disbarment of Leach. Disbarment entered. [For earlier order herein, see 446 U. S. 963.]

No. D–196. In re Disbarment of Broadwell. Disbarment entered. [For earlier order herein, see 449 U. S. 978.]

No. D–215. In re Disbarment of Long. George Wayne Long, of Bayside, Tex., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 19, 1981 [449 U. S. 1107], is hereby discharged.

No. D–216. In re Disbarment of Mehta. Mahendra R. Mehta, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 19, 1981 [449 U. S. 1107], is hereby discharged.

No. D–231. In re Disbarment of Kelley. It is ordered that Joseph P. Kelley, of Columbus, Ohio, 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–233. In re Disbarment of Barbara. It is ordered that Peter R. Barbara, of Detroit, Mich., 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. 80–544. First National Maintenance Corp. *v.* National Labor Relations Board. C. A. 2d Cir. [Certiorari granted, 449 U. S. 1076.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted.

No. 80–289. UNITED MINE WORKERS OF AMERICA, LOCAL No. 1854, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 80–692. NATIONAL LABOR RELATIONS BOARD *v.* AMAX COAL CO., A DIVISION OF AMAX, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 449 U. S. 1110.] Motion of the Solicitor General for divided argument granted.

No. 80–756. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* GRAY PANTHERS. C. A. D. C. Cir. [Certiorari granted *sub nom. Harris* v. *Gray Panthers,* 449 U. S. 1123.] Motion of the Solicitor General to permit George W. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 80–757. NEW YORK MERCANTILE EXCHANGE ET AL. *v.* LEIST ET AL.;

No. 80–895. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. *v.* LEIST ET AL.; and

No. 80–936. HEINOLD COMMODITIES, INC., ET AL. *v.* LEIST ET AL. C. A. 2d Cir. [Certiorari granted, 450 U. S. 910.] Motions of Futures Industry Association, Inc., New York Stock Exchange, Inc., and Board of Trade of the City of Chicago et al. for leave to file briefs as *amici curiae* granted.

No. 80–795. HEFFRON, SECRETARY AND MANAGER OF THE MINNESOTA STATE AGRICULTURAL SOCIETY BOARD OF MANAGERS, ET AL. *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. Sup. Ct. Minn. [Certiorari granted, 449 U. S. 1109.] Motion of New York for leave to file a brief as *amicus curiae* granted.

No. 80–846. ROSE, WARDEN *v.* LUNDY. C. A. 6th Cir. [Certiorari granted, 450 U. S. 910.] Motion for appointment of counsel granted, and it is ordered that D. Shannon Smith, Esquire, of Cincinnati, Ohio, be appointed to serve as counsel for respondent in this case.

No. 80–1070. RIDGWAY ET AL. *v.* RIDGWAY ET AL. Sup. Jud. Ct. Me. [Certiorari granted, 450 U. S. 979.] Motion of respondents for appointment of counsel granted, and it is ordered that Curtis Webber, Esquire, of Auburn, Me., be appointed to serve as counsel for respondents in this case.

No. 80–1082. SMITH, CORRECTIONAL SUPERINTENDENT *v.* PHILLIPS. C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 80–1146. ZOBEL ET UX. *v.* WILLIAMS, COMMISSIONER OF REVENUE OF ALASKA, ET AL. Sup. Ct. Alaska. [Probable jurisdiction noted, 450 U. S. 908.] Motion of appellants to dispense with printing the joint appendix granted.

No. 80–1251. UNITED STATES *v.* VOGEL FERTILIZER CO. Ct. Cl. [Certiorari granted, 450 U. S. 994.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 80–6390. IN RE WELCH. Petition for writ of habeas corpus denied.

No. 80–6268. IN RE CROSS; and

No. 80–6352. IN RE PIATT. Petitions for writs of mandamus denied.

No. 80–1414. IN RE INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. Petition for writ of mandamus and prohibition denied.

Certiorari Granted

No. 80–644. G. D. SEARLE & CO. *v.* COHN ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 628 F. 2d 801.

No. 80–988. HAVENS REALTY CORP. ET AL. *v.* COLEMAN ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 633 F. 2d 384.

No. 80–203. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* CURRAN ET AL. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition and case set for oral argument in tandem with No. 80–757, *New York Mercantile Exchange* v. *Leist;* No. 80–895, *Clayton Brokerage Co. of St. Louis, Inc.* v. *Leist;* and No. 80–936, *Heinold Commodities, Inc.* v. *Leist* [certiorari granted, 450 U. S. 910]. Reported below: 622 F. 2d 216.

No. 80–1417. OKIN ET AL. *v.* ROGERS ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 634 F. 2d 650.

No. 80–1190. PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. *v.* SWINT ET AL.; and

No. 80–1193. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* SWINT ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by each petition, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 624 F. 2d 525.

No. 80–1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES. C. A. 6th Cir. Motions of respondents Lincoln Isaac and Kenneth L. Bell for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 646 F. 2d 1129 (first case); 635 F. 2d 575 (second case); 642 F. 2d 451 (third case).

Certiorari Denied. (See also Nos. 80–1360, 80–5972, 80–6169, and 80–6273, *supra.*)

No. 80–660. SILVER SPUR CASINO ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 80–1083. BARNEY'S CLUB, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 571.

No. 80–904. California *v.* Hall. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–1057. 400 Condominium Assn. et al. *v.* Tully, Cook County Assessor, et al. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 80–1060. Taylor *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 605 S. W. 2d 930.

No. 80–1164. McVicker *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 80–1200. Roza *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 224.

No. 80–1201. Holley *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 857.

No. 80–1213. Johnson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 735.

No. 80–1217. City of Gallup *v.* Federal Energy Regulatory Commission et al. C. A. 10th Cir. Certiorari denied. Reported below: 628 F. 2d 1267.

No. 80–1227. Tanner et al. *v.* McCall. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1183.

No. 80–1228. Bullard *v.* Webster, Director, Federal Bureau of Investigation. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1042.

No. 80–1236. Motor Vehicle Manufacturers Association of the United States, Inc., et al. *v.* Costle, Administrator, United States Environmental Protection Agency. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1218.

No. 80–1249. DEFOURNEAUX, ADMINISTRATRIX *v.* STURM, RUGER & Co., INC. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 768.

No. 80–1260. LEONHARD ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 599.

No. 80–1270. MITCHELL *v.* AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1091.

No. 80–1276. PATRICELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 770.

No. 80–1282. PODESTA *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 80–1301. RUSS ET AL. *v.* WILKINS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 914.

No. 80–1314. NADER *v.* MCBRIDE ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–1325. DAHL *v.* AKIN ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 2d 277.

No. 80–1330. SCHANBARGER *v.* WRIGHT, POLICE CHIEF OF THE VILLAGE OF MASSENA, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1204.

No. 80–1334. FRENCH LINE ET AL. *v.* BARULIC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 75 App. Div. 2d 761, 427 N. Y. S. 2d 815.

No. 80–1354. INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 241, AFL–CIO *v.* ASSOCIATION OF SCIENTISTS & PROFESSIONAL ENGINEERING PERSONNEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 771.

No. 80–1358. THOMPSON ET AL. *v.* PEOPLES LIBERTY BANK. Ct. App. Ky. Certiorari denied.

No. 80–1359. FLAGG *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 1087.

No. 80–1364. ISKE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 1225.

No. 80–1382. MARX ET AL. *v.* COMPUTER SCIENCES CORP. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1356.

No. 80–1388. DOWE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80–1392. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 598 S. W. 2d 884.

No. 80–1395. BRADLEY ET AL. *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL.; and LAFAYETTE, INC., ET AL. *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxviii (first case); 221 Va. cxii (second case).

No. 80–1399. BERNDT *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 785.

No. 80–1401. MALANCHE *v.* AMERICAN MOTORS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–1404. EHLERS *v.* BOGUE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1314.

No. 80–1405. SHAPIRO ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 1214.

No. 80–1406. Gartenberg *v.* Pollack, U. S. District Judge (Merrill Lynch Asset Management, Inc., et al., Real Parties in Interest). C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 16.

No. 80–1410. E-Systems, Inc. *v.* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, et al. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 487.

No. 80–1413. Marion County School District et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 607.

No. 80–1415. Murphy *v.* Eagen, Justice, Pennsylvania Supreme Court, et al. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 774.

No. 80–1426. Zeigler Coal Co. *v.* Dethloff et ux. Sup. Ct. Ill. Certiorari denied. Reported below: 82 Ill. 2d 393, 412 N. E. 2d 526.

No. 80–1433. Evans *v.* Arkansas Racing Commission et al. Sup. Ct. Ark. Certiorari denied. Reported below: 270 Ark. 788, 606 S. W. 2d 578.

No. 80–1438. Tennessee River Pulp & Paper Co. et al. *v.* Seger. Sup. Ct. Miss. Certiorari denied. Reported below: 390 So. 2d 595.

No. 80–1443. Sapag, S. A. *v.* Standard Fittings Co. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 630.

No. 80–1444. Klumpp *v.* Colonial Pipeline Co. et al. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 389 So. 2d 457.

No. 80–1447. Allen *v.* Snow et al. C. A. 1st Cir. Certiorari denied. Reported below: 635 F. 2d 12.

No. 80–1456. CATALANO ET AL. *v.* PECHOUS ET AL.; and
No. 80–1466. PECHOUS *v.* CATALANO ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 83 Ill. 2d 146, 419 N. E. 2d 350.

No. 80–1458. EDWARD J. SWEENEY & SONS, INC., ET AL. *v.* TEXACO, INC. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 2d 105.

No. 80–1473. STEVENSON *v.* STEVENSON. Ct. App. Ky. Certiorari denied. Reported below: 608 S. W. 2d 64.

No. 80–1476. TANKLINING CORP. *v.* GALVESTON SHIPBUILDING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 731.

No. 80–1482. SIMPSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 275 S. C. 426, 272 S. E. 2d 431.

No. 80–1483. MILLEDGEVILLE FARMER'S ELEVATOR CO. *v.* WAGNER ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 84 Ill. App. 3d 1198, 410 N. E. 2d 692.

No. 80–1484. U. S. STEEL CREDIT CORP. *v.* AMERICAN FLETCHER MORTGAGE CO., INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 1247.

No. 80–1497. AB TURN-O-MATIC *v.* TVETER, DBA SGT ENTERPRISES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 831.

No. 80–1508. GILA RIVER INDIAN COMMUNITY *v.* HENNINGSON, DURHAM & RICHARDSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 708.

No. 80–1510. KURTZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 380, 414 N. E. 2d 699.

No. 80–1513. HERMAN BLUM CONSULTING ENGINEERS, INC. *v.* HADRA. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1242.

No. 80–1531. TWIN FALLS CANAL CO. ET AL. *v.* CANYON VIEW IRRIGATION CO. Sup. Ct. Idaho. Certiorari denied. Reported below: 101 Idaho 604, 619 P. 2d 122.

No. 80–1539. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–1554. DAWE *v.* ROBINSON, UNITED STATES MARSHAL. C. A. 9th Cir. Certiorari denied.

No. 80–1555. LINTON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 930.

No. 80–1557. BUCHANAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 423.

No. 80–1560. CALDER *v.* UNITED STATES; and
No. 80–6291. CALDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 76.

No. 80–1585. SINDONA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 792.

No. 80–1598. BOWMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 163.

No. 80–5790. WEAVER *v.* PHILLIPS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1102.

No. 80–5813. RESENDEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–5836. WILSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1158.

No. 80–5900. SIMMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–5910. DELGADO *v.* ISRAEL, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–5925. KANTORSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 212.

No. 80–5951. BLACK *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 213.

No. 80–5977. MAYOLA *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 992.

No. 80–5996. REED *v.* JAGO, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 218.

No. 80–5998. GIRARDI *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. 459, 270 S. E. 2d 743.

No. 80–6012. GRANT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 390 So. 2d 341.

No. 80–6029. DALLAS *v.* MCCLAY, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 768.

No. 80–6051. LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 787.

No. 80–6064. FUREY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–6068. COMBS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1295.

No. 80–6075. PAPPAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 639 F. 2d 1.

No. 80–6076. MACK *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 225 Ct. Cl. ——, 635 F. 2d 828.

No. 80–6154. PATTERSON *v.* GENERAL MOTORS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 476.

No. 80–6198. GREEN *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA, TEXAS. C. A. 5th Cir. Certiorari denied.

No. 80–6199. MANNING *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 390 So. 2d 494.

No. 80–6200. FULLERTON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 46 N. C. App. 837, 266 S. E. 2d 684.

No. 80–6209. BROWNFIELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6211. MAKARA *v.* BRITISH PETROLEUM CORP. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No. 80–6212. ARCE *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1200.

No. 80–6213. ROSS *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1219.

No. 80–6216. HUTCHINSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 391 So. 2d 637.

No. 80–6219. COVINGTON ET AL. *v.* ALLSBROOK. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 63.

No. 80–6223. MATHIESEN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 27 Wash. App. 257, 616 P. 2d 1255.

No. 80–6224. THOMPSON *v.* HARGETT, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–6225. REED *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–6226. DISNEY ET AL. *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 80–6228. WIDEMON *v.* CAMPBELL ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6229. WORTHINGTON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 405 N. E. 2d 913.

No. 80–6233. SWOFFORD *v.* CITY OF JASPER ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 392 So. 2d 1380.

No. 80–6234. DUDAR *v.* GEORGIA MILITARY COLLEGE ET AL. Ct. App. Ga. Certiorari denied.

No. 80–6235. WILLIAMS *v.* JERRY'S FORD SALES, INC., ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. clxi.

No. 80–6237. MOHN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6241. LOMBARDI *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No. 80–6244. JOHNSON *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 885.

No. 80–6245. ATENCIO *v.* NEW MEXICO BOARD OF BAR EXAMINERS. Sup. Ct. N. M. Certiorari denied.

No. 80–6247. FELTUS *v.* DEES, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 581.

No. 80–6249. JAYNES *v.* FLORIDA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 311.

No. 80–6252. JONES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 490.

No. 80–6257. JACKSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–6259. JAFFER *v.* CITY OF MIAMI, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 892.

No. 80–6260. WORKMAN *v.* BRACKEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 166.

No. 80–6262. WRIGHT ET AL. *v.* NIGH, GOVERNOR OF OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6263. LANE *v.* JEEP CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 451.

No. 80–6267. CAMPBELL *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 423 A. 2d 952.

No. 80–6271. STEVENS *v.* SEYMOUR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 782.

No. 80–6276. HARRIS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 1152.

No. 80–6278. CASH *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 450.

No. 80–6285. WHITELAW *v.* MWP LIMITED PARTNERSHIP. Ct. App. D. C. Certiorari denied.

No. 80–6292. IN RE CURRIER. C. A. 1st Cir. Certiorari denied.

No. 80–6294. MINES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 390 So. 2d 332.

No. 80–6318. In re Warden. C. A. 8th Cir. Certiorari denied.

No. 80–6321. Young *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 974.

No. 80–6323. Coffman et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 638 F. 2d 192.

No. 80–6329. Alexander *v.* United States. Ct. App. D. C. Certiorari denied.

No. 80–6334. Beckett *v.* Cuyler, Correctional Superintendent, et al. C. A. 3d Cir. Certiorari denied.

No. 80–6346. Davis *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80–6348. Nelson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 313.

No. 80–6356. Roche *v.* Fenton, Warden, et al. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 443.

No. 80–6372. Stewart *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 563.

No. 80–6377. Clay *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 889.

No. 80–6380. Kajevic *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 786.

No. 80–6382. Ford *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 642 F. 2d 77.

No. 80–1147. Local 1576, International Longshoremen's Assn., AFL–CIO *v.* Equal Employment Opportunity Commission et al. C. A. 5th Cir. Motion of Southern Stevedoring Co. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 623 F. 2d 1054.

No. 80–1173. J. F. Hoff Electric Co. *v.* National Labor Relations Board et al. C. A. D. C. Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 206 U. S. App. D. C. 298, 642 F. 2d 1266.

No. 80–1203. New Jersey *v.* Reading Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 211.

Justice Rehnquist, dissenting.

Bankruptcy cases seldom receive much notice outside of those who are familiar with this branch of the law, and it is therefore understandable that there is a dearth of recent bankruptcy precedents decided on the merits in this Court as compared with constitutional cases, labor cases, and other more alluring subjects. Nonetheless, because it seems to me that the Court of Appeals has failed to heed the meaning of a statute which was enacted by Congress—a meaning plain on its face—I would grant certiorari in order to consider the claims of the State of New Jersey here.

Title 28 U. S. C. § 960 provides:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

Section 77 (e)(3) of the Bankruptcy Act, 11 U. S. C. § 205 (e)(3), as in effect prior to the 1978 revision of the Act, requires a reorganization court to approve a plan of reorganization only if it is satisfied that

> "the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled

thereto will accept such payment, and the judge is hereby given power to approve the same."

The District Court here recognized that a trustee, while conducting the business of a debtor railroad, must pay state and local taxes as they accrue. It stated: "It is without question, as the State argues, that a railroad is under a duty to pay state and local taxes as they accrue during a reorganization. 28 U. S. C. § 960." *In re Reading Co.*, 439 F. Supp. 389, 391 (ED Pa. 1977). Yet notwithstanding its acknowledgment of this fact, the District Court on May 21, 1980, approved the trustees' plan which did *not* provide for the payment of state taxes as they accrue and the United States Court of Appeals for the Third Circuit subsequently affirmed.

The District Court rejected the State's contentions because it "found the necessity for the continued operation of the railroad sufficient justification to defer tax payments . . . ." — F. Supp. —, — (1980). The District Court placed reliance on what is perceived to be the public interest in the maintenance of a railroad system. Although one can readily understand and sympathize with such a "public interest," when opposed to Acts of Congress it can turn out to be just as "unruly" a horse as "public policy" has been described in decisions in other fields of the law.

The State of New Jersey now has tax claims against the trustees for the years 1972–1977 in the amount of $250,000. The State has not consented to be paid in securities for its current tax obligations, as would be permitted under § 77 (e)(3) of the Bankruptcy Act. The paramount federal interest to which the District Court and all other courts must defer in this case is the one enacted into law by Congress through the specific legislation previously quoted. Until a contrary intent is manifested through subsequent legislation, it is my opinion that the District Court must follow this ex-

press mandate. Because the courts below failed to adhere to it, I would grant the petition for a writ of certiorari.

No. 80–1294. HONEYWELL, INC. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 636 F. 2d 1217.

No. 80–1343. AERONAUTICAL RADIO, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 80–1408. UNITED STATES *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 206 U. S. App. D. C. 253, 642 F. 2d 1221.

No. 80–1380. GONSALVES *v.* CATERPILLAR TRACTOR CO., INC. C. A. 7th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 634 F. 2d 1065.

No. 80–1400. CITIES SERVICE OIL CO. *v.* TIRE SALES CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 637 F. 2d 467.

No. 80–6274. WILLIAMS *v.* ARKANSAS PUBLIC SERVICE COMMISSION. Cir. Ct., Pulaski County, Ark. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–1442. ROMILLY ET AL. *v.* AMOCO TRINIDAD OIL CO. ET AL. C. A. 9th Cir. Motion of petitioners for leave to proceed as seamen under 28 U. S. C. § 1916 granted. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this motion and this petition. Reported below: 632 F. 2d 82.

No. 80–1462. MAITER ET AL. *v.* CHICAGO BOARD OF EDUCATION ET AL. Sup. Ct. Ill. Motion of respondent Raquel Guerrero for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 82 Ill. 2d 373, 415 N. E. 2d 1034.

No. 80–5757. DAVIS *v.* GEORGIA;

No. 80–5775. SPRAGGINS *v.* GEORGIA; and

No. 80–5850. BROOKS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: Nos. 80–5757 and 80–5775, 246 Ga. 432, 271 S. E. 2d 828; No. 80–5850, 246 Ga. 262, 271 S. E. 2d 172.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

These cases were all remanded to the Supreme Court of Georgia for reconsideration in light of our opinion in *Godfrey* v. *Georgia,* 446 U. S. 420 (1980). On remand, that court reaffirmed petitioners' death sentences. Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth Amendment, I would grant the petitions for certiorari in these cases and vacate the judgments below insofar as they leave undisturbed the death sentences. I add a few extra lines, however, to point out that even accepting, *arguendo,* the prevailing view that there are circumstances in which the death sentence may constitutionally be imposed, the state court in these cases has ignored the mandates of this Court.

Under Georgia law, the jury is responsible for sentencing in death penalty cases. Petitioners in all three of these cases were sentenced to death after the jury found, pursuant to Ga. Code § 27–2534.1 (b)(7) (1978), that they had committed murders that were "outrageously or wantonly vile, horrible or inhuman in that [they] involved torture, depravity of mind, or an aggravated battery to the victim." This statutory language is so broad that it openly invites the jury to impose the death penalty in every murder case. It was

the recognition that this invitation was being accepted that led to our decision last Term in *Godfrey*. There, four Justices of this Court agreed that "[a] person of ordinary sensibility could fairly characterize almost every murder" as falling within the language of § 27–2534.1 (b)(7). 446 U. S., at 428–429. The plurality explained that in order to be constitutionally valid, a State's capital punishment scheme "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.*, at 428 (footnotes omitted). See *id.*, at 436–437 (MARSHALL, J., concurring in judgment). Because the Georgia courts had failed to provide such guidance to sentencing juries, the plurality reasoned that the death sentence imposed in that case had to be vacated.

Following our decision in *Godfrey*, we vacated the judgments in these and several other cases insofar as they left undisturbed the sentences of death. On remand, the Georgia Supreme Court has treated every case in exactly the same way: it has reviewed the record to discern whether the jury, *if* properly instructed, *could* still have found the existence of this aggravating circumstance beyond a reasonable doubt. On the basis of this review, that court affirmed the death sentences imposed without a proper jury instruction. I would have thought that *Godfrey* made clear that this sort of appellate speculation is impermissible. What I took to be the rule of *Godfrey* is that it is the discretion of the *sentencer* that must be properly narrowed. See also *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Westbrook* v. *Balkcom*, 449 U. S. 999, 1001 (1980) (STEWART, J., dissenting from denial of certiorari). In murder cases in the State of Georgia, only the trier of fact may impose a sentence of death. Consequently, it is the discretion of the trier of fact—in these cases, the jury—that must be narrowed. And no matter what facts the jury might find, it always retains under Georgia law the ultimate discre-

tion to refuse to impose the penalty at all. An appellate court can do no more than guess at what a jury might have done. Thus only a new sentencing hearing before a properly instructed jury can accomplish the purpose of our remands for reconsideration in light of *Godfrey*. The decision of the Georgia Supreme Court in these cases to substitute its own judgment for that of the sentencer is, in my view, contrary to the mandates of this Court. I would therefore grant the petitions for certiorari in these cases and vacate the judgments below on this additional ground as well.

No. 80–5933. HILL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 402, 271 S. E. 2d 802.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that capital punishment is under all circumstances cruel and unusual punishment forbidden by the Eighth Amendment, I would vacate the judgment of the Supreme Court of Georgia, insofar as it left undisturbed the death penalty in this case. Moreover, even assuming, *arguendo*, the death penalty may under certain conditions be imposed constitutionally, those conditions are absent here.

Petitioner was convicted of first-degree murder and forcible rape. The jury imposed the death sentence on the basis of two statutory aggravating circumstances. The first aggravating circumstance was that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27–2534.1 (b)(7) (1978). We considered this provision of Georgia law in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). There, a plurality of this Court held that the discretion of the trier of fact must be narrowed when it considers the possibility of aggravation under § 27–2534.1 (b)(7). Our decision in *Godfrey* which was decided after the trial in this case, was available to the Georgia Supreme Court when it reviewed petitioner's appeal. That reviewing court

assumed it could determine for itself the presence of the aggravating circumstance in light of *Godfrey*. The proper course instead would have been to remand for reconsideration by the State's sole sentencing authority, the trial court. See *Westbrook* v. *Balkcom*, 449 U. S. 999, 1001 (1980) (STEWART, J., dissenting from denial of certiorari) (citing Ga. Code §§ 27–2503 (b), 27–2534.1 (b) (1978)).

The error of the State Supreme Court in this regard is not remedied by the jury's assessment of another statutory aggravating circumstance in this case. Neither this Court nor the State Supreme Court has the ability to forecast the decision of the properly instructed sentencing authority. *Davis* v. *Georgia*, *ante*, p. 921 (MARSHALL, J., dissenting from denial of certiorari). The State Supreme Court's failure to follow the proper course is particularly troubling in cases, such as this, where the remaining ground for imposing the death sentence is itself vulnerable to constitutional attack. The second aggravating circumstance here involved is that the offense of murder was committed while the offender was engaged in the commission of another capital felony, Ga. Code § 27–2534.1 (b)(2) (1978). The aggravating felony found here was forcible rape. Yet the jury may well have declined to find this aggravating circumstance had the trial judge granted petitioner's request for an instruction on statutory rape. It is uncontested that the victim here was 12 years old, and that Georgia defines statutory rape as sexual intercourse with a female under the age of 14. Ga. Code § 26–2018 (1978). It is also undisputed that statutory rape would not constitute an aggravating circumstance permitting imposition of the death sentence.

The Georgia Supreme Court reasoned that no instruction on this offense was necessary because statutory rape is not a lesser included offense of forcible rape. This conclusion accurately reflects the legislature's assignment of different elements to each of the two offenses. For statutory rape, the fact of sexual intercourse must be supplemented by proof of

the victim's age. For forcible rape, the fact of intercourse must be supplemented by proof it occurred forcibly and against the victim's will. Ga. Code § 26–2001 (1978). Yet in light of the proof necessary to the two offenses, where a minor is the victim, these differences dissolve. The Georgia Supreme Court recently has reaffirmed its longstanding view that "[a] female under 14 years of age is legally incapable of giving consent," so the element of rape against the victim's will is "automatically shown by her age." *Drake* v. *State,* 239 Ga. 232, 233, 236 S. E. 2d 748, 750 (1977). As a result, the only remaining difference between statutory rape and forcible rape is the element of force. And the Georgia Supreme Court has held that the youth of the victim may support a finding of force based on the victim's "state of mind" and "subjective apprehension of danger." *Id.,* at 236, 236 S. E. 2d, at 751. Where a defendant's life depends on whether the evidence beyond a reasonable doubt establishes forcible rape rather than statutory rape, minimal fairness calls for letting the jury consider the possibility of a statutory rape conviction.

Indeed, this was the essential thrust of our reasoning in *Beck* v. *Alabama,* 447 U. S. 625 (1980). There we concluded that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.,* at 637. We concluded that this risk introduces "a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.,* at 643. This reasoning casts serious doubt on the trial court's refusal to instruct the jury on statutory rape in this capital case. Petitioner's death sentence thus rests on an exercise of sentencing discretion unbounded as required by *Godfrey* and unaided by an instruction on a lesser offense.

If a death sentence may ever be properly imposed, it must be the result of correct procedures, carefully applied. Because I believe this requirement was lacking here, I dissent.

No. 80–6026. MONTANO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari.

No. 80–6030. WILLIS *v.* BALKCOM, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was convicted of murder and the jury returned a sentence of death. On direct appeal, the Georgia Supreme Court affirmed the conviction and death sentence. Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would grant the petition for a writ of certiorari and vacate the judgment below insofar as it left the death sentence undisturbed. But even assuming, *arguendo,* that there are circumstances in which the death penalty may constitutionally be imposed, I believe those circumstances are not present in this case.

Under Georgia law, the jury is responsible for sentencing in death penalty cases. In imposing the death sentence in this case, the jury found three statutory aggravating circumstances: (1) the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"; [1] (2) the "offense of murder was committed against any peace officer . . . while engaged in the performance of his official duties"; [2] and (3) the "murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself

[1] Ga. Code § 27–2534.1 (b) (7) (1978).

[2] § 2534.1 (b) (8).

or another." [3] In seeking review of the death sentence imposed in this case, petitioner does not challenge the validity of the findings concerning the latter two aggravating circumstances. He does argue, however, that the trial court's charge to the jury on the first aggravating circumstance was constitutionally defective.

This provision, Ga. Code § 27–2534.1 (b)(7) (1978) (hereafter § (b)(7)), was the same one involved in this Court's decision last Term in *Godfrey* v. *Georgia,* 446 U. S. 420 (1980). In that case, the trial judge instructed the jury about this aggravating circumstance simply by reading the text of the statute. A plurality of this Court found that practice unconstitutional. It reasoned that the language of § (b)(7) does not impose "any inherent restraint on the arbitrary and capricious infliction of the death sentence" since "[a] person of ordinary sensibility could fairly characterize almost every murder" as falling within the language of § (b)(7). *Id.,* at 428–429. The plurality explained that to be constitutionally valid, a State's capital punishment scheme "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Id.,* at 428 (footnote omitted) (quoting *Gregg* v. *Georgia,* 428 U. S. 153, 198 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Proffitt* v. *Florida,* 428 U. S. 242, 253 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Woodson* v. *North Carolina,* 428 U. S. 280, 303 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.)). Because the trial court had failed to provide adequate guidance to the jury, the death sentence imposed in that case was vacated.

In the instant case, as in *Godfrey,* the trial court's instruction to the jury on § (b)(7) consisted of simply reciting the statutory language. Although both the trial and direct appeal in this case predated *Godfrey,* petitioner challenged the

[3] § 2534.1 (b)(10).

adequacy of the charge in a state habeas corpus proceeding. The Georgia habeas court held, however, that "*Godfrey* is not germane to or controlling of Petitioner's case," because petitioner's death sentence was based not only on § (b)(7) but also on the other two aggravating circumstances. App. to Pet. for Cert. B–5. Thus, the court simply assumed that the jury would still have sentenced petitioner to death even if it had found only the two unchallenged aggravating circumstances. But under Georgia law, the finding of one or more aggravating circumstances *permits,* but does not *require* a sentence of death. See *Bowen* v. *State,* 241 Ga. 492, 246 S. E. 2d 322 (1978). Moreover, the jury verdict to impose the death penalty must be unanimous. See *Miller* v. *State,* 237 Ga. 557, 229 S. E. 2d 376 (1976). Under this scheme, it is evident that each aggravating circumstance may play an important role in influencing the jury's verdict. Just what weight each juror attached to a particular aggravating circumstance can never be known by a reviewing court, and if a jury is allowed to base its decision partly upon an improper finding of a § (b)(7) circumstance, it is impossible to determine to what extent the jury's verdict rested upon this circumstance. This situation, which exists in the instant case, is sufficient to invoke the rule that any doubt as to whether a criminal judgment rests upon a constitutionally unsound basis requires its reversal. See *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); *Stromberg* v. *California,* 283 U. S. 359 (1931).

This defect is not cured by a reviewing court's speculation about what a jury faced with a finding of two aggravating circumstances would or might have done. Under Georgia law, only the trier of fact may impose a death sentence. The reviewing court is neither privy to the jury's deliberations nor endowed with psychic powers. Most important, such speculation is, in my judgment, inconsistent with the recognition that because "the penalty of death is qualitatively different from a sentence of imprisonment," there is a heightened "need for reliability in the determination that death is

the appropriate punishment in a specific case." *Woodson* v. *North Carolina, supra,* at 305 (opinion of STEWART, POWELL, and STEVENS, JJ.). See *Beck* v. *Alabama,* 447 U. S. 625 (1980). The proper procedure to follow in cases such as this is to vacate the death sentence and remand the case for resentencing by a properly instructed jury. Cf. *Westbrook* v. *Balkcom,* 449 U. S. 999, 1001 (1980) (STEWART, J., dissenting from denial of certiorari); *Davis* v. *Georgia, ante,* p. 921 (MARSHALL, J., joined by BRENNAN, J., dissenting from denial of certiorari).

Because it cannot be said with assurance that an improper finding of a § (b)(7) circumstance played no part in the jury's decision to impose the death penalty in this case, I would grant the petition for a writ of certiorari and vacate the death sentence on this additional ground.

JUSTICE STEWART joins all but the first and last paragraphs of this dissenting opinion. He would grant the petition for certiorari and vacate the judgment imposing the death penalty, so that a properly instructed jury may consider what sentence to impose. See *Westbrook* v. *Balkcom,* 449 U. S. 999, 1001 (1980) (dissent from denial of certiorari).

No. 80–6039. GREEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 925.

JUSTICE MARSHALL, dissenting.

In *United States* v. *Dinitz,* 424 U. S. 600 (1976), this Court held that when a criminal defendant's successful request for a mistrial is precipitated by " 'prosecutorial or judicial overreaching,' " a subsequent trial on the same charges is barred by the Double Jeopardy Clause of the Fifth Amendment. *Id.,* at 607 (quoting *United States* v. *Jorn,* 400 U. S. 470, 485 (1971)). Because the decision of the Court of Appeals in the present case raises substantial questions concerning the scope of the *Dinitz* rule, I dissent from the denial of certiorari.

Petitioner was tried for conspiracy to distribute heroin.

The prosecution's chief witness was Special Agent Robert Dixon of the Drug Enforcement Administration. During cross-examination, defense counsel succeeded in eliciting several statements that substantially damaged Dixon's credibility.[1] Annoyed at this turn of events, Dixon made a deliberate, impermissible reference to petitioner's prior conviction for armed robbery. Defense counsel then moved for a mistrial, which was granted. Petitioner was subsequently reindicted on the same drug charge. He moved to dismiss this second indictment on the ground that the Double Jeopardy Clause, as interpreted in *Dinitz,* barred his retrial. The District Judge denied the motion, and a divided Court of Appeals for the Fourth Circuit affirmed. 636 F. 2d 925 (1980). The majority reasoned that *Dinitz* was inapplicable because the improper statement was made with the general purpose of prejudicing petitioner rather than the specific purpose of provoking a mistrial and because the misconduct was by a Government witness rather than the prosecutor.

The court's reasoning is questionable on both grounds. The central issue presented by this case—whether prosecutorial misconduct must have the specific purpose of provoking a defendant's request for a mistrial in order to raise double jeopardy concerns—has divided the Courts of Appeals. The majority in the court below, as well as the Court of Appeals for the Tenth Circuit in *United States* v. *Nelson,* 582 F. 2d 1246 (1978), cert. denied, 439 U. S. 1079 (1979), have limited *Dinitz* to situations in which the prosecution

[1] Under the Government's theory of the case, petitioner was a distributor for a heroin dealer. Agent Dixon testified that dealers did not distribute heroin through heroin users. The defense then produced evidence that petitioner was receiving large amounts of heroin for his personal use at the relevant time, and that the arrest report on petitioner noted that he was a "heroin user." The defense then asked Dixon if he was the agent who had arrested petitioner. Agent Dixon stated that he was not. The defense, however, again discredited Dixon by proving that he was indeed the arresting officer.

deliberately attempts to provoke a mistrial. In contrast, the Courts of Appeals for the Fifth and Eighth Circuits have concluded that the "prosecutorial overreaching" referred to in *Dinitz* is not limited to specific attempts to provoke a mistrial, but may also encompass other forms of serious Government misconduct intended in a more generalized way to prejudice the defendant. *United States* v. *Weaver,* 565 F. 2d 129, 133 (CA8 1977), cert. denied, 434 U. S. 1074 (1978); *United States* v. *Kessler,* 530 F. 2d 1246 (CA5 1976).

In my view, this latter interpretation of *Dinitz* is the correct one.[2] The Double Jeopardy Clause protects a criminal defendant's interest in a single, fair adjudication of his guilt or innocence. *United States* v. *Jenkins,* 420 U. S. 358, 370 (1975); *United States* v. *Wilson,* 420 U. S. 332, 343 (1975); *Downum* v. *United States,* 372 U. S. 734, 736 (1963). This constitutional interest is implicated whenever intentional governmental misconduct results in a mistrial. Regardless of whether the Government's misbehavior was designed specifically to provoke a mistrial or was simply intended to reduce the chances of an acquittal, the net effect on the defendant is the same: he is faced with the burdens and risks of a second trial solely because the Government has deliberately undermined the integrity of the first proceeding. Indeed, in *United States* v. *Jorn,* 400 U. S. 470 (1971), the central decision relied on in *Dinitz,* this Court concluded that

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[2] As an initial matter, I question the validity of the lower court's assumption that the Government in such cases tailors its misconduct to achieve one improper result as opposed to another. It is far more likely that in cases such as this, where the prosecution is concerned that the trial may result in an acquittal, that the Government engages in misconduct with the general purpose of prejudicing the defendant. In this case, for example, the Government stood to benefit from Dixon's misconduct, regardless of whether it resulted in a guilty verdict or a mistrial. Moreover, even if such subtle differences in motivation do exist, I suspect that a defendant seeking to prevent a retrial will seldom be able to prove the Government's actual motivation.

"where a defendant's mistrial motion is necessitated by . . . prosecutorial impropriety *designed to avoid an acquittal,* reprosecution might well be barred." 400 U. S., at 485, n. 12 (emphasis added). This language strongly suggests that a general governmental intent to affect the trial in a manner that *objectively* might be viewed as risking a mistrial, rather than a specific, *subjective* intent on the part of the prosecution to achieve that precise result, is sufficient to invoke the double jeopardy concerns discussed in *Dinitz.* In any event, because the Courts of Appeals are divided on this important issue, I believe that this Court is obliged to resolve the conflict.

The second ground for the decision of the court below—that *Dinitz* does not apply to Government witnesses—is equally suspect. *Dinitz* referred to " 'prosecutorial . . . overreaching,' " 424 U. S., at 607, but nothing in that decision suggests that its holding was limited solely to misconduct by the prosecutor. To be sure, the prosecutor cannot be held responsible for the misconduct of every Government witness. However, in this case, Agent Dixon's role in the prosecution of petitioner was far more extensive than that of an ordinary Government witness. As Judge Winter observed in dissent:

> "Agent Dixon was a four-year veteran of the Drug Enforcement Administration. . . . Since joining DEA he had made over 150 arrests and participated in approximately 35 cases. Manifestly he was the agent in charge of the instant case; he sat at counsel table throughout the entire trial. Significantly, the government had been advised that defendant would not testify because of his record. Undoubtedly, as the agent in charge, Dixon had that knowledge." 636 F. 2d, at 930.

Given Dixon's extensive involvement in the prosecution of the Government's case against petitioner, I question whether the court below correctly found *Dinitz* to be inapplicable. In any event, the question is sufficiently important to warrant this Court's review.

Accordingly, I dissent from the denial of certiorari and would instead grant the petition and set the case for argument.

Rehearing Denied

No. 79–1266. STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION, 450 U. S. 91;

No. 80–532. FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES ET AL. *v.* FLORIDA NURSING HOME ASSN. ET AL., 450 U. S. 147;

No. 80–694. WOOD *v.* WOOD, 449 U. S. 1081;

No. 80–843. CARIBE TRAILER SYSTEMS, INC., ET AL. *v.* PUERTO RICO MARITIME SHIPPING AUTHORITY ET AL., 450 U. S. 914;

No. 80–876. SCARPELLI *v.* ILLINOIS, 450 U. S. 915;

No. 80–1054. OLTERSDORF *v.* CHESAPEAKE & OHIO RAILROAD CO., 450 U. S. 920;

No. 80–1071. SMITH *v.* UNITED STATES, 450 U. S. 920;

No. 80–1309. LEE *v.* LAW OFFICES OF ALIOTO ET AL., 450 U. S. 967;

No. 80–5584. OUTLAW *v.* ILLINOIS, 450 U. S. 983;

No. 80–5768. MCDONALD *v.* TENNESSEE, 450 U. S. 983;

No. 80–5859. MCDONALD *v.* DRAPER, JUDGE, 450 U. S. 983;

No. 80–5902. DE PRIEST *v.* BIBLE, COMMISSIONER, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., 450 U. S. 903;

No. 80–5924. TENG ET AL. *v.* UNITED STATES, 450 U. S. 930;

No. 80–5944. KOHLS *v.* UNITED PARCEL SERVICE, INC., ET AL., 450 U. S. 931;

No. 80–5986. GREEN *v.* GEORGIA, 450 U. S. 936;

No. 80–5990. HOCKENBURY *v.* SOWDERS, PENITENTIARY SUPERINTENDENT, 450 U. S. 933;

No. 80–6000. DAVIS *v.* TEXAS, 450 U. S. 968; and

No. 80–6050. HARRIS *v.* SPAIN, JUDGE, ET AL., 450 U. S. 985. Petitions for rehearing denied.

No. 80–6053. MULLINS *v.* OHIO, 450 U. S. 985;

No. 80–6091. HENDERSON *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, 450 U. S. 985; and

No. 80–6159. WRIGHT *v.* UNITED STATES, 450 U. S. 970. Petitions for rehearing denied.

No. 80–910. CALAVO GROWERS OF CALIFORNIA *v.* GENERALI BELGIUM ET AL., 449 U. S. 1084. Motion for leave to file petition for rehearing denied.

No. 80–1117. CASTILLO *v.* FORSHT, UNITED STATES MARSHAL, 450 U. S. 922. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

APRIL 27, 1981

Dismissal Under Rule 53

No. 80–1453. SHOWCASE CINEMAS, INC., ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari dismissed under this Court's Rule 53. Reported below: 156 Ga. App. 225, 274 S. E. 2d 578.

Affirmed on Appeal

No. 80–1183. MISSISSIPPI *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. JUSTICE WHITE and JUSTICE STEVENS would postpone the question of jurisdiction and set case for oral argument. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

No. 80–1275. GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., ET AL. *v.* ORR, GOVERNOR OF INDIANA, ET AL. Affirmed on appeal from D. C. N. D. Ind. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 496 F. Supp. 894.

Appeal Dismissed

No. 80–1486. OMNI FARMS, INC. *v.* ARKANSAS POWER & LIGHT CO. 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: 271 Ark. 61, 607 S. W. 2d 363.

Certiorari Granted—Vacated and Remanded

No. 80–461. RETAIL, WHOLESALE & DEPARTMENT STORE UNION, AFL–CIO *v.* G. C. MURPHY CO. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Northwest Airlines, Inc.* v. *Transport Workers, ante,* p. 77. Reported below: 629 F. 2d 248.

Certiorari Dismissed

No. 80–1284. GRAY, TREASURER OF HARRIS COUNTY, TEXAS (KRIEGEL, SUCCESSOR IN OFFICE) *v.* VAN OOTEGHEM. C. A. 5th Cir. Certiorari dismissed without prejudice. Reported below: 628 F. 2d 488.

Miscellaneous Orders

No. 80–689. WIDMAR ET AL. *v.* VINCENT ET AL. C. A. 8th Cir. [Certiorari granted, 450 U. S. 909.] Motions of Anti-Defamation League of B'nai B'rith and American Jewish Congress for leave to file briefs as *amici curiae* granted.

No. 80–1010. CURREY ET AL., DBA CURREY & CURREY *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Sup. Ct. Okla.;

No. 80–1494. UNITED AIR LINES, INC. *v.* DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA ET AL. C. A. 9th Cir.; and

No. 80–1523. FAIRDALE FARMS, INC. *v.* YANKEE MILK, INC., ET AL. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 80–6406. In re Nolan. Petition for writ of habeas corpus denied.

No. 80–1511. In re Halvorsen. Petition for writ of mandamus and/or other relief denied.

No. 80–6293. In re Jones. Petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 80–415. Railway Labor Executives' Assn. *v.* Gibbons, Trustee, et al. Appeal from D. C. N. D. Ill.; and

No. 80–1239. Railway Labor Executives' Assn. *v.* Gibbons, Trustee, et al. Appeal from C. A. 7th Cir. In No. 80–415, further consideration of question of jurisdiction postponed to hearing of case on the merits. In No. 80–1239, probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. In the course of briefing the questions presented in these cases, the parties are requested to address whether the issue of the constitutionality of sections 106 and 110 of the Rock Island Railroad Transition and Employee Assistance Act, as modified by section 701 of the Staggers Rail Act of 1980, Pub. L. 96–448, 94 Stat. 1959, 45 U. S. C. §§ 1005 and 1008 (1976 ed., Supp. IV), is properly before us. See Fed. Rule Civ. Proc. 65 (a)(2). Reported below: No. 80–1239, 645 F. 2d 74.

No. 80–6298. Mills *v.* Habluetzel. Appeal from Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

Certiorari Granted

No. 80–1436. Baldrige, Secretary of Commerce, et al. *v.* Shapiro, Essex County Executive. C. A. 3d Cir. Certiorari granted. Reported below: 636 F. 2d 1210.

Certiorari Denied. (See also No. 80–1486, *supra.*)

No. 80–980. MICHIENZI ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 630 F. 2d 455.

No. 80–966. SMITH *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 193.

No. 80–1154. HAYWARD ET AL. *v.* PROCUNIER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 629 F. 2d 599.

No. 80–1176. BLOCK *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 270 Ark. 671, 606 S. W. 2d 362.

No. 80–1244. ALESSI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1133.

No. 80–1248. BRIGUGLIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–1262. SUPREME OPTICAL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 628 F. 2d 1262.

No. 80–1286. F. W. WOOLWORTH CO. *v.* FELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 629 F. 2d 1204.

No. 80–1295. CORNET STORES ET AL. *v.* BUCHANAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 96.

No. 80–1296. SOUTHERN CALIFORNIA FINANCIAL CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 225 Ct. Cl. ——, 634 F. 2d 521.

No. 80–1310. TRANSWESTERN PIPELINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1266.

No. 80–1326. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1228.

No. 80–1342. BASSETT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 633 F. 2d 108.

No. 80–1375. ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1196.

No. 80–1423. ASSARSSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 1237.

No. 80–1445. HEARST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 1190.

No. 80–1446. LAVIN *v.* COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–1451. ROBBINS & MYERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 653 F. 2d 237.

No. 80–1468. BATTELSTEIN ET AL. *v.* INTERNAL REVENUE SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 1182.

No. 80–1470. PENNINGTON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 635 F. 2d 1387.

No. 80–1472. HOUSTON *v.* BENTTREE, LTD. C. A. 10th Cir. Certiorari denied. Reported below: 637 F. 2d 739.

No. 80–1485. LOHMAN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–1487. HARVEY *v.* CONNOR. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 85 Ill. App. 3d 1061, 407 N. E. 2d 879.

No. 80–1488. PARKS ET AL. *v.* ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 608 S. W. 2d 881.

No. 80–1489. COYNE ET AL. *v.* CITY OF CINCINNATI. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 2d 28, 413 N. E. 2d 1177.

No. 80–1490. WORKMAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 47 Ore. App. 1055, 615 P. 2d 1140.

No. 80–1495. CALIFORNIA *v.* AUSTIN. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 80–1505. RANCHO LA COSTA *v.* COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 111 Cal. App. 3d 54, 168 Cal. Rptr. 491.

No. 80–1524. TIFFANY, DBA PATRICIA ANN'S COUNTRY STORE *v.* COUNTY OF ALBEMARLE, VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cli.

No. 80–1559. ZELLER *v.* RANKIN. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 844.

No. 80–1636. MAIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 580.

No. 80–5660. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 207.

No. 80–6009. ROGERS *v.* BRITTON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 631 F. 2d 572.

No. 80–6025. SOAP *v.* CARTER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 2d 872.

No. 80–6031. ABELL *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 606 S. W. 2d 198.

No. 80–6059. MITCHELL ET AL. *v.* SUPERIOR COURT FOR THE COUNTY OF SANTA CLARA, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 767.

No. 80–6107. NELSON *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1291.

No. 80–6135. ISBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 885.

No. 80–6146. TSOSIE *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 630 F. 2d 1328.

No. 80–6258. DRUCKER *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 562.

No. 80–6265. CHRISTIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 1354.

No. 80–6282. HARRINGTON *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 165.

No. 80–6284. HEIRENS *v.* MIZELL, WARDEN, ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 1208, 417 N. E. 2d 277.

No. 80–6288. PORTELA *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–6289. WEXLER *v.* LOWER MORELAND TOWNSHIP POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6295. LIGHTCSY *v.* SUMNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 80–6296. KICKASOLA, ADMINISTRATRIX *v.* JIM WALLACE OIL CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 580.

No. 80–6297. CODA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 287 Pa. Super. 570, 428 A. 2d 240.

No. 80–6300. JOHN *v.* JOSEPH. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1208.

No. 80–6305. TRUPPI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 182 Conn. 449, 438 A. 2d 712.

No. 80–6308. WEDDELL *v.* MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 211.

No. 80–6310. GAMBLE *v.* JONES, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–6312. HOLLAND *v.* RICHTMYER. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. ci.

No. 80–6370. GARCIA-YEPES *v.* UNITED STATES; and
No. 80–6420. DELOS-RIOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 642 F. 2d 42.

No. 80–6376. SCANLON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 640 F. 2d 144.

No. 80–6391. MAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6396. BLAIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–6402. ROBLES-SANDOVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 692.

No. 80–6404. FOX *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1355.

No. 80–6407. GAFFNEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 421 A. 2d 924.

No. 80–6413. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 1134.

No. 80–6424. HUBBARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–6428. HEIMERLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80–500. NEWELL BRIDGE & RAILWAY CO. *v.* DAILEY, STATE TAX COMMISSIONER OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 266 S. E. 2d 453.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioner is a West Virginia corporation. Its pays West Virginia property, capital stock, and income taxes. Petitioner's sole business is the operation and maintenance of a toll bridge across the Ohio River. The bridge spans the river between Newell, W. Va., and East Liverpool, Ohio. Two-thirds of the bridge is within West Virginia and one-third is within Ohio. The bridge has only one entrance and exit in each State and carries an equal volume of traffic in both directions. There is a single tollbooth, located on the Ohio side.

The West Virginia Business and Occupation Tax, W. Va. Code § 11–13–2 (1974), imposes an annual privilege tax on persons, including corporations, measured by gross receipts. The statute, however, specifically exempts "gross income de-drived from commerce between this State and other states of the United States . . . ." § 11–13–2d. Since 1933, petitioner has regularly reported all tolls collected in its operation of the bridge, but has claimed that this income falls within the exemption for income received from interstate commerce.

In January 1974, respondent assessed the corporation $83,000 in unpaid taxes, representing the tax due on the tolls received between 1968 and 1972. Petitioner appealed

this assessment and won a reversal. That decision, however, was subsequently reversed, and the tax reinstated, by the Supreme Court of Appeals of West Virginia.

That court held that the exemption for gross income derived from commerce between West Virginia and other States is identical in scope to the federal Interstate Commerce Clause: "If revenues from bridges are not covered by the federal constitution's commerce clause, they are not excepted from the statute." — W. Va. —, —, 266 S. E. 2d 453, 454 (1980). To determine the scope of the federal Commerce Clause, the court relied on two prior decisions of this Court: *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150 (1897), and *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83 (1935). In *Henderson Bridge,* the Court upheld a Kentucky tax on the intangible property of a Kentucky corporation, the business of which was the operation of a railroad bridge over the Ohio River between the Kentucky and Indiana shores. The West Virginia court relied on the following language from that opinion:

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge." 166 U. S., at 153–154.

In *Detroit International Bridge Co.,* the Court specifically relied on the above language to reach a similar conclusion. 294 U. S., at 86. It upheld a state tax on a state corporation, the sole business of which was to operate and maintain a toll bridge across the Detroit River, from Detroit, Mich., to Ontario, Canada. In both cases, the Court held that the bridge itself was an "instrumentality which others may use in conducting foreign commerce," *id.,* at 85, but that operation of the bridge was not itself interstate commerce.

The West Virginia court correctly noted that *"Hender-*

son . . . is still good law having never been overruled." —— W. Va., at ——, 266 S. E. 2d, at 456. In my view, however, it is time that this Court took a new look at *Henderson* and *Detroit International Bridge Co.* to consider whether they are consistent with this Court's more recent treatment of the effect of the Interstate Commerce Clause on the power of the States to impose taxes.

The Court has dealt with other fixed facilities as "instrumentalities" of interstate commerce and treated their operation as interstate commerce. In *Colonial Pipeline Co.* v. *Traigle,* 421 U. S. 100 (1975), the Court assumed that a corporation that owned and operated an interstate pipeline linking the oil refining complexes of Texas and Louisiana with the population centers of the Northeast and Southeast was engaged in interstate commerce. See also *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954). It is not at all clear that a pipeline is distinguishable from a bridge as an instrumentality of interstate commerce.

Furthermore it is arguable that the Court's conclusion in *Henderson,* subsequently followed in *Detroit International Bridge Co.,* that operation of an interstate bridge is not interstate commerce was not necessary to support the result reached there. Kentucky had excluded tangible and intangible property located in Indiana from its tax: "The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky." 166 U. S., at 154. Petitioner argues that the case "involved in reality a *de facto* apportionment to property within the state." Pet. for Cert. 16. More importantly, under today's standards it would be unnecessary to exclude an interstate bridge from the interstate commerce field to sustain the Kentucky tax involved in the *Henderson* case. Under *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274 (1977), a state tax on a corporation will be sustained if there is a substantial nexus between its operations and the taxing State, and if the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to

the services provided by the State. Under this test, it makes no difference whether operation of an interstate bridge is considered "interstate commerce." Although the Kentucky tax probably would have been upheld under this test, the West Virginia tax involved in the case before us now is an unapportioned tax and would probably not satisfy the test. This creates an incongruous situation: The West Virginia court relied on *Henderson*'s reasoning, which may never have been, and in any case is not now, necessary to support the conclusion it was designed to reach, to support another conclusion that might not otherwise survive under contemporary standards.

Accordingly, I think this case should be given plenary consideration, and therefore I dissent from denial of certiorari.

No. 80–1032. GARTNER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE STEWART would grant certiorari.

No. 80–1258. MARKHAM ET AL. *v.* GELLER. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 1027.

JUSTICE REHNQUIST, dissenting.

This case presents the question whether a school board may enact a policy which, for budgetary reasons, favors the hiring of less experienced teachers. Because I think the Court of Appeals for the Second Circuit erred in holding that such a policy violates the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*, I dissent from the denial of the petition for a writ of certiorari.

The respondent in this action was 55 years old when she applied for a position as an art teacher in the West Hartford, Conn., school system. Respondent had 13 years of prior experience as a teacher in New Jersey. When the job opening for which respondent applied was filled by a 26-year-old teacher with three years' experience, respondent initiated this lawsuit alleging violations of the ADEA and pointing in par-

ticular to the "sixth step" policy adopted by the West Hartford Board of Education (Board). This cost-cutting policy read:

> "Except in special situations and to the extent possible, teachers needed in West Hartford next year will be recruited at levels below the sixth step of the salary schedule."

The "sixth step" is the salary grade reached by teachers with more than five years' experience. This policy would be applicable to the respondent because the Board, like most school districts, gives credit for experience received in other schools.

At trial, the respondent introduced statistical evidence establishing that 92.6% of Connecticut teachers between 40 and 65 years of age (the protected age group under ADEA) have more than five years' experience and thus are discriminated against by the sixth-step policy. The significance of this evidence, however, was minimized by the additional evidence that over 60% of teachers under age 40 also have more than five years' experience. The District Court instructed the jury that petitioners' sixth-step policy was discriminatory as a matter of law and that respondent was entitled to recover if petitioners' employment "decision about [respondent] was made in whole or in part because she was above the fifth step on the salary scale . . . . " The jury returned a verdict for the respondent.

On appeal, the Court of Appeals affirmed in pertinent part. The Court of Appeals likened this case to a Title VII discriminatory impact case and held that respondent's statistics had established a prima facie case of discriminatory impact and that petitioners had not justified their employment practice by a showing of business necessity or need. The Court of Appeals specifically rejected petitioners' contention that the sixth-step policy was supportable as a necessary cost-cutting gesture in the face of tight budgetary constraint. The Court of Appeals reasoned that this cost-cutting justification

must fail because of 29 CFR § 860.103 (h) (1979), which provides in part:

> "[A] general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed."

The Court of Appeals held that this regulation similarly defeated petitioners' defense to respondent's disparate-treatment case.

In my opinion, the decision of the Court of Appeals is inconsistent with the express provisions of the ADEA and is not supported by any prior decision of this Court. The ADEA makes it unlawful for any employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U. S. C. § 623 (a)(1). The policy under attack in this case, however, makes no reference to age. For budgetary reasons, a school board simply adopted a policy to hire teachers with fewer years of experience. No one contends that the Board discriminated against teachers over the age of 40 who had fewer than five years of prior teaching experience and who sought employment. In spite of this, the courts below found the Board's policy unlawful because it has a greater "impact" on teachers between

the ages of 40 and 65 than it has on teachers under the age of 40. They reached this conclusion even though over 60% of all teachers under the age of 40 also have more than five years of experience and are detrimentally affected by the Board's policy. This Court has never held that proof of discriminatory impact can establish a violation of the ADEA, and it certainly has never sanctioned a finding of a violation where the statistical evidence revealed that a policy, neutral on its face, has such a significant impact on all candidates concerned, not simply the protected age group.

Of greater importance, however, is the rationale employed by the Court of Appeals in rejecting the Board's "cost" justification for its policy. The court held that such justification conflicted with 29 CFR § 860.103 (h) (1979), which is one of the many guidelines that has been issued by the Secretary of Labor in this area. By its express terms, however, this regulation is inapplicable to the present situation. The Board has not made a general assertion that "the average cost of employing older workers as a group is higher than the average cost of employing younger workers," nor does this involve an attempt "[t]o classify or group employees solely on the basis of age for the purpose of comparing costs . . . ." Rather, this is a policy which by its express terms makes no reference to age and which in practice has had a significant impact on teachers under the age of 40 as well as those over that age. The Court of Appeals' opinion manages to tie the hands of local school boards in dealing with ever-increasing costs without the sanction of the Act which Congress passed to protect older workers. Presumably, the Court of Appeals' rationale would similarly prohibit the Board from deciding no longer to give full credit for teaching experience received at other school districts. Such a policy, although neutral on its face with regard to age and affecting all teachers, would no doubt have a statistically different impact on teachers over the age of 40 than on those under that age.

In my view, Congress did not intend the ADEA to have

the restraining influence on local governments which will result from the decision below. Congress revealed this intention in 29 U. S. C. § 623 (f)(1), which provides that it shall not be unlawful for an employer to take any action otherwise prohibited "where the differentiation is based on reasonable factors other than age." Because the differential based on experience in petitioners' sixth-step policy has nothing to do with age, I would grant the petition for a writ of certiorari and give plenary consideration to the decision of the Court of Appeals.

No. 80–1289. OHIO DEPARTMENT OF HIGHWAY SAFETY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 635 F. 2d 1195.

No. 80–1389. ALESSANDRELLO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 637 F. 2d 131.

No. 80–5980. COLEMAN *v.* BALKCOM, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied.

JUSTICE STEVENS, concurring.

The Court's management of its discretionary docket is a subject that merits re-examination from time to time in the light of changes that affect the business of the federal judiciary. See, *e. g., Watt* v. *Alaska, ante,* p. 273 (STEVENS, J., concurring), and *Singleton* v. *Commissioner,* 439 U. S. 940, 942–946 (opinion of STEVENS, J.). Opinions dissenting from the denial of certiorari sometimes create the impression that we review fewer cases than we should; I hold the opposite view. Today JUSTICE REHNQUIST advances the proposition, as I understand his dissenting opinion, that we should promptly grant certiorari and decide the merits of every capital case coming from the state courts in order to expedite the administration of the death penalty.

In my judgment, the Court wisely rejects this proposal.

In the last 10 months, over 90 certiorari petitions have been filed in capital cases. If we were to hear even a substantial percentage of these cases on the merits, they would consume over half of this Court's argument calendar. Although the interest in protecting the constitutional rights of persons sentenced to death is properly characterized as a federal interest, the interest in imposing the death sentence is essentially a state interest. Because the persons on death row are concentrated in only a few States, because some States have no capital punishment at all, and because the range of capital offenses differs in different States, it is quite clear that all States do not share the same interest in accelerating the execution rate. This Court's primary function is to adjudicate federal questions. To make the primary mission of this Court the vindication of certain States' interests in carrying out the death penalty would be an improper allocation of the Court's limited resources.

Moreover, one may also question whether JUSTICE REHNQUIST's proposal would accomplish its intended purpose. As I understand his proposal, it would preclude the federal district courts from granting writs of habeas corpus in any capital cases on any ground that had been presented to and rejected by this Court. Because this Court is not equipped to process all of these cases as expeditiously as the several district courts, it is most unlikely that this innovative proposal would dramatically accelerate the execution of the persons on death row.[1]

One of the causes of delay in the conclusion of litigation in capital cases has been the fact that the enactment of new

[1] This proposed procedure in some cases would require the Court to grant certiorari and review the merits twice, once on direct appeal and once to review state collateral proceedings. Review of the merits would certainly involve more delay than would a denial of certiorari. Moreover, JUSTICE REHNQUIST's proposal would not have any effect on the delay in those cases in which a state court's resolution of collateral proceedings on procedural grounds would bar this Court's consideration of the merits of the claims raised in those proceedings.

state legislation after this Court's decision in *Furman* v. *Georgia,* 408 U. S. 238, generated a number of novel constitutional questions. Although those questions have not been difficult for three Members of the Court,[2] other Justices have found a number of these questions sufficiently important and difficult to justify the delays associated with review in this Court. The principal delay—a matter of four years—was the period between the entry of the stays in the *Furman* litigation in 1972, and the decisions in July 1976 in *Gregg* v. *Georgia,* 428 U. S. 153, *Proffitt* v. *Florida,* 428 U. S. 242, and *Jurek* v. *Texas,* 428 U. S. 262, in which the constitutionality of the death penalty was ultimately sustained. Following that basic holding, the Court has also decided several other cases presenting substantial constitutional issues relating to capital punishment statutes;[3] presumably those issues will no longer detain the state or federal courts in their consideration of cases in which the death penalty has been imposed.[4] One therefore should not assume that the delays of the past few years will necessarily be reflected in the future if the various state authorities act with all possible diligence.[5]

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[2] JUSTICE BRENNAN and JUSTICE MARSHALL have invariably voted to set aside the death penalty and, if my memory serves me correctly, JUSTICE REHNQUIST has invariably voted to uphold the death penalty.

[3] See *Adams* v. *Texas,* 448 U. S. 38; *Beck* v. *Alabama,* 447 U. S. 625; *Godfrey* v. *Georgia,* 446 U. S. 420; *Green* v. *Georgia,* 442 U. S. 95; *Presnell* v. *Georgia,* 439 U. S. 14; *Lockett* v. *Ohio,* 438 U. S. 586; *Bell* v. *Ohio,* 438 U. S. 637; *Coker* v. *Georgia,* 433 U. S. 584; *Dobbert* v. *Florida,* 432 U. S. 282; *Roberts* v. *Louisiana,* 431 U. S. 633; *Gardner* v. *Florida,* 430 U. S. 349; *Davis* v. *Georgia,* 429 U. S. 122.

[4] It must be emphasized that some of the delay in these cases is attributable to a congressional determination that state prisoners must exhaust state remedies prior to seeking review in federal court. See 28 U. S. C. § 2254 (b).

[5] In the case of John Spenkelink, the only person who continued to attack his sentence and who has been executed since 1976, the date of his crime was February 3, 1973, and the date of his execution was May 25, 1979. Of the more than six years between his crime and his execution, approximately 38 months was spent in the federal courts. During 17 of

The deterrent value of any punishment is, of course, related to the promptness with which it is inflicted. In capital cases, however, the punishment is inflicted in two stages. Imprisonment follows immediately after conviction; but the execution normally does not take place until after the conclusion of post-trial proceedings in the trial court, direct and collateral review in the state judicial system, collateral review in the federal judicial system, and clemency review by the executive department of the State. However critical one may be of these protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution. If the death sentence is ultimately set aside, or its execution delayed for a prolonged period, the imprisonment during that period is nevertheless a significant form of punishment. Indeed, the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself. In all events, what is at stake in this procedural debate is the length of that period of incarceration rather than the question whether the offender shall be severely punished.

How promptly a diligent prosecutor can complete all of the proceedings necessary to carry out a death sentence is still uncertain. Much of the delay associated with past litigation should not reoccur in cases that merely raise issues that have now been resolved. As is true of all other types of litigation as well, however, inevitably new issues arise that will be sufficiently important and difficult to require

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those months Spenkelink's certiorari petition was awaiting this Court's determination of the constitutionality of the Florida death penalty statute in *Proffitt* v. *Florida*, 428 U. S. 242. Thus over three of the six-plus years were spent at trial, on appeal in the Florida state courts, before the Governor of Florida on a petition for executive clemency, and before the trial court on a motion to vacate, set aside, or correct a sentence. See *Spinkellink* v. *State*, 313 So. 2d 666 (1975); *Spenkelink* v. *Wainwright*, 442 U. S. 1301 (REHNQUIST, J., in chambers). These delays would be unaffected by JUSTICE REHNQUIST's proposal.

deliberation before they are fully resolved. This Court should endeavor to conclude capital cases—like all other litigation—as promptly as possible. We must, however, also be as sure as possible that novel procedural shortcuts have not permitted error of a constitutional magnitude to occur. For after all, death cases are indeed different in kind from all other litigation. The penalty, once imposed, is irrevocable. In balance, therefore, I think the Court wisely declines to select this group of cases in which to experiment with accelerated procedures. Accordingly, I concur in the order denying certiorari.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was convicted of first-degree murder and sentenced to death. After exhausting his direct appeals, petitioner filed this action in the Superior Court of Tattnall County, Ga., seeking a writ of habeas corpus. One of petitioner's claims was that prejudicial publicity had created an atmosphere in which a fair trial was impossible. Petitioner's counsel asserted in an affidavit that the jurors in his original trial, if called as witnesses, would "testify as to the widespread discussion of the [offense] in Seminole County . . . and to the fact that they, as jurors, were affected in their statutory decision-making process by the adverse pre-trial publicity." The affidavit further alleged that the county jury commissioners, members of the jury panels, and numerous reporters and expert witnesses would offer testimony to similar effect. In order to prove these allegations, petitioner sought compulsory process to require the witnesses to testify.

At that point, petitioner's efforts were thwarted by Ga. Code § 38–801 (e) (1978). Although that statute has since been amended,[1] at the time of petitioner's habeas hearing, it

[1] The statute as amended, effective February 15, 1980, permits service of process "at any place within the state." 1980 Ga. Laws 71–72. Petitioner's hearing was held prior to that date.

provided that subpoenas in habeas cases could be served only in the county in which the hearing was held or within 150 miles of that county. None of the witnesses petitioner wished to summon lived so close. As one would expect, most of them lived in or near Seminole County, where the offense was committed. Petitioner was further constrained by the provisions of Ga. Code § 50–127 (1978) to file his habeas petition in the county where he was incarcerated.[2] In sum, only the State's procedural requirement threatened to prevent petitioner from calling the witnesses who he alleged would testify in support of his claim. Consequently, petitioner asked the trial court to declare § 38–801 (e) unconstitutional and to permit him to perfect service anywhere in the State. The trial court sustained the statute and denied the petition for habeas corpus on the merits. The Georgia Supreme Court declined to grant leave to appeal. Because the availability of compulsory process to an individual challenging his death penalty raises important questions under the Due Process Clause, I would grant the petition for certiorari.[3]

A habeas corpus proceeding is, of course, civil rather than criminal in nature, and consequently the ordinary Sixth Amendment guarantee of compulsory process, which is made applicable to the States by the Fourteenth Amendment,[4] does not apply. Nevertheless, when the death penalty is in issue, the Constitution may impose unusual limitations on the States. As we emphasized just last Term in *Beck* v. *Ala-*

[2] It is true that Rule 45 (e)(1) of the Federal Rules of Civil Procedure limits service of district court subpoenas to 100 miles of the hearing site. But under 28 U. S. C. § 2241 (d) an individual has the option of filing his petition for a writ of habeas corpus in the district where the conviction occurred rather than the one where he is incarcerated. The Georgia statutory scheme challenged in this case does not include that option.

[3] Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment, I would in any event grant the petition for certiorari and vacate the judgment below insofar as it leaves undisturbed the death sentence.

[4] *Washington* v. *Texas*, 388 U. S. 14, 17–19 (1967).

bama, 447 U. S. 625, 637 (1980), "there is a significant constitutional difference between the death penalty and lesser punishments." If an individual is imprisoned for an offense he did not commit, the error can to some extent be rectified. But if he is executed, the wrong that has been done can never be corrected. That is just one reason that I, of course, adhere to my view that the State may never put an individual to death without imposing a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Yet surely those among my Brethren who believe that there are circumstances in which the State may legitimately impose this ultimate sanction would not want to see an innocent individual put to death. Certainly no Member of this Court would countenance a conviction obtained in violation of the Constitution. Because of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review. I do not believe that this rigorous scrutiny is possible when, as here, procedural rules ultimately abandoned by the State are all that stand between the convicted individual and the chance to prove his claims.

Petitioner offered to call as witnesses the jurors, who, he alleged, would testify not merely to the atmosphere surrounding the trial, but to the actual effect of that atmosphere on their deliberations. The only obstacle to calling those witnesses was the State's failure to provide him with a means of serving compulsory process. In order to agree with petitioner that this failure amounts to a violation of the Due Process Clause, it would not be necessary to hold that compulsory process is constitutionally required in any other civil, or indeed, in any other habeas proceeding. It would instead be sufficient, as it was last Term in *Beck,* to recognize the unique character of the death penalty and of the restraints required by the Constitution before the State may impose it. Granting the assistance of compulsory process to an individual under sentence of death but ready and willing to demon-

strate the unconstitutionality of the manner of his conviction might well be among those restraints.[5] Accordingly, I would grant the petition for certiorari to consider that question.

JUSTICE REHNQUIST, dissenting.

Ordinarily I would have no hestitation joining the majority of my colleagues in denying the petition for certiorari in this case. The questions presented in the petition are of importance only to petitioner himself and therefore are not suitable candidates for the exercise of our discretionary jurisdiction. But in a larger sense, the case raises significant issues about the administration of capital punishment statutes in this country, and reflects the increasing tendency to postpone or delay the enforcement of those constitutionally valid statutes. Because I think stronger measures are called for than the mere denial of certiorari in a case such as this, I would grant the petition for certiorari so that the case can be fully briefed and argued.

A mere recital of the facts of this case illustrates the delay to which I have referred. Petitioner was convicted by a jury in 1973 of murdering six members of a family, after raping and torturing some members of that family. He was sentenced to death under Georgia's capital punishment statute, a statute expressly held constitutional in *Gregg* v. *Georgia*, 428 U. S. 153 (1976). The sentence was affirmed by the Supreme Court of Georgia, *Coleman* v. *State*, 237 Ga. 84, 226 S. E. 2d 911 (1976), and this Court denied the first petition for certiorari. *Coleman* v. *Georgia*, 431 U. S. 909, rehearing denied, 431 U. S. 961 (1977). Petitioner subse-

[5] Because Georgia law now permits service anywhere in the State, it cannot fairly be argued that requiring compulsory process to force witnesses to appear would be contrary to any state policy. It is no longer true, as the State asserts in its brief in opposition, that the 150-mile limit reflects a legislative determination concerning "the interests of sparing undue burdens to witnesses and of establishing realistic boundaries to the jurisdictional reach of the trial courts."

quently sought state collateral relief, which was denied by the state habeas court. The Georgia Supreme Court then denied his application for a writ of probable cause to appeal. Petitioner has now filed his second petition for certiorari in this Court. Because petitioner has had a full opportunity to have his claims considered on direct review by both the Supreme Court of Georgia and this Court and on collateral review by the state courts of Georgia, and because the issues presented are not substantial, it is not surprising that the majority of the Court votes to deny the petition for certiorari.

I dissent not because I believe that petitioner has made any showing in the Georgia courts that he was deprived of any rights secured to him by the United States Constitution, but rather because our mere denial of certiorari will not in all likelihood end the already protracted litigation in this case. If petitioner follows the path of many of his predecessors, he will now turn to a single-judge federal habeas court, alleging anew some or all of the reasons which he urges here for granting the petition for certiorari. If he fails to impress the particular United States District Court in which his habeas petition is filed, he may upon the issuance of a certificate of probable cause appeal to a United States Court of Appeals. And throughout this exhaustive appeal process, any single judge having jurisdiction over the case may of course stay the execution of the penalty pending further review. 28 U. S. C. § 1651. Given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error. See *Estelle* v. *Jurek*, 450 U. S. 1014 (1981) (REHNQUIST, J., dissenting).

It seems to me that we have thus reached a stalemate in the administration of federal constitutional law. Although this Court has determined that capital punishment statutes do not violate the Constitution, *Gregg* v. *Georgia, supra,* and although 30-odd States have enacted such statutes, apparently in the belief that they constitute sound social policy, the ex-

istence of the death penalty in this country is virtually an illusion. Since 1976, hundreds of juries have sentenced hundreds of persons to death, presumably in the belief that the death penalty in those circumstances is warranted, yet virtually nothing happens except endlessly drawn out legal proceedings such as those adverted to above. Of the hundreds of prisoners condemned to die who languish on the various "death rows," few of them appear to face any imminent prospect of their sentence being executed. Indeed, in the five years since *Gregg* v. *Georgia,* there has been only one execution of a defendant who has persisted in his attack upon his sentence. See *Spenkelink* v. *Wainwright,* 442 U. S. 1301 (1979) (REHNQUIST, J., in chambers). My in-chambers opinion in that case describes some of the many avenues of relief which can be pursued by one sentenced to death.

I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system. Perhaps out of a desire to avoid even the possibility of a "Bloody Assizes," this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the Federal Government into arcane niceties which parallel the equity court practices described in Charles Dickens' "Bleak House." Even though we have upheld the constitutionality of capital punishment statutes, I fear that by our recent actions we have mistakenly sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs.

That surely was not the intent of the opinion of JUSTICES STEWART, POWELL, and STEVENS in *Gregg* v. *Georgia.* That opinion recognized that capital punishment is said to serve two principal social purposes—retribution and the deterrence of capital crimes by prospective offenders. It went on to explain:

> "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which

properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. . . .

"In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." 428 U. S., at 186–187.[1]

What troubles me is that this Court, by constantly tinkering with the principles laid down in the five death penalty cases decided in 1976, together with the natural reluctance of state and federal habeas judges to rule against an inmate on death row, has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes. When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system. To be

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[1] That same opinion once again rejected the argument that evolving "standards of decency" demand the end of the death penalty, as if the role of judges, as opposed to democratically elected legislatures, is to "divine" what are "decent" societal values. The opinion made clear that recent developments—such as the enactment of capital punishment statutes by 35 States—had undercut that argument. "Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." 428 U. S., at 179–180.

sure, the importance of procedural protections to an accused should not be minimized, particularly in light of the irreversibility of the death sentence. But it seems to me that when this Court surrounds capital defendants with numerous procedural protections unheard of for other crimes and then pristinely denies a petition for certiorari in a case such as this, it in effect all but prevents the States from imposing a death sentence on a defendant who has been fairly tried by a jury of peers. As Justice Jackson stated in *Stein* v. *New York,* 346 U. S. 156, 197 (1953): "The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law."

The other principal purpose of capital punishment is retribution. The testimony of Lord Justice Denning, then Master of the Rolls of the Court of Appeal in England, before the Royal Commission on Capital Punishment answers those who insist that respect for the "sanctity of life" compels the end of the death sentence for any crime, no matter how heinous. He explained:

> "Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not." Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p. 207 (1950), quoted in *Gregg* v. *Georgia,* 428 U. S., at 184, n. 30.

There can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution. As

the opinion in *Gregg* stated, " '[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve" then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.' " *Id.*, at 183, quoting *Furman* v. *Georgia*, 408 U. S. 238, 308 (1972) (STEWART, J., concurring). San Francisco experienced vigilante justice during the Gold Rush in the middle part of the last century; the mining towns of Montana experienced it a short time later; and it is still with us as a result of the series of unsolved slayings of Negro children in Atlanta.[2]

In thinking about capital punishment, it is important to remember that the preservation of some degree of liberty for all demands that government restrain the few who kill law-abiding members of the community. As Judge Learned Hand long ago recognized:

> "And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the

[2] A recent article in the Washington Star, Mar. 21, 1981, p. 1, cols. 3–4, illustrates this growing problem. It reads:

"ATLANTA (AP)—Two gun-wielding men were arrested yesterday at the start of a housing project's self-defense patrol to protect youngsters against Atlanta's child killers.

"Younger members of the patrol, who carried baseball bats, were not stopped but those carrying weapons were questioned by police. The two arrested were charged with possession of deadly weapons at a public gathering. . . .

"Israel Green, who heads the project's tenants' association, called for national support of the patrol's right to carry arms.

" 'We cannot stop them (killers) by consulting psychics, by having seances, by prayer vigils or by lighting little candles or forms of distracting activity that is not directly connected to the problems we face,' Green said in a statement. 'We have to face these killers in the real world.' "

possession of only a savage few; as we have learned to our sorrow." The Spirit of Liberty 190 (3d ed. 1960).

James Madison made the same point in this now famous passage from Federalist Paper No. 51:

> "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: *you must first enable the government to control the governed;* and in the next place oblige it to control itself." The Federalist Papers 322 (1961). (Emphasis supplied.)

I believe we have in our judicial decisions focused so much on controlling the government that we have lost sight of the equally important objective of enabling the government to control the governed. When our systems of administering criminal justice cannot provide security to our people in the streets or in their homes, we are rapidly approaching the state of savagery which Learned Hand describes. In Atlanta, we cannot protect our small children at play. In the Nation's Capital, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment.[3]

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[3] When the issue of capital punishment arises, one is reminded of Judge Parker, a well-known judge who sat in the Western District of Arkansas for more than 20 years, and had to deal with the outlaws of his time and place. He had earned the reputation of a "hanging judge." Of the several biographies written of him, J. Gregory & R. Strictland, Hell on the Border 28 (1971) makes the following statement:

"It did not seem to Judge Parker to be an act of cruelty to sentence such blood-thirsty men to die. 'I never hanged a man,' he said when lying on his death bed, 'I never hanged a man. It is the law. The good ladies who carry flowers and jellies to criminals mean well. There is no

In light of the foregoing, I do not believe it is a responsible exercise of our certiorari jurisdiction to blithely deny petitions for certiorari in cases where petitioners have been sentenced to death and present for review claims which seem on their face to have little merit, and which have been extensively considered by state and federal courts on both direct and collateral review. The 5-year history of death sentences, as opposed to execution of those sentences, is a matter with respect to which no Member of this Court can be unaware. If capital punishment is indeed constitutional when imposed for the taking of the life of another human being, we cannot responsibly discharge our duty by pristinely denying a petition such as this, realizing full well that our action will simply further protract the litigation.

Accordingly, I believe that the petition should be granted in order that this Court may deal with all of petitioner's claims on their merits. If after full briefing and argument the Court decides to affirm, the provisions of 28 U. S. C. § 2244 (c) would come into operation. That section provides in pertinent part:

> "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein . . . ."

See *Neil* v. *Biggers,* 409 U. S. 188 (1972).

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doubt of that, but what mistaken goodness! Back of the sentimentality are the motives of sincere pity and charity, sadly misdirected. They see the convict alone, perhaps chained in his cell; they forget the crime he perpetrated and the family he made husbandless and fatherless by his assassin work.' "

Thus the jurisdiction of the federal courts over petitioner's sentence of death would be at an end, and unless the appropriate state officials commuted petitioner's sentence, it would presumably be carried out. In any event, the decision would then be in the hands of the State which had initially imposed the death penalty, not in the hands of the federal courts.

No. 80–6281. SCHILLER ET AL. *v.* UNITED STATES. Ct. App. D. C. Motion of James R. Walker et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 424 A. 2d 51.

No. 80–6299. PICKENS *v.* ARKANSAS. Sup. Ct. Ark.; and No. 80–6369. PEEK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 80–6369, 395 So. 2d 492.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–5932. DOE ET AL. *v.* DELAWARE, 450 U. S. 382;

No. 80–485. IMMIGRATION AND NATURALIZATION SERVICE *v.* JONG HA WANG ET UX., 450 U. S. 139; and

No. 80–6061. MACARTHUR *v.* PHILIPPINE AIR LINES, INC., ET AL., 450 U. S. 985. Petitions for rehearing denied.

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Appeals Dismissed

No. 80–1407. WINTERS ET AL. *v.* CITY OF KLAMATH FALLS. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 289 Ore. 747, 619 P. 2d 217.

No. 80–6243. HELLER ET AL. *v.* HANCOCK COUNTY CHILDREN SERVICES BOARD ET AL. Appeal from Sup Ct. Ohio dismissed for want of substantial federal question.

No. 80–6277. HARRIS *v.* FUERST. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 64 Ohio St. 2d 130, 413 N. E. 2d 826.

No. 80–6341. THOMPSON *v.* KENTUCKY. Appeal from Cir. Ct. Ky., Kenton County, 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. 78–1851. HARRIS *v.* H. SCHULDT REEDEREI, 444 U. S. 839. Petition for rehearing granted and order of October 1, 1979, denying petition for writ of certiorari is vacated. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 596 F. 2d 92.

No. 79–813. AMERICAN COMMERCIAL LINES, INC. *v.* GRIFFITH ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 610 F. 2d 116.

No. 79–1625. SIERRA CLUB ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California* v. *Sierra Club, ante,* p. 287. Reported below: 610 F. 2d 581.

No. 80–26. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. *v.* FLOWERS ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United Parcel Service, Inc.* v. *Mitchell, ante,* p. 56. Reported below: 622 F. 2d 573.

No. 80–245. OCEANIC NAVIGATION CORP. ET AL. *v.* SARAUW. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 622 F. 2d 1168.

No. 80–455. FUTO, ADMINISTRATRIX *v.* LYKES BROTHERS STEAMSHIP CO., INC., ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 619 F. 2d 81.

No. 80–1643. SILVER BULK SHIPPING, LTD. *v.* MCCARTHY. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 639 F. 2d 775.

No. 80–6017. PAYTON *v.* HARRIS. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated, and case remanded for further consideration in light of *Cuyler* v. *Adams,* 449 U. S. 433 (1981). Reported below: 636 F. 2d 1203.

Miscellaneous Orders

No. A–856 (80–1728). YEOHAM ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–870. PREMACHANDRA *v.* MITTS, ACTING ASSOCIATE DEPUTY CHIEF MEDICAL DIRECTOR, VETERANS ADMINISTRATION, DEPARTMENT OF MEDICINE AND SURGERY, ET AL. Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–198. IN RE DISBARMENT OF FOGEL. Disbarment entered. [For earlier order herein, see 449 U. S. 979.]

No. D–200. IN RE DISBARMENT OF MCMAHON. Disbarment entered. [For earlier order herein, see 449 U. S. 1006.]

No. D–203. In re Disbarment of Henderson. Disbarment entered. [For earlier order herein, see 449 U. S. 978.]

No. D–205. In re Disbarment of Silaski. Disbarment entered. [For earlier order herein, see 449 U. S. 979.]

No. D–208. In re Disbarment of Noren. Disbarment entered. [For earlier order herein, see 449 U. S. 990.]

No. D–213. In re Disbarment of Halverson. Disbarment entered. [For earlier order herein, see 449 U. S. 1007.]

No. D–234. In re Disbarment of Fontaine. It is ordered that Ernest H. Fontaine III of Houston, Tex., 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–235. In re Disbarment of Williams. It is ordered that Michael W. Williams, of Corpus Christi, Tex., 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–236. In re Disbarment of Rosenblum. It is ordered that Henry Rosenblum, of Houston, Tex., 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. 79–404. United States *v.* Cortez et al., 449 U. S. 411. Motion for appointment of counsel granted, and it is ordered that S. Jeffrey Minker, Esquire, of Tucson, Ariz., be appointed to serve as counsel for respondent, Jesus Cortez, *nunc pro tunc.*

No. 77, Orig. TENNESSEE *v.* ARKANSAS. Report of the 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 order herein, see, *e. g.*, 439 U. S. 1061.]

No. 80–757. NEW YORK MERCANTILE EXCHANGE ET AL. *v.* LEIST ET AL.;

No. 80–895. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. *v.* LEIST ET AL.; and

No. 80–936. HEINOLD COMMODITIES, INC., ET AL. *v.* LEIST ET AL. C. A. 2d Cir. [Certiorari granted, 450 U. S. 910.] Motion of petitioners in No. 80–757 to divide oral argument with petitioners in Nos. 80–895 and 80–936, and motion of petitioners in Nos. 80–895 and 80–936 to divide oral argument with petitioners in No. 80–757, granted. Motions of petitioners in Nos. 80–895 and 80–936 for designation of counsel to present oral argument denied.

No. 80–1499. COMMISSIONER OF INTERNAL REVENUE *v.* DELTA METALFORMING CO., INC. C. A. 5th Cir. Motion of respondent to consolidate this case with No. 80–1251, *United States* v. *Vogel Fertilizer Co.* [certiorari granted, 450 U. S. 994], denied.

Probable Jurisdiction Noted

No. 80–1188. EDGAR *v.* MITE CORP. ET AL. Appeal from C. A. 7th Cir. Probable jurisdiction noted. Reported below: 633 F. 2d 486.

No. 80–1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 628 F. 2d 448.

Certiorari Granted

No. 80–1074. VELDE, ADMINISTRATOR, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ET AL. *v.* NATIONAL BLACK POLICE ASSN., INC., ET AL. C. A. D. C. Cir. Certiorari granted. JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 203 U. S. App. D. C. 202, 631 F. 2d 784.

No. 80–1345. KAISER STEEL CORP. *v.* MULLINS ET AL. C. A. D. C. Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 206 U. S. App. D. C. 334, 642 F. 2d 1302.

Certiorari Denied. (See also No. 80–6341, *supra.*)

No. 79–706. MCCULLEY, ADMINISTRATOR *v.* MITSUI O. S. K. LINES, LTD., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 596 F. 2d 746.

No. 79–1240. STOCKSTILL ET AL. *v.* GYPSUM TRANSPORTATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1112.

No. 80–94. COMPANIA MARITIME NAVEGACION NETUMAR, S. A. *v.* IRIZARRY. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 80–503. KING, CHIEF, FAIRFAX COUNTY POLICE DEPARTMENT, ET AL. *v.* WALLACE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 1157.

No. 80–642. RAYMOND, ADMINISTRATRIX *v.* I/S CARIBIA. C. A. 1st Cir. Certiorari denied. Reported below: 626 F. 2d 203.

No. 80–745. ORIENTAL STEAMSHIP CORP. *v.* MCMICHAEL. C. A. 9th Cir. Certiorari denied.

No. 80–890. LIOTTA *v.* NATIONAL FORGE CO.; and
No. 80–1115. NATIONAL FORGE CO. *v.* LIOTTA. C. A. 3d Cir. Certiorari denied. Reported below: 629 F. 2d 903.

No. 80–1101. KELCE *v.* U. S. FINANCIAL INC. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 515.

No. 80–1261. GRUBB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–1332. BERKOWITZ ET AL. *v.* SELZER; and
No. 80–1335. SELZER *v.* BERKOWITZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 809.

No. 80–1344. VIEGAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 639 F. 2d 42.

No. 80–1376. CORROS, ADMINISTRATRIX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 630 F. 2d 224.

No. 80–1385. INDUSTRIAL CONTRACTORS, INC., ET AL. *v.* CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 215. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1223.

No. 80–1402. PRINCIPE ET AL. *v.* MCDONALD'S CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 303.

No. 80–1416. ROGERS ET AL. *v.* GORDON, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 633 F. 2d 739.

No. 80–1480. ROWE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 799.

No. 80–1504. SUMMITT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 301 N. C. 591, 273 S. E. 2d 425.

No. 80–1516. LoBue *v.* Nevada ex rel. Department of Highways. Sup. Ct. Nev. Certiorari denied. Reported below: 96 Nev. 505, 611 P. 2d 1077.

No. 80–1519. Barber, Commissioner, Department of Agriculture and Markets of New York, et al. *v.* International Society for Krishna Consciousness, Inc., et al. C. A. 2d Cir. Certiorari denied.

No. 80–1520. Sangster *v.* United Air Lines, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 864.

No. 80–1522. Duemig *v.* Colorado. Sup. Ct. Colo. Certiorari denied. Reported below: 620 P. 2d 240.

No. 80–1526. D'Arc *v.* D'Arc. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 175 N. J. Super. 598, 421 A. 2d 602.

No. 80–1530. Boise Baseball Club, Inc. *v.* Kuhn et al. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1226.

No. 80–1532. Entrekin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 597.

No. 80–1533. Barham *v.* Welch et al. C. A. 8th Cir. Certiorari denied. Reported below: 635 F. 2d 1322.

No. 80–1535. Morgan et al. *v.* Global Communications, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1203.

No. 80–1537. Pittston Stevedoring Corp. *v.* Doca et al. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 30.

No. 80–1546. Acquisto *v.* Lee County Board of Public Instruction et al. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 581.

No. 80–1548. ESTY ET AL. *v.* O'NEAL, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. Reported below: 637 F. 2d 846.

No. 80–1605. DELELLO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 80–1645. DEPALMA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 53.

No. 80–1649. PAYNE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 643.

No. 80–1657. FLETCHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 637 F. 2d 227.

No. 80–1660. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 689.

No. 80–1671. HAZELIP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 790.

No. 80–5918. LEACH *v.* GRECO, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1202.

No. 80–6093. TOURTILLOTT *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 835, 618 P. 2d 423.

No. 80–6102. BARRERA *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 99 Wis. 2d 269, 298 N. W. 2d 820.

No. 80–6112. WILLIAMS *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1220.

No. 80–6145. BOWDEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–6240. COBB *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 80–6301. JOHN *v.* ATTORNEY GENERAL OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1208.

No. 80–6314. WRIGHT, AKA THOMPSON *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 80–6319. KRAIMER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 99 Wis. 2d 306, 298 N. W. 2d 568.

No. 80–6320. JACKSON *v.* HOWARD, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 442.

No. 80–6325. CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6326. SMITH *v.* FAIRMAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 80–6327. PIERCE ET AL. *v.* YOCHUM ET AL. Sup. Ct. Ind. Certiorari denied.

No. 80–6330. SEGARRA *v.* SEA-LAND SERVICE OF PUERTO RICO, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 636 F. 2d 1199.

No. 80–6331. CUNDRIFF *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 382 Mass. 137, 415 N. E. 2d 172.

No. 80–6333. KOLINSKY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 182 Conn. 533, 438 A. 2d 762.

No. 80–6335. TURNER *v.* MOORE, SHERIFF, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6337. HUFFMAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 394 So. 2d 278.

No. 80–6338. RYAN *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 782.

No. 80–6339. PORTER *v.* MILLER, DETENTION CENTER SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 625.

No. 80–6340. BAKER ET AL. *v.* METCALFE, JUDGE. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 1198.

No. 80–6343. WARD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 493 Pa. 115, 425 A. 2d 401.

No. 80–6344. PAYNE *v.* ET & WNC TRANSPORTATION CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 452.

No. 80–6347. MILLER *v.* TRW, INC., CREDIT DATA DIVISION. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 789.

No. 80–6349. ANDERSON *v.* MORROW ET AL. Sup. Ct. Colo. Certiorari denied.

No. 80–6350. JOHN *v.* FENTON, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 443.

No. 80–6351. LITTLEFIELD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 613 S. W. 2d 138.

No. 80–6353. ASHLOCK *v.* SHIELDS. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 876.

No. 80–6357. HUGHES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–6360. MOUNT *v.* CHASE BANK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1203.

No. 80–6361. BAKER *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 620.

No. 80–6371. MATHEWS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–6427. OWENS *v.* MCCALL, CHAIRMAN, U. S. PAROLE COMMISSION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 443.

No. 80–6443. VALLIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 174.

No. 80–6444. CRIBBS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6452. GARCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 75.

No. 80–6453. HILGERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 72.

No. 80–6455. HUBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 630.

No. 79–624. ERNST RUSS STEAMSHIP CO. *v.* MATTHEWS. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 603 F. 2d 676.

No. 80–1118. STANCIL ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant the petition and reverse the convictions. Reported below: 155 Ga. App. 731, 272 S. E. 2d 511.

No. 80–1257. DONALD SCHRIVER, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Motion of Center on National Labor Policy for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 204 U. S. App. D. C. 4, 635 F. 2d 859.

No. 80–1267. GRAVES TRUCK LINE, INC. *v.* APPLETON ELECTRIC CO. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 635 F. 2d 603.

No. 80–1683. GENERAL ELECTRIC CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 206 U. S. App. D. C. 253, 642 F. 2d 1221.

No. 80–1449. FLORIDA *v.* HARRISON. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN would grant certiorari. Reported below: 389 So. 2d 293.

No. 80–6231. DICK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 697, 273 S. E. 2d 124.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Granted. (See No. 78–1851, *supra.*)

Rehearing Denied

No. 80–1085. UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL., 450 U. S. 996. Petition for rehearing denied.

No. 80–6090. STEIN *v.* FRANK ET UX., 450 U. S. 990;

No. 80–6101. MABRY *v.* CENLA FINANCE, INC., 450 U. S. 1002; and

No. 80–6179. DORTY *v.* HAYES ET AL., 450 U. S. 1034. Petitions for rehearing denied.

No. 80–5577. WILEY *v.* KANSAS, 449 U. S. 1087. Motion for leave to file petition for rehearing denied.

MAY 11, 1981

Dismissal Under Rule 53

No. 80–6429. DANIELS ET AL. *v.* BOONE ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 639 F. 2d 779.

MAY 18, 1981

Appeals Dismissed

No. 80–1034. WARMUTH *v.* JONES. Appeal from Sup. Ct. App. W. Va. dismissed, it appearing that the judgment below rests upon independent and adequate state grounds. Reported below: —— W. Va. ——, 272 S. E. 2d 446.

No. 80–1073. MARCAL *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 388 So. 2d 656.

No. 80–6232. BEACHBOARD *v.* COLUMBIA UNIVERSITY. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 51 N. Y. 2d 768, 411 N. E. 2d 801.

No. 80–1291. HADWEN, INC. *v.* VERMONT DEPARTMENT OF TAXES. Appeal from Sup. Ct. Vt. dismissed for want of substantial federal question. Reported below: 139 Vt. 37, 422 A. 2d 255.

No. 80–1313. LAMPKIN-ASAM *v.* FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSN. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 392 So. 2d 1371.

No. 80–1611. SHILLING *v.* STATE COMMISSION ON JUDICIAL CONDUCT. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 51 N. Y. 2d 397, 415 N. E. 2d 900.

No. 80–1628. WALL *v.* DONOVAN. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Reported below: 113 Cal. App. 3d 122, 169 Cal. Rptr. 644.

Certiorari Granted—Vacated and Remanded

No. 79–538. MAMMOTH BULK CARRIERS, LTD. *v.* BACHTEL ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156. Reported below: 605 F. 2d 438.

No. 79–850. TWIN HARBORS STEVEDORING CO. *v.* BACHTEL ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Scindia Steam Navigation Co.* v. *De Los Santos, ante,* p. 156, and *Bloomer* v. *Liberty Mutual Ins. Co.,* 445 U. S. 74 (1980). Reported below: 605 F. 2d 438.

Miscellaneous Orders

No. A–887 (80–6581). MCDONALD *v.* DRAPER, JUDGE. Ct. App. Tenn. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–202. IN RE DISBARMENT OF EASLER. Disbarment entered. [For earlier order herein, see 449 U. S. 989.]

No. D–214. IN RE DISBARMENT OF TOOMEY. Disbarment entered. [For earlier order herein, see 449 U. S. 1106.]

No. D–217. IN RE DISBARMENT OF DOUGLAS. Disbarment entered. [For earlier order herein, see 449 U. S. 1107.]

No. D–218. IN RE DISBARMENT OF KAUFMAN. Disbarment entered. [For earlier order herein, see 449 U. S. 1120.]

No. D–220. IN RE DISBARMENT OF OSTROFF. Disbarment entered. [For earlier order herein, see 450 U. S. 976.]

No. D–237. IN RE DISBARMENT OF CONNAGHAN. It is ordered that John D. Connaghan, of St. Louis, Mo., 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–238. IN RE DISBARMENT OF NATALE. It is ordered that David J. Natale, of Media, Pa., 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. 80–608. UNITED STATES POSTAL SERVICE *v.* COUNCIL OF GREENBURGH CIVIC ASSNS. ET AL. D. C. S. D. N. Y. [Probable jurisdiction noted, 449 U. S. 1076.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 80–689. WIDMAR ET AL. *v.* VINCENT ET AL. C. A. 8th Cir. [Certiorari granted, 450 U. S. 909.] Motion of Baptist Joint Committee on Public Affairs for leave to file a brief as *amicus curiae* granted.

No. 80–848. PIPER AIRCRAFT CO. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL.; and

No. 80–883. HARTZELL PROPELLER, INC. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL. C. A. 3d Cir. [Certiorari granted, 450 U. S. 909.] Motion of Boeing Co. et al. for leave to file a brief as *amici curiae* granted.

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.;

No. 78–1549. TRANS WORLD AIRLINES, INC. *v.* ZIPES ET AL.; and

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 450 U. S. 979.] TWA's motion to limit review in No. 80–951 to the order of the District Court entitled "Order Awarding Seniority," and thereafter to dismiss Nos. 78–1545 and 78–1549 as moot, is denied. Motion filed by petitioners in No. 78–1545 (the "plaintiff class"), requesting that the Court (1) grant TWA's motion; or (2) order TWA and the plaintiff class to stipulate to dismissal of the writs in Nos. 78–1545 and 78–1549; or (3) dismiss Nos. 78–1545 and 78–1549 as moot, is denied. No. 78–1549 is removed from the argument calendar, and further consideration of the case is deferred. The writ of certiorari in No. 80–951 is limited to Questions 1 and 2 presented by the petition and is otherwise dismissed as improvidently granted. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 80–939. FEDERAL ELECTION COMMISSION *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; and

No. 80–1129. NATIONAL REPUBLICAN SENATORIAL COMMITTEE *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE ET AL. C. A. D. C. Cir. [Certiorari granted, 450 U. S. 964.] Motion of National Republican Senatorial Committee to be designated to argue on behalf of all petitioners denied. Alternative request for divided argument and motion of Federal Election Commission for divided argument granted. Federal Election Commission allotted 20 minutes for oral argument, and National Republican Senatorial Committee allotted 10 minutes for oral argument.

No. 80–1556. CORY, CONTROLLER OF CALIFORNIA, ET AL. *v.* WHITE, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari granted.

No. 80–5727. EDDINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 450 U. S. 1040.] Motion for appointment of counsel granted, and it is ordered that Jay C. Baker, Esquire, of Tulsa, Okla., be appointed to serve as counsel for petitioner in this case.

No. 80–6527. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

No. 80–6385. IN RE JONES. Petition for writ of mandamus denied.

No. 80–6386. IN RE JONES. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 80–1208. NEW ENGLAND POWER CO. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL.;

No. 80–1471. MASSACHUSETTS ET AL. *v.* NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL ET AL.; and

No. 80–1610. ROBERTS, ATTORNEY GENERAL OF RHODE ISLAND, ET AL. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL. Appeals from Sup. Ct. N. H. Motions of Edison Electric Institute and New England Power Tool Executive Committee for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 120 N. H. 866, 424 A. 2d 807.

No. 80–1577. CITY OF MESQUITE *v.* ALADDIN'S CASTLE, INC. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 630 F. 2d 1029.

No. 80–1576. PRINCETON UNIVERSITY ET AL. *v.* SCHMID. Appeal from Sup. Ct. N. J. Further consideration of question of jurisdiction postponed to hearing of case on the merits. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 84 N. J. 535, 423 A. 2d 615.

Certiorari Granted

No. 80–1348. FLORIDA DEPARTMENT OF STATE *v.* TREASURE SALVORS, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 621 F. 2d 1340.

No. 80–1496. UNDERWRITERS NATIONAL ASSURANCE CO. *v.* NORTH CAROLINA LIFE & ACCIDENT & HEALTH INSURANCE GUARANTY ASSN. ET AL. Ct. App. N. C. Certiorari granted. Reported below: 48 N. C. App. 508, 269 S. E. 2d 688.

No. 80–1594. UNITED STATES *v.* ERIKA, INC. Ct. Cl. Certiorari granted. Reported below: 225 Ct. Cl. ——, 634 F. 2d 580, and 225 Ct. Cl. ——, 647 F. 2d 129.

No. 80–1429. YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. *v.* ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of American Psychiatric Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 644 F. 2d 147.

No. 80–5887. WHITE *v.* NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 629 F. 2d 697.

Certiorari Denied. (See also Nos. 80–1073 and 80–6232, *supra.*)

No. 79–571. ILLINOIS *v.* CITY OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 151.

No. 80–56. LORAIN, A DIVISION OF KOEHRING CO. *v.* UNITED STEELWORKERS OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 919.

No. 80–870. PERRY v. ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 81 Ill. App. 3d 422, 401 N. E. 2d 1263.

No. 80–985. PUTNAM FABRICATING CO. *v.* NULL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 311.

No. 80–1167. MCCORD *v.* BAILEY ET AL.; and

No. 80–1168. BAILEY ET AL. *v.* MCCORD. C. A. D. C. Cir. Certiorari denied. Reported below: 204 U. S. App. D. C. 334, 636 F. 2d 606.

No. 80–1233. SYUFY ENTERPRISES *v.* NORTHERN CALIFORNIA STATE ASSOCIATION OF I. A. T. S. E. LOCALS, LOCAL UNION No. 241. C. A. 9th Cir. Certiorari denied. Reported below: 631 F. 2d 124.

No. 80–1246. MAX FACTOR & CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 197.

No. 80–1252. PUERTO RICO *v.* REGAN, SECRETARY OF THE TREASURY;

No. 80–1253. VIRGIN ISLANDS *v.* REGAN, SECRETARY OF THE TREASURY (TWO CASES); and

No. 80–1647. REGAN, SECRETARY OF THE TREASURY *v.* PUERTO RICO; AND REGAN, SECRETARY OF THE TREASURY *v.* VIRGIN ISLANDS. C. A. D. C. Cir. Certiorari denied. Reported below: Nos. 80–1252, 80–1253 (first case), and 80–1647 (first case), 206 U. S. App. D. C. 217, 642 F. 2d 622; Nos. 80–1253 (second case) and 80–1647 (second case), 206 U. S. App. D. C. 236, 642 F. 2d 641.

No. 80–1256. NESBITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 433.

No. 80–1274. CONNOR *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1089.

No. 80–1281. SEA-LAND SERVICE, INC. *v.* FEDERAL MARITIME COMMISSION ET AL.; and

No. 80–1346. TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 27, 650 F. 2d 1235.

No. 80–1302. SHAFFER *v.* COOK, JUDGE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1259.

No. 80–1308. OCANAS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 353.

No. 80–1333. PROCHASKA *v.* MARCOUX. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 2d 848.

No. 80–1341. IN RE SUTTON. C. A. 2d Cir. Certiorari denied.

No. 80–1369. SOUTH DAKOTA *v.* LEWIS, SECRETARY OF TRANSPORTATION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 635 F. 2d 698.

No. 80–1384. SHINDELAR *v.* HOLDEMAN ET AL. C. C. P. A. Certiorari denied. Reported below: 628 F. 2d 1337.

No. 80–1432. KENNEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–1452. SAHARA-TAHOE CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 553.

No. 80–1461. CLEAR PINE MOULDINGS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 721.

No. 80–1477. CRUZ *v.* KNIGHT, DIRECTOR, UNITED STATES SECRET SERVICE. C. A. D. C. Cir. Certiorari denied.

No. 80–1500. CLIPPER *v.* STARKEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 621.

No. 80–1503. DICKEY FARMS, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 1176.

No. 80–1506. ARIZONA FUELS CORP. ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 638 F. 2d 239.

No. 80–1515. CUARON *v.* ESTRADA; DAWSON ET AL. *v.* HOLGUIN ET AL.; and CUARON *v.* MECHEM, U. S. DISTRICT JUDGE. C. A. 10th Cir. Certiorari denied.

No. 80–1540. PARTIDO NUEVO PROGRESISTA *v.* PEREZ, ADMINISTRATOR, PUERTO RICO ELECTIONS COMMISSION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 639 F. 2d 825.

No. 80–1551. GODERRE *v.* CITY OF PEEKSKILL ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 52 N. Y. 2d 754, 417 N. E. 2d 565.

No. 80–1552. WILLIAMS *v.* BOORSTIN, LIBRARIAN OF CONGRESS. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 345, 663 F. 2d 109.

No. 80–1564. FORT PITT STEEL CASTING DIVISION, CONVAL-PENN, INC. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 635 F. 2d 1071.

No. 80–1566. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* EWALD. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 884.

No. 80–1567. MADHANI *v.* MT. VERNON AVIATION. Ct. App. Mich. Certiorari denied.

No. 80–1568. PADUCAH ASSOCIATES, LTD. *v.* INDIANA INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1219.

No. 80–1570. SMITH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 790.

No. 80–1571. EASTERN ASSOCIATED COAL CORP. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 632 F. 2d 1068.

No. 80–1572. JACKSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 391 So. 2d 637.

No. 80–1574. ROGERS ET UX. *v.* SARRETT BUILDERS & REALTY, INC. Sup. Ct. Miss. Certiorari denied. Reported below: 391 So. 2d 654.

No. 80–1578. CARPENTER *v.* CONTINENTAL TRAILWAYS. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 578.

No. 80–1580. LINCOLN UNIVERSITY ET AL. *v.* TROTMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 635 F. 2d 216.

No. 80–1581. MATTIS ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1227.

No. 80–1584. CRIST *v.* CRIST. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1226.

No. 80–1587. SAFEWAY STORES, INC. *v.* CRESPIN. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1273.

No. 80–1590. LURIE ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 786.

No. 80–1593. KURLAND *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 3d 376, 618 P. 2d 213.

No. 80–1596. MOREHOUSE PARISH SCHOOL ET AL. *v.* PEGUES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1279.

No. 80–1603. BERARD *v.* GENERAL MOTORS CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 657 F. 2d 261.

No. 80–1612. HAWKINS *v.* HOLIDAY INNS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 634 F. 2d 342.

No. 80–1618. YOUNGSTOWN SHEET & TUBE CO., DBA FIBERCAST CO., ET AL. *v.* PIERCE ASSOCIATES, INC. C. A. D. C. Cir. Certiorari denied.

No. 80–1620. CITY OF PHILADELPHIA *v.* GILFILLAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 2d 924.

No. 80–1623. BRAGER & CO., INC. *v.* LEUMI SECURITIES CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 559.

No. 80–1630. CELOTEX *v.* UNITED STATES GYPSUM CO. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80–1634. NEW YORK *v.* ONOFRE; and

No. 80–1710. NEW YORK *v.* PEOPLES ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 476, 415 N. E. 2d 936.

No. 80–1639. MILLER, GUARDIAN *v.* BOCK LAUNDRY MACHINE CO. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 2d 265, 416 N. E. 2d 620.

No. 80–1651. LEONARD ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 163.

No. 80–1654. HUMPHRIES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1172.

No. 80–1682. BROWNING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 630 F. 2d 694.

No. 80–1718. SARMIENTO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–1732. GUST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 265.

No. 80–1756. VLCEK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 637 F. 2d 227.

No. 80–5795. ISAACS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 26 Wash. App. 1006.

No. 80–5982. COLEMAN *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–6096. WALLACE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 738, 273 S. E. 2d 143.

No. 80–6109. BROWN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxxi.

No. 80–6125. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 461.

No. 80–6136. SEMENAK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 98 Wis. 2d 749, 297 N. W. 2d 515.

No. 80–6188. FITZHARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 416.

No. 80–6194. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 526.

No. 80–6202. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 453.

No. 80–6210. BLOCKER *v.* HERMAN ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 409 Mich. 942.

No. 80–6217. WADE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 390 So. 2d 1309.

No. 80–6358. WEBER *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 166.

No. 80–6359. CIUMMEI *v.* AMARAL, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 636 F. 2d 1199.

No. 80–6362. JOHNSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 156 Ga. App. 411, 274 S. E. 2d 778.

No. 80–6363. PHILLIPS *v.* EVENING STAR NEWSPAPER CO. Ct. App. D. C. Certiorari denied. Reported below: 424 A. 2d 78.

No. 80–6365. READ *v.* KUBINSKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1210.

No. 80–6373. JACKSON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 624 P. 2d 751.

No. 80–6381. WILSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 87 Ill. App. 3d 544, 408 N. E. 2d 1209.

No. 80–6383. DUNHAM *v.* SHIELDS, CHAIRMAN, VIRGINIA PAROLE BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 622.

No. 80–6388. HAMMOND *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–6392. MCCRARY *v.* MINER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 561.

No. 80–6393. BRISBON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 513, 411 N. E. 2d 956.

No. 80–6394. WILLIAMS *v.* MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 640 F. 2d 140.

No. 80–6399. LYNCH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 894, 435 N. Y. S. 2d 617.

No. 80–6400. BONNETT *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 640 F. 2d 125.

No. 80–6405. DE ANDA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 114 Cal. App. 3d 480, 170 Cal. Rptr. 830.

No. 80–6409. ROBINSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 88 Ill. App. 3d 96, 410 N. E. 2d 331.

No. 80–6410. FREE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 392 So. 2d 857.

No. 80–6411. FRIEDMAN *v.* FAIRHILL HOSPITAL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6412. MARTIN *v.* FAUVER, CORRECTION COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6414. FIELDS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxxxviii.

No. 80–6415. SPINELLI *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 311.

No. 80–6416. OSBORNE *v.* DISTRICT OF COLUMBIA PAROLE BOARD. Ct. App. D. C. Certiorari denied.

No. 80–6417. HURST *v.* HARVEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 80–6421. MCFARLAND *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 74.

No. 80–6422. COLLINS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 415 N. E. 2d 46.

No. 80–6423. GLENN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 48 N. C. App. 742, 271 S. E. 2d 107.

No. 80–6425. PHILLIPS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 640 F. 2d 87.

No. 80–6426. ODES *v.* NOWLAND, ACTING DIRECTOR, DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 80–6436. HOWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 80–6440. COOPER *v.* COOPER. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 389 So. 2d 281.

No. 80–6446. BLAND *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 390 So. 2d 1098.

No. 80–6454. MARKLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 174.

No. 80–6465. HARRELL *v.* HOPKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 885.

No. 80–6467. CHEUNG HON LAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 1156.

No. 80–6481. HERMANN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 167.

No. 80–6484. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 1352.

No. 80–6487. BOSQUE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 78 App. Div. 2d 986, 433 N. Y. S. 2d 658.

No. 80–6491. THOMPSON *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 167.

No. 80–6501. MANLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 58.

No. 80–6503. ROBINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 981.

No. 80–6509. NEVITT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 55.

No. 80–6518. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 173.

No. 80–6522. HART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 640 F. 2d 856.

No. 80–6528. WINCHELL *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 60.

No. 80–6532. SANTOVENIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 383.

No. 80–6537. MCCUE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 643 F. 2d 394.

No. 80–6543. BEACHEM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 47 Md. App. 737.

No. 80–6549. DICKINSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 219.

No. 80–6550. BAZAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 363.

No. 80–6553. HUDSON *v.* COMMERCE CLEARING HOUSE, INC. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 161.

No. 80–6555. CARCIONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 858.

No. 80–6558. BOWERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 320.

No. 80–6562. DOMINGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 457.

No. 80–6563. FOUNTAIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 642 F. 2d 1083.

No. 80–6566. BURROUGHS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 56.

No. 80–254. CALIFORNIA *v.* SMITH. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 103 Cal. App. 3d 840, 163 Cal. Rptr. 322.

No. 80–1027. MARSHALL ET AL. *v.* DOE. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST would grant the petition and reverse the judgment for the reasons stated by JUSTICE REHNQUIST in his dissent from the denial of certiorari in *Alioto* v. *Williams,* 450 U. S. 1012 (1981). Reported below: 622 F. 2d 118.

No. 80–1160. HOLLYWOOD MARINE, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner Hollywood Marine, Inc., for leave to submit the Rule 28.1 listing under seal denied. Certiorari denied. Reported below: 625 F. 2d 524.

JUSTICE REHNQUIST, dissenting.

Petitioner Hollywood Marine is engaged in the business of transporting petroleum cargo by barge. Its barges are towed by tugboat operators who are in no way associated with petitioner except by reason of the contract between the two for services to be performed by the tugboat operator. Under such contract, the tugboat operator exercises complete control over the method and manner of performing the towing operations, including all decisions to be made as to questions of navigation.

On August 5, 1976, a barge owned by petitioner discharged over 2,000 gallons of oil into the Intracoastal Waterway in Texas. The spill occurred as a result of damage sustained by the barge while it was under the control of a tugboat operator. The spill was cleaned up by the Coast Guard at a total cost to the United States of $61,816.85. Pursuant to §§ 311 (f)(1), (n), of the Federal Water Pollution Control Act, as added, 86 Stat. 866 and 869, 33 U. S. C. §§ 1321 (f)(1), (n), the United States brought this suit to recover from petitioner the costs incurred during the cleanup. Under § 1321 (f)(1), the owner or operator of a discharging vessel is liable for the costs of cleaning up an oil spill except

> "where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) *an act or omission of a third party without regard to whether any such act or omission was or was not negligent,* or any combination of the foregoing clauses . . . ." (Emphasis added.)

Petitioner's defense to the Government's action was that

the oil spill was caused by an act or omission of its independent contractor, the tugboat operator, and that the tugboat operator was a "third party" under § 1321 (f)(1). The District Court sustained the defense, but the United States Court of Appeals for the Fifth Circuit reversed. 625 F. 2d 524 (1980). The Court of Appeals relied on its earlier decision in *United States* v. *LeBeouf Brothers Towing Co.*, 621 F. 2d 787, rehearing denied, 629 F. 2d 1350 (1980). In *LeBeouf*, the Court of Appeals concluded that the third-party defense contained in § 1321 (f)(1) must be narrowly interpreted. The statute's scheme for preventing and cleaning up oil spills would be undermined if barge owners could escape liability merely by hiring out their operations to tugs and independent contractors. The term "third party" was intended to refer to a complete outsider (*e. g.*, a colliding vessel or a vandal), not an independent contractor whom the vessel owner was responsible for hiring in the first place.

While no one can say that the decision of the Court of Appeals places a wholly unreasonable interpretation on the language contained in § 1321 (f)(1), that court itself stated that the term "third party" must be narrowly interpreted. The court's interpretation, however, is not supported by the plain language of the statute, which in its express terms provides a defense whenever the discharge is the result of an act of a "third party." The statute is entirely silent as to what judicial refinements, if any, were intended to be placed on the term "third party."

Because the Federal Water Pollution Control Act is legislation of vital importance, and the furnishing of oil for the country's economy is likewise of vital importance, the question presented will continue to arise. The Court of Appeals' interpretation is at odds with the decision reached by the District Court in *Tug Ocean Prince, Inc.* v. *United States*, 436 F. Supp. 907 (SDNY 1977), aff'd in part and rev'd in part on other grounds, 584 F. 2d 1151 (CA2 1978), cert. denied,

440 U. S. 959 (1979), where on almost identical facts the Government's claim against a barge owner was dismissed because the owner was found not to be responsible for the oil spill.

There is no question that either the barge owner or the tug operator is liable for reimbursement to the Government for expenses incurred by the Coast Guard in cleaning up the oil spill. The Court of Appeals has decided that it should be the barge owner, while the District Court for the Southern District of New York has implicitly decided that it should be the tugboat operator. It seems to me that the Court of Appeals has supplied a good deal of gloss to the statutory language in reaching the result it has; perhaps it is justified in so doing, but certainly it has greatly narrowed the enacted language of Congress on the subject. Since it clearly was not the policy of the Federal Water Pollution Control Act to prohibit the movement of oil in barges, but simply to fix responsibility as to which segment of the oil transportation industry should be responsible for reimbursement to the Government for the cost of cleaning up spills, I do not think this is the type of case in which the Court should await a conflict between two Courts of Appeals to resolve the question in point. Though it cannot be said with certainty on the basis of this record, it seems highly probable that contracts such as this, as well as the insurance coverage of the various parties, depend on the way this "third party" exception is construed. Insurance policies and contracts, unlike actual collisions, are frequently matters which are entered into consensually for a period of months or years in reliance upon one or another construction of applicable law. This factor is sufficiently important, when combined with the recognized importance of the enterprise being conducted and the evil at which the legislation is aimed, to justify the Court granting certiorari and giving the issue plenary consideration at this time.

No. 80–1163. TRAPPER ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 48 N. C. App. 481, 269 S. E. 2d 680.

JUSTICE BRENNAN, dissenting.

Stone v. *Powell,* 428 U. S. 465 (1976), held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.,* at 494 (footnote omitted). The effect of this holding was to make this Court, on direct review, the only federal forum available to the accused to monitor state-court compliance with the Fourth Amendment. I dissented in that case and reminded my Brethren that "institutional constraints totally preclude any possibility that this Court can adequately oversee whether state courts have properly applied federal law." *Id.,* at 526. "[O]ur certiorari jurisdiction is inadequate for containing state criminal proceedings within constitutional bounds," because "federal review by certiorari in this Court is a matter of grace, and it is grace now seldom bestowed at the behest of a criminal defendant." *Id.,* at 534. While the lower federal courts by way of habeas corpus are better suited than are we on direct review to assure state-court compliance with Fourth Amendment requirements, we are now duty bound by *Stone* v. *Powell* to fulfill this monitoring function. The denial of certiorari in this case demonstrates, however, that the Court will not discharge that duty, because the petition presents a substantial issue whether the North Carolina courts properly applied the Fourth Amendment. I, therefore, dissent from the denial of certiorari and would set this case for argument.

I

Petitioners were arrested for various crimes connected with the possession, sale, and delivery of marihuana. Deputy

Sheriff Charlie Carawan, of Hyde County, N. C., first met petitioner Lombardo two years prior to his arrest when Lombardo purchased property about one-half mile from Carawan's home. App. to Pet. for Cert. 13. Lombardo's property is "located adjacent to a paved, rural road and adjacent to the main stream of Fortescue Creek" which is connected to the Intracoastal Waterway. *Id.*, at 13–14. Improvements were made on the property, including construction of rock driveways and a metal gate.

Several events caused Carawan to become suspicious of activities on the Lombardo property. First, "Carowan [*sic*] began to receive reports from some of his acquaintances in the neighborhood that they had begun to hear the sounds of heavy truck and boat engines on and near the Lombardo property," sounds which were "unusual in that area." *Id.*, at 14. In addition, on December 21, 1978, Carawan assisted a boat which was stuck in the mud bottom of Fortescue Creek about one mile from the Lombardo property. Based on his knowledge of the channels of the creek and of the prevailing winds that day, Carawan disbelieved the story of the boat's skipper that he had become disabled in the Pungo River and then drifted into the creek where he ran aground. *Id.*, at 14–16. Sometime thereafter, Carawan motored his small boat near the Lombardo property to observe activities thereon. While doing so, he heard two rifle shots which he believed came from the Lombardo property, one of which apparently passed near him. *Id.*, at 16.

These events led Carawan to suspect that the Lombardo property was being used for marihuana smuggling. *Id.*, at 16–17. Accordingly, Carawan arranged for two state troopers to be stationed east and west of the intersection of the rural paved road leading to the Lombardo property and U. S. Highway 264. *Id.*, at 17. On the night of January 13, 1979, Carawan secluded himself 50 yards from the Lombardo gate and observed the property until about midnight, when a truck which appeared to be heavily loaded left the Lom-

bardo property. *Id.*, at 17–18. Carawan followed the truck past his own home, where he left his personal car and took his patrol car. He also radioed the two state troopers who were stationed on U. S. Highway 264. After following the truck, which was being driven by petitioner Trapper, Carawan and the state troopers eventually stopped it. *Id.*, at 18. Upon reaching the truck, the two state troopers and Carawan smelled marihuana. *Id.*, at 19. Trapper was then arrested and one of the troopers left for Swan Quarter to obtain a warrant to search the truck. *Ibid.* The trooper returned at 1:40 a.m. on January 14, 1979, with a warrant. The search of the truck revealed approximately 4,000 pounds of marihuana. Carawan then obtained a warrant "to search the Lombardo double-wide house trailer for marijuana," and "the Lombardo house and curtilage, including a metal storage building was searched and . . . a large quantity of baled and loose marijuana was found and seized from the aforesaid metal building." *Id.*, at 19–20.

Prior to trial, petitioners moved to suppress the evidence seized during the two searches on Fourth Amendment grounds. Their motion to suppress was denied. Petitioners then pleaded guilty to various marihuana-related crimes and received suspended sentences. They subsequently appealed the trial court's ruling on the suppression motion to the North Carolina Court of Appeals, which affirmed the trial judge. 48 N. C. App. 481, 269 S. E. 2d 680 (1980). The court, taking judicial notice that "Hyde County is on the coast of North Carolina in an area which is regularly used by smugglers of marijuana," *id.*, at 486, 269 S. E. 2d, at 683, held that Carawan, as an experienced law enforcement officer, had "reasonable suspicion" that a crime was being committed and thus was authorized to conduct a *Terry* stop of the truck. *Terry* v. *Ohio*, 392 U. S. 1 (1968); see *Delaware* v. *Prouse*, 440 U. S. 648 (1979). The court further concluded that the stop was reasonable in extent and time, and that when the officers smelled marihuana from their outside inspection of

the truck, they had probable cause to arrest Trapper and to obtain a warrant to search the truck. The court also held that the marihuana discovered in the truck created probable cause to obtain a warrant to search the Lombardo premises.

The Supreme Court of North Carolina subsequently dismissed petitioners' appeal, finding that it did not present a substantial constitutional question. This petition followed.

II

Petitioners challenge the ruling of the North Carolina Court of Appeals on two grounds: (1) that the stop of the truck was illegal as not based on reasonable suspicion, resting on objective articulable facts, that the driver was involved in criminal activity; and (2) that the search of the Lombardo property was unlawful since the warrant authorizing it was issued pursuant to an affidavit which itself was premised on illegally seized evidence. Petitioners' second argument depends entirely on the validity of the first.

The first argument has substantial merit. The reasons advanced by Carawan as justification for stopping the truck hardly amounted in the aggregate to objective articulable facts leading to reasonable suspicion that individuals associated with the Lombardo property were engaged in criminal activity. See *Brown* v. *Texas,* 443 U. S. 47, 51 (1979). Boat and truck noises and the presence of a locked metal gate across the Lombardo premises are fully consistent with lawful activity. Similarly, the grounding of the boat in Fortescue Creek occurred over one mile from the Lombardo premises. Even if Carawan totally disbelieved the skipper's story of how the boat came to be grounded, there is no basis for linking the boat to the Lombardo premises. Moreover, the fact that Hyde County, N. C., may be an area frequented by marihuana smugglers is of no significance in the absence of articulable facts linking the Lombardo premises to marihuana smuggling. See *Ybarra* v. *Illinois,* 444 U. S. 85 (1979);

United States v. *Mendenhall*, 446 U. S. 544, 572 (1980) (WHITE, J., dissenting).

The only arguably objective fact of criminal activity was the firing of two rifle shots, which may have occurred as long as 24 days before the arrest. However, if Carawan believed that the shots were directed at him, it is hard to understand why he took no immediate action. Nor is there any indication how Carawan believed those shots to be linked to criminal activity, particularly since Lombardo had previously told Carawan that he bought the land for hunting purposes. The record before us is simply too ambiguous on the purpose, origin, and date of the shots to assess the incident properly in terms of whether Carawan had a reasonable suspicion that individuals on the Lombardo premises were engaged in criminal activity on January 13, 1979. This is precisely the type of ambiguity that a hearing before a federal habeas court is ideally designed to resolve. But since *Stone* v. *Powell* effectively eliminated federal habeas corpus review of Fourth Amendment claims, this Court has no choice but to decide petitioners' nonfrivolous constitutional claims presented in this case on the record as it comes to us from the state courts.

If a federal habeas forum were available to petitioners, I would not hesitate to vote to deny certiorari and leave to a habeas court the burden of resolving any ambiguity in the key facts. Moreover, the lower federal courts might well determine that the state courts committed constitutional error, thereby obviating the need for review in this Court. However, since *Stone* v. *Powell* saddles this Court with the duty of providing the only federal forum for decision of Fourth Amendment claims, we are obligated to decide cases on direct review which we might otherwise deny. This is such a case because there is a substantial question whether Carawan had reasonable suspicion to stop Trapper's truck.

JUSTICE STEWART also dissents from the denial of certiorari.

No. 80–1277. SMITH, REFORMATORY SUPERINTENDENT *v.* BROWN. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE POWELL would grant certiorari. Reported below: 633 F. 2d 213.

No. 80–1237. UVALDE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 547.

JUSTICE REHNQUIST, dissenting.

In this case, the Attorney General has filed a complaint under § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended in 1975, 42 U. S. C. § 1973,[1] alleging that petitioner School District's at-large system of electing members " 'has been implemented with the intent and purpose of causing . . . irreparable injury to Mexican-American voters . . . by effectively and purposefully precluding them from meaningful access to the political process . . . .' " 625 F. 2d 547, 548–549 (CA5 1980). The complaint further alleges:

> "[T]he seven member Board of Trustees of the Uvalde Consolidated Independent School District is elected at-large;
>
> "approximately fifty percent of the population of the school district is Mexican-American, but Mexican-American voters' residences are concentrated in one part of the City of Uvalde;

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[1] The statute was amended to include the italicized below:

"No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or implied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, *or in contravention of the guarantees set forth in § 4(f)(2)* [42 U. S. C. § 1973b (f)(2)]." 89 Stat. 402.

The guarantees of § 1973b (f)(2) assure against any denial or abridgment of the right to vote because the voter is a member of a language minority group. Congress enacted this amendment to § 2 pursuant to its power to enforce the guarantees of both the Fourteenth and Fifteenth Amendments. 42 U. S. C. § 1973b (f)(1).

"only one Mexican-American has ever been elected to the Board of Trustees and currently no Mexican-Americans serve on the Board; [2]

"voting is normally along racial lines;

"the Board has discriminated against Mexican-Americans in the past by operating intentionally segregated elementary schools and is unresponsive to the needs of the Mexican-American community;

"as a result of the school district's election system, Mexican-Americans have less opportunity than 'whites' to participate in the political process and to elect candidates of their choice to the Board." *Id.*, at 549 (footnote omitted).

The United States District Court for the Western District of Texas dismissed the suit for failure to state a claim upon which relief could be granted. 461 F. Supp. 117 (1978). It concluded that the Fifteenth Amendment, upon which § 2 of the Act rests,[3] applies only to practices which directly affect access to the ballot and is thus not available to challenge at-large election districts on the basis of so-called "vote dilution."

The Court of Appeals reversed, finding that respondent had stated a cause of action under the Fifteenth Amendment. It canvassed the various opinions in *Mobile* v. *City of Bolden*, 446 U. S. 55 (1980), and concluded that a majority of *this* Court had held that the *Fifteenth* Amendment prohibits not just the actual prevention or hindrance of people from voting, but also purposeful vote dilution. The Court of Appeals, however, did not rest its decision on that ground alone. It

[2] As the court below noted, the United States now stipulates that two Mexican-Americans have recently been elected. 625 F. 2d 547, 549, n. 2 (CA5 1980).

[3] The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

looked to the 1975 amendment of § 2. The court held that even if the Fifteenth Amendment does not proscribe at-large voting districts purposefully adopted to dilute the voting strength of minorities, the Fourteenth Amendment clearly does. According to the court, when Congress, pursuant to its authority to enforce the guarantees of the Fourteenth Amendment, extended § 2 to protect the right to vote of linguistic minorities, it did so cognizant of the problem of vote dilution and intended to incorporate the broad reach of the Fourteenth Amendment into § 2 of the Act. Thus, in the court's view, respondent had stated a cause of action under § 2 of the Act as amended. Judge Hill concurred on the grounds that it was unnecessary to determine whether the *Fifteenth* Amendment applies to the voting practices alleged in the complaint, because the court properly found that the 1975 amendment incorporated the Fourteenth Amendment.[4]

Because I believe that the Court of Appeals has misread the language, holding, and spirit of this Court's decision in *Bolden,* and has misconstrued the congressional purpose behind the 1975 amendment, I dissent from the denial of the petition for certiorari. In the first place, as I read the plurality decision in *Bolden,* it held that the Fifteenth Amendment proscribed only the denial or the abridgment of the right to vote: When blacks "register and vote without hindrance," the provisions of the Fifteenth Amendment are thus

[4] The Court of Appeals also concluded that a school board is a "political subdivision" within the meaning of § 2. In *Dougherty County Board of Education* v. *White,* 439 U. S. 32 (1978), and *United States* v. *Sheffield Board of Comm'rs,* 435 U. S. 110 (1978), this Court broadly construed the terms "State or political subdivision" so as to subject the entities at issue there to the § 5 preclearance requirement. By contrast, in *City of Rome* v. *United States,* 446 U. S. 156 (1980), the Court narrowly construed the terms for the purpose of limiting resort to the Act's so called "bailout" provisions. Because this Court has not yet settled on the proper construction of the term "political subdivision", this issue also strikes me as worthy of review by this Court.

satisfied. 446 U. S., at 65. In contrast to the Fourteenth Amendment, there is nothing in the Fifteenth Amendment which prohibits at-large election districts. See *Beer* v. *United States*, 425 U. S. 130, 142, n. 14 (1976) (observing that "[t]here is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment"). Because the Attorney General does not allege in this case that Mexican-Americans have been prohibited or discouraged from voting, I do not believe that the Attorney General has stated a cause of action under the Fifteenth Amendment and, consequently, § 2 of the Voting Rights Act.

With respect to the 1975 amendment, I do not view that amendment as changing the substantive law of § 2. The purpose of the change was to extend § 2 protections to a new group of persons, namely, members of language minorities such as Mexican-Americans. See S. Rep. No. 94–295, p. 24 (1975) (the amendment was made to "broaden [the Act's] special coverage to new geographic areas . . ."). Congress based the addition to § 2 on its power to enforce the guarantees of the Fourteenth Amendment in order to ensure the constitutionality of the change, not to allow language minorities to challenge at-large voting districts on grounds of vote dilution. The legislative history reveals that Congress was concerned about the possibility that certain language minority groups might not be considered members of a "race or color" group protected under the Fifteenth Amendment. Thus, Congress based the 1975 "expansion amendment" on *both* the Fourteenth and Fifteenth Amendments in order to "doubly insure the constitutional basis for the Act." *Id.*, at 47–48. In sum, the Court of Appeals quite clearly erred in concluding that the 1975 amendment to § 2 incorporates the Fourteenth Amendment's prohibition of purposeful vote dilution. Even as amended, § 2 simply does not permit the Attorney General to bring suits challenging at-large electoral systems.

Moreover, even if § 2 does incorporate the prohibitions of

the Fourteenth Amendment, I do not believe that the Attorney General's allegations are sufficient to survive a motion to dismiss. The plurality opinion in *Mobile* v. *City of Bolden*, *supra*, observed that the Court of Appeals there held that a plaintiff may establish purposeful discrimination by adducing evidence that satisfies the standards announced in its earlier decision in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973). We rejected that view:

> "That approach, however, is inconsistent with our decisions in *Washington* v. *Davis*, [426 U. S. 229 (1976)], and *Arlington Heights* [v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977)]. Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case." 446 U. S., at 73.

Yet if one reads the specific allegations of the complaint heretofore set forth, they bear a striking resemblance to the so-called *Zimmer* criteria. If, as is alleged, approximately 50% of the population of the School District is Mexican-American, one wonders why an at-large system should result in no Mexican-American being elected. Indeed, the fact that two Mexican-Americans *have* recently been elected under the at-large system belies the Attorney General's allegations. In *Bolden*, we rejected emphatically the theory that every "political group" or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers. 446 U. S., at 75. A court-imposed requirement that a specified number of Mexican-American seats be guaranteed by virtue of the approximately 50% Mexican-American population would, in my view, be clearly unwarranted.

Finally, it is important to remember that this is the beginning of a decennium which will involve a good deal of reapportionment. That task will fall primarily to legislators. "The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt. *Connor* v. *Finch,* 431 U. S. 407, 414–415 (1977); *Chapman* v. *Meier,* 420 U. S. 1, 27 (1975); *Gaffney* v. *Cummings,* 412 U. S. 735, 749 (1973); *Burns* v. *Richardson,* 384 U. S. 73, 84–85 (1966)." *Wise* v. *Lipscomb,* 437 U. S. 535, 539–540 (1978). In *Minnesota State Senate* v. *Beens,* 406 U. S. 187, 200 (1972), we concluded that "the action of the three-judge court in so drastically changing the number of legislative districts and the size of the respective houses of the Minnesota Legislature is not required by the Federal Constitution and is not justified as an exercise of federal judicial power." Accordingly, those legislators who embark on the difficult and politically sensitive task of reapportionment will need clear rules for determining whether a particular plan for a particular governmental district is or is not constitutional.

Unfortunately, those legislators will not be aided by the decisions of this Court, decisions which are obviously not wholly in harmony with one another. Cf. *Burns* v. *Richardson,* 384 U. S. 73 (1966); *East Carroll Parish School Board* v. *Marshall,* 424 U. S. 636 (1976); *White* v. *Regester,* 412 U. S. 755, 765 (1973); *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *Connor* v. *Johnson,* 402 U. S. 690 (1971); *Mahan* v. *Howell,* 410 U. S. 315 (1973); *Gaffney* v. *Cummings,* 412 U. S. 735, 749 (1973). The decision below is no exception: it will further confuse an already confused area. If all of the various governmental units subject to the ever-oscillating "one-person, one-vote" rule are to have even a fighting chance of reapportioning themselves within constitutional limits, rather than to be remitted to court-ordered redistricting, with all of the additional legal baggage which such plans bring with them, this Court should make every effort to

clarify what the Voting Rights Act and the Federal Constitution require.

For the foregoing reasons, I dissent from the denial of the petition for certiorari.

No. 80–1278. SOWDERS, WARDEN *v.* CLEAVER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE POWELL would grant certiorari. Reported below: 634 F. 2d 1010.

No. 80–1322. FAMILIA DE BOOM ET AL. *v.* AROSA MERCANTIL, S. A., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 629 F. 2d 1134.

No. 80–1457. HARDIN *v.* PITNEY-BOWES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

JUSTICE REHNQUIST, dissenting.

The petitioner in this case brought suit under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.*, alleging that respondent had unlawfully discharged him from his job. The District Court granted respondent's motion for summary judgment and the Court of Appeals for the Sixth Circuit affirmed. 636 F. 2d 1217 (1980). Chief Judge Edwards dissented, reasoning that summary judgment is improperly invoked where, as here, the defendant's motive and intent in discharging the plaintiff is at issue. Because I believe that petitioner raised a triable issue of fact under the Federal Rules of Civil Procedure, I believe that it was error to grant respondent's motion for summary judgment. Accordingly, I would grant the petition for certiorari in order to give the case plenary consideration.

It has long been established that it is inappropriate to resolve issues of credibility, motive, and intent on motions for summary judgment. It is equally clear that where such issues are presented, the submission of affidavits or deposi-

tions is insufficient to support a motion for summary judgment. In *Arnstein* v. *Porter,* 154 F. 2d 464, 469 (1946), for example, the Court of Appeals for the Second Circuit fully explored the circumstances in which summary judgment could be granted and concluded that "[a]lthough part of plaintiff's testimony on deposition (as to 'stooges' and the like) does seem 'fantastic,' yet plaintiff's credibility, even as to those improbabilities, should be left to the jury." And this Court has recently questioned the propriety of deciding defamation cases on summary judgment where the defendant's state of mind is called into question under the "actual malice" standard. *Hutchinson* v. *Proxmire,* 443 U. S. 111, 120, n. 9 (1979); *Wolston* v. *Reader's Digest Assn., Inc.,* 443 U. S. 157, 161, n. 3 (1979). Likewise in this case, I agree, substantially for the reasons set forth by Chief Judge Edwards in his dissent, that petitioner raised a triable issue of fact as to the reasons for his discharge.

This case illustrates the frequency with which courts misapprehend the rule against summary judgment. In *Butz* v. *Economou,* 438 U. S. 478 (1978), for example, this Court held that top-level federal officials had only a qualified or good-faith immunity, such as that accorded in *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), against damages suits for malicious institution of administrative proceedings. The Court went on, however, to reassure that such litigation could still be disposed of summarily. The Court asserted:

> "[D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 U. S., at 250. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." 438 U. S., at 508 (footnote omitted).

For the reasons stated above and demonstrated by this case, I believe that view is wrong. Summary judgment simply may not be granted when such matters as the defendant's motive and intent are questioned. Thus in any suit where the defendant is not accorded *absolute* immunity, so that the defendant's state of mind is at issue, it will not require an ingenious advocate to force a trial of the case. It seems to me that even the most frivolous lawsuits filed against top-level federal officials will have to be tried. Indeed, that is one reason why I dissented in *Butz* v. *Economou, supra,* at 517 (concurring in part and dissenting in part), and remain convinced that the case was wrongly decided.

Just as summary judgment is inappropriate in qualified-immunity cases and in defamation cases, it is inappropriate here. Because petitioner raised issues going to respondent's motive and intent, it was error to grant the motion for summary judgment. Accordingly, I dissent from the denial of the petition for certiorari.

No. 80–1602. Illinois State Dental Society et al. *v.* Schiller et al. C. A. 7th Cir. Certiorari denied. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 645 F. 2d 73.

No. 80–1606. Price Enterprises, Inc., et al. *v.* American International Pictures, Inc., et al. C. A. 4th Cir. Certiorari denied. Justice Stewart took no part in the consideration or decision of this petition. Reported below: 636 F. 2d 933.

No. 80–6256. Berry *v.* Louisiana. Sup. Ct. La. Certiorari denied. Justice Stewart would grant certiorari. Reported below: 391 So. 2d 406.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428

U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 80–6366. TURNER *v.* VIRGINIA. Sup. Ct. Va.;

No. 80–6368. JONES *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County; and

No. 80–6375. SOLOMON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 80–6366, 221 Va. 513, 273 S. E. 2d 36; No. 80–6375, 247 Ga. 27, 277 S. E. 2d 1.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1157. ROSEWELL, TREASURER OF COOK COUNTY, ILLINOIS, ET AL. *v.* LASALLE NATIONAL BANK, TRUSTEE, 450 U. S. 503;

No. 79–1733. W. D. R. *v.* TAYLOR COUNTY CHILD WELFARE UNIT, 450 U. S. 989;

No. 80–537. IN RE J. W. B. ET AL., 450 U. S. 990;

No. 80–763. ESTELLE, CORRECTIONS DIRECTOR *v.* JUREK, 450 U. S. 1014;

No. 80–840. WEBER ET AL. *v.* BARRETT, 450 U. S. 1022;

No. 80–1021. WOOD *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (FIVE POINTS SHOPPING CENTER, REAL PARTY IN INTEREST), 450 U. S. 995;

No. 80–1229. EHRMAN *v.* CITY OF PHILADELPHIA, 450 U. S. 997;

No. 80–1378. CASAREZ-ULLOA, AKA MOLINA *v.* UNITED STATES, 450 U. S. 999; and

No. 80–5942. AMADEO *v.* RUSSEAU, SHERIFF, 450 U. S. 1035. Petitions for rehearing denied.

No. 80–6127. McDowell *v.* North Carolina, 450 U. S. 1025; and

No. 80–6163. Johns *v.* King, Lieutenant Governor of Hawaii, et al., 450 U. S. 1033. Petitions for rehearing denied.

No. 80–5949. Burkhalter *v.* Chrysler Corp. et al., 450 U. S. 931. Motion for leave to file petition for rehearing denied.

May 20, 1981

Dismissals Under Rule 53

No. 80–309. Heverly et al. *v.* Commissioner of Internal Revenue. C. A. 3d Cir.; and

No. 80–310. Chapman et al. *v.* Commissioner of Internal Revenue. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: No. 80–309, 621 F. 2d 1227; No. 80–310, 618 F. 2d 856.

May 26, 1981

Appeals Dismissed

No. 80–1641. Supreme Court of Virginia et al. *v.* Consumers Union of the United States, Inc., et al.; and

No. 80–1664. Consumers Union of the United States, Inc., et al. *v.* Virginia State Bar et al. Appeals from D. C. E. D. Va. Motions of appellants to defer consideration of the appeals denied. Appeals dismissed for want of jurisdiction. Justice Powell took no part in the consideration or decision of these motions and these cases. Reported below: 505 F. Supp. 822.

No. 80–1661. Egan *v.* New York. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of substantial federal question. Reported below: 78 App. Div. 2d 1017, 435 N. Y. S. 2d 201.

No. 80–6460. PRENZLER *v.* ALLEN. 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.

Vacated and Remanded on Appeal

No. 80–1507. CITY OF PARMA, OHIO, ET AL. *v.* RECORD REVOLUTION No. 6, INC., ET AL. Appeal from C. A. 6th Cir. Judgment vacated and case remanded for further consideration in light of the recently enacted Section 2925.14 of the Ohio Revised Code. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 638 F. 2d 916.

Certiorari Granted—Vacated and Remanded

No. 79–6366. BLAKNEY *v.* MONTANA. Sup. Ct. Mont. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. JUSTICE BLACKMUN dissents and would deny certiorari. Reported below: —— Mont. ——, 605 P. 2d 1093.

No. 79–6601. WHITE *v.* FINKBEINER. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. Reported below: 611 F. 2d 186.

No. 80–997. MISSOURI *v.* GREER; MISSOURI *v.* KENDRICK; and MISSOURI *v.* WILLIAMS. Sup. Ct. Mo. Motions of respondents Williams, Kendrick, and Greer for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Albernaz* v. *United States,* 450 U. S. 333 (1981). Reported below: 605 S. W. 2d 93 (first case); 606 S. W. 2d 643 (second case); 606 S. W. 2d 777 (third case).

No. 80–1674. CONSUMERS POWER CO. ET AL. *v.* UTILITY WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alessi* v. *Raybestos-Manhattan, Inc., ante,* p. 504. Reported below: 637 F. 2d 1082.

No. 80–5084. LEUSCHNER *v.* MARYLAND. Ct. Sp. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. Reported below: 45 Md. App. 323, 413 A. 2d 227.

No. 80–5258. MONROE *v.* IDAHO. Sup. Ct. Idaho. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. Reported below: 101 Idaho 251, 611 P. 2d 1036.

No. 80–5640. WANTLAND *v.* MARYLAND. Ct. Sp. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. JUSTICE BLACKMUN dissents and would deny certiorari. JUSTICE POWELL and JUSTICE REHNQUIST dissent. Reported below: 45 Md. App. 527, 413 A. 2d 1376.

No. 80–5799. JAMES *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona, ante,* p. 477. JUSTICE STEWART, JUSTICE POWELL, and JUSTICE REHNQUIST dissent. JUSTICE BLACKMUN dissents and would deny certiorari. Reported below: 82 Ill. App. 3d 551, 402 N. E. 2d 936.

Miscellaneous Orders

No. A–894 (80–6646). WHITE *v.* UNITED STATES. Super. Ct. D. C. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–916. DIAMOND M CO. ET AL. *v.* RAINS. Ct. App. La., 3d Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–219. IN RE DISBARMENT OF ROSPOND. Disbarment entered. [For earlier order herein, see 450 U. S. 976.]

No. D–223. IN RE DISBARMENT OF WOLF. Edward H. Wolf, of New York, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 9, 1981 [450 U. S. 977], is hereby discharged.

No. D–224. IN RE DISBARMENT OF KLAUBER. Disbarment entered. [For earlier order herein, see 450 U. S. 976.]

No. D–239. IN RE DISBARMENT OF FAHY. It is ordered that Francis X. Fahy, of Jersey City, N. J., 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. 80–885. NATIONAL LABOR RELATIONS BOARD *v.* HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP.; NATIONAL LABOR RELATIONS BOARD *v.* MALLEABLE IRON RANGE CO.; and

No. 80–1103. HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 450 U. S. 964.] Motion of United Auto Workers for leave to file a brief as *amicus curiae* granted.

No. 80–608. UNITED STATES POSTAL SERVICE *v.* COUNCIL OF GREENBURGH CIVIC ASSNS. ET AL. D. C. S. D. N. Y. [Probable jurisdiction noted, 449 U. S. 1076.] Motion of appellant for leave to file a supplemental brief after argument granted.

No. 80–5950. LOGAN *v.* ZIMMERMAN BRUSH CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 450 U. S. 909.] Motion of Illinois Congress of Organizations of the Physically Handicapped et al. for leave to file a brief as *amici curiae* granted.

No. 80–6582. IN RE CORLEY; and

No. 80–6587. IN RE EL-AMIN. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 80–1582. UNITED STATES *v.* MACDONALD. C. A. 4th Cir. Certiorari granted. Reported below: 632 F. 2d 258 and 635 F. 2d 1115.

No. 80–1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80–1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 209 U. S. App. D. C. 71, 651 F. 2d 792.

Certiorari Denied. (See also No. 80–6460, *supra.*)

No. 79–6801. RIGLER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 488 Pa. 441, 412 A. 2d 846.

No. 80–238. BARTLETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 387 So. 2d 886.

No. 80–1534. OCHS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–1434. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* UNITED STATES ET AL.;

No. 80–1439. RAILWAY LABOR EXECUTIVES' ASSN. *v.* UNITED STATES ET AL.; and

No. 80–1632. ILLINOIS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 392.

No. 80–1536. MARYLAND ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 73.

No. 80–1599. HOME MUTUAL INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 333.

No. 80–1607. ALCON LABORATORIES (PUERTO RICO), INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 636 F. 2d 876.

No. 80–1613. STARR ET UX. *v.* PRING. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1227.

No. 80–1633. DAVIS *v.* FLORIDA EAST COAST RAILWAY CO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 392 So. 2d 69.

No. 80–1648. NIERRAS *v.* OHIO. Ct. App. Ohio, Richland County. Certiorari denied.

No. 80–1652. INTERNATIONAL PRODUCE, INC. *v.* A/S ROSSHAVET. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 548.

No. 80–1653. SMITH *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 86 Ill. App. 3d 575, 408 N. E. 2d 743.

No. 80–1673. FREDERIKSEN ET AL. *v.* POLOWAY. C. A. 7th Cir. Certiorari denied. Reported below: 637 F. 2d 1147.

No. 80–1678. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 34.

No. 80–1685. PACIFIC DEVELOPMENT, INC., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 128, 629 F. 2d 162.

No. 80–1701. NEWPORT TANKERS CORP. *v.* SIMMONS. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 312.

No. 80–1709. PRUDENTIAL FEDERAL SAVINGS & LOAN ASSN. *v.* MADSEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 635 F. 2d 797.

No. 80–1723. BECK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–1752. WERNKE *v.* MILLER, CHIEF OF POLICE OF THE TOWN OF PLAINFIELD, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 75.

No. 80–1775. KLAUBER *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 289 Md. 446, 423 A. 2d 578.

No. 80–1776. GAGNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 635 F. 2d 766.

No. 80–1782. HERZOG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 644 F. 2d 713.

No. 80–1789. CALABRESE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 645 F. 2d 1379.

No. 80–1812. BAKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 787.

No. 80–5921. KRUEGER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 82 Ill. 2d 305, 412 N. E. 2d 537.

No. 80–6055. WILLIAMS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 606 S. W. 2d 777.

No. 80–6118. CAUSEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 735, 273 S. E. 2d 6.

No. 80–6165. WILLIAMS *v.* KELLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 695.

No. 80–6192. MCCRARY *v.* HONGISTO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 162.

No. 80–6214. DUFFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–6269. BURTON *v.* WHITE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 80–6286. MCKNABB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–6384. BUTLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 205 U. S. App. D. C. 19, 636 F. 2d 727.

No. 80–6431. BROWN ET AL. *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 88 Ill. App. 3d 514, 410 N. E. 2d 505.

No. 80–6432. SINCLAIR *v.* DALSHEIM, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 54.

No. 80–6433. CHICCO *v.* PECK. C. A. 1st Cir. Certiorari denied. Reported below: 647 F. 2d 159.

No. 80–6435. YIP *v.* UNITED STATES; and
No. 80–6495. GAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 28.

No. 80–6441. COOLIDGE *v.* SCHOONER CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1321.

No. 80–6442. PFAFF *v.* CITY OF CHILLICOTHE. Ct. App. Ohio, Ross County. Certiorari denied.

No. 80–6445. HAMILTON *v.* ABSHIRE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 885.

No. 80–6448. ROPER, AKA BARRY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 77 App. Div. 2d 820, 429 N. Y. S. 2d 340.

No. 80–6449. PRINCE *v.* TEXAS ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 80–6450. LEWIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 396 So. 2d 290.

No. 80–6456. ALLEN *v.* FARLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 56.

No. 80–6457. COX *v.* WATSON, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 312.

No. 80–6459. MCKINLEY *v.* PULLEY, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 80–6463. CUMMINS *v.* JAGO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 164.

No. 80–6466. BURNS *v.* STATE BAR OF WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80–6468. KUMMER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 100 Wis. 2d 220, 301 N. W. 2d 240.

No. 80–6470. Cox *v.* Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 642 F. 2d 222.

No. 80–6476. Ross *v.* Correctional Institutional Inspection Committee. Sup. Ct. Ohio. Certiorari denied.

No. 80–6497. Miranda de Chavez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 457.

No. 80–6565. Sivigliano *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 80–6571. McCaskill *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–6579. Wright *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 641 F. 2d 602.

No. 80–6584. Brunk *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 206.

No. 80–6603. Roush *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 80–456. Thompson, Secretary, Department of Social and Health Services of Washington, et al. *v.* Berry et al. Sup. Ct. Wash. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 93 Wash. 2d 17, 604 P. 2d 1288.

No. 80–664. California *v.* Braeseke. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 28 Cal. 3d 86, 618 P. 2d 149.

No. 80–974. Ford *v.* Ford et al. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Motion of respondent Dorothy Ford for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 80–1158. FLORIDA *v.* RODRIGUEZ. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE POWELL would grant certiorari and reverse the judgment. Reported below: 389 So. 2d 4.

No. 80–1306. DOE, BY DOE ET UX., HER PARENTS AND NEXT FRIENDS *v.* RENFROW, SUPERINTENDENT OF THE HIGHLAND COMMUNITY SCHOOL CORPORATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 91.

JUSTICE BRENNAN, dissenting.

I dissent from the denial of the petition for certiorari. I would grant the petition and summarily reverse the judgment of the Court of Appeals insofar as it affirmed the judgment of the District Court. I cannot agree that the Fourth Amendment authorizes local school and police officials to detain every junior and senior high school student present in a town's public schools and then, using drug-detecting, police-trained German shepherds, to conduct a warrantless, student-by-student dragnet inspection "to see if there were any drugs present." While school officials acting *in loco parentis* may take reasonable steps to maintain a safe and healthful educational environment, their actions must nonetheless be consistent with the Fourth Amendment. The problem of drug abuse in the schools is not to be solved by conducting schoolhouse raids on unsuspecting students absent particularized information regarding drug users or suppliers.

I

Petitioner Diane Doe is a 13-year-old student at Highland Junior High School in Highland, Ind., a community of approximately 30,000 residents. Highland has one junior high school and one senior high school, located in adjacent buildings. There are 2,780 students enrolled in those schools.

On the morning of March 23, 1979, petitioner went to her first-period class as usual. Shortly before 9:15, when the class was scheduled to adjourn, petitioner's teacher ordered

everyone to remain seated until further notice. An assistant principal, accompanied by a police-trained German shepherd, a dog handler, and a uniformed police officer, then entered the classroom as one of six teams conducting simultaneous raids at the Highland schools. For the next 2½ hours, petitioner and her classmates were required to sit quietly in their seats with their belongings in view and their hands upon their desks. They were forbidden to use the washroom unless accompanied by an escort. Uniformed police officers and school administrators were stationed in the halls. Guards were posted at the schoolhouse doors. While no student was allowed to leave the schoolhouse, representatives of the press and other news media, on invitation of the school authorities, were permitted to enter the classrooms to observe the proceedings.

The dogs were led up and down each aisle of the classroom, from desk to desk, and from student to student. Each student was probed, sniffed, and inspected by at least 1 of the 14 German shepherds detailed to the school. When the search team assigned to petitioner's classroom reached petitioner, the police dog pressed forward, sniffed at her body, and repeatedly pushed its nose and muzzle into her legs. The uniformed officer then ordered petitioner to stand and empty her pockets, apparently because the dog "alerted" to the presence of drugs. However, no drugs were found. After petitioner emptied her pockets, the dog again sniffed her body, and again it apparently "alerted." Petitioner was then escorted to the nurse's office for a more thorough physical inspection.

Petitioner was met at the nurse's office by two adult women, one a uniformed police officer. After denying that she had ever used marihuana, petitioner was ordered to strip. She did so, removing her clothing in the presence of the two women. The women then looked over petitioner's body, inspected her clothing, and touched and examined the hair on

her head. Again, no drugs were found.[1] Petitioner was subsequently allowed to dress and was escorted back to her classroom.

Each of the 2,780 students present at Highland Junior and Senior High Schools that day was subjected to the mass detention and general exploratory search. Eleven students, including petitioner, were subjected to body searches. Although the police dogs "alerted" 50 times, no junior high school students, and only 17 senior high school students, were found to be in possession of contraband. This contraband included marihuana, drug "paraphernalia," and three cans of beer.

Petitioner brought suit in the District Court for the Northern District of Indiana against various Highland school officials, the Highland Police Chief, and the trainer of the German shepherds used in the search. Claiming a violation of rights secured by the Fourth, Ninth, and Fourteenth Amendments to the Constitution, petitioner sought injunctive and declaratory relief and compensatory and punitive damages under 42 U. S. C. §§ 1983 and 1985 (3) (1976 ed., Supp. III).

After trial, the District Court rejected petitioner's claims. 475 F. Supp. 1012 (1979). First, it found that all aspects of the mass detention and inspection, except for the strip-search, were constitutionally valid. Then, it dismissed petitioner's action against the Police Chief and the dog trainer on the ground that they did not personally participate in the strip-search, and it denied petitioner's claim for damages against the school administrators on the ground that they enjoyed qualified good-faith immunity under *Wood* v. *Strickland*, 420 U. S. 308 (1975).[2]

The Court of Appeals for the Seventh Circuit affirmed all parts of the judgment except for the grant of good-faith im-

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[1] Apparently, the police dogs alerted to petitioner because she had been playing with her own dog, which was in heat, on the morning of the raid.

[2] The court also denied petitioner's motion for class certification.

munity with respect to the strip-search. 631 F. 2d 91 (1980).[3] Expressly relying upon the District Court's reasoning, it held that the entry into the classrooms "was a justified action taken in accordance with the *in loco parentis* doctrine," and that "the sniffing of a trained narcotic detecting canine is not a search." 475 F. Supp., at 1019. The court also found that there was sufficient evidence of drug activity at the Highland schools to establish "reasonable cause to believe" contraband would be found, and thus to justify the use of drug-sniffing police dogs. Petitioner's request for rehearing en banc was denied, with Chief Judge Fairchild and Judges Swygert, Wood, and Cudahy dissenting. 635 F. 2d 582 (1980).

II

I cannot agree that the Highland school officials' use of the trained police dogs did not constitute a search. The dogs were led from student to student for the express purpose of sniffing their clothing and their bodies to obtain information that the school authorities and police officers, with their less developed sense of smell, were incapable of obtaining. In the case of petitioner, the dog repeatedly jabbed its nose into her legs. Petitioner testified that the experience of being sniffed and prodded by trained police dogs in the presence of the police and representatives of the press was degrading and embarrassing. I am astonished that the court did not find that the school's use of the dogs constituted an in-

[3] With respect to good-faith immunity, the Court of Appeals concluded:

"It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under 'settled indisputable principles of law' [*Wood* v. *Strickland*, 420 U. S. 308, 321 (1975).] . . . We suggest as strongly as possible that the conduct herein described exceeded the 'bounds of reason' by two and a half country miles." 631 F. 2d, at 92–93.

vasion of petitioner's reasonable expectation of privacy. See *Katz* v. *United States,* 389 U. S. 347 (1967); *Wolf* v. *Colorado,* 338 U. S. 25 (1949).[4]

Moreover, even if the Fourth Amendment permits school authorities, acting *in loco parentis,* to conduct exploratory inspections if they have "reasonable cause to believe" contraband will be found, that standard could not apply where, as here, the school officials planned and conducted the search with the full participation of local police officials.[5] Once school authorities enlist the aid of police officers to help maintain control over the school's drug problem, they step outside the bounds of any quasi-parental relationship, and their conduct must be judged according to the traditional probable-cause standard.[6]

Although a number of incidents involving alcohol, drugs, and related paraphernalia had been reported to school authorities in the seven months preceding the raid on the Highland schools, those incidents involved only 21 students, 13 of

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[4] Although the court below relied on a number of cases holding that the use of trained dogs to sniff out contraband does not constitute a search, see, *e. g., United States* v. *Solis,* 536 F. 2d 880 (CA9 1976); *United States* v. *Bronstein,* 521 F. 2d 459 (CA2 1975), cert. denied, 424 U. S. 918 (1976); *United States* v. *Fulero,* 162 U. S. App. D. C. 206, 498 F. 2d 748 (1974), those cases involved the sniffing of inanimate and unattended objects rather than persons. Thus, even if those cases correctly state the law, they are inapposite.

[5] For the same reason, I would disagree with the Court of Appeals' conclusion that the mass detention of students by school authorities and police officers did not constitute an unreasonable seizure. See *Terry* v. *Ohio,* 392 U. S. 1 (1968).

[6] The Court of Appeals found it significant that the police officials agreed not to seek prosecution of students found to possess drugs. However, I agree with the dissenting opinion of Judge Swygert that the Fourth Amendment's protection against unreasonable searches is based on "'the right of the people to be secure in their persons,'" and that it is constitutionally irrelevant that the police officers may have agreed not to arrest students found to be in possession of contraband. 635 F. 2d 582, 584 (1980).

whom had been "withdrawn" from the school system by March 1979. 475 F. Supp., at 1015, and n. 1. At the time of the raid, school authorities possessed no particularized information as to drugs or contraband, suppliers or users. Furthermore, they had made no effort to focus the search on particular individuals who might have been engaged in drug activity at school. The authorities had no more than a generalized hope that their sweeping investigative techniques would lead to the discovery of contraband.

This Court has long expressed its abhorrence of unfocused, generalized, information-seeking searches. See, *e. g., Ybarra* v. *Illinois,* 444 U. S. 85 (1979) (mass investigatory detention, interrogation, and search of bar patrons); *Davis* v. *Mississippi,* 394 U. S. 721 (1969) (mass detention and fingerprinting of black men fitting general description of perpetrator of crime). But that is precisely the type of search the Highland officials conducted. They certainly had far less than probable cause—or in my view even reasonable suspicion—to believe that each student searched would possess drugs or other contraband. Accordingly, I believe the search was unconstitutional.

We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school

authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.

No. 80–1465. CROCKER NATIONAL BANK *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE POWELL would grant certiorari. Reported below: 639 F. 2d 458.

No. 80–1583. COLORADO *v.* CHAVEZ. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 621 P. 2d 1362.

No. 80–1637. MCELROY, WARDEN *v.* HOLLOWAY. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 605.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Perhaps the tersest summary of the reasons I would grant certiorari in this case is contained in the "black letter" heading of Part II, section B, subsection 4 of the opinion of the Court of Appeals: *"Where the states are left after Winship, Mullaney, and Patterson."* 632 F. 2d 605, 624. The opinion of that court, which comprises 79 printed pages of the appendix to the petition for certiorari here, suggests that the answer is not crystal clear, even to the Court of Appeals for the Fifth Circuit whose judgment we are asked to review.

Mullaney v. *Wilbur,* 421 U. S. 684 (1975), established that a State must prove every element of a criminal offense beyond a reasonable doubt. It is equally well established, however, that state legislatures and state courts, not federal judges, define the elements of a state criminal offense. *Id.,* at 691. The Court of Appeals for the Fifth Circuit in this case followed the former rule but not the latter and, on the strength of this possible error, ordered released from prison a person convicted of voluntary manslaughter whose conviction had been affirmed on direct appeal and state habeas corpus. Because I believe that it is for Georgia, and not the Court of

Appeals for the Fifth Circuit, to define the elements of the crime of voluntary manslaughter under Georgia law, I would grant plenary consideration.

Respondent Holloway was tried before a Georgia jury for murder and convicted of the lesser included offense of voluntary manslaughter. Under Georgia law "[a] person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." Ga. Code § 26–1101 (a) (1978). Voluntary manslaughter is defined as causing the death of another human being under circumstances which would otherwise be murder if the killer "acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." § 26–1102. Respondent admitted that he intentionally killed the victim but claimed that he acted in self-defense. Georgia law recognizes the defense of self-defense, § 26–902, and explicitly provides that a claim of self-defense "is an affirmative defense." § 26–907. The trial judge accordingly instructed the jury, without objection from respondent's counsel, that after the State had proved an intentional homicide *"the burden is on the slayer"* to show that the killing was justified, in this case by self-defense. 632 F. 2d, at 619 (emphasis in original).

Respondent appealed his conviction, but did not raise any *Mullaney* issue. The Georgia Court of Appeals affirmed, 137 Ga. App. 124, 222 S. E. 2d 898 (1975), and the Georgia Supreme Court denied certiorari. Respondent then sought federal habeas relief, but the District Court dismissed his application without prejudice for failure to exhaust, suggesting *sua sponte* that the trial court's instruction was " 'notably suspect under the principles of *Mullaney* v. *Wilbur*.' " 632 F. 2d, at 614. The state trial court denied state habeas relief, and the Georgia Supreme Court affirmed. Rejecting respondent's *Mullaney* claim, the Georgia Supreme Court ruled: "The burden placed on the defendant to excuse the homicide

is an affirmative defense. Code Ann. § 26–907. The defendant is not required to negate any of the elements of the crime which the state must prove to convict." 241 Ga. 400, 401, 245 S. E. 2d 658, 659 (1978).

Respondent thereupon again sought federal habeas relief, which this time was granted on the ground that the instruction impermissibly shifted the burden of proof from the State. The Court of Appeals for the Fifth Circuit affirmed. After stating that "the statute's characterization of self-defense as an 'affirmative defense' tells us nothing about the burden of persuasion on the self-defense issue," 632 F. 2d, at 630, the court concluded that since an element of the crime for which respondent was convicted was that the killing be "unlawful," and self-defense negates that element, requiring the defendant to prove that he acted in self-defense relieves the State of its burden of proving the unlawfulness of the killing. The court noted that "[t]he State has not cited, and our research has not found, any case from the Georgia courts which holds that the absence of self-defense has . . . been read out of the requirement of unlawfulness." *Id.*, at 634.

A common-sense reading of a statutory characterization of a defense as an "affirmative defense," however, certainly suggests that its absence is not an "element of the crime" which the State must prove. But more significantly, that is the exact reading given to this statutory characterization of self-defense as an affirmative defense by the Supreme Court of Georgia in the opinion which denied this very respondent state habeas relief. In the words of that court, the putting of the burden of proof on the defendant to prove self-defense is not requiring him to "negate any of the elements of the crime which the state must prove to convict." 241 Ga., at 401, 245 S. E. 2d, at 659.

In *Patterson* v. *New York*, 432 U. S. 197, 210 (1977), this Court declined "to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a

reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." By interpreting the term "unlawful" in the Georgia statutes as broadly as it has, the Court of Appeals in this case achieved just this result. It is doubtful that any state legislature would intend such a result; the Georgia Supreme Court in this case has told us that the Georgia Legislature did not. As stated in *Mullaney* itself, "state courts are the ultimate expositors of state law . . . and . . . we are bound by their constructions." 421 U. S., at 691. In *Patterson* we recognized that the rule that the definition of the elements of a crime is a state-law matter would permit state legislatures to allocate burdens of proof "by labeling as affirmative defenses" that which could otherwise be considered elements of a crime. 432 U. S., at 210. In that opinion, the Court noted that in *Rivera* v. *Delaware,* 429 U. S. 877 (1976), decided *after Mullaney,* we had dismissed for want of a substantial federal question the claim that the latter case had overruled *Leland* v. *Oregon,* 343 U. S. 790 (1952), which held that a State might make insanity an "affirmative defense." That is precisely what Georgia has done in this case with respect to "self-defense." Because the Court of Appeals for the Fifth Circuit deprived Georgia of an option specifically recognized in *Patterson,* by substituting its own reading of the term "unlawful" in the Georgia Code for the reading given that term by the Georgia Supreme Court, I dissent from the denial of certiorari.

No. 80–1669. Moss *v.* Lawrence. C. A. 10th Cir. Motion of Society of Professional Journalists, Sigma Delta Chi, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 639 F. 2d 634.

No. 80–6324. Milton *v.* Texas. Ct. Crim. App. Tex.; and

No. 80–6367. Briley *v.* Virginia. Sup. Ct. Va. Certio-

rari denied. Reported below: No. 80–6324, 599 S. W. 2d 824; No. 80–6367, 221 Va. 532, 273 S. E. 2d 48.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–950. NICOLADZE *v.* UNITED STATES, 450 U. S. 995;

No. 80–1162. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HANSEN, 450 U. S. 785;

No. 80–1316. BAUER *v.* UNITED STATES ET AL., 450 U. S. 1031;

No. 80–5572. DOUTHIT *v.* ESTELLE, CORRECTIONS DIRECTOR, 449 U. S. 1064;

No. 80–6195. HORNICK *v.* NOYES ET AL., 450 U. S. 1044; and

No. 80–6352. IN RE PIATT, *ante*, p. 905. Petitions for rehearing denied.

No. 80–6274. WILLIAMS *v.* ARKANSAS PUBLIC SERVICE COMMISSION, *ante*, p. 920. Petition for rehearing denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1032 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

CALIFORNIA *v.* PRYSOCK

ON APPLICATION FOR STAY

No. A–834 (80–1846). Decided April 24, 1981

An application by California to stay, pending the filing and disposition of a petition for certiorari, the California Court of Appeal's judgment reversing respondent's criminal conviction on the ground that he had not been properly advised of his right to the services of a free attorney before and during police interrogation that resulted in incriminating statements which were admitted at trial, is granted. The Court of Appeal apparently concluded that although respondent had been told of his right to have a lawyer present before questioning and of his right to have a lawyer appointed, as required by *Miranda* v. *Arizona,* 384 U. S. 436, the warnings were inadequate because of the order in which they had been given.

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California (hereafter State), seeks a stay of the judgment of the California Court of Appeal (Fifth Appellate District) in this case after the Supreme Court of California denied the State's petition for hearing on March 17, 1981, with Justices Mosk and Richardson expressing the view that the petition should be granted. Because it appeared to be common ground between the Court of Appeal which ruled against the State, the State, and other courts which have spoken to the question of the applicability of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), that its precision was one of its great virtues, I entered a temporary stay of the order of the Court of Appeal in view of the strict California speedy-trial requirements in order that I might consider in more detail the application, the response, and the decided cases on the issue.

The facts may be briefly stated. The victim was brutally murdered on January 30, 1978. She was struck with a wooden dowel, bludgeoned with a fireplace poker, stabbed with an ice pick, and finally strangled with a telephone cord. On the evening of the murder respondent, a minor, was arrested along with a codefendant. He was brought to a substation of the Tulare County Sheriff's Department and advised of his *Miranda* rights. He declined to talk and, since he was a minor, his parents were notified. Respondent's parents arrived, and after meeting with them respondent decided to answer police questions. An officer questioned respondent, on tape, with respondent's parents present. Respondent was advised of his constitutional rights. The tape reflects the following warnings regarding the right to counsel:

> "Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: You all, uh, — if, — you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?
>
> "Randall P.: Yes."

Respondent thereafter made incriminating statements which were admitted at trial. He was convicted of first-degree

murder with two special circumstances of torture and robbery, robbery, burglary, auto theft, destruction of evidence, and escape from a juvenile camp. He was sentenced to life imprisonment.

The Court of Appeal reversed on the ground that respondent was not properly advised of his right to the services of a free attorney before and during interrogation. Although respondent was informed that he had "the right to talk to a lawyer before you are questioned, have him present while you are being questioned, and all during the questioning," and "the right to have a lawyer appointed to represent you at no cost to yourself," the Court of Appeal ruled that these warnings were inadequate because respondent was not informed of his right to have an attorney appointed before further questioning.

The Court of Appeal stated:

> "It is not for this Court to overrule *Miranda,* disparage it, nor extend it. Its meaning is clear. It has stood the test of time. Law enforcement practices have adjusted to its strictures. One of its virtues is its precise requirements which are so easily met." App. A to Application 7.

The Court of Appeal went on to quote from a recent decision of the United States Court of Appeals for the Fifth Circuit sitting en banc in *Harryman* v. *Estelle,* 616 F. 2d 870, 873–874, cert. denied, 449 U. S. 860 (1980), to the following effect:

> " 'The rigidity of the *Miranda* rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength. E. g., *Tague* v. *Louisiana,* [444] U. S. [469] (1980); *Miranda* v. *Arizona,* 384 U. S., at 479 . . . . See also *Fare* v. *Michael C.,* 439 U. S. 1310, 1314 . . . (1978) (REHNQUIST, J., on application for stay) (calling rigidity of *Miranda* its single "core virtue"). The decision's rigidity has afforded police clear guidance on the acceptable man-

ner of questioning an accused. It has allowed courts to avoid the intractable factual determinations that the former totality of the circumstances approach often entailed. When a law enforcement officer asks a question of an accused and the accused, without the benefit of *Miranda's* safeguards, answers, the totality of the circumstances is irrelevant. The accused's answer is simply inadmissible at trial as part of the prosecution's case in chief.'" App. A to Application 7–8.

In *Harryman* v. *Estelle,* however, the defendant was asked and answered a question before being given any *Miranda* warnings at all. *Fare* v. *Michael C.,* 442 U. S. 707 (1979), considered whether a minor's request to talk with his probation officer should be treated for *Miranda* purposes in the same manner as a request to consult with an attorney, and the Court held that it should not. The case did not consider the content of *Miranda* warnings. Neither did *Tague* v. *Louisiana,* 444 U. S. 469 (1980) (*per curiam*), which reversed a decision upholding a conviction when "no evidence at all was introduced to prove that petitioner knowingly and intelligently waived his rights." *Id.,* at 471. In short, none of the decisions cited for the proposition that the rigidity of *Miranda* is its great virtue support the proposition that the desirable rigidity extends to the precise formulation of the warnings.

The decision of the Court of Appeal in this case may, in the name of advancing *Miranda's* virtue of rigidity and precision, have transformed the *Miranda* warnings into a ritualistic formalism. Respondent was told of his right to have a lawyer present before questioning, and of his right to have a lawyer appointed. The Court of Appeal seems to have held that the warnings were inadequate because of the order in which they were given.

Applying the relevant factors, see *Fare* v. *Michael C.,* 439 U. S. 1310, 1311 (1978) (REHNQUIST, J., in chambers),

I have decided to issue the requested stay. The request for a stay of the judgment of the California Court of Appeal pending the timely filing of a petition for writ of certiorari and final determination of the case by this Court is accordingly granted.

BECKER ET AL. *v.* UNITED STATES ET AL.

ON APPLICATION FOR STAY

No. A–918. Decided May 29, 1981

On application for a stay, pending appeal to the Court of Appeals, of the District Court's judgment ordering applicants to turn over certain videotapes to the Internal Revenue Service (IRS), which had issued summonses for production of the videotapes, a temporary stay previously granted by the Circuit Justice is continued pending further action by the full Court. Applicants, who claimed depreciation, investment credits, and other expenses on their income tax returns with respect to the videotapes, agreed to permit an IRS agent to play and inspect the videotapes in their presence, but refused to leave the videotapes in his possession. Pursuant to Federal Rule of Civil Procedure 62 (d), applicants sought a stay of the District Court's order in the IRS' summons enforcement proceedings, but both the District Court and the Court of Appeals denied the stay. Since no tax deficiency has yet been assessed by the IRS and the Government has not gathered sufficient information to invoke its authority for summary seizure of assets, it is probable that four Justices of this Court would vote to grant certiorari, after the Court of Appeals' decision on the merits, to determine whether the IRS may, pursuant to its summons authority, acquire and indefinitely retain material which is not merely books and records relevant for purposes of determining the correctness of the taxpayer's income tax return, but which is also property that the taxpayer uses for the production of income. Moreover, the balance of equities tips heavily in favor of applicants, and the decisions below not to grant a stay may have been based on the view that this was an ordinary tax summons enforcement proceeding.

JUSTICE REHNQUIST, Circuit Justice.

Applicants claimed depreciation, investment credits, and other expenses on their federal income tax returns with respect to certain videotapes. The Internal Revenue Service issued summonses directing the production of the videotapes and, on the appointed date, applicants appeared before the IRS agent with the videotapes. They agreed to permit the agent to examine, play, and otherwise inspect the videotapes

for as long as desired, but only in their presence, and declined to leave the videotapes in the possession of the agent. Not satisfied with such an arrangement, the IRS brought an enforcement proceeding under 26 U. S. C. §§ 7402 (b) and 7604 (a).

The United States District Court for the Eastern District of California ordered applicants to turn over the videotapes as demanded by the IRS. Applicants filed notices of appeal and moved the District Court to stay its judgment pending appeal. They offered to post a supersedeas bond and argued in their memorandum in support that they were entitled to a stay under Federal Rule of Civil Procedure 62 (d) upon posting of such bond. This Rule provides:

> "*Stay upon appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court."

The exceptions mentioned in Rule 62 (a) are injunction cases, receivership cases, and patent infringement cases in which an accounting has been ordered. The District Court denied the motion for a stay and the Court of Appeals for the Ninth Circuit denied a subsequent motion for a stay.

Applicants thereupon filed the instant application for a stay pending appeal of the District Court judgment to the Court of Appeals. I granted a temporary stay and called for a response from the United States. That response has now been received and, upon examination of it and the relevant authorities, I have decided to continue the stay pending further action by the full Court.

Pursuant to Federal Rule of Civil Procedure 81 (a)(3), the Federal Rules apply "to proceedings to compel the giving of

testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings." In *Donaldson* v. *United States,* 400 U. S. 517, 528–529 (1971), however, we ruled that Rule 81 (a)(3) and prior language in *United States* v. *Powell,* 379 U. S. 48, 58, n. 18 (1964), to the effect that the Rules apply in summons enforcement proceedings were "not intended to impair a summary enforcement proceeding so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available." When gathering testimony, the need for summary enforcement of IRS summonses is clear and justifies dispensing with Federal Rules which might interfere with that task. The question here is whether the Government's enforcement order includes more than mere testimony, as broadly as we have construed the word "testimony" in cases such as *United States* v. *Euge,* 444 U. S. 707 (1980); *United States* v. *Dionisio,* 410 U. S. 1 (1973); *United States* v. *Mara,* 410 U. S. 19 (1973); and *Schmerber* v. *California,* 384 U. S. 757 (1966). If the effect of the summons enforcement proceeding is to take what is potentially income-producing property of the respondent rather than merely require him to produce evidence, the need to proceed summarily is less clear, as is the justification for dispensing with otherwise applicable provisions of the Federal Rules.

If the Federal Rules do apply, it should be noted that whether the automatic stay provisions of Rule 62 (d) or the discretionary stay provisions of Rule 62 (c) apply will have no effect on applicants' case once its merits are decided by the Court of Appeals for the Ninth Circuit, before which it is presently pending. While I am not fully convinced by the submissions of either the applicants or the Government on this point, I do not think it can be said that applicants' position is totally unwarranted. The Government devotes only

one page of its nine-page response to this contention, and its treatment of the subject is not altogether persuasive. The language of Rule 62 (d) seems clear, and the enumerated exceptions do not include tax summons enforcement proceedings. *Expressio unius est exclusio alterius.* Contrary to the Government's assertion, an order enforcing an IRS summons is not the "equivalent" of a mandatory injunction—and hence within the exceptions to Rule 62 (d)—simply because the coercive power of the court is invoked. The only authority directly in point supports applicants' contention. *United States* v. *Neve,* 80 F. R. D. 461 (ED La. 1978). But cf. *FTC* v. *TRW, Inc.,* 202 U. S. App. D. C. 207, 210, n. 3, 628 F. 2d 207, 210, n. 3 (1980) (dictum criticizing District Court for granting stay as of right under Rule 62 (d) in Federal Trade Commission subpoena enforcement proceeding).

The question before me in my capacity as Circuit Justice, however, is not simply whether applicants were entitled to a stay from the District Court or from the Court of Appeals pursuant to Rule 62 (d), but rather whether I should now continue in effect a stay previously entered to protect the ultimate jurisdiction of this Court in the event that applicants' case is decided adversely to them by the Court of Appeals, and they petition this Court for certiorari. See 28 U. S. C. § 1651 (a). It is at this point that the Rules of Civil Procedure, the summons enforcement proceedings of the Internal Revenue Code, and the extent of my authority under 28 U. S. C. § 1651 (a) do not nicely mesh. Once the Court of Appeals decides the merits of the case, it will not be relevant to either party whether a stay should have been granted pending appeal, and Rule 62 (d) by its terms speaks only to such stays. Thus, the Rule 62 (d) question will "wash out" after decision on the merits by the Court of Appeals, unless applicants can persuade at least four Justices of this Court that the issue is one "capable of repetition, yet evading review" and therefore not moot. Yet if a decision of the Court of Appeals is favorable to the applicants on the merits of

their claim, it would make the unavailability of any stay pending appeal pursuant to the posting of an appropriate supersedeas bond a hardship on them and others similarly situated. This hardship may be of some weight in deciding whether to grant a stay pending decision by the Court of Appeals and a subsequent petition for certiorari by applicants in the event the decision is unfavorable to them.

The question applicants present before the Court of Appeals, as I understand it, is whether a taxpayer who has offered to make available to the IRS on conditions unsatisfactory to the Service videotaped material which is not merely "evidence" but is also "property" with which applicant conducts business, may be compelled by the IRS to relinquish possession of the property. Title 26 U. S. C. § 7602 (1) confers authority on the IRS to examine "any books, papers, records, or other data which may be relevant or material" to an inquiry into a taxpayer's liability. The videotapes do not appear to be such records or data; rather, they are applicants' copies of the asset itself. Under 26 U. S. C. § 7606 the IRS can *examine* objects subject to tax such as these videotapes. Requiring applicants to relinquish possession of the asset subject to tax as opposed to records *concerning* that asset would seem to be tantamount to ruling that a taxpayer must upon demand relinquish possession of a building to the IRS simply because he claimed depreciation on the building. The Government relies on *United States* v. *Davey,* 543 F. 2d 996, 999 (CA2 1976), which held that the IRS could compel production of taxpayer's financial records which were on computer tape, but the computer tape in that case was not the asset in question but rather simply the form in which records were kept.

I am by no means convinced of the correctness of the position of either party, and neither the District Court nor the Court of Appeals entered more than a minute order by way of explanation of their action in denying a stay. Obviously, as pointed out in *Donaldson,* the IRS must retain its au-

thority to conduct summary enforcement proceedings if large amounts of properly taxable income are not to evade taxation. But in this case no deficiency has been assessed by the IRS, and the summary provisions for the seizure of actual assets which are then authorized by statute have not yet become available to the Government. This is not the typical case with which the Court has dealt in the last few years, culminating in *United States* v. *LaSalle National Bank,* 437 U. S. 298 (1978), where the Government is seeking to inspect purely evidentiary or testimonial material—from which the taxpayer would derive no monetary benefit by retaining it in his possession—and the taxpayer denies the Government access to that evidence on grounds of privilege or the like. Obviously the taxpayer cannot simply write his own ticket as to the manner in which relevant nonprivileged evidence shall be made available to the IRS; but it seems to me that until the Government has gathered sufficient information to invoke its summary seizure authority, there are probably four Justices of this Court who would vote to grant certiorari to determine whether the IRS may, pursuant to its summons authority, acquire and indefinitely retain material which is not merely books and records relevant for purposes of determining the correctness of the taxpayer's income tax return, but which is also property which the taxpayer uses for the production of income.

The balance of equities tips heavily in favor of applicants. If a stay is not granted, applicants will be required to turn over their videotapes and their appeal may well become moot, particularly if the IRS completes its investigation prior to decision by the Court of Appeals. Much of the harm applicants contend will result from turning their videotapes over to the IRS will not be remediable if a stay is denied here and applicants eventually prevail. Applicants will lose the use of their videotapes as a sales promotional device for the time they are in the possession of the IRS.

Injury to the Government, on the other hand, seems to me minimal in this case. Applicants have already agreed, at the request of the IRS, to extend the statute of limitations. They have made the videotapes available to the Service for examination, and have indicated no hesitancy to continue to do so, albeit on terms which the Government regards as unsatisfactory.

My conclusions, however, are not entertained without considerable doubt. It is, as the Government has pointed out in its response, highly unusual for a Circuit Justice to stay an order of the District Court while an appeal from that order is pending in the Court of Appeals. Were I convinced that either the District Court or the Court of Appeals thought it had the usual discretion to grant the stay in question, but nonetheless declined to exercise that discretion, the proverbial "stay equities" might well fall on the other side of the line. The decisions below not to grant a stay, however, may have been based on the view that this was an ordinary tax summons enforcement proceeding, a view which at least four Justices of this Court may not share. For these reasons I shall continue the stay in effect, subject to the posting of the supersedeas bond approved as to form and amount by the District Court, until the question may be reviewed at the next regularly scheduled Conference of the full Court on June 4, 1981.

It is so ordered.

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1. *Discharge of employee—Vacation of arbitration award—Statute of limitations.*—In an employee's action under § 301 (a) of Act against union for alleged breach of duty of fair representation at grievance and arbitration proceedings which resulted in a decision upholding employee's discharge for dishonest acts, and against employer for alleged improper discharge of employee, District Court properly applied New York's 90-day statute of limitations for actions to vacate arbitration awards, thus barring employee's action, rather than New York's 6-year limitations

LABOR MANAGEMENT RELATIONS ACT—Continued.

period for breach-of-contract actions. United Parcel Service, Inc. v. Mitchell, p. 56.

2. *Former employee's suit against union and employer—Failure to exhaust appeal procedure under union constitution.*—Where former employee filed suit under § 301 (a) of Act against union and employer—alleging that employer had breached collective-bargaining agreement by discharging him without just cause and that union had breached its duty of fair representation in failing to seek arbitration of employee's grievance—employee was not precluded from maintaining suit merely because he had failed to exhaust appeal procedure against union under union constitution, since such procedure could not reactivate employee's grievance or grant him complete relief sought under § 301 (a). Clayton v. Automobile Workers, p. 679.

3. *Illegal strikes—Employees' liability to employer.*—Section 301 (a) of Act does not sanction damages actions by employers against individual employees for violating no-strike provision of a collective-bargaining agreement, whether or not union participated in or authorized strike. Complete Auto Transit, Inc. v. Reis, p. 401.

LABOR UNIONS. See **Antitrust Acts**, 2; **Equal Pay Act of 1963**; **Labor Management Relations Act.**

LAKE MICHIGAN. See **Federal Water Pollution Control Act.**

LAND OWNERSHIP AS QUALIFICATION FOR VOTING. See **Constitutional Law**, III, 2.

LESSEES' RIGHT TO CLAIM MINERAL DEPLETION DEDUCTIONS. See **Internal Revenue Code**, 1.

LIBERTY INTERESTS. See **Constitutional Law**, VIII.

LICENSING OF THEATRICAL AGENTS. See **Antitrust Acts**, 2.

LIFE SENTENCE AFTER MURDER CONVICTION AS PRECLUDING DEATH PENALTY ON RETRIAL. See **Constitutional Law**, II.

LIMITATION OF ACTIONS. See **Labor Management Relations Act**, 1.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

1. *Injury to longshoreman—Defective ship's gear—Shipowner's liability.*—Under Act's provision authorizing longshoreman injured by vessel's negligence to sue vessel as third party, a longshoreman, employed by a stevedore, may sue shipowner for injuries resulting from malfunctioning of ship's gear being used by stevedore in cargo operations if shipowner knew of defect in ship's gear and that stevedore was continuing to use it,

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—Continued.

and should have realized defect presented an unreasonable risk of harm to longshoremen; however, while shipowner is also liable for injuries caused by defective gear if he fails to warn stevedore of hidden danger known to shipowner or which should have been known to him in exercise of reasonable care, once stevedore's cargo operations have begun shipowner has no general duty to exercise reasonable care to discover dangerous conditions that develop within confines of cargo operations assigned to stevedore. Scindia Steam Navigation Co. v. De Los Santos, p. 156.

2. *Injury to longshoreman—Right to recover from shipowner—Assignment to employer.*—Section 33 (b) of Act—which provides that a longshoreman's acceptance of compensation from his employer shall operate as an assignment to employer of longshoreman's right to recover damages from a third party unless longshoreman commences an action against third party within six months after compensation award—precludes injured longshoremen who accepted compensation awards from their stevedore employers from pursuing their third-party claims against shipowners after 6-month period expired. Rodriguez v. Compass Shipping Co., p. 596.

LOUISIANA. See **Constitutional Law**, I, 2; VII; **Jurisdiction.**

MAIL OF PRISONERS. See **Civil Rights Act of 1871.**

McCARRAN-FERGUSON ACT. See **Constitutional Law**, I, 1.

MEDICAID BENEFITS. See **Social Security Act.**

"MEDICALLY NEEDY" PERSONS. See **Social Security Act.**

MEMPHIS. See **Civil Rights Act of 1866; Constitutional Law**, VIII.

MENTALLY RETARDED PERSONS. See **Developmentally Disabled Assistance and Bill of Rights Act.**

MEXICAN ALIENS. See **Juries.**

MILWAUKEE. See **Federal Water Pollution Control Act.**

MINERAL DEPLETION DEDUCTIONS. See **Internal Revenue Code**, 1.

MINERAL LEASING ACT OF 1920.

Federal wildlife refuges—Oil and gas leases—Distribution of revenues.—Revenues generated by Government-issued oil and gas leases on federal wildlife refuges consisting of reserved public lands must be distributed according to formula in § 35 of Act, rather than by formula in § 401 of Wildlife Refuge Revenue Sharing Act, which applies only to minerals on land acquired for wildlife refuges. Watt v. Alaska, p. 259.

MIRANDA WARNINGS. See Constitutional Law, IV; V, 1; Stays, 1.

MOOTNESS. See Rehabilitation Act of 1973.

NATIONAL WILDLIFE REFUGES. See Mineral Leasing Act of 1920.

NATURAL GAS ACT. See Constitutional Law, I, 2; VII; Jurisdiction.

NAVIGABLE WATERS. See Federal Water Pollution Control Act; Rivers and Harbors Appropriation Act of 1899.

NEBRASKA. See Civil Rights Act of 1871.

NEW JERSEY. See Employee Retirement Income Security Act of 1974.

NEW YORK. See Labor Management Relations Act, 1.

NORRIS-LaGUARDIA ACT. See Antitrust Acts, 2.

NO-STRIKE CLAUSES. See Labor Management Relations Act, 3.

NUISANCES. See Federal Water Pollution Control Act.

OBSCENITY. See Certiorari, 1.

OBSTRUCTIONS TO NAVIGABLE WATERS. See Rivers and Harbors Appropriation Act of 1899.

OFFSET OF WORKERS' COMPENSATION AWARDS AGAINST PENSION BENEFITS. See Employee Retirement Income Security Act of 1974.

OHIO. See Certiorari, 1.

OIL AND GAS LEASES. See Mineral Leasing Act of 1920.

ONE-PERSON, ONE-VOTE PRINCIPLE. See Constitutional Law, III, 2.

OUT-OF-STATE INSURANCE COMPANIES. See Constitutional Law, I, 1; III, 1.

PARENT AND CHILD. See Certiorari, 2.

PAROCHIAL SCHOOLS. See Internal Revenue Code, 2.

PENNSYLVANIA. See Developmentally Disabled Assistance and Bill of Rights Act.

PENSION PLANS. See Employee Retirement Income Security Act of 1974.

POLICE INTERROGATIONS. See Constitutional Law, V, 2; Stays, 1.

POLLUTION. See Federal Water Pollution Control Act.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See Constitutional Law, VII; Employee Retirement Income Security Act of 1974; Social Security Act.

PREJUDICE OF PROSPECTIVE JURORS AGAINST MEXICANS. See **Juries.**

PRELIMINARY INJUNCTIONS. See **Rehabilitation Act of 1973.**

PRICE DISCRIMINATION. See **Antitrust Acts,** 3.

PRICE FIXING. See **Antitrust Acts,** 1.

PRISON OFFICIALS' LIABILITY FOR LOSS OF PRISONERS' MAIL. See **Civil Rights Act of 1871.**

PRIVACY RIGHTS. See **Constitutional Law,** VI.

PRIVATE PENSION PLANS. See **Employee Retirement Income Security Act of 1974.**

PRIVATE RIGHTS OF ACTION. See **Rivers and Harbors Appropriation Act of 1899.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** IV; V, 2.

PRODUCTION OF VIDEOTAPES. See **Stays,** 2.

PROPERTY OWNERSHIP AS QUALIFICATION FOR VOTING. See **Constitutional Law,** III, 2.

PROSECUTION'S RIGHT TO APPEAL. See **Criminal Law.**

PROSPECTIVE JURORS' RACIAL PREJUDICE. See **Juries.**

PSYCHIATRIC EXAMINATIONS. See **Constitutional Law,** IV; V, 1.

PUBLIC LANDS. See **Mineral Leasing Act of 1920.**

QUALIFICATIONS FOR VOTING. See **Constitutional Law,** III, 2.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1866; Constitutional Law,** VIII.

RACIAL PREJUDICE OF PROSPECTIVE JURORS. See **Juries.**

REDUCING PENSION BENEFITS BY AMOUNT OF WORKERS' COMPENSATION AWARD. See **Employee Retirement Income Security Act of 1974.**

REHABILITATION ACT OF 1973.

Deaf student—University's refusal to pay for sign-language interpreter—Preliminary injunction.—In deaf graduate student's action for injunctive relief on ground that university had allegedly violated § 504 of Act by discriminatorily refusing to pay for a sign-language interpreter for student, question whether District Court had properly issued a preliminary injunction—Court of Appeals having affirmed grant of injunction and university having in meantime paid for interpreter for student who

REHABILITATION ACT OF 1973—Continued.

then graduated—is moot, but question whether university must pay for interpreter remains for trial on merits. University of Texas v. Camenisch, p. 390.

REMOVAL OF STATE PROSECUTION TO FEDERAL COURT. See **Criminal Law.**

"RETALIATORY" TAX AGAINST FOREIGN INSURANCE COMPANIES. See **Constitutional Law,** I, 1; III, 1.

RETIREMENT BENEFITS. See **Employee Retirement Income Security Act of 1974.**

REVENUES FROM GOVERNMENT OIL AND GAS LEASES. See **Mineral Leasing Act of 1920.**

RIGHT TO COUNSEL. See **Constitutional Law,** V; **Stays,** 1.

RIGHT TO REMAIN SILENT. See **Constitutional Law,** IV.

RIVERS AND HARBORS APPROPRIATION ACT OF 1899.

Prohibition of obstructions to navigable waters—Private right of action to enforce.—No private right of action can be implied on behalf of those allegedly injured by claimed violation of § 10 of Act, which prohibits creation of any obstruction to navigable capacity of waters of United States not affirmatively authorized by Congress, and thus environmental organization and private citizens may not maintain federal-court action to enjoin, as violating § 10, construction and operation of water diversion facilities that are part of California water allocation project. California v. Sierra Club, p. 287.

ROBINSON-PATMAN ACT. See **Antitrust Acts,** 3.

"SALES INCENTIVE" PROGRAMS OF AUTOMOBILE MANUFACTURERS. See **Antitrust Acts,** 3.

SEARCHES AND SEIZURES. See **Constitutional Law,** VI.

SECRETARY OF THE INTERIOR. See **Mineral Leasing Act of 1920.**

SELECTIVE ENFORCEMENT OF OBSCENITY LAWS. See **Certiorari,** 1.

SELF-INCRIMINATION. See **Constitutional Law,** IV; V, 2.

SENTENCE TO LIFE IMPRISONMENT AFTER MURDER CONVICTION AS PRECLUDING DEATH PENALTY ON RETRIAL. See **Constitutional Law,** II.

SEWAGE. See **Federal Water Pollution Control Act.**

SEX DISCRIMINATION. See **Equal Pay Act of 1963.**

SHERMAN ACT. See **Antitrust Acts**, 1.

SHIPOWNERS' LIABILITY FOR INJURIES TO LONGSHOREMEN. See **Longshoremen's and Harbor Workers' Compensation Act.**

SIGN-LANGUAGE INTERPRETERS FOR DEAF STUDENTS. See **Rehabilitation Act of 1973.**

SIXTH AMENDMENT. See **Constitutional Law**, V, 1; **Stays**, 1.

SMUGGLING ALIENS INTO COUNTRY. See **Juries.**

SOCIAL SECURITY ACT.

Medicaid benefits—Effect of transfer of assets by claimant—Validity of state law.—Court of Appeals' decision upholding, as not in conflict with governing federal law, a California statute that denied Medicaid benefits to "medically needy" persons because of their previous transfers of assets for less than full consideration is vacated, and case is remanded for reconsideration in light of subsequent amendment of Social Security Act which alters federal standards governing state Medicaid plans with respect to transfer-of-asset rules. Beltran v. Myers, p. 625.

SOUTH DAKOTA. See **Internal Revenue Code**, 2.

SPENDING POWER OF CONGRESS. See **Developmentally Disabled Assistance and Bill of Rights Act.**

STAGE PERFORMERS. See **Antitrust Acts**, 2.

STATE "RETALIATORY" TAX AGAINST FOREIGN INSURANCE COMPANIES. See **Constitutional Law**, I, 1; III, 1.

STATE'S RIGHT TO APPEAL IN CRIMINAL CASES. See **Criminal Law.**

STATE TAX ON "FIRST USE" OF NATURAL GAS. See **Constitutional Law**, I, 2; VII; **Jurisdiction.**

STATE UNEMPLOYMENT COMPENSATION TAXES. See **Internal Revenue Code**, 2.

STATE WATER ALLOCATION PROJECTS. See **Rivers and Harbors Appropriation Act of 1899.**

STATUTES OF LIMITATIONS. See **Labor Management Relations Act**, 1.

STAYS.

1. *Criminal prosecution—Right to counsel.*—Application by State to stay California Court of Appeal's judgment reversing respondent's conviction on ground that he had not been properly advised of his right to services of a free attorney before and during police interrogation that resulted in

STAYS—Continued.
incriminating statements which were admitted at trial, is granted. California v. Prysock (REHNQUIST, J., in chambers), p. 1301.

2. *Internal Revenue Service's summonses—Production of videotapes.*—On application for a stay pending appeal to Court of Appeals of District Court's judgment ordering applicants to turn over certain videotapes to Internal Revenue Service, which had issued summonses for production of videotapes, a temporary stay previously granted by Circuit Justice is continued pending further action by full Court. Becker v. United States (REHNQUIST, J., in chambers), p. 1306.

STEVEDORES. See **Longshoremen's and Harbor Workers' Compensation Act.**

STREET CLOSINGS. See **Civil Rights Act of 1866; Constitutional Law, VIII.**

STRIKES. See **Labor Management Relations Act, 3.**

SUMMONSES IN TAX INVESTIGATIONS. See **Stays, 2.**

SUPREMACY CLAUSE. See **Constitutional Law, VII.**

SUPREME COURT. See **Certiorari; Jurisdiction.**

TAXES. See **Constitutional Law, I; III, 1; VII; Internal Revenue Code; Jurisdiction; Stays, 2.**

TEXAS. See **Constitutional Law, IV; V, 1.**

THEATRICAL AGENTS. See **Antitrust Acts, 2.**

THIRTEENTH AMENDMENT. See **Constitutional Law, VIII.**

TRANSFER OF ASSETS AS AFFECTING RIGHT TO MEDICAID BENEFITS. See **Social Security Act.**

TREATMENT OF MENTALLY RETARDED PERSONS. See **Developmentally Disabled Assistance and Bill of Rights Act.**

TREBLE DAMAGES. See **Antitrust Acts, 1, 3.**

UNEMPLOYMENT COMPENSATION TAXES. See **Internal Revenue Code, 2.**

UNFAIR REPRESENTATION OF EMPLOYEES BY UNION. See **Labor Management Relations Act, 1, 2.**

UNIONS. See **Antitrust Acts, 2; Equal Pay Act of 1963; Labor Management Relations Act.**

UNIVERSITY'S REFUSAL TO PAY FOR INTERPRETER FOR DEAF STUDENT. See **Rehabilitation Act of 1973.**

VACATION OF ARBITRATION AWARDS. See **Labor Management Relations Act**, 1.

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VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS. See **Juries.**

VOTING RIGHTS. See **Constitutional Law**, III, 2.

WAGE DIFFERENTIALS BASED ON SEX. See **Equal Pay Act of 1963.**

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WELFARE BENEFITS. See **Social Security Act.**

WILDCAT STRIKES. See **Labor Management Relations Act**, 3.

WILDLIFE REFUGE REVENUE SHARING ACT. See **Mineral Leasing Act of 1920.**

WISCONSIN. See **Federal Water Pollution Control Act.**

WORDS AND PHRASES.

1. *"In the employ of . . . a church or convention or association of churches."* § 3309 (b)(1)(A), Internal Revenue Code of 1954, 26 U. S. C. § 3309 (b)(1)(A). St. Martin Evangelical Lutheran Church v. South Dakota, p. 772.

2. *"Minerals."* § 401 (a), Wildlife Refuge Revenue Sharing Act, 16 U. S. C. § 715s (a) (1976 ed., Supp. III). Watt v. Alaska, p. 259.

3. *"Who shall be injured in his business or property."* § 4, Clayton Act, 15 U. S. C. § 15. J. Truett Payne Co. v. Chrysler Motors Corp., p. 557.

WORKERS' COMPENSATION. See **Employee Retirement Income Security Act of 1974; Longshoremen's and Harbor Workers' Compensation Act.**

WRONGFUL DISCHARGES OF EMPLOYEES. See **Labor Management Relations Act**, 1, 2.

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